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1/25/12 OVERVIEWS: REVIEW OF SELECT 2011 COURT DECISIONS

<TARGET><BILL></BILL><SUBJECT>1-25-12 OVERVIEWS REVIEW OF SELECT 2011 COURT DECISIONS</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
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House Judiciary Committee
Agenda
1:00 p.m.

Wednesday, January 25th, 2012
Capitol, Room 120

Review of select 2011 court decisions – Division of Legal and Research Services

1. Williams v. Barbee -- pg. 18

Presumption against custody for domestic violence applies to modifications of custody.

2. Christoffersen v. State -- pg. 24

Absolute quasi-judicial immunity extended to court-appointed investigators acting within the scope of appointment.

3. State v. Alyeska -- pg. 14

Statutory limitations applicable to an owner controlled insurance program for a construction project do not apply to workers' compensation and general liability coverages for work characterized as maintenance.

4. Calvert v. State -- pg. 15

Suitability of work and good cause for quitting interpreted for purposes of unemployment benefits.

5. Monzulla v. Voorhees -- pg. 17

Workers' compensation appeals commission has authority to review non-final orders of the workers' compensation board.

6. Marathon Oil v. State -- pg. 22

Agreement to accept a contract price as the value of the state's royalty share of gas production may not be applied retroactively.

Presenters:

JEAN MISCHEL, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA)

DENNIS BAILEY, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA)

DON BULLOCK, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA)

Melanie Lesh

From: MaryEllen Duffy
Sent: Thursday, January 19, 2012 5:06 PM
To: Melanie Lesh
Subject: 2011 Oversight Report mtg -- 1/25/12

Mel,
Jerry gave me the list below after speaking with you. It appears our attorneys will meet with HJUD on Wednesday, Jan. 25th at 1:00 p.m. to discuss the following cases from the 2011 Oversight Report:

1. Williams v. Barbee -- pg. 18 (Jean)
2. Christoffersen v. State -- pg. 24 (Jean)
3. State v. Alyeska -- pg. 14 (Dennis)
4. Calvert v. State -- pg. 15 (Dennis)
5. Monzulla v. Voorhees -- pg. 17 (Dennis)
6. Marathon Oil v. State -- pg. 22 (Don)

Take care,
Mel

MaryEllen Duffy
Special Assistant
LAA Legal Services
907-465-6651 direct
907-465-2029 fax

Warning: This message and any attachments to it are confidential. If you have received this message in error, please notify the sender by electronic mail and delete the message. If you are not the intended recipient of this message, you are hereby notified that disclosing, disseminating, or copying this message or any attachments to it is prohibited. Thank you.

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(GAVEL IN) Call this meeting of the House Judiciary Committee to order.

First, as a matter of housekeeping, I ask that all cell phones and miniature computer devices be placed in the stun mode and remain silenced throughout the hearing. Thank You.

"It's 1 PM on Wednesday, January 25, 2012.

Present today are:

___ Representative Lynn

___ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

___ Representative Holmes

___ Vice Chair, Representative Thompson

___and Myself, Chair Gatto"

Susan is doing the recording so speak your name clearly.

Today's Agenda includes the overview of six court decisions, which can be found in the Legislative Legal Services report dated December 2011 (the yellow book):

1. Williams v. Barbee -- pg. 18
2. Christoffersen v. State -- pg. 24
3. State v. Alyeska -- pg. 14
4. Calvert v. State -- pg. 15

5. Monzulla v. Voorhees -- pg. 17

6. Marathon Oil v. State -- pg. 22

We will devote fifteen minutes to each case. If the committee's business with a case cannot be completed in the allotted time, we will table the discussion until our next meeting. I will also entertain motions to send letters to the committees of jurisdiction on these issues if we determine that it would be more appropriate to have the discussion in those venues.

We have Legal Services attorneys here to explain the history/reason for the report and to answer questions about specific cases.

- Jean Mischel
- Dennis Bailey
- Don Bullock (in that order)

Williams v. Barbee

- Legal Services summarizes.
- Committee discusses.
- Motions?

Christoffersen v. State

- Legal Services summarizes.
- Committee discusses.
- Motions?

State v. Alyeska

- Legal Services summarizes.
- Committee discusses.
- Motions?

Calvert v. State

- Legal Services summarizes.
- Committee discusses.
- Motions?

Monzulla v. Voorhees

- Legal Services summarizes.

- Committee discusses.
- Motions?

Marathon Oil v. State

- Legal Services summarizes.
- Committee discusses.

Motions?

Thank you all for being here today.

"At ___ PM, I adjourn this interim meeting of the House Judiciary Committee." (GAVEL OUT)

file copy

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January 26, 2012

Representative Kurt Olson
Chairman, House Labor
and Commerce Committee
Capitol, Room 24
Juneau, Alaska 99811

Dear Chairman Olson,

The House Judiciary Committee met January 25, 2012 to discuss the 2011 Oversight Report examining court decisions and Opinions of the Attorney General construing Alaska Statutes' assembled by Legislative Legal Services. We discussed six cases from the report, three of which the Judiciary committee agreed fall within the jurisdiction of the Labor and Commerce committee. These cases: *State of Alaska v. Alyeska Pipeline Service Co.*; *Calvert v. State; Monzulla v. Voorhees*; (all attached) also received recommendations by Legislative Legal Services for further legislative review.

The *Alyeska* case revealed that the Legislature may want to review whether AS 21.36.475 was intended to, or otherwise should, apply to an owner controlled insurance program (OCIP) for maintenance or another activity other than "working on a construction project" or whether on OCIP for non-construction purposes should be regulated in another manner. *Calvert v. State* analysis by Legislative Legal Services recommended legislative review to determine whether the department's benefit policy manual – for unemployment insurance compensation – correctly interprets legislative concepts of suitability and good cause. In *Monzulla* review is similarly recommended to determine whether the court properly interpreted legislative intent to include that the Workers' Compensation Appeals Commission has the authority to review non-final decisions of the board.

As a courtesy to you and your members, I have attached relevant materials from our meeting and discussion of these cases. Please contact my office if you have any questions or concerns.

Sincerely,

Carl Gatto
Chairman
House Judiciary Committee

Enclosures

cc: House Labor & Commerce Committee members
House Judiciary Committee Members

file copy

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January 31, 2012

Representative Eric Fiege
Co-Chair House Resources Committee
State Capitol, Room 126
Juneau, Alaska 99811

Representative Paul Seaton
Co-Chair House Resources Committee
State Capitol, Room 126
Juneau, Alaska 99801

Dear Chairmen,

The House Judiciary Committee met January 25, 2012 to discuss the 2011 Oversight Report examining court decisions and opinions of the attorney general construing Alaska Statutes' compiled by Legislative Legal Services. We discussed six cases from the report, one of which the Judiciary Committee agreed falls within the jurisdiction of the House Resources committee. The case: *Marathon Oil v State of Alaska* (attached) received recommendations by Legislative Legal Services for further legislative review.

The *Marathon* case revealed that the Legislature may want to review to determine whether the court's interpretation of the statute disallowing retroactive application is consistent with the legislative intent. As a courtesy to you and your members, I have attached relevant materials from our meeting and discussion of this case. Please contact my office if you have any questions or concerns.

Sincerely,

Carl Gatto, Chairman
House Judiciary Committee

cc: House Resource Committee members
House Judiciary Committee members

Rep. Gatto

STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-SEVENTH STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

DECEMBER 2011

A REPORT TO THE TWENTY-SEVENTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals or Delayed Amendments and Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed between February 29, 2012, and March 1, 2013, according to laws enacted before the 2012 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2010, and September 30, 2011,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2010, and September 30, 2011.

Prepared by
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

December 2011

INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

(1) the courts and agencies are properly implementing legislative purposes;
(2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;
(3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;
(4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The review also covers formal and informal opinions of the Attorney General. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included in this report.

This report also includes a list of Alaska Statutes that, absent any action by the 2012 Legislature, will be repealed or amended before March 1, 2013, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions were prepared by Jean Mischel, Don Bullock, and Dan Wayne, Legislative Counsel, and Jerry Luckhaupt, Assistant Revisor of Statutes. Dennis Bailey, Legislative Counsel, reviewed federal court decisions and opinions of the Attorney General. Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

December 2011

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 29, 2012 and March 1, 2013 according to laws enacted before the 2012 legislative session

Laws enacted in 2004

Ch. 70, SLA 2004, as amended by ch. 61, SLA 2009, ch. 48, SLA 2010, and ch. 13, 2011 -- Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2013
AS 16.40.260	repealed effective January 1, 2013
AS 16.40.270	repealed effective January 1, 2013
AS 16.40.280	repealed effective January 1, 2013
AS 16.40.290	repealed effective January 1, 2013
AS 16.40.299	repealed effective January 1, 2013
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2013
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2013
AS 41.21.506(b)	amended (conditionally) effective January 1, 2013 by secs. 22 and 31, ch. 58, SLA 2010 contingent on repeal of AS 16.40.260 and 16.40.270 under ch. 70, 2004

Laws enacted in 2007

Ch. 27, SLA 2007 -- Requiring Electronic Monitoring as a Special Condition of Probation and Parole for Offenders Whose Offense Was Related to a Criminal Street Gang

AS 12.55.100(f)	repealed effective December 31, 2012
AS 33.16.150(g)	repealed effective December 31, 2012

Laws enacted in 2008

Ch. 71, SLA 2008 -- Report to the Legislature on Teacher Preparation, Retention, and Recruitment by the Board of Regents

AS 14.40.190(b)	amended effective July 1, 2012

2008 Legislative Resolve No. 35 -- Amending the Uniform Rules of the Alaska State Legislature Relating to Standing Committees

Uniform Rule 20	removes the Education Committees from the list of standing committees effective on the first day of the first regular session of the Twenty Eighth Legislature, and adds education to the jurisdiction of the Health and Social Services Committees, renaming them the Health, Education, and Social Services Committees

Laws enacted in 2010

Ch. 10 and 71, SLA 2010 -- Municipal Property Tax Exemptions

AS 29.45.030	amended effective November 30, 2012

Ch. 24, SLA 2010 -- Concealed Handgun Permits

AS 18.65.725	enacted effective July 1, 2012

Ch. 93, SLA 2010 -- School Construction and Major Maintenance

AS 14.11.025	enacted effective July 1, 2012
AS 14.11.030	enacted effective July 1, 2012
AS 14.11.035	enacted effective July 1, 2012

Laws enacted in 2011

Ch. 23, SLA 2011 -- Health Care Insurance and Related Matters

AS 21.54.180	repealed effective July 1, 2012

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunsets of advisory boards and task forces and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

FRAUDULENT CONCEALMENT OF EVIDENCE, AS DISTINGUISHED FROM SPOLIATION, IS AVAILABLE CAUSE OF ACTION FOR INTENTIONALLY CONCEALED EVIDENCE.

A construction worker was injured on a homeowner's staircase that had no railing and was icy. The insurer investigated and made photographs available during discovery without the investigator's notes on them about the condition of the staircase, believing the notes to be privileged. The homeowner's testimony about the condition of the staircase contradicted the investigator's notes. The insurer later realized that the notes were not privileged and produced them and offered to pay for a new deposition of the homeowner. The court sanctioned the insurer. The construction worker then filed a separate lawsuit alleging spoliation of evidence by the insurer. The Alaska Supreme Court for the first time defined the tort of spoliation as a destruction of evidence. In cases where evidence is not actually destroyed the court recognized the alternative common law tort of fraudulent concealment as a separate cause of action in Alaska.

Allstate Insurance Co. v. Dooley, 243 P.3d 197 (Alaska 2010).

Legislative review is not recommended unless the legislature disagrees with the court's definitions of the torts.

IT IS FOR TRIAL JUDGES TO DECIDE CORPUS DELICTI AND CRIMINAL DEFENDANTS ARE ONLY ENTITLED TO A NEW TRIAL FOR A VIOLATION OF THE CORPUS DELICTI RULE.

Police officers were called to Jerry Langevin's apartment to investigate a domestic dispute. Langevin was visibly intoxicated and told officers he was "three sheets to the wind." Langevin stated he had been drinking at a Fairbanks bar and had either driven all the way home or part of the way home. Langevin was arrested and subsequently convicted of drunk driving based solely upon his statements to the police. On appeal, Langevin argued his conviction violated the *corpus*

delicti rule and he was therefore entitled to an acquittal. The *corpus delicti* rule provides that a criminal conviction can not be based solely on a defendant's uncorroborated confession. The Alaska Court of Appeals found that Alaska follows the evidentiary foundation approach to *corpus delicti*, thereby requiring the trial judge to determine if the state has introduced independent evidence that substantially corroborates the confession. The court found that the state had not, reversed Langevin's conviction, and determined that, under *corpus delicti*, the proper remedy is a new trial.

Langevin v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10510, decided June 3, 2011. 2011 Alas. App. LEXIS 49.

Legislative review is not recommended.

Art. I, sec. 24, Constitution of the State of Alaska
AS 12.61.010 - AS 12.61.900

WHEN A CRIMINAL DEFENDANT CHALLENGES A CONVICTION AND DIES WHILE THE CHALLENGE IS PENDING THE CONVICTION MAY STAND.

The Alaska Supreme Court consolidated two otherwise unrelated criminal cases to resolve the question: under Alaska law, what is the effect of the death of a criminal defendant while an appeal is pending in that defendant's case? The court held that when a criminal defendant dies after filing an appeal, or a petition for hearing which has been granted, the defendant's conviction will stand unless the defendant's personal representative elects to continue the appeal. In doing so the court expressly overruled its own prior holding, *Hartwell v. State*, 423 P.2d 282 (Alaska 1967), that the death of a criminal defendant while a conviction is on appeal permanently abates all proceedings in the defendant's case and nullifies the conviction. The court explained that overruling *Hartwell* was necessary because many other state courts have since reconsidered the propriety of abatement and because abatement is inconsistent with the various victims' rights provisions that have been enacted in the last 30 years in Alaska.

Carlin v. State, 249 P.3d 752 (Alaska 2011).

Legislative review is not recommended unless the legislature wishes to examine the issue and adopt a different result. The court noted that no statute or court rule divests the appellate courts of jurisdiction upon the death of a party.

Art. VII, sec. 10, Constitution of the State of Alaska
AS 38.05.035(f)

PREFERENCE FOR PURCHASE OF STATE LAND REQUIRES LESSOR TO ENTER LAND TO QUALIFY.

The Alaska Constitution, art. VIII, sec. 10, provides for the selection, management, and disposal of state lands. In 1984, the legislature provided for a preference right without competitive bid to purchase or lease state land to an individual who has erected a building on the land and used it for a bona fide purpose before and after selection by the state from federal lands. A regulation, 11 AAC 67.053(a)(1) and (2), required written proof of entering the land, and of erecting and using a building there while under federal ownership. In 1989, the plaintiff leased state land and built a sport hunting lodge and business there. In 2005, the state conveyed that land to the borough. The plaintiff challenged the requirement that he had to have entered the land while it was under federal ownership as contrary to the plain meaning of the statutory preference right. The Alaska Supreme Court disagreed and held that the plain meaning of AS 38.05.035(f) required the entry while under federal ownership. The court explained that all land available for selection by the state was under federal ownership, so that the use by the legislature of the phrase "after selection by the state" could only apply to pre-selection use of federal land.

Gillis v. Aleutians East Borough and State of Alaska, ___ P.3d ___ (Alaska 2011).

Legislative review is not recommended since it appears that the court's interpretation is consistent with the statutory construction of the purchase preference.

AS 08.08.210(d)

STATUTE AUTHORIZING RECENT LAW SCHOOL GRADUATES TO PRACTICE LAW FOR A LIMITED PERIOD OF TIME DOES NOT CONFLICT WITH RULES GOVERNING THE PRACTICE OF LAW.

AS 08.08.210(d) authorizes recently graduated law students to be employed by and practice law for the Alaska Public Defender Agency for up to 10 months before they are licensed in Alaska as lawyers. Grove was represented in court by an employee of the Alaska Public Defender Agency, as permitted under AS 08.08.210(d), when he was convicted of assault and eluding a police officer. Grove filed a petition for post-

conviction relief arguing that he had been provided ineffective assistance of counsel because his counsel, like others representing clients under AS 08.08.210(d), was subject to a requirement under Alaska Bar Rule 44 that employees be supervised in-person by a licensed attorney when appearing in a courtroom on a client's behalf. Grove further argued that the Alaska Supreme Court has sole constitutional authority to regulate the practice of law in Alaska, the Alaska Supreme Court adopted Rule 44 for that purpose, and AS 08.08.210(d) is unconstitutional because it conflicts with Rule 44. The Alaska Court of Appeals found that AS 08.08.210(d) does not conflict with Rule 44 but merely creates an alternative method for law school graduates to practice law temporarily before becoming licensed. The court found it significant that the Alaska Bar Association considers AS 08.08.210(d) and Rule 44 alternatives to each other, and that Rule 44 has been subsequently amended to specifically exempt employees practicing law under AS 08.08.210(d).

Grove v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10622, decided May 27, 2011. 2011 Alas. App. LEXIS 36

Legislative review is not recommended.

AS 09.60.010
Alaska R. App. P. 508

THE EPA DECISION TO ALLOW ALASKA TO ADMINISTER PORTIONS OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM UNDER THE CLEAN WATER ACT WAS NOT ARBITRARY OR CAPRICIOUS.

Petitioners challenged the Environmental Protection Agency's (EPA) approval of the state's assumption of responsibility for administering parts of the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act (CWA), arguing that the EPA did not ensure that (1) state law will provide the same opportunities for judicial review of permitting decisions, (2) the state has the necessary enforcement tools to abate permit violations, and (3) the subsistence resources will be protected as mandated by the Alaska National Interest Lands Conservation Act (ANILCA). NPDES allows the EPA to approve state administration of portions of NPDES (subject to EPA oversight) pursuant to CWA if certain criteria are met. The Ninth Circuit Court of Appeals found that the EPA's approval was not arbitrary or capricious and denied the petition for review based on the following:

(1) CWA mandates that the EPA encourage public participation in the development, revision, and enforcement of regulations; NPDES regulations require that states that administer the program shall provide for judicial review of permit approval or denial that is the same as that available to obtain judicial review in federal court; the petitioner questioned whether Alaska law on the award of attorney's fees, including the abrogation of the public interest exception enacted in 2003, interfered with appropriate judicial review; the court compared the effect of the federal "dual standard" for the award of attorney's fees with Alaska law on the award of attorney's fees; the court recognized some uncertainty about the possibility of future attorney's fees awards, but decided that the EPA decision to allow administration of NPDES was not arbitrary or capricious even in light of the attorney's fees issue and concluded that the state provides an opportunity for judicial review of the approval or denial of permits that is sufficient to assist with public participation in the permitting process;

(2) the court also reviewed the state's authority to abate violations of the permit or permit program and other means of enforcement in the context of the EPA's approval of state administration of the program; the EPA has administrative enforcement options while the state must initiate a legal proceeding to impose a civil penalty; the court concluded that the state has adequate enforcement remedies;

(3) finally, the court concluded that the EPA's transfer of the NPDES program to the state did not trigger the requirement of a subsistence evaluation under sec. 810 of ANILCA; the court concluded that a subsistence evaluation is not required because (a) doing so would amend CWA by implication, by adding additional criteria, (b) the more specific provisions of CWA control the general application of ANILCA, and (c) the EPA was not required to conduct subsistence evaluations before it transferred its authority to the state because the EPA does not directly manage public lands and is not a federal land management agency.

Akiak Native Cmty. v. United States EPA, 625 F.3d 1162 (9th Cir. 2011).

Legislative review is not recommended.

AS 10.06.430
AS 10.06.450(d)

DISCLOSURE OF CORPORATE RECORDS TO A SHAREHOLDER DOES NOT REQUIRE DELIVERY TO THE SHAREHOLDER.

Former directors of a corporation who sought re-election sued the corporation for excluding their names on corporate proxy materials for holding a board election and for failure to provide shareholder e-mail information as requested. The board had rejected the former directors' applications for re-election as board-approved candidates. The board informed them of the decision before the election and that they could provide their own proxy materials and run independently. In response, the former directors requested the corporation electronically send them the shareholder list containing the numbers of shares held by each, the shareholders' e-mail addresses, telephone numbers, and addresses in order to mail election materials separately to the shareholders in a subsequent election. The corporation provided all information electronically except e-mail and telephone information. The former directors did not seek to inspect the records as provided for under AS 10.06.430 and 10.06.450 but sued for failure to provide the records electronically. In a case of first impression, the court held that the statute unambiguously provided a right to inspect, not a right to delivery of, corporate records.

Heinrichs v. Chugach Alaska Corp., ___ P.3d ___ (Alaska 2011).

Legislative review is not recommended unless the legislature would like to provide a right to electronic delivery of specified corporate records such as e-mail contact information of shareholders.

AS 11.56.310

PRISONER DOES NOT COMMIT ESCAPE IN THE SECOND DEGREE IF THE PRISONER MERELY LEAVES AN UNSECURED CORRECTIONAL FACILITY.

Bridge, charged with a misdemeanor and unable to make bail, was confined at the Fairbanks Correctional Center and after classification was transferred to a halfway house to await trial. Bridge left the facility without permission and was eventually caught 15 months later and charged with a violation of AS 11.56.310(a)(1)(A), escape in the second degree. Escape in the second degree is committed when a person removes oneself from a correctional facility while under official

detention. Bridge argued that the halfway house was not a correctional facility. The Alaska Court of Appeals found that while Bridge was at the halfway house and in the custody of the commissioner of corrections awaiting trial, Bridge was not *confined* at the halfway house because the halfway house did not have staff whose duty is to prevent prisoners from leaving the facility. The court concluded that, under AS 11.56.310(a)(1)(A), a person may only be convicted of escape from a correctional facility if the correctional facility has guards or other staff who have a duty to prevent prisoners from leaving the correctional facility.

Bridge v. State, __ P.3d __ (Alaska App. 2011).

Legislative review is recommended. The decision appears to disregard that the legislature has defined "official detention" to include "actual or constructive restraint" and seems to always require that a prisoner be actually restrained at a correctional facility to be convicted under AS 11.56.310(a)(1)(A).

AS 11.61.128

AMENDMENTS TO CRIMINAL STATUTE PROSCRIBING DISTRIBUTION OF INDECENT MATERIAL TO MINOR UNCONSTITUTIONAL UNDER FIRST AMENDMENT.

Plaintiffs challenged the constitutionality of AS 11.61.128 as modified in SB 222, secs. 9 - 12, enacted by the 26th Alaska State Legislature. SB 222 amended the elements of the crime of distribution of indecent material to minors by adding "material harmful to a minor" to the existing "censorship law" and defining "harmful to minors."

The court analyzed the amended statute using the strict scrutiny standard applicable to free speech issues, which requires that the statute must (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of advancing that interest. The court acknowledged the compelling governmental interest in protecting minor children but questioned the compliance with the additional tests under the strict scrutiny standard. The court said that if the legislature intends the statute to only criminalize the grooming of children for sexual abuse, as argued by the state, the legislature could do so without violating the constitutional rights of the average citizen. The court noted that AS 11.61.125 applies the "harmful to minors" test approved by the U.S. Supreme Court.

But the court also stated that the language of the statute in other areas, particularly in regard to Internet communications, lacked the precision the First Amendment requires when a statute regulates the content of speech. The court concluded that the statute violates the First Amendment to the United States Constitution because it is not narrowly tailored to achieve the state's compelling interest.

American Booksellers Found. For Free Expression v. Sullivan, Civil Action No 3:10-cv-0193-RRB, 2011 U.S. Dist. Lexis 70414 (D.C. Alaska 2011).

Legislative review is recommended because the court suggested that alternatives might be available depending on the intent of the legislature.

AS 11.71.020(a)

MULTIPLE FELONY COUNTS OF POSSESSION OF INGREDIENTS INTENDED FOR THE MANUFACTURE OF METHAMPHETAMINE IN A SINGLE CONTINUING EFFORT CONSTITUTE A SINGLE CRIME FOR SENTENCING.

Wiglesworth was convicted of six separate counts of misconduct involving a controlled substance in the second degree (MICS2) (AS 11.71.020(a)(2) - (6)). Wiglesworth's convictions related to his possession of various listed chemicals important to the manufacture of methamphetamine and immediate precursors of methamphetamine, with the intent to manufacture methamphetamine. Wiglesworth argued that his six counts of misconduct involving a controlled substance actually was a continuing attempt to manufacture methamphetamine and his separate counts should merge for sentencing as a single count. After examining the various forms of MICS2, the Alaska Court of Appeals agreed, and found that a defendant that violates two or more provisions of AS 11.71.020(a)(2) - (6) during the course of a single, continuing effort to manufacture methamphetamine is guilty of only one act of MICS2 for purposes of conviction and punishment. The court noted that the legislature: "did not perceive a separate societal interest in the defendant's possession of each separate chemical, or in the defendant's accomplishment of each separate state in the manufacturing process. Rather, the societal interest at stake is to prevent the illicit manufacturing of methamphetamine."

The court noted that separate convictions and punishments

would be proper when there are separate discrete attempts to manufacture methamphetamine and when the requisite facts have been expressly pleaded by the state and found by the jury.

Wiglesworth v. State, 249 P.3d 321 (Alaska App. 2011).

The decision seems reasonable. Legislative review is not recommended unless the legislature perceives that there is a different societal interest involved in the different forms of misconduct involving a controlled substance in the second degree discussed here and wants to ensure separate punishments for these different forms.

AS 12.55.090

COURT NOT LIMITED TO SENTENCE AGREED TO IN PLEA BARGAIN AFTER SUBSEQUENT PROBATION VIOLATION.

In separate prosecutions, two defendants entered into plea bargains with the state for resolution of criminal charges against them. Each defendant served a period of incarceration and a subsequent period of probation for a suspended term of imprisonment. Each violated probation and at a revocation hearing each asked to be sentenced to a term of imprisonment (that is, neither wanted to be put back on probation). In each case the judge sentenced the defendant to a term of imprisonment less than the period of suspended imprisonment agreed to in the plea bargain. The state appealed, arguing that the plea bargain was a contract and that the new lesser sentences were a violation of that contract (the plea bargain). The Alaska Court of Appeals disagreed and found the new sentences proper and within the sentencing court's discretion. The court noted the plea bargains did not contain provisions "requiring the defendants to relinquish their right under Alaska law to reject further probation. Nor do the plea agreements contain any express provision requiring the defendants to relinquish their accompanying right . . . to have the superior court assess their sentences of imprisonment . . . rather than automatically imposing the full amount of the defendants' remaining suspended jail time."

State v. Henry, 240 P.3d 846 (Alaska App. 2010).

It appears that the issue presented by this case could be resolved by the Department of Law by including, when warranted, some additional express terms in the department's

plea agreements. Legislative review is still recommended to determine if the department has amended their agreements and whether the issue has been resolved.

AS 15.15.360

ABBREVIATIONS, MISSPELLINGS, AND OTHER MINOR VARIATIONS IN THE NAME ON A BALLOT CAST FOR A WRITE-IN CANDIDATE MUST BE COUNTED IF VOTER INTENT CAN BE DISCERNED.

Lisa Murkowski ran for the United States Senate on a write-in campaign. Joe Miller, one of her opponents, challenged the decision of the state elections division to count ballots cast for Murkowski that contained misspellings or other minor errors. The Alaska Supreme Court interpreted AS 15.15.360's requirement that the write-in ballot include the "name, as it appears on the write-in declaration of candidacy . . . or the last name of the candidate," as allowing minor misspellings and pseudonyms. The court held that voter intent is paramount and that the legislative purpose was not to require perfection but to ensure that ballots are counted and not excluded.

Miller v. Treadwell, 245 P.3d 867 (Alaska 2010).

Legislative review is recommended to determine whether the court correctly interpreted legislative intent.

AS 16.43.150(e)

LIMITED ENTRY PERMIT IS NOT A PROPERTY RIGHT FOR PURPOSES OF COMPENSATION FOR GOVERNMENTAL TAKING.

After the state adopted regulations shortening the fishing year and limiting the number of salmon that commercial fishers could harvest, plaintiffs sued, asking the United States district court to declare those regulations an unconstitutional taking of property without just compensation and as a violation of due process rights. The court held that an entry permit to fish commercially for salmon is not "property" for the purpose of requiring compensation when its value decreases due to state regulation. The court also held that the state's decision to enact a system of licenses or use privileges is not unreasonable, arbitrary, or capricious, and AS 16.43.150(e) bears a substantial and reasonable relationship to Alaska's goals of salmon conservation and maintenance of a sustainable fishery.

Therefore, AS 16.43.150(e) does not violate permit holders' substantive due process rights.

Vandevere v. Lloyd, 644 F.3d 957 (9th Cir. 2011).

Legislative review is not recommended.

AS 18.65.240

PUBLIC POLICY EXCEPTION APPLIES TO ENFORCEMENT OF ARBITRATION AWARDS.

A police officer was terminated for lying about performing a burnout during motorcycle training and an arbitrator reinstated the officer. The state argued that the reinstatement decision was unenforceable as a violation of state policy of not employing dishonest peace officers. The Alaska Supreme Court recognized that a public policy exception applies to arbitration decisions but held that, because there was no explicit, well-defined, and dominant public policy in Alaska against the reinstatement of a law enforcement officer who had engaged in relatively minor dishonesty, the arbitrator's award was not unenforceable as a violation of public policy. None of the sources of law the state cited clearly set out a public policy pertaining to the minimal consequences that had to follow when law enforcement officers committed minor acts of dishonesty that were not directly related to their duties to the public, that were not directed toward superiors in their chain of command, and that did not arise in the context of a formal investigation. The court further held that the arbitrator did not commit gross error in determining that the state lacked just cause to terminate the trooper because: (1) the trooper was not convicted of a crime; (2) a more experienced trooper who was also found to be deceptive, misleading, or evasive received only a reprimand; and (3) the state did not make it clear how the decision constituted an obvious mistake.

State v. Public Safety Employees' Association, ___ P.3d ___ (Alaska 2011).

Legislative review is recommended to determine whether the court correctly recognized a public policy exception to enforcing an arbitration decision, whether the court correctly failed to apply that exception in the present case involving dishonesty by a law enforcement officer, and whether the policy is or should be explicit.

AS 18.66.990
Alaska Rule of
Evidence 404(b)(4)

THE TERM "CRIME INVOLVING DOMESTIC VIOLENCE" AS DEFINED BY AS 18.66.990 AND INCORPORATED BY ALASKA RULE OF EVIDENCE 404(b)(4) IS NOT UNCONSTITUTIONALLY VAGUE.

Bates was convicted of attempted murder for an attack upon his former girlfriend. At his trial, evidence was presented of Bates' prior assault on his former girlfriend and on another former girlfriend. The evidence was admitted under Alaska Rule of Evidence 404(b)(4), which allows, in a domestic violence case, the introduction of a defendant's other crimes of domestic violence. Rule 404(b)(4) incorporates the definition of "household member" contained in AS 18.66.990(3) to determine what is a crime of domestic violence. Bates asserted that the definition of "household member" is unconstitutionally vague as it includes persons who are "dating" or in a "sexual relationship" without defining those terms. The Alaska Court of Appeals found "sexual relationship" to be sufficiently descriptive. The court had a harder time determining what the legislature meant by "dating" and finally determined that it should be interpreted to mean: "a relationship that either is marked by emotional intimacy or whose purpose is to allow two people to evaluate each other's suitability as a partner in an intimate relationship or in marriage." When interpreted in this manner, the court concluded that Rule 404(b)(4) was constitutional.

Bates v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10350, decided June 3, 2011. Alas. App. LEXIS 48

Legislative review is not recommended unless the legislature determines that the court determined meaning of "dating," as used in the definition of the term "household member" found in AS 18.66.990(3), is incorrect or insufficient.

AS 21.36.475

STATUTORY LIMITATIONS APPLICABLE TO AN OWNER CONTROLLED INSURANCE PROGRAM FOR A CONSTRUCTION PROJECT DO NOT APPLY TO WORKERS' COMPENSATION AND GENERAL LIABILITY COVERAGES FOR WORK CHARACTERIZED AS MAINTENANCE.

The division of insurance issued a cease and desist order to Liberty Mutual Group (Liberty) because the owner controlled insurance program (OCIP) written by Liberty was designed to cover ongoing maintenance and was not restricted to a large

construction project. The division contended that an OCIP for anything other than a large construction project was prohibited by AS 21.36.475 (originally enacted as AS 21.36.065 and renumbered in 2010). The Alaska Supreme Court rejected the division's position that the OCIP for ongoing maintenance was prohibited by the definition of "an owner controlled insurance program" in AS 21.36.475. The court stated that AS 21.36.475(c)(4) defines "owner controlled insurance program," in relevant part, as "an insurance program where one or more insurance policies are procured on behalf of a project owner," and "project owner" is defined in AS 21.36.475(c)(5) as "a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project." The court declined to look beyond the plain meaning of the statute and held that an OCIP written for ongoing maintenance, such as the one written by Liberty, is not prohibited by AS 21.36.475 and is therefore unregulated.

State v. Alyeska Pipeline Service Co., __ P.3d __ (Alaska 2011).

Legislative review is recommended to consider whether AS 21.36.475 was intended to, or otherwise should, apply to an owner controlled insurance program (OCIP) for maintenance or another activity other than "working on a construction project" or whether an OCIP for non-construction purposes should be regulated in another manner.

AS 23.20.379
AS 23.20.385

SUITABILITY OF WORK AND GOOD CAUSE FOR QUITTING INTERPRETED FOR PURPOSES OF UNEMPLOYMENT BENEFITS.

An employee quit her job voluntarily and applied for unemployment benefits claiming reasons for quitting that included transportation difficulties and personality conflicts with coworkers. She also expressed concern about workplace safety and described one incident of unsafe practices. When the hearing officer asked the claimant what efforts she had made to keep her job, the claimant replied that she had tried to use public transportation but that her work schedule had been too unpredictable. The claimant acknowledged that she had not discussed the personality conflicts or her transportation difficulties with management and had not asked for an adjustment to her work schedule that would have enabled her to use the transit system and continue working. The court held

that the claimant failed to show good cause for quitting under AS 23.20.379(a). That section disqualifies an employee from receiving unemployment benefits if the employee leaves "suitable work voluntarily without good cause." As a separate inquiry, the court found that the employee did not show that the work was unsuitable under AS 23.20.385 because the workplace hostility and safety concerns she described did not provide evidence of significant health and safety risks. Because she did not exhaust all reasonable alternatives with regard to her transportation problems and workplace hostility, she did not show good cause for leaving work. The court relied heavily on the Department of Labor and Workforce Development's benefit policy manual for interpretations of the concepts of suitability and good cause, including a finding that reductions in work hours and pay did not constitute good cause for quitting.

Calvert v. State, 251 P.3d 990 (Alaska 2011).

Legislative review is recommended to determine whether the department's benefit policy manual correctly interprets legislative concepts of suitability and good cause.

AS 23.30.008(d)

"SUCCESSFUL CLAIMANT" INTERPRETED FOR PURPOSES OF AWARDING ATTORNEY'S FEES IN WORKERS' COMPENSATION APPEAL.

A successful workers' compensation claimant requested attorney's fees. The Alaska Workers' Compensation Board reduced the claimant's attorney's fees request by 30 percent. The claimant disagreed with this reduction and appealed to the Workers' Compensation Appeals Commission. The commission reversed the board's decision and ordered the board to reconsider the award of attorney's fees to the claimant. The claimant then sought attorney's fees for the successful appeal from the commission but the commission refused, finding that the claimant was not a "successful" party under AS 23.30.008. The Alaska Supreme Court reversed, interpreting the statutory concept of "successful claimant" in workers' compensation appeals for the first time. The court found that the legislature intended for attorney's fees awards under AS 23.30.008 to follow the same rules as appellate court attorney's fees awards. See Rule 508, Alaska Rules of Appellate Procedure. Therefore, the claimant was entitled to an award of attorney's fees as the claimant prevailed on a significant issue in the appeal.

Lewis-Wlaunga, et. al. v. Municipality of Anchorage, 249 P.3d 1063 (Alaska 2011).

The decision appears reasonable. Legislative review is recommended if the legislature wishes to reexamine the standard for awarding attorney's fees in workers' compensation appeals.

AS 23.30.007
AS 23.30.125(b)
AS 23.30.128(b)

WORKERS' COMPENSATION APPEALS COMMISSION HAS AUTHORITY TO REVIEW NON-FINAL ORDERS OF THE WORKERS' COMPENSATION BOARD.

An employer asked the Workers' Compensation Appeals Commission to review and to stay the Workers' Compensation Board's non-final order denying a change of venue from Fairbanks. The commission issued an order preventing the hearing from being held in Fairbanks and later reversed the board's denial of a change of venue. The employee challenged the commission's authority to review a non-final decision. The Alaska Supreme Court interpreted the various statutes that established the commission's jurisdiction to hear board appeals "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." Although nothing in the statutes explicitly gave the commission jurisdiction over discretionary review of non-final board decisions, the court held that such authority was implied based on its quasi-judicial function and the effect of delay of some decisions until a final order is issued. The court relied upon the legislative purpose in establishing the commission to increase efficiency and flexibility and to reduce costs.

Monzulla v. Voorhees, 254 P.3d 341 (Alaska 2011).

Legislative review is recommended to determine whether the court properly interpreted legislative intent to include that the Workers' Compensation Appeals Commission has the authority to review non-final decisions of the board.

AS 25.24.150(h)

PRESUMPTION AGAINST CUSTODY FOR DOMESTIC VIOLENCE APPLIES TO MODIFICATIONS OF CUSTODY.

Parents of a child entered a negotiated agreement to share physical and legal custody of their child despite a 2007 arrest and other alleged incidents involving domestic violence perpetrated by a father. The agreement was included in a 2009 divorce decree. Two weeks after the divorce decree was entered, the father pleaded guilty to third-degree assault from the 2007 charge of domestic violence and agreed to attend a domestic violence intervention program and to have no contact with his former wife. Four months after the guilty plea, the ex-wife filed a motion to modify the custody agreement based on two changed circumstances: (1) the domestic violence offense made the father ineligible for joint custody based on the statutory presumption against awarding custody to a person with a history of perpetrating domestic violence and the no contact order made co-parenting impossible; and (2) the ex-wife intended to move out of state to remarry. The Alaska Supreme Court held that the rebuttable presumption for domestic violence applied in modification proceedings after reviewing the legislative history for the presumption. The court also found that applying the statutory presumption in a modification proceeding was appropriate where the presumption was not addressed in the initial custody determination.

Williams v. Barbee, 243 P.3d 995 (Alaska 2010).

Legislative review is recommended to clarify that the applicability of the rebuttable presumption against the award of child custody in domestic violence circumstances applies in custody modification proceedings.

AS 25.24.170(a)

18-YEAR-OLD MUST BE SUPPORTED THROUGH HIGH SCHOOL EVEN IF IN THE CUSTODY OF A GUARDIAN.

A father refused to pay child support to a legal guardian for the benefit of his 18-year-old son, who was in high school, on the basis that the legal custody under the guardianship order had expired at the age of majority. In a case of first impression, the court held that child support is not linked to the legal custody of the child and that the support obligation continued through high school.

Brotherton v. Warner, 240 P.3d 1225 (Alaska 2010).

Legislative review is not recommended since the court's interpretation of the statute appears to be consistent with the statutory purpose of providing for support through high school.

AS 29.45.110(d)

PROPERTY ASSESSMENT ON FULL AND TRUE VALUE MAY INCLUDE EFFECT OF LOW INCOME RENTAL RESTRICTION WITHOUT CONSIDERATION OF FEDERAL TAX CREDITS.

The federal low income housing tax credit (LIHTC) program provides a 10-year amortized tax credit for a commitment to restrict rental rates for not less than 30 years. AS 29.45.110(a) provides that property shall be assessed at its "full and true value," defined as "the estimated price that the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer both conversant with the property and with prevailing general price levels." Subsection (d)(1) of the statute provides for consideration of actual income derived from the property and excludes consideration of federal tax credits for the property before 2001. After January 1, 2001, subsection (d)(2) directs local governments to choose whether to apply (d)(1)'s mandatory income approach or to provide for a parcel-by-parcel appraisal method. Kenai Peninsula Borough chose the parcel-by-parcel option. The owner of a 30-unit apartment complex that qualified in 2003 for LIHTC requested the application of the mandatory income approach and was denied, resulting in a much higher tax assessment than for an appraisal based on mandatory income. The owner appealed the assessment and the local board reduced the assessment by 40 percent because the original approach resulted in an assessment that was "overvalued and was grossly disproportionate as compared to similar projects." States are split on the question of whether and how the LIHTC commitment is accounted for in tax assessments on the property affected by a rental restriction. The Alaska Supreme Court held that state law and the local assembly decision do not prohibit a taxing authority from considering restricted rental rates, without the commensurate tax credit, in another valuation method if it is reasonable to do so.

Horan v. Kenai Peninsula Borough, 247 P.3d 990 (Alaska 2011).

Legislative review is recommended to clarify the statutory choice available to a taxing authority when considering rental restrictions and tax credits.

AS 33.20.010
AS 33.20.030
AS 33.20.040

PRISONERS ON MANDATORY PAROLE ARE ENTITLED TO GOOD TIME REDUCTIONS OF THEIR SENTENCES WHEN RELEASED TO CORRECTIONAL RESTITUTION CENTERS OR HALFWAY HOUSES AND WHEN CONFINED PENDING REVOCATION OF THEIR PAROLE.

The legislature has authorized the Department of Corrections to award a prisoner a good time reduction of the prisoner's sentence when confined in a correctional facility. The Alaska Court of Appeals has noted that "the legislative purpose of this statute is 'to reward prisoners for good behavior during their terms of confinement . . . [and to] give [correctional officials] a means of enforcing discipline within correctional facilities.'" *Valencia v. State*, 91 P.3d 983, 984 (Alaska App. 2004). The amount of good time earned is deducted from the prisoner's sentence and the prisoner is released on mandatory parole for the period of the good time deduction. In this case, the Alaska Court of Appeals determined that a prisoner who has been released on mandatory parole is entitled to an additional good time deduction when the prisoner (1) is serving some or all of that period of mandatory parole in a correctional restitution center or a halfway house, and (2) has been arrested for violation of terms of mandatory parole and is incarcerated in a correctional restitution center or halfway house pending revocation of parole.

State v. Shetters, 246 P.3d 332 (Alaska App. 2010), *on rehearing at, reaffirmed* 246 P.3d 338 (Alaska App. 2010).

Legislative review is recommended to determine if the awarding of good time mandated by the court in these two situations is consistent with the overall legislative intent for the awarding of good time in AS 33.20.010.

AS 33.30.028

PRISONER'S LIABILITY FOR COSTS OF MEDICAL CARE.

AS 33.30.028 provides that "liability for payment of the costs of medical, psychological, and psychiatric care provided or

made available to a prisoner . . . is the responsibility of the prisoner and" certain other persons. A superior court judge ruled that this statute only imposed liability for payment on a prisoner while the prisoner was incarcerated and that the liability for payment and the state's ability to seek reimbursement ends when the prisoner is released. The Alaska Supreme Court reversed, finding that the statute imposed liability for payment on a prisoner who has had health care provided or made available to the prisoner regardless of whether the prisoner is still incarcerated when reimbursement is sought. The plaintiff (the prisoner's estate) also argued that the state can only seek reimbursement from a prisoner under AS 33.30.028 for health care that has been "provided to them by the department." The plaintiff argued that "provided to them by the department" means only in-house prison medical care and that the state cannot seek payment for medical care that was made available to the prisoner through outside providers (regardless of whether the state paid the outside providers for the care). The court found that AS 33.30.028 "may be ambiguous" as it pertains to outside providers and remanded the case to the superior court.

State v. Hendricks-Pearce, 254 P.3d 1088 (Alaska 2011).

Legislative review is recommended. The Alaska Supreme Court's decision that liability for the costs of health care provided to a prisoner continue after the prisoner's release is correct. The confusion regarding reimbursement seems misplaced. In AS 33.30.028(a), it appears that the legislature was making a clear statement that a prisoner (and certain other people and entities) is responsible for the costs of health care provided to the prisoner (that is, paid for by the department) or made available to the prisoner (that is, facilitated by the department but not provided at department expense). In AS 33.30.028(b), the legislature required the commissioner of corrections to require a prisoner who is provided health care by the department (that is, paid for by the department) to pay for the costs of that health care, if the department did not pay for the health care then there is no need for the prisoner to reimburse the department. The legislature could add language that clarifies that the prisoner is liable and must pay the costs incurred by the department in providing or making available health care to the prisoner.

AS 38.05.180(aa)

AGREEMENT TO ACCEPT A CONTRACT PRICE AS THE VALUE OF THE STATE'S ROYALTY SHARE OF GAS PRODUCTION MAY NOT BE APPLIED RETROACTIVELY.

Gas lessees must pay a royalty to the state. AS 38.05.180 sets the value of the gas at the highest of four possible prices but allows lessees to request of the Department of Natural Resources (DNR) to instead use or accept the price for gas established in a contract with a gas or electric utility as the basis for determining the value of the state's royalty share of gas production. Marathon requested contract pricing and further requested that DNR apply the contract pricing retroactively as well as prospectively. DNR entered into the agreement to accept contract pricing under AS 38.05.180(aa), but denied its retroactive application based on DNR's longstanding interpretation that retroactive application was prohibited because of the use of the word "prospective" in the statute and the Alaska Land Act's purpose of maximizing revenue. Although the Alaska Supreme Court found the statute to be ambiguous, the court upheld DNR's interpretation on the basis that DNR's determination was longstanding, was within the department's area of jurisdiction, and had a reasonable basis in the statute. The court also decided that DNR was not required to promulgate its interpretation as a regulation.

Marathon Oil Co. v. State, 254 P.3d 1078 (Alaska 2011).

Legislative review is recommended to determine whether the court's interpretation of the statute disallowing retroactive application is consistent with the intent of the legislature.

AS 39.52.170

PUBLIC EMPLOYEE NOT REQUIRED TO REPORT UNION RELATED SERVICES AS CONFLICTING OUTSIDE EMPLOYMENT UNDER ETHICS ACT.

The Alaska Executive Branch Ethics Act, AS 39.52.170(a), prohibits a public employee from rendering services or accepting employment outside of the employee's agency if the outside employment is incompatible or in conflict with the proper discharge of the employee's official duties. AS 39.52.170(b) requires an employee to report outside employment annually for review and approval. The attorney general opined that union activities (1) are associated with and are a right of state employment, (2) are not outside services or

employment under AS 39.52.170(a), and (3) need not be reported under AS 39.52.170(b).

2011 Op. Alaska Att'y Gen. (July 26, 2011).

Legislative review is not recommended.

AS 42.30.020

THE FEDERAL MARITIME COMMISSION HAS PRIMARY JURISDICTION OF THE REGULATION OF WHARFAGE AND DOCKING FEES IN THE SHIPPING INDUSTRY UNDER THE SHIPPING ACT.

Minto, a British Columbia mining company that ships ore concentrate through Skagway, Alaska, sued Pacific and Arctic Railway and Navigation Company (PARN), the owner of a shipping dock where ore is loaded on ships, claiming that the wharfage and docking fees being charged to Minto by PARN were higher and different than those charged other shippers and were discriminatory under AS 42.30.020 and under the federal Shipping Act, 46 U.S.C. 41106. The federal district court held that, as the parties were engaged in shipping, the discrimination claim is governed by the Shipping Act. The court determined that Minto must first bring its claim of discrimination to the Federal Maritime Commission and that AS 42.30.020 does not apply.

Minto Explorations Ltd. v. Pac. & Arctic Ry. & Navigation Co., 3:11-cv-00031, August 12, 2011.

Legislative review is not recommended.

AS 45.50.471

UNFAIR TRADE PRACTICES ACT DOES NOT APPLY TO RESIDENTIAL LEASES.

A tenant challenged late fees due under her residential lease agreement as a violation of the Unfair Trade Practices and Consumer Protection Act (UTPA). The court held that the UTPA was not intended to apply to residential leases for two reasons: (1) the legislature has not extended the Act to include real estate transactions, including residential leases; and (2) another Act, the Uniform Residential Landlord and Tenant Act, AS 34.03.010 - 34.03.380, regulates residential leases.

Roberson v. Southwood Manor Associates, 249 P.3d 1059 (Alaska 2011).

Legislative review is not recommended unless the legislature desires to extend the application of the UTPA to real estate transactions.

AS 47.17.050

ABSOLUTE QUASI-JUDICIAL IMMUNITY EXTENDED TO COURT-APPOINTED INVESTIGATORS ACTING WITHIN THE SCOPE OF APPOINTMENT.

A child custody investigator appointed by a court failed to report to the child's parents or the Office of Children's Services an allegation of sexual misconduct by the child contained in a police report reviewed as part of the investigation. The investigator included the allegation in her report to the court but in the meantime, the child had assaulted a half-sibling with whom the child had been placed. The parents asserted that the investigator had a duty to warn them regarding the allegation of sexual misconduct. The Alaska Supreme Court held that court-appointed child custody investigators are entitled to absolute quasi-judicial immunity from suits arising from the performance of their duties and further that the immunity extended to the state as the employer.

Christoffersen v. State of Alaska, 242 P.3d 1032 (Alaska 2010).

Legislative review is recommended to determine whether immunity may be extended vicariously to the state or other employer.

AS 47.30.735

EVIDENCE OF MENTAL ILLNESS RELEVANT IF SYMPTOMS EXIST AT THE TIME OF AN INVOLUNTARY COMMITMENT HEARING, NOT ON ADMISSION, AND COURT MAY CONSIDER RECENT SYMPTOMS.

A woman was admitted involuntarily to a psychiatric facility based, in part, on her symptoms on the day of and prior to admission to the facility. At the commitment hearing the woman argued that her symptoms were diminished, that she was compliant with her treatment plan, and that a court could only consider symptoms that existed on the day of the commitment hearing, not when she was admitted to the hospital. The Alaska Supreme Court disagreed. The Court found that while AS 47.30.735 provides a court may grant an

involuntary commitment petition only if the court finds the person mentally ill and likely to harm herself or others or is gravely disabled at the time of the commitment hearing, in making this determination a court may consider recent behavior and conditions, as well as the patient's symptoms on the day of the hearing.

In the Matter of Tracy C., 249 P.3d 1085 (Alaska 2011).

The court's interpretation of the statute appears correct, therefore legislative review is not recommended.

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243 P.3d 995
Supreme Court of Alaska.

Shayla WILLIAMS, f/k/a Shayla Barbee, Appellant,
v.
Jomell BARBEE, Appellee.

No. S-13604. | Dec. 8, 2010.

Synopsis

Background: Mother, who had separated from father, requested change in shared custody on grounds that she planned to move to Washington with child and because father had pleaded guilty to an assault involving an act of domestic violence toward mother. The Superior Court, Third Judicial District, Anchorage, Craig Stowers, J., continued shared custody but awarded primary physical custody to mother if and when child relocated out of state. Mother appealed.

Holdings: The Supreme Court held that:
1 rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence applies in custody modification proceedings;
2 was required to make explicit findings on whether choking incident, standing alone, amounted to a history of domestic violence; and
3 mother was entitled to present evidence and testimony regarding individual domestic violence incidents as alleged in motion.

Reversed and remanded.

West Headnotes (17)

1 **Child Custody** ⇐ Discretion
Child Custody ⇐ Discretion
Child Custody ⇐ Questions of Fact and Findings of Court

A superior court has broad discretion in determining child custody matters, and the Supreme Court will not reverse a superior court's custody determination unless convinced that the trial court abused its discretion or that its controlling factual findings are clearly erroneous.

1 Cases that cite this headnote

2 **Child Custody** ⇐ Discretion

A superior court abuses its discretion in the child custody context when it fails to consider statutorily mandated factors, weighs factors improperly, or includes improper factors in its decision. AS 25.24.150(c).

3 **Appeal and Error** ⇐ Clearly erroneous findings

A factual finding is "clearly erroneous" when a review of the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made.

4 **Child Custody** ⇐ Credibility of witnesses

The Supreme Court does not readily second-guess a trial court's child custody determination because it is the function of the trial court, not of the Supreme Court, to judge witnesses' credibility and to weigh conflicting evidence.

1 Cases that cite this headnote

5 **Child Custody** ⇐ Welfare of child and material change in circumstances

The parent seeking modification of child custody must first establish that there has been a significant change in circumstances affecting the child's best interests. AS 25.20.110.

2 Cases that cite this headnote

6 **Child Custody** ⇐ Grounds and Factors

Child Custody ⇐ Parent or custodian's relocation of home

As a matter of law, both the occurrence of a crime involving domestic violence and one parent's relocation out of state constitute significant changes in circumstances for child custody purposes. AS 25.20.110(c).

2 Cases that cite this headnote

7 **Child Custody** ⇐ Decision and findings by court

Once a party seeking a change in child custody demonstrates a qualifying change in circumstances, the court will determine whether modification is in the best interests of the child. AS 25.20.110.

1 Cases that cite this headnote

8 **Child Custody** ⇐ Parent or custodian's relocation of home

In child custody modification cases involving a parent's relocation out of state, as long as the relocating parent's reasons for moving are legitimate, the trial court must examine the best interests of the child. AS 25.20.110.

9 **Child Custody** ⇐ Presumptions

The rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence applies in custody modification proceedings. AS 25.24.150(g, h).

1 Cases that cite this headnote

10 **Child Custody** ⇐ Misconduct or status affecting presumption

The primary purpose of statute creating a rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence is to protect children from potentially adverse custody determinations in response to growing evidence that domestic violence has severe and long-lasting effects on children. AS 25.24.150(g).

1 Cases that cite this headnote

11 **Child Custody** ⇐ Decision and findings by court

Trial court considering mother's request for change in shared custody, which was based in part on fact that father had pleaded guilty to an assault involving an act of domestic violence toward mother, was required to make explicit findings on whether choking incident, standing alone, amounted to a history of domestic violence for purposes of

rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence. AS 25.24.150(g, h).

2 Cases that cite this headnote

12 **Child Custody** ⇐ Decision and findings by court

Where a superior court considering a child custody modification request finds that domestic violence occurred, it must make express findings regarding whether the incident or incidents of domestic violence constitutes a statutory history of perpetrating domestic violence. AS 25.24.150(g, h).

2 Cases that cite this headnote

13 **Child Custody** ⇐ Hearing and Determination

Mother, who alleged as part of child custody modification request that father had a history of domestic violence, was entitled to present evidence and testimony regarding individual incidents as alleged in her motion to modify custody in order to allow court to determine whether the alleged events were acts of domestic violence which created rebuttable presumption against awarding custody to father. AS 25.24.150(g).

14 **Child Custody** ⇐ Welfare and best interest of child

Child Custody ⇐ Decision and findings by court

In making a custody decision based on the best interests of the child, a superior court must consider each statutory factor and must discuss the factors that it deems relevant to the case before it. AS 25.24.150(c).

1 Cases that cite this headnote

15 **Child Custody** ⇐ Welfare and best interest of child

Though a trial court, when considering the best interests of the child for custody purposes, cannot assign disproportionate weight to particular statutory factors while ignoring others, it has considerable discretion in determining the importance of each statutory factor in the context of a specific case and is not required to weigh the factors equally. AS 25.24.150(c).

1 Cases that cite this headnote

16 **Child Custody** ⇐ Parent or custodian's relocation of home

The interest in stability and continuity, as a statutory factor when considering the best interests of the child in a custody modification proceeding, cannot categorically favor the non-relocating party purely due to geographic stability. AS 25.24.150(c)(5).

17 **Child Custody** ⇐ Presentation and reservation of grounds of review

Mother failed to argue in Superior Court that it was inappropriate to allow father to have unsupervised visitation with child, and thus Supreme Court would decline to decide that issue on appeal in child custody modification action.

Attorneys and Law Firms

***996** Shayla Williams, pro se, Anchorage, Appellant.
Justin R. Eschbacher, Law Offices of G.R. Eschbacher, Anchorage, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, and CHRISTEN, Justices.

Opinion

OPINION

PER CURIAM.

I. INTRODUCTION

Jomell Barbee and Shayla Williams both seek primary physical custody of their young son De'Shawn. Barbee and Williams have shared custody of De'Shawn since their separation in February 2008. In April 2009 Williams requested a change in custody because she planned to move to Washington ***997** and because Barbee had pleaded guilty to an assault involving an act of domestic violence toward Williams. After a hearing in June 2009, the superior court concluded that it was in De'Shawn's best interests to continue the shared custody arrangement as long as both parents remained in Anchorage but awarded primary physical custody to Barbee if and when Williams relocated out of state. Williams appeals the superior court's custody award, arguing primarily that the court should not have granted custody to Barbee because Barbee had a "history of domestic violence" that raised a rebuttable statutory presumption against custody and he had not overcome the presumption.

Because the trial court was presented with multiple allegations of abuse and found that at least one incident of domestic violence had been perpetrated by Barbee, it was required to make an express finding as to whether Barbee had a "history of perpetrating domestic violence" under AS 25.24.150(h). Failure to make this finding was plain error. We thus reverse and remand for the superior court to make an express determination whether there is a "history of perpetrating domestic violence." If the superior court finds that Barbee has this history, it must address the statutory presumption against awarding custody to Barbee under AS 25.24.150(g) before awarding any custody to Barbee. [1]

II. FACTS AND PROCEEDINGS

A. Barbee And Williams's Relationship And Divorce

Jomell Barbee and Shayla Williams (f/k/a Shayla Barbee) are the parents of De'Shawn Barbee. De'Shawn was born on November 30, 2005. Barbee and Williams married on April 14, 2006 in Anchorage.

Williams alleges that Barbee was abusive during the parties' marriage; she claims that Barbee had "anger issues" and that arguments would "always turn into something bigger than expected and would eventually end with him abusing [her]." According to Williams, Barbee would "choke ... hit ... kick ... [and] throw [her] on the ground" and several times she called the police.

On the night of December 17, 2007, Barbee allegedly "tackled [Williams] from behind and put her in a headlock." Williams stated that Barbee "used both arms and strangled [Williams] to the point she thought that she would lose consciousness" and after Barbee "let go" Williams experienced vomiting, difficulty breathing, and trouble swallowing. Williams later alleged that she had to fight for her life and thought that she was going to die. Williams called the police the next morning; when the police arrived they observed that Williams had "pet[e]chia [2] on her neck and behind both ears" and "what appeared to be blood pooled behind both of her lower eyelids and red marks on her right arm and wrist." Barbee was arrested and charged with assault in the second degree on December 20.

On February 15, 2008, while the criminal charge against him was pending, Barbee filed for divorce. Barbee and Williams, acting pro se, came to an agreement regarding custody and property division at a December 10, 2008 status hearing. On February 11, 2009, the superior court entered a decree of divorce stating that Barbee and Williams had been able to negotiate a settlement regarding property and child custody. Barbee and Williams agreed to have joint legal custody and shared physical custody of De'Shawn; De'Shawn would spend Friday afternoon through Monday morning with Barbee and Monday morning through Friday afternoon with Williams, with alternating holiday arrangements.

On February 27, 2009, Barbee pleaded guilty to the third-degree assault charge that ***998** arose from the December 2007 incident. He was sentenced to 24 months imprisonment with 23 months suspended and three years probation. As part of his probation, Barbee agreed to enroll in and complete a 24-week state-approved Domestic Violence Intervention Program and not to have any contact with Williams.

B. Williams's Request For Custody Modification

On April 27, 2009, Williams filed a motion to modify the custody arrangement based on two distinct changed circumstances. She first argued that Barbee's guilty plea to a felony assault charge stemming from an act of domestic violence warranted a change in custody. Specifically citing AS 25.24.150(g) and (h), Williams contended that Barbee's plea proved that he had engaged in domestic violence, making him ineligible for a physical custody award unless he overcame the statutory presumption against custody. Williams added that co-parenting was no longer an option because Barbee was prohibited from having contact with Williams and because Williams did not "feel comfortable or safe sharing custody" with Barbee.

Williams also argued for custody modification because she planned to move to Washington with her soon-to-be husband. She stated that it would be in De'Shawn's best interests to move with her. Williams allowed that De'Shawn had always lived in Alaska and had ties to Barbee's family in the state, but argued that because De'Shawn was only three years old, he would easily be able to adapt to a new environment.

Barbee opposed Williams's motion, arguing that pleading guilty to a single act of domestic violence did not constitute a "history of perpetrating domestic violence." Barbee stated that it would be "mentally and emotionally devastating" to De'Shawn to leave Barbee's extended family in Alaska. Barbee then asked for full legal and physical custody of De'Shawn.

C. The Modification Hearing And The Superior Court's Custody Award

On June 24, 2009, the superior court held a hearing on Williams's motion to modify custody. The court initially found that Williams's reasons for leaving the state were "a legitimate change in circumstances" such that the court would determine what custody arrangement would be in De'Shawn's best interests if and when Williams moved out of state.

The court heard testimony from both parties. Barbee argued that it would be best for De'Shawn to stay in Alaska because De'Shawn had been born and raised in Anchorage and Barbee's extended family members in Anchorage provided care and support to both Barbee and De'Shawn. Barbee explained how he provides for De'Shawn's financial, physical, and mental needs. He also testified that De'Shawn had been in a "stable" environment and that despite the parties' divorce he had encouraged the relationship between De'Shawn and Williams. When asked about the assault, Barbee admitted that he "choked" Williams, calling it "a terrible mistake." He disputed that he ever "beat" Williams as she alleged. Barbee testified that he was taking domestic violence classes and planned to complete them within the month.

Williams also testified that she provides for De'Shawn's needs. She agreed that De'Shawn was in a "stable" environment in Anchorage, but explained that he was "still pretty young" and "very adaptable to changes." She also detailed how she would make sure that De'Shawn stayed in touch with Barbee if she moved out of state. Williams believed that it would be best for De'Shawn to move with her to Washington because she and her husband could provide a "family structure" including future siblings and financial security, and neither of them had any type of criminal or domestic violence background.

After Barbee and Williams testified, the superior court observed that this was "a close case" and summarized the best interests factors under AS 25.24.150(c). The superior court found that De'Shawn had the typical needs of any child of his age, that both Barbee and Williams were capable of meeting those needs, that the child's preference was not a factor because of De'Shawn's ***999** young age, and that there was love and affection between De'Shawn and both of his parents.[3] These factors weighed evenly between Barbee and Williams.

The superior court then turned to the fifth statutory factor, the desire to maintain continuity,[4] and found that De'Shawn had "been in a stable, satisfactory environment" and that Barbee's extended family in Anchorage was "an important factor." The court determined that it would be in De'Shawn's best interests to "continue the stability" and weighed the fifth factor in favor of Barbee.

Examining the sixth factor, willingness and ability to foster a relationship between the other parent and the child,[5] the court first noted that the factor might not apply to the case in light of the domestic violence between the parties,[6] but ultimately concluded that the factor did not favor either party.

Finally, the superior court touched on the seventh factor, evidence of domestic violence,[7] and found that the factor weighed in favor of Williams because of Barbee's felony assault conviction. The superior court acknowledged that Williams had alleged other instances of abuse and filed other domestic violence petitions that were denied but suggested that none of the additional incidents had been proved. Thus, the court evaluated the seventh factor based on "this one really big deal incident here where you choked her terribly" and found that the seventh factor weighed against Barbee.

Summarizing its best interests analysis, the superior court found "one factor favoring [Williams] fairly strongly [and] one factor favoring [Barbee] somewhat strongly, and the rest of the factors [ ] equally balanced." The court concluded that "the factor of stability and the existence of the extended family on Mr. Barbee's side ... suggest that De'Shawn's best interest would be best served by having Mr. Barbee exercise what would probably be called the custodial period." The court ruled that it would maintain the current custody arrangement if Williams remained in Alaska, but Barbee would be awarded primary physical custody if Williams moved to Washington.

On July 22, 2009, the superior court entered a written order memorializing its decision:

1. Shayla Williams'[s] Motion to Modify Custody is denied.

2. If and when Shayla Williams relocates out of state, Jomell Barbee shall exercise primary physical custody of the parties' child De'Shawn....

3. As long as Ms. Williams continues to reside in Anchorage, the parties shall exercise shared physical custody under the current (previously ordered) schedule.

4. The parents shall continue to exercise shared legal custody. However, if Ms. Williams relocates out of Anchorage, Mr. Barbee may make all decisions regarding De'Shawn's education.

***1000** Williams asked the superior court to reconsider the custody ruling on July 6, 2009; her motion was denied on July 22. Williams appealed the superior court's decision.

III. STANDARD OF REVIEW

1 2 3 4 A superior court has broad discretion in determining child custody matters.[8] We will not reverse a superior court's custody determination unless we are "convinced that the trial court abused its discretion or that its controlling factual findings are clearly erroneous."[9] A superior court abuses its discretion in the custody context when it "fails to consider statutorily mandated factors, weighs factors improperly, or includes improper factors in its decision."[10] A factual finding is clearly erroneous when

a review of the entire record leaves us with the "definite and firm conviction" that a mistake has been made. [11] We do not "readily second guess a trial court's custody determination because it is the function of the trial court, not of this court, to judge witnesses' credibility and to weigh conflicting evidence." [12]

IV. DISCUSSION

5 6 7 Alaska Statute 25.20.110 provides that the superior court may modify child custody or visitation "if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child." [13] The parent seeking modification must first establish that there has been a "significant change in circumstances affecting the child's best interests." [14] As a matter of law, both the occurrence of a crime involving domestic violence and one parent's relocation out of state constitute significant changes in circumstances. [15] Once a party demonstrates a qualifying change in circumstances, the court will determine whether modification is in the best interests of the child. [16]

8 In cases involving a parent's relocation out of state, as long as the relocating parent's reasons for moving are legitimate, the trial court must examine the best interests of the child. [17] Here, the superior court found that Williams's reasons for relocating were "totally legitimate" and proceeded to analyze De'Shawn's best interests.

A. Domestic Violence And The Presumption Against Custody

Alaska Statute 25.24.150(g), enacted by the legislature in 2004, directs that "[t]here is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child." [18] The statute provides that a person has a "history of perpetrating domestic violence ... if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence." ***1001** [19] We define "serious physical injury" under subsection (h) as "physical injury caused by an act performed under circumstances that create a substantial risk of death; or physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy." [20] We have held that once the trial court determines that a party has a "history of perpetrating domestic violence" as defined by subsection .150(h), "the path charted in subsection .150(g)-(i) must be followed," *i.e.*, the rebuttable presumption against custody applies. [21]

At the June 24, 2009 hearing and in its July 22, 2009 order the superior court granted primary physical and shared legal custody to Barbee should Williams relocate out of state. Williams's main argument on appeal is that it was error for the superior court to award custody to Barbee because Barbee has a history of domestic violence and failed to rebut the statutory presumption against custody. Specifically, Williams asserts that "despite recognizing that Mr. Barbee had engaged in serious domestic violence the court failed to make a specific finding or clearly address the presumption that Mr. Barbee could not be awarded physical or legal custody of the child pursuant to AS 25.24.150(g)." Barbee responds that the superior court found that he did not have a history of domestic violence and so did not have to address the presumption of AS 25.24.150(g).

1. The statutory presumption against custody applies in modification proceedings.

9 As a threshold matter, we must determine whether the rebuttable presumption against awarding custody to a parent who has "a history of perpetrating domestic violence" applies in custody modification proceedings. [22] We have held that the "ultimate focus" in the custody modification context "is the best interests of the children." [23] We conclude that applying the statutory presumption against custody is appropriate and necessary in light of this focus.

10 First, the legislative history behind AS 25.24.150(g) strongly indicates that the legislature intended for the presumption to apply in modification proceedings. Alaska Statute 25.24.150(g) was enacted in 2004 by House Bill 385. [24] The primary

purpose of H.B. 385 was to protect children from potentially adverse custody determinations in response to growing evidence that domestic violence has severe and long-lasting effects on children. [25] The bill sought to decrease the likelihood that children would be placed in the custodial household where domestic violence exists by ensuring that domestic violence was adequately and specifically included when courts analyzed a child's best interests. [26] This purpose is equally valid at a ***1002** modification hearing where, just as in making an initial custody determination, a court should fully address any existence of domestic violence and avoid making a custody determination that will place a child in the custody of an abusive parent.

To accomplish its goal, H.B. 385 refined the best interests analysis by requiring that courts consider the existence of domestic violence not only as part of the traditional "best interests" factors laid out in AS 25.24.150(c) but also as triggering a rebuttable presumption against custody where a history of domestic violence exists. [27] It follows that the presumption is properly a part of the "best interests" analysis in modification proceedings just as it is in initial custody determinations. [28]

Adding support to our conclusion that the presumption applies in modification cases, we observe that AS 25.20.110 does not limit a superior court to consideration of *only* the factors under subsection (c) when determining whether modification is warranted. [29] Nor have we so limited courts making any custody determinations-our guiding concern has long been the best interests of the child and not strict adherence to the factors enumerated in the statute. [30] In addition, we recently assumed that the statutory presumption applies to a proceeding to modify visitation; there is no reason why it should not similarly apply to a proceeding to modify custody. [31] And employing the presumption where one party seeks modification is a logical extension of our cases applying the other subsections of AS 25.24.150 to modification proceedings. [32] Moreover, given that a finding that a crime involving domestic violence has occurred since the last custody determination is, as a matter of law, a changed circumstance that warrants a modification proceeding, it would make little sense to exclude the presumption against custody in modification cases. [33] The statutory purpose of protecting children would be completely unfulfilled if, in a modification hearing triggered by the occurrence of a crime involving domestic violence, the court could ignore the statutory presumption against awarding custody to the perpetrator of domestic violence.

Finally, we believe that applying the statutory presumption against custody is undoubtedly ***1003** appropriate in a case such as this one, where the presumption was not addressed at the initial custody determination because the custody award was made pursuant to an agreement of the parties. [34] Applying the presumption is especially necessary where the settlement agreement awarding custody was made by parties with a history of domestic violence during the marriage. [35]

2. The superior court must make express findings regarding whether Barbee has a "history of perpetrating domestic violence."

11 Williams maintains on appeal that Barbee "has a history of domestic violence as evidenced by his conviction and his own testimony" and that the trial court "recognized that Mr. Barbee has a history of domestic violence." Citing to the same page of the transcript as Williams, Barbee responds that the superior court found that he *did not* have a history of domestic violence, and so did not have to address the statutory presumption against custody. The transcript suggests that neither party is entirely correct-the superior court did not make any express finding regarding a "history of perpetrating domestic violence" under AS 25.24.150(h). While the trial court's dialogue did include the phrase "history of domestic violence," read in context, it appears that the term "history of domestic violence" referred to the best interests of the child criteria found at AS 25.24.150(c)(7) rather than a separate analysis under subsection .150(h). [36]

We have held that "when the record shows that domestic violence has occurred and the trial court so finds, it is plain error for the court not to make findings as to whether the domestic violence amounted to a history of perpetrating domestic violence." [37] In *Puddicombe v. Dreka,* we concluded that it was error for the superior court to fail to evaluate whether there was a history under AS 25.24.150(h) after the court found when discussing the seventh best interests factor that both parties had engaged in domestic violence. [38] The evidence of domestic violence in *Puddicombe* consisted of plaintiff's allegations (presented without

witness testimony) that defendant punched, sexually assaulted, choked, and threatened to kill her along with extensive testimony about several altercations that occurred between the parties, though "most of the evidence regarding physical violence was from the parties themselves and was highly contested."[39] Even so, because the superior court found that domestic violence had occurred, it was required to "explicitly address whether it was serious enough to be a history of perpetrating ***1004** domestic violence under the definition set out in subsection .150(h)."[40]

12 Addressing this same issue, we recently concluded that a trial court must determine whether domestic violence amounted to a history under AS 25.24.150(h) even when evidence of domestic violence is less "overwhelming" than in *Puddicombe.*[41] In *Michele M. v. Richard R.* the superior court did not find any relevant, recent domestic violence incidents and "may have *implicitly* determined that [defendant's] past acts of domestic violence were neither numerous nor significant and so did not amount to a 'history of perpetrating domestic violence.' "[42] Still, we remanded, stating that "it was plain error for the court not to further determine whether [defendant's] previous acts of domestic violence constituted" a history under the statute.[43] We hold today that where a superior court finds that domestic violence occurred, it must make express findings regarding whether the incident or incidents of domestic violence constitute a "history of perpetrating domestic violence" under AS 25.24.150(h).

At the June 24, 2009 hearing, the superior court made some comments about both the single substantiated incident and Williams's other alleged incidents but did not expressly state whether they amounted to a statutorily defined history of abuse. First, the court referred to the incident that resulted in Barbee's assault conviction and recognized that it was "one really big deal incident here where you choked her terribly." Crucially, however, the superior court did not explain whether "chok[ing] her terribly" amounted to causing a "serious physical injury" such that the single incident constituted a history under subsection .150(h).

"Serious physical injury" in the context of the presumption against awarding custody means "physical injury caused by an act performed under circumstances that create a substantial risk of death; or physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."[44] The absence of a finding in this case is especially problematic because Williams claimed that she feared for her life during the incident, and the charging document, which was "based upon a review of [the] police report" indicates:

> [Williams] reported that her husband tackled her from behind and put her in a headlock. She said that he used both arms and strangled her to the point she thought she would lose consciousness. She stated that after he let go, she began vomiting and had difficulty breathing. She stated that her voice was hoarse and continued to have trouble swallowing on the morning of the 18th when she called the police. The officer observed that she had pet[e]chia on her neck and behind both ears. The officer noted what appeared to be blood pooled behind both of her lower eyelids and red marks on her right arm and wrist.
> On remand the superior court must make an explicit finding whether this choking incident, standing alone, amounts to a history of domestic violence under AS 25.24.150(h).

We next turn to Williams's many additional allegations of domestic violence in her pleadings to the superior court. Even if the superior court determines on remand that the single choking incident did not amount to a history of domestic violence, if Williams's evidence warrants a finding that there were additional incidents of domestic violence, then there was a "history of perpetrating domestic violence," and the superior court must address the rebuttable presumption against custody.

3. If pro se parties make allegations of domestic violence the superior court must inquire into the allegations and allow the parties to present evidence regarding the allegations.

13 In *Parks v. Parks,* we concluded that AS 25.24.150(g) "requires trial courts to ***1005** consider *alleged incidents* of domestic violence" and that it is appropriate to "question the pro se litigants about facts relevant to the issue" to determine whether an alleged event was an incident of domestic violence.[45] We reaffirm this position here and conclude that it was error not to give Williams an opportunity to put forth evidence to support her allegations.

In *Parks,* a husband admitted during a custody hearing that he had thrown water in his wife's face; the trial court found that this was not an incident of domestic violence for purposes of triggering the statutory presumption against custody because there was no evidence that the wife was afraid. [46] We clarified on appeal that the water-throwing would constitute domestic violence if the husband was attempting to place his wife in fear of imminent physical injury. [47] We then remanded to the superior court for additional findings, explaining:

> Alaska Statute 25.24.150(g) requires trial courts to consider alleged incidents of domestic violence, and here the trial court was in a position to question the pro se litigants about facts relevant to the issue. On remand, the trial court should solicit from the parties the information it needs to determine whether the water-throwing incident was an act of domestic violence. [[[[48]]

In this case, Williams's pleadings to the superior court contained numerous allegations of domestic abuse. Williams detailed in her motion to modify custody that during their marriage Barbee had "anger issues" and that arguments would end with Barbee "abusing" Williams, including choking, hitting, kicking, and throwing Williams to the ground. Yet, the superior court did not take testimony from Williams about the individual incidents alleged in her motion to modify custody. [49] Nor did the trial court ask Williams to provide additional information that would have allowed the court to determine whether the alleged events were acts of domestic violence. [50] The superior court should have inquired into the details of the events and provided an opportunity for Williams to present evidence in support of her allegations of abuse in order to determine whether the events were acts of domestic violence. We remand for the superior court to allow and evaluate such evidence.

B. The Best Interests Factors Under AS 25.24.150(c)

14 **15** In making a custody decision based on the best interests of the child, a superior court must consider each statutory factor in subsection .150(c) and must discuss the factors that it deems relevant to the case before it. [51] Though a trial court cannot "assign[ ] disproportionate weight to particular factors while ignoring others," it has "considerable discretion in determining the importance of each statutory factor in the context of a specific case" and is not required to weigh the factors equally. [52]

Here, the superior court specifically discussed each factor under AS 25.24.150(c). The court determined that most of the factors did not favor either party, but that two factors affected its analysis-the interest in maintaining stability and continuity weighed in favor of Barbee under AS 25.24.150(c)(5), [53] ***1006** while the incident of domestic violence weighed in favor of awarding custody to Williams under AS 25.24.150(c)(7). [54]

Williams argues that the superior court improperly weighed the stability and continuity factor equally against the existence of domestic violence. Barbee replies that the superior court properly discussed and weighed the best interests factors, and that it was appropriate for the trial court to focus on the stability and continuity factor in light of Williams's planned move to Washington.

16 Because the superior court will have to reevaluate on remand the relative weights of the continuity and stability factor and the domestic violence factor in light of its findings regarding the alleged domestic violence, we do not reach the issue of whether the superior court properly analyzed the factors. We note, however, that several of our recent decisions addressing custody modification where one parent relocates out of state emphasize that the interest in stability and continuity described in AS 25.24.150(c)(5) cannot categorically favor the non-relocating party purely due to geographic stability. [55] In *Blanton v. Yourkowski,* we explained our reasoning:

> A continuity test centered entirely on the child's geographical stability would always favor placing the child with the non-moving parent. Yet our decisions recognize that courts may properly award primary custody to the relocating parent when that parent offers superior emotional stability. Thus, the continuity and stability factor does not preordain the result in such cases; instead, it commands a comprehensive inquiry into each parent's respective ability to maintain stable and satisfactory relations between themselves and the child. [[56]]

We have concluded that stability and continuity "can encompass a multitude of factors, including, but not limited to, the relationship with the custodial parent, the home provided by the custodial parent, the children's school, the community of friends and family, the cultural community, ... the children's relationship with the non-custodial parent ... [and] stability of place." [57] It is the trial court's task "to examine all of these factors and determine, in each case, which predominate." [58]

C. Unsupervised Visitation

17 On appeal, Williams argues that it was inappropriate for the superior court to allow Barbee to have unsupervised visitation. Barbee urges us not to reach this issue because Williams did not brief the argument. While Williams's briefing on appeal is likely sufficient under our more liberal standards for pro se litigant pleadings, [59] we will not decide this issue because Williams did not raise it in the superior court.

V. CONCLUSION

We REVERSE the award of primary physical and shared legal custody to Barbee ***1007** and REMAND for the superior court to make an express finding regarding whether Barbee has a "history of perpetrating domestic violence" pursuant to AS 25.24.150(h). If the superior court finds that Barbee does have a history of domestic violence, it must address the rebuttable presumption against custody under AS 25.24.150(g) before awarding any custody to Barbee.

STOWERS, Justice, not participating.

Footnotes

1 Though Williams did not appeal the portion of the superior court's order granting shared physical custody to the parties should Williams remain in Alaska, we note that before granting *any* type of custody to Barbee the superior court must address the presumption of AS 25.24.150(g) if it finds that Barbee has a history of perpetrating domestic violence under AS 25.24.150(h).

2 A "petechia" is "a minute reddish or purplish spot containing blood that appears in skin or mucous membrane as a result of localized hemorrhage." MERRIAM-WEBSTER DICTIONARY, available at http://www.merriam-webster.com/dictionary/petechia.

3 The superior court later noted that substance abuse was not an issue for either party.

4 AS 25.24.150(c)(5) ("the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity").

5 AS 25.24.150(c)(6) ("the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child").

6 We have held that the sixth statutory factor might not be relevant where domestic violence has occurred because a victimized parent should not be expected to foster a relationship with the abusive parent. *Puddicombe v. Dreka,* 167 P.3d 73, 77 (Alaska 2007) ("Once the trial court makes an evidence-based finding that domestic violence occurred ... it should explicitly address whether or not the parent is a continuing threat to the health and safety of the other parent [or] the children prior to relying on the parent's willingness to foster a relationship under AS 25.24.150(c)(6)."); *see also* AS 25.24.150(c)(6) (directing courts to consider this factor "except that the court may not consider this willingness and ability if one parent shows that the other parent has ... engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child").

7 AS 25.24.150(c)(7) ("any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents").

8 *Wee v. Eggener,* 225 P.3d 1120, 1124 (Alaska 2010).

9 *Michele M. v. Richard R.,* 177 P.3d 830, 834 (Alaska 2008) (quoting *Valentino v. Cote,* 3 P.3d 337, 339 (Alaska 2000)).

10 *Id.*

11 *Wee,* 225 P.3d at 1124.

12 *Michele M.,* 177 P.3d at 834 (internal quotation marks omitted).

13 AS 25.20.110(a).

14 *Ebertz v. Ebertz,* 113 P.3d 643, 647 (Alaska 2005).

15 AS 25.20.110(c) (stating that a "finding that a crime involving domestic violence has occurred since the last custody ... determination" is a changed circumstance); *Chesser-Witmer v. Chesser,* 117 P.3d 711, 717 (Alaska 2005) (explaining that a change of circumstances "exists as a matter of law when a custodial parent [including a parent with joint custody] moves out of state").

16 *Ebertz,* 113 P.3d at 647.

17 *Eniero v. Brekke,* 192 P.3d 147, 150 (Alaska 2008); *see also Barrett v. Alguire,* 35 P.3d 1, 7 (Alaska 2001) (stating that "the legal standard in custody cases where one parent chooses to relocate is the same whether the superior court has an initial custody determination or motion to modify custody before it").

18 Ch. 111, § 5, SLA 2004.

19 AS 25.24.150(h); *see also* Lisa Bolotin, Note, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence,* 25 ALASKA L.REV. 263, 275 (2008) (explaining that the Alaska statute "requires that a parent perpetrate a certain level of violence ... before the presumption takes effect").

20 *Parks v. Parks,* 214 P.3d 295, 301 (Alaska 2009) (quoting AS 11.81.900(b)(56)).

21 *Wee v. Eggener,* 225 P.3d 1120, 1125 (Alaska 2010).

22 Neither party raised this point on appeal, but Barbee's counsel raised it at oral argument. Moreover, we must answer this threshold question before considering the superior court's obligations in the modification context.

23 *Lashbrook v. Lashbrook,* 957 P.2d 326, 328 (Alaska 1998).

24 House Bill (H.B.) 385, 23d Leg., 2d Sess. (2004).

25 *See* Minutes, House Judiciary Comm. Hearing on H.B. 385, 23d Leg., 2d Sess. (March 1, 2004) (Statement of Chair Lesil McGuire, sponsor) (stating that protection of children is the overarching goal of H.B. 385 and later explaining that similar policies against awarding custody to abusive parents have been widely supported and implemented in other jurisdictions in response to "a growing body of social science literature"); *see also* H.R.REP. NO. 101-737, at 3 (1990) (Congress reporting that domestic violence causes children to "experience shock, fear, guilt, long lasting impairment of self-esteem, and impairment of development and socialization skills").

26 Minutes, Senate Judiciary Comm. Hearing on H.B. 385, 23d Leg., 2d Sess. (April 27, 2004) (Statement of Representative Lesil McGuire, sponsor) (explaining that batterers are often awarded custody and that H.B. 385 seeks to "level the playing field" by requiring that courts consider domestic violence not only as one factor under .150(c) but as raising a rebuttable presumption against custody); *see also* Bolotin, *supra* note 19, at 287-89 (commenting that the benefit of the rebuttable presumption is that it "ensures that courts give adequate weight to the existence of domestic violence in determining the child's best interests" and "is the best way to ensure that domestic violence is always appropriately considered").

27 *See* Minutes, House Judiciary Comm. Hearing on H.B. 385, 23d Leg., 2d Sess. (March 1, 2004) (Statement of Chair Lesil McGuire, sponsor) ("We will ask the court to continue to ... consider[ ] the factors that are in [AS] 25.24.150(c), ... but we're also saying that you have to consider the rebuttable presumption that's now going to be present in what will be a new subsection (g).").

28 In addition, the amendments and additions to AS 25.24.150 were based on a model statute, which directed that "[i]n *every proceeding* where there is at issue a dispute as to the custody of the child" the presumption against custody should apply. Bolotin, *supra* note 19, at 273 (quoting the MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (Nat'l Council of Juvenile and Family Court Judges 1994)) (emphasis added). A modification proceeding is clearly a situation where child custody is in dispute, and so the rebuttable presumption should apply.

29 AS 25.20.110(a) (in modifying a custody award, the court must determine that "the modification is in the best interests of the child"); *see also* Chapter 111, §§ 1, 2, SLA 2004 (showing that H.B. 385 specifically amended statutory provisions directing courts to look to AS 25.24.150(c) to include the presumption under AS 25.24.150(g)).

30 *See Schmitz v. Schmitz,* 88 P.3d 1116, 1122-23 (Alaska 2004) ("The court may consider other factors not listed in the statute if those additional considerations are relevant to the child's best interests.").

31 *See Morris v. Horn,* 219 P.3d 198, 208-10 (Alaska 2009) (remanding for the trial court to independently find whether multiple incidents of domestic violence had occurred rather than invoking issue preclusion but assuming that the presumption would apply to limit visitation under AS 25.24.150).

32 *See West v. Lawson,* 951 P.2d 1200, 1203 (Alaska 1998) (applying subsection .150(d) in the modification context).

33 AS 25.20.110(c).

34 *See Hamilton v. Hamilton,* 42 P.3d 1107, 1115 (Alaska 2002) (clarifying that while a court modifying a custody award should consider findings made at the original hearing, the court does not have to give such deference where "no findings of fact [were] made at the time of the original order as it was entered into pursuant to a settlement agreement").

35 *See Crane v. Crane,* 986 P.2d 881, 889 n. 27 (Alaska 1999) (noting that in certain circumstances a court may examine a custody agreement more closely, such as when there has been domestic violence between the parties); *see also* AS 25.24.220(h)(2) (providing

that a court will use a heightened level of scrutiny in reviewing dissolution agreements if there is evidence of domestic violence during the marriage).

36 In full, the trial court's statement was:

> The next factor is evidence of domestic violence, child abuse or child neglect, and a history of domestic violence between the parents, and this factor weighs in favor of Ms. Williams and against Mr. Barbee, principally because of this conviction. Now, I know that you've argued that there have been other instances.
>
> ....
>
> I also know that there have been other domestic violence petitions filed and denied ... I don't blame people for filing things if they feel that they really have been the victim of domestic violence, but on the other hand it's not been proven. So what we've got is we've got this one really big deal incident here where you choked her terribly, and that factor weighs against you.

37 *Puddicombe v. Dreka,* 167 P.3d 73, 77 (Alaska 2007); *see also* Bolotin, *supra* note 19, at 276-77 (noting that fact finders in Alaska must follow the procedures outlined in subsections .150(g)-(i) "whenever one party presents credible evidence of domestic violence" such that "once the issue of domestic violence is properly raised, the court must address the question" whether there is a history pursuant to the statute's definition).

38 167 P.3d at 75-77.

39 *Id.* at 75-76.

40 *Id.* at 77.

41 *Michele M. v. Richard R.,* 177 P.3d 830, 837-38 (Alaska 2008).

42 *Id.* at 837 (emphasis added).

43 *Id.* at 837-38.

44 *Parks v. Parks,* 214 P.3d 295, 301 (Alaska 2009) (quoting AS 11.81.900(b)(56)).

45 214 P.3d at 302 (emphasis added).

46 *Id.* at 300.

47 *Id.*

48 *Id.* at 302; *see also id.* at 300-01 (remanding for the trial court to also determine whether the husband's alleged violations of a long-term protective order were incidents of domestic violence that would constitute a "history" under AS 25.24.150(h) where the trial court made no findings on the subject).

49 While the superior court did not expressly bar Williams from testifying about her allegations, it is unclear when during the hearing Williams would have had an opportunity to do so.

50 Although the trial court did refer to its earlier rulings denying domestic violence petitions filed by Williams, it is not at all clear that each of the incidents of abuse detailed in Williams's motion to modify custody was the subject of a domestic violence petition.

51 *Park v. Park,* 986 P.2d 205, 207 (Alaska 1999).

52 *Barlow v. Thompson,* 221 P.3d 998, 1005 (Alaska 2009) (citations omitted).

53 AS 25.24.150(c)(5) ("the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity").

54 AS 25.24.150(c)(7) ("any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents").

55 *See, e.g., Blanton v. Yourkowski,* 180 P.3d 948, 954 (Alaska 2008).

56 *Id.* (quoting *Meier v. Cloud,* 34 P.3d 1274, 1279 (Alaska 2001)).

57 *Moeller-Prokosch v. Prokosch,* 99 P.3d 531, 534 (Alaska 2004) (quoting *Barrett v. Alguire,* 35 P.3d 1, 9 (Alaska 2001)) (remanding for the superior court to "fully consider[ ] the effect of [child's] separation from the non-custodial parent" and explaining that "[p]erforming the best interests analysis based on [mother's] assumed move requires symmetric consideration of the consequences to [child] both if she leaves with him and if she leaves without him").

58 *Barrett,* 35 P.3d at 9 (upholding a trial court finding that it was in the children's best interests to stay in Alaska with their mother because maintaining the children's relationships with their school, community of friends and family, cultural community, and mother outweighed maintaining the relationship with their father with whom they had lived for four and a half years).

59 *See Peterson v. Ek,* 93 P.3d 458, 464 n. 9 (Alaska 2004) (concluding that a pro se litigant's briefing was adequate to preserve claims where we "could discern his legal arguments and [defendant] could reply to them"); *see also Breck v. Ulmer,* 745 P.2d 66, 75 (Alaska 1987) ("The pleadings of pro se litigants should be held to less stringent standards than those of lawyers.").

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242 P.3d 1032
Supreme Court of Alaska.

Dusty CHRISTOFFERSEN, Appellant,
v.
STATE of Alaska, COURT CUSTODY INVESTIGATOR'S OFFICE, Appellee.

No. S-13539. | Nov. 5, 2010.

Synopsis

Background: Father and stepmother of child who was subject of a custody investigation brought action against the state, seeking damages for court-appointed custody investigator's failure to immediately report that the child had engaged in sexual misconduct with a younger child in the past, and after child thereafter engaged in sexual misconduct with his half-sister. The Superior Court, Third Judicial District, Anchorage, John Suddock, J., entered summary judgment in favor of investigator. Step-mother appealed.

Holdings: The Supreme Court, Winfree, J., held that:
1 court-appointed custody investigator was entitled to absolute quasi-judicial immunity, and
2 that immunity extended to the state, precluding claim of vicarious liability.

Affirmed.

West Headnotes (8)

1 **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo a grant of summary judgment.

2 **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo the legal question of whether immunity exists as a defense to a claim.

3 **Infants**
Societies, agencies, and officers in general

Court-appointed custody investigator was entitled to absolute quasi-judicial immunity from civil suit arising from the performance of investigation, in which investigator failed to immediately report that child, whose custody was being investigated, had engaged in sexual misconduct with a younger child, regardless of whether investigator would not have been entitled to statutory immunity protecting people who make good faith reports of suspected child abuse from civil liability; the reporting statute did not override common-law quasi-judicial immunity. AS 47.17.050.

4 **Judges**
Liabilities for official acts

Judges are absolutely immune from liability for damages for acts performed in the exercise of their judicial functions.

5 **Judges**
Liabilities for official acts

Absolute judicial immunity applies to acts performed in the exercise of judicial functions, no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive, and only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity.

1 Cases that cite this headnote

6 **Judges**
Liabilities for official acts

The doctrine of absolute judicial immunity extends not only to judges but to others who perform duties sufficiently related to the judicial process.

1 Cases that cite this headnote

7 **Torts**
Litigation privilege; witness immunity

In Alaska, neutral court-appointed experts are shielded by absolute quasi-judicial immunity.

8 **Infants**

Societies, agencies, and officers in general

Where a court-appointed custody investigator was entitled to absolute quasi-judicial immunity from suits arising from the performance of her duties, that immunity extended to the state, on claim of vicarious liability.

Attorneys and Law Firms

***1032** Dusty Christoffersen, pro se, Anchorage, Appellant. Laura Fox, Assistant Attorney General, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

1033** ***OPINION

WINFREE, Justice.

I. INTRODUCTION

In the course of performing her duties, a court-appointed custody investigator received a police report regarding an allegation that the child whose custody was being investigated had engaged in sexual misconduct. The investigator later included this information in her custody report, but did not notify the child's parents or the Office of Children's Services at the time she received the police report. During a period of time that apparently began before the custody investigator received the police report and perhaps continued until the custody investigator issued her report, the child committed further sexual misconduct, this time against his half-sister. The child's father and stepmother filed suit against the State of Alaska for damages, arguing that the custody investigator had a duty to warn them upon learning of the child's previous misconduct. The superior court dismissed the suit on summary judgment. Because court-appointed custody investigators are entitled to absolute quasi-judicial immunity from suits arising from the performance of their duties and because that immunity extends to the State, we affirm.

II. FACTS AND PROCEEDINGS

Mark Christoffersen married Brandi Martin and they had a son, M.C., in 1992. When the couple divorced in 1999, Brandi was awarded primary custody of M.C. and Mark was granted visitation rights. In 2001 Brandi and M.C. moved to Florida and Mark lost contact with them for several years. In March 2006 Mark filed a motion to modify the custody order, seeking primary physical custody of M.C. After the court served Mark's motion on Brandi, the two resumed contact with each other, and Mark resumed visitation with M.C. shortly thereafter. By the time Mark and M.C. were reunited, Mark had married Dusty and the couple had two young daughters.

In May 2006 Master Andrew Brown responded to Mark's motion to modify M.C.'s custody order by directing the Alaska Court System's Custody Investigator's Office (the State) to conduct an investigation and prepare a custody report. The State assigned the case to a custody investigator. The custody investigator interviewed a number of people over the course of her investigation and requested information from collateral resources, including the Anchorage Police Department (APD).

In late June 2006 APD responded to the custody investigator's information request. Included in APD's response was a report concerning an April 2006 incident in which M.C. had inappropriately touched a two-year-old girl. According to the report, M.C. admitted he had touched the child, but the child's mother did not pursue criminal charges.

The custody investigator distributed her completed report to the court, Mark, and Brandi in late October 2006. The custody report addressed a number of custodial issues, including the allegation that M.C. had inappropriately touched the young child. From this report the Christoffersens apparently learned for the first time about M.C.'s inappropriate contact with the young child.

A few days after the custody report was distributed, the Christoffersens contacted the police and told them that M.C. had sexually abused their five-year-old daughter-M.C.'s half-sister-beginning soon after he resumed visitation with Mark. During an interview with police, M.C. admitted perpetrating sexual misconduct against the girl. M.C. was subsequently adjudicated on a charge of sexual assault of a minor in the fourth degree.

In April 2008 the Christoffersens filed suit against the State, seeking ten million dollars in damages. They alleged the custody investigator violated her duty to protect their children by not warning the Christoffersens about the allegations of M.C.'s prior sexual misconduct immediately after she received the APD report. They also alleged the custody investigator violated AS 47.17.020's mandated reporting requirements by not forwarding the APD report about M.C. to the Office of Children's Services (OCS).[1] After ***1034** the State filed its answer to the complaint, the Christoffersens filed a response adding their belief that by not notifying them or OCS as soon as she received the APD report concerning M.C.'s March 2006 misconduct, the custody investigator violated several additional statutes contained in Titles 9 and 47.[2]

The State filed two motions for summary judgment. In its first motion the State argued that (1) custody investigators are entitled to absolute quasi-judicial immunity from civil suits arising out of the performance of their duties, and (2) this immunity bars the Christoffersens's vicarious liability claim against the State. In its second motion the State argued that the custody investigator had no actionable tort duty to warn about or control M.C.'s conduct under the statutes cited by the Christoffersens, Alaska case law, or public policy. The Christoffersens filed a cross-motion for summary judgment, asserting that the custody investigator violated mandated reporting requirements.

In November 2008 the superior court granted both of the State's summary judgment motions, disposing of the Christoffersens's complaint in its entirety and denying their cross-motion for summary judgment *sub silentio.* Dusty appealed the superior court's decision; Mark did not.

III. STANDARD OF REVIEW

1 **2** We review de novo both a grant of summary judgment[3] and the legal question of whether immunity exists as a defense to a claim.[4]

IV. DISCUSSION

A. Overview

This case requires us to determine whether the superior court correctly granted summary judgment to the State on the basis of either (1) absolute quasi-judicial immunity or (2) lack of an actionable tort duty. "We usually consider whether there is a tort duty before deciding sovereign immunity questions, [though] this is not always our practice."[5] We have analyzed immunity first when "doing so clarifies the public policy considerations that also bear on our duty analysis,"[6] and we do so here for that reason. We conclude that (1) a court-appointed custody investigator is entitled to absolute quasi-judicial immunity from civil suits arising from the performance of an investigation, and (2) when a custody investigator is an employee or contractor of the State, that immunity extends to the State. We therefore do not need to address the superior court's ruling on duty.

B. Court-Appointed Custody Investigators Are Protected Under The Doctrine Of Absolute Quasi-Judicial Immunity.

3 **4** **5** Judges are absolutely immune from liability for damages for acts performed in the exercise of their judicial functions.[7] This ***1035** absolute judicial immunity applies "no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive. Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity."[8]

6 **7** The doctrine of absolute judicial immunity extends not only to judges but to others who perform duties sufficiently related to the judicial process.[9] We have previously stated that the "clearest case for quasi-judicial immunity is presented in instances where some aspect of the court's adjudicative responsibility is delegated to another official such as a master or referee. And in Alaska, as well as in almost all other jurisdictions, neutral court-appointed experts are also shielded by absolute quasi-judicial immunity."[10]

In *Lythgoe v. Guinn*[11] we held that quasi-judicial immunity bars suit against a court-appointed custody investigator.[12] Dr. Janet Guinn, a psychologist, had been appointed in that case "to act as an independent custody investigator" and to make a custody recommendation to the court.[13] A party to the underlying child custody dispute subsequently sued Dr. Guinn, alleging that she committed negligent and intentional torts during her investigation and during the preparation of her report.[14] We held that Dr. Guinn served as an "arm of the court" and performed a function "integral to the judicial process" in her capacity as a court-appointed custody investigator,[15] qualifying her for immunity under

relevant case law. We further held that policy considerations supported granting her absolute quasi-judicial immunity. [16]

We explained that "[e]xposure to liability could deter [court-appointed experts'] acceptance of court appointments" [17] and "may affect the manner in which such court-appointed experts perform their jobs." [18] We noted that individuals appointed by the court to conduct custody investigations exercise discretionary judgment in rendering their evaluations, and that "the *sine qua non* of the exercise of such discretion is the freedom to act in an objective and independent manner." [19] If faced with the threat of personal liability for exercising that discretion, court-appointed experts would be less likely to offer "the disinterested objective opinion the court seeks." [20] Therefore we concluded that extending absolute judicial immunity to quasi-judicial officers is appropriate to prevent a professional who is delegated judicial duties to aid the court from becoming a "lightning rod for harassing litigation." [21]

Nothing distinguishes *Lythgoe* from this case. Custody investigators performing duties pursuant to their employment by or contract with the Alaska Court System's Custody Investigator's Office are quasi-judicial officers. [22] As such they are entitled to absolute quasi-judicial immunity from suits arising out of the performance of those duties. [23] Dusty nonetheless appears to contend that the custody investigator here is not immune from suit because she is not entitled ***1036** to the immunity described in AS 47.17.050, which protects persons who make good-faith reports of suspected child abuse from civil or criminal liability. Although Dusty may be correct in contending that AS 47.17.050 would not immunize the custody investigator from suit in this case, the investigator is nevertheless protected by common-law quasi-judicial immunity. [24] Dusty's contention is therefore without merit.

C. The State May Not Be Held Liable For The Conduct Of Custody Investigators Who Are Acting Through The Custody Investigator's Office And Are Shielded By Absolute Quasi-Judicial Immunity.

8 The Christoffersens named the State as the defendant in their suit, not the custody investigator herself. The Christoffersens have not alleged any separate negligence by the State. Instead they imply that the State is vicariously liable for the court-appointed custody investigator's actions.

We have not previously addressed vicarious liability within the context of absolute quasi-judicial immunity. But we have held that a government employee's official immunity from suit bars vicarious liability claims against government entities for the same conduct. [25] Other courts addressing this issue have consistently held that an employee's quasi-judicial immunity bars any vicarious liability claims brought against the employer. [26] We support this view. The policy considerations that support extending absolute quasi-judicial immunity to court-appointed investigators acting within the scope and capacity of their appointment also support extending that same immunity to their principal, here, the State. To conclude otherwise would merely shift the threat of liability from the agent to the principal and would stifle the "disinterested objective opinion that the court seeks." [27]

We therefore hold that because the court-appointed custody investigator is absolutely immune from suits for actions performed within that capacity, the State cannot be held liable for her conduct.

V. CONCLUSION

We AFFIRM the superior court's grant of summary judgment in favor of the State on the ground that it is shielded by the custody investigator's absolute quasi-judicial immunity.

Footnotes

1 AS 47.17.020 requires certain classes of persons, including doctors, teachers, and peace officers, to report suspected physical, mental, or sexual abuse.

2 The Christoffersens alleged that the custody investigator violated the following statutes: AS 09.10.065 ("Commencement of actions for acts constituting sexual offenses"); AS 09.10.070 ("Action for torts, for injury to personal property, for certain statutory liabilities, and against peace officers and coroners to be brought in two years"); AS 09.15.020 ("Parents or guardian may sue for seduction of child"); AS 09.17.010 ("Noneconomic damages"); AS 09.17.020 ("Punitive damages"); AS 47.05.065 ("Legislative findings related to children"); AS 47.10.020 ("Investigation and petition"); 47.10.082 ("Health and safety of child and other considerations"); AS 47.10.092 ("Disclosure to certain public officials and employees"); and AS 47.10.093 ("Disclosure of agency records").

3 *Snyder v. Am. Legion Spenard Post No. 28,* 119 P.3d 996, 1001 (Alaska 2005) (citing *Native Vill. of Elim v. State,* 990 P.2d 1, 5 (Alaska 1999)).

4 *Greywolf v. Carroll,* 151 P.3d 1234, 1241 (Alaska 2007) (citing *State, Dep't of Transp. & Pub. Facilities v. Sanders,* 944 P.2d 453, 456 (Alaska 1997)).

5 *Kinegak v. State, Dep't of Corr.,* 129 P.3d 887, 888 (Alaska 2006) (citing *Kiokun v. State, Dep't of Pub. Safety,* 74 P.3d 209, 213 (Alaska 2003)).

6 *State, Dep't of Corr. v. Cowles,* 151 P.3d 353, 358 (Alaska 2006) (citing *Kiokun,* 74 P.3d at 213 (proceeding directly to immunity because that analysis "illustrates the public policy issues that would also bear on a duty analysis")).

7 *Trapp v. State,* 53 P.3d 1128, 1129 (Alaska 2002).

8 *Id.* at 1130 (quoting *Cok v. Cosentino,* 876 F.2d 1, 2 (1st Cir.1989)).

9 *Id.*

10 *Id.* (internal footnotes and citations omitted).

11 884 P.2d 1085 (Alaska 1994).

12 *Id.* at 1093.

13 *Id.* at 1086.

14 *Id.*

15 *Id.* at 1088 (quoting *Seibel v. Kemble,* 63 Haw. 516, 631 P.2d 173, 179 (1981)).

16 *Id.* at 1093.

17 *Id.* at 1089 (quoting *Lavit v. Superior Court,* 173 Ariz. 96, 839 P.2d 1141, 1144 (Ariz.App.1992)).

18 *Id.*

19 *Id.*

20 *Id.* at 1090 (citing *LaLonde v. Eissner,* 405 Mass. 207, 539 N.E.2d 538, 541 (1989)).

21 *Id.* (quoting *Lavit,* 839 P.2d at 1144).

22 *See Ogden v. Ogden,* 39 P.3d 513, 516 (Alaska 2001) (noting that "court-appointed custody investigators are officers of the court and perform quasi-judicial functions").

23 *Lythgoe,* 884 P.2d at 1093.

24 *See B.K. v. Cox,* 116 S.W.3d 351, 360-61 (Tex.App.2003) (holding that statutorily created immunity for failure to report abuse of a minor does not override common-law derived judicial immunity in the absence of statutory language explicitly doing so). AS 47.17.050 contains no statement of intent to override common-law quasi-judicial immunity.

25 *See Logusak v. Togiak,* 185 P.3d 103, 108-10 (Alaska 2008); *Pauley v. Anchorage Sch. Dist.,* 31 P.3d 1284, 1285-86 (Alaska 2001).

26 *See, e.g., Ward v. San Diego Cnty. Dep't of Soc. Servs.,* 691 F.Supp. 238, 241 (S.D.Cal.1988) ("Because plaintiff's only theory of liability against defendant ... is respondeat superior, this court also finds that [defendant] is entitled to absolute quasi-judicial immunity."); *Hulsman v. Hemmeter Dev. Corp.,* 65 Haw. 58, 647 P.2d 713, 717 (1982) (holding that under respondeat superior "if the employee has immunity from suit, it follows that the employer would also be immune" and noting "[t]he reasoning which justifies this rule is based primarily on public policy") (internal citations omitted); *S.J.S. v. Faribault Co.,* 556 N.W.2d 563, 566 (Minn.App.1996) ("The policy considerations that support extending absolute immunity to prosecutors also support extending absolute immunity vicariously to the county.... [T]he threat of litigation against the county ... could deter prosecutors from vigorously and fearlessly performing their duties.") (internal citation omitted); *Reddy v. Karr,* 102 Wash.App. 742, 9 P.3d 927, 932 (2000) (holding that custody investigator's quasi-judicial immunity extended to her employer).

27 *Lythgoe,* 884 P.2d at 1090 (citing *LaLonde,* 539 N.E.2d at 541).

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262 P.3d 593
Supreme Court of Alaska.

STATE of Alaska, DEPARTMENT OF COMMERCE, COMMUNITY & ECONOMIC DEVELOPMENT, DIVISION OF INSURANCE, Appellant/Cross–Appellee,
v.
ALYESKA PIPELINE SERVICE COMPANY, Appellee/Cross–Appellant.

Nos. S–13499, S–13520. | June 10, 2011.

Synopsis

Background: Oil pipeline operator appealed decision of the Department of Commerce, Division of Insurance, determining that owner-controlled insurance program (OCIP) issued to oil pipeline operator was prohibited by statute providing that owner-controlled insurance programs shall be allowed only for major construction projects. The Superior Court, Third Judicial District, Anchorage, Peter A. Michalski, J., reversed, and Department appealed.

Holding: The Supreme Court, Winfree, J., held that statute did not apply to operator's OCIP.

Affirmed.

Opinion, 2011 WL 193592, superseded.

West Headnotes (6)

1 **Administrative Law and Procedure**
⇐Scope

When a superior court acts as an intermediate appellate court in an administrative matter, the Supreme Court reviews the merits of the agency's decision.

2 **Appeal and Error**
⇐Cases Triable in Appellate Court

The proper interpretation of a statute presents a question of law that the Supreme Court reviews de novo on appeal, adopting the rule of law most persuasive in light of precedent, reason, and policy.

3 **Insurance**
⇐Miscellaneous Entities
Insurance
⇐Employers' Liabilities
Workers' Compensation
⇐Private Insurance

Owner-controlled insurance program (OCIP) issued to oil pipeline operator, providing workers' compensation and general liability coverages for operator and contractors that provided operator non-construction services including warehousing, mineral mining, security, medical and emergency response, catering, oil spill prevention, and surveying, was not governed by statute providing that owner-controlled insurance programs shall be allowed only for major construction projects, since statute, by its own terms, applied only to construction OCIPs and not non-construction OCIPs; statute applied to OCIPs procured on behalf of a person engaged contractor services for the purpose of working on a construction project. AS 21.36.065 (2005).

4 **Statutes**
⇐Intention of Legislature
Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

In interpreting a statute a court looks to the plain meaning of the statute, the legislative purpose, and the intent of the statute.

5 **Statutes**
⇐Intention of Legislature

Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

Courts decline to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach, under which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be, even if a statute is facially unambiguous.

6 **Statutes**
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⇐Meaning of Language

When interpreting a statute, a court applies a sliding scale approach, under which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be, even if a statute is facially unambiguous.

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Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

*594 ***OPINION***

WINFREE, Justice.

I. INTRODUCTION

Alyeska Pipeline Service Company (Alyeska) contracted with the Liberty Mutual Group (Liberty Mutual) to write an owner-controlled insurance program (OCIP). The State of Alaska, Department of Commerce, Community and Economic Development, Division of Insurance (Division), issued a cease and desist order stating that Alyeska's OCIP was prohibited by statute. An administrative law judge determined that "the Liberty Mutual program does not fit within the definition of an 'owner controlled insurance program' that the statute supplies." The Division's deputy director, acting as the final agency decision-maker, reversed the administrative law judge's decision. On appeal the superior court reversed the deputy director's decision. Because the superior court correctly ascertained the statute's limits, we affirm the superior court's decision.

II. FACTS AND PROCEEDINGS

A. Facts

1. Alyeska's Non–Construction OCIP

Alyeska transports crude oil through the Trans–Alaska Pipeline System. Alyeska contracted with Liberty Mutual to write an OCIP to "include[ ] workers compensation and general liability coverages" for Alyeska and several contractors,[1] effective for three years beginning January 2002. Alyeska renewed the program for another three years effective January 2005.

Six contractors enrolled in Alyeska's program. These contractors provided a variety of services for Alyeska, including warehousing, mineral mining, security, medical and emergency response, catering, oil spill prevention, and surveying. It is undisputed that the contractors' work is properly characterized as maintenance and support—not construction. For this reason, we refer to Alyeska's OCIP as a "non-construction OCIP."

2. Alaska Statute 21.36.065

In 2005 the legislature enacted AS 21.36.065 which, in subsection (a), states that "[a]n owner controlled insurance program or a contractor controlled insurance program ... shall be allowed only for a major construction project."[2] The statute defines "owner controlled insurance program" in relevant part as "an insurance program where one or more insurance policies are procured on behalf of a project owner,"[3] and in turn defines "project owner" as "a person who, in the course of the person's business,

engages the service of a contractor for the purpose of working on a construction project."[4] The statute became effective on June 25, 2005.[5]

The legislative history of AS 21.36.065 is undisputed. In March 2005 the House Labor and Commerce Committee met to discuss House Bill 147, a bill generally relating to insurance regulation.[6] Mike Combs, a representative of Alaska Independent Agents and Brokers, Inc., suggested that the Committee adopt his trade group's proposed amendment "to clarify its position regarding [OCIPs]."[7] According to the Committee Minutes, Combs testified that "there are several problems with using [the OCIP] insurance method for maintenance and repair programs" and that "[t]he [proposed] amendment would limit ***595** [OCIPs] to construction projects in excess of $50 million only and not include any repair or maintenance operations."[8] Representative Tom Anderson, Committee Chair, stated the Committee would consult with the Division's director and consider Combs's proposal.[9]

When the House Labor and Commerce Committee met again, Chairperson Anderson introduced a committee substitute for House Bill 147 containing the amendment language Combs proposed.[10] After explaining that the Division "is ultimately the bill's sponsor" he asked the Division's director to "give ... a closing with this amendment, what it does and the change to the bill...."[11] The Division's director testified with respect to OCIPs:

> There have been times when that ability [to have an OCIP] has been attempted to expand into other than construction projects, for example, maintenance projects, ongoing things that in our mind OCIPs were never intended to do, and our concern with the ability to do that for things other than large, one-time construction projects is that it takes one premium out of an already fragile marketplace.[12]

The Committee approved the committee substitute.[13]

The Division's director also testified before the House Finance Committee.[14] The director stated that OCIPs "are designed for major construction projects" and that the proposed amendment "is a prohibition against expanding them into other types of things than large construction projects."[15] The amendment was adopted and the bill was moved out of committee.[16]

The Division's director made additional statements about OCIPs before two Senate committees. The director expressed concern to the Senate Labor and Commerce Committee about OCIPs expanding into non-construction projects.[17] Similarly at the Senate Finance Committee meeting the director testified that OCIPs were appropriate only for large construction projects and not for non-construction projects.[18] Senator Lyda Green, the Committee co-chairperson, understood the director's testimony to mean that an OCIP " 'should not morph' into an ongoing insurance program."[19]

The legislative history includes neither committee reports nor statements by non-committee-member legislators indicating the full legislature's intent in passing the final bill.

B. Proceedings

In November 2006 the Division issued Liberty Mutual a cease and desist order listing seven compliance issues. Count One stated that Alyeska's OCIP was prohibited under Alaska law because "[i]n its present form, the OCIP is designed to cover on-going maintenance and is not restricted to a large construction project in violation of AS 21.36.065." Liberty Mutual requested an administrative hearing. The administrative law judge granted Alyeska's request to intervene.[20]

***596** Alyeska filed a motion for partial summary adjudication arguing that (1) by its express language AS 21.36.065 applies only to construction OCIPs and therefore does not apply to its non-construction OCIP, and (2) even if AS 21.36.065 did govern non-construction OCIPs, Alyeska's OCIP falls within a statutory exception.[21]

The administrative law judge granted Alyeska's motion, determining "the Liberty Mutual program does not fit within the definition of an 'owner controlled insurance program' that the statute supplies." Based on the statute's plain language, the administrative law judge concluded AS 21.36.065 "addresses only construction OCIPs," and therefore does not govern Alyeska's non-construction OCIP. The administrative law judge was not persuaded that the statute's legislative history compelled a different conclusion. According to the administrative law judge, the legislation proposed by the trade group "was misdrafted. While the surrounding documentation makes perfectly clear the group's intent to 'prohibit[ ] the use of OCIP[s] ... outside the construction industry,' the group's private attorney wrote language that instead defined non-construction OCIPs out of the scope of the legislation, leaving them unregulated."

After the Division and Alyeska filed proposals for agency action,[22] the Division's deputy director, acting as the final agency decision-maker, issued a decision and final order in October 2007. Determining that the statute is ambiguous and that the legislative history supported the Division's position, the deputy director found that Alyeska's OCIP is governed by and in violation of AS 21.36.065. The deputy director reversed the administrative law judge's decision with respect to AS 21.36.065 and affirmed Count One of the cease and desist order.

Alyeska then appealed to the superior court, which determined the deputy director's decision was "contrary

to the plain language of the statute." The superior court reasoned that notwithstanding the legislative history, AS 21.36.065 restricts only construction OCIPs. It stated that:

> It [is] one thing to use legislative history to correct a drafting error when that error is obvious or the error imposes a restriction on the persons subject to the legislation that was never intended by the legislature. It is another to expand a restriction to persons plainly excluded by language of the statute. In these instances, the remedy must lie with the legislature, not the court.

The superior court also rejected Alyeska's argument that its OCIP falls within two exceptions under AS 21.36.065(b).

The Division appeals regarding the application of AS 21.36.065(a). Alyeska cross-appeals regarding the application of an exception under AS 21.36.065(b).

III. STANDARD OF REVIEW

1 **2** When a superior court acts as an intermediate appellate court in an administrative matter, we review the merits of the agency's decision.[23] The proper interpretation of a statute presents a question of law that we review de novo, "adopting the rule of law most persuasive in light of precedent, reason, and policy."[24]

IV. DISCUSSION

3 The Division claims the superior court erred because AS 21.36.065 applies to non-construction OCIPs. The Division makes three arguments in support of its position. First, the Division contends the court failed to interpret AS 21.36.065 in conjunction with AS 21.36.190(f).[25] Second, the ***597** Division claims the court failed to interpret AS 21.36.065 in a manner consistent with the legislature's intent, as evidenced by the statute's legislative history. Third, the Division argues the court's interpretation does not comply with the maxim *expressio unius est exclusio alterius.*[26]

4 **5** **6** In interpreting a statute we "look to the plain meaning of the statute, the legislative purpose, and the intent of the statute."[27] We have declined to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach: "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[28] We apply this sliding scale approach even if a statute is facially unambiguous.[29] Canons of interpretation can also provide useful aids in our efforts to interpret a statute.[30]

Based on its plain language, AS 21.36.065 does not govern non-construction OCIPs such as Alyeska's. When the statutory definitions provided in AS 21.36.065(c) are substituted for the relevant terms in AS 21.36.065(a), the statute provides:

> An insurance program [where one or more insurance policies are procured on behalf of a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project ... for the purpose of insuring that person] ... shall be allowed only for a major construction project.

Through its incorporation of specifically defined terms, the statute simply was not drafted to govern non-construction OCIPs.[31] The Division argues that extratextual sources or canons of interpretation reveal a legislative intent requiring us to disregard the statute's plain language. Alyeska argues that the Division seeks to reform the statute, not interpret it. We agree with Alyeska. Taking into account AS 21.36.190(f) and *expressio unius,* AS 21.36.065 remains unsusceptible to the Division's interpretation.[32] On the record before us, including the limited legislative committee history, we must conclude that the statute was either (1) intended by the full legislature to govern only construction OCIPs,[33] or (2) misdrafted through reliance ***598** on the industry trade group's proposal. Even if the latter, we will not invade the legislature's province by extending the plain language of AS 21.36.065 to govern non-construction OCIPs.[34] The Division's remedy lies with the legislature, not this court.[35]

V. CONCLUSION

We AFFIRM the superior court's decision.[36]

Footnotes

1 Contractors typically acquire insurance to protect themselves and others who might be injured while working on a project. Jacqueline P. Sirany & James Duffy O'Connor, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-ups,* 22 CONSTRUCTION LAW. 30, 30 (2002). An OCIP "centralizes the insurance program for all of the construction entities" and is "managed by one for the use and benefit of all." *Id.* As the administrative law judge explained, the purpose of Alyeska's OCIP "is to save contractor insurance costs that would otherwise be billed or passed through to Alyeska. By purchasing coverage collectively, Alyeska achieves cost savings."

2 AS 21.36.065(a); ch. 1, § 23, SLA 2005.

3 AS 21.36.065(c)(4).

4 AS 21.36.065(c)(5).

5 Ch. 1, SLA 2005.

6 Committee Minutes, House Labor & Commerce Committee hearing on House Bill (HB) 147 (Mar. 18, 2005).

7 *Id.* (testimony of Combs).

8 *Id.*

9 *Id.* (statement of Chairperson Anderson).

10 *See* Transcript of House Labor & Commerce Committee Meeting, at 1–2, (Mar. 30, 2005) (statement of Chairperson Anderson).

11 *Id.* at 4.

12 *Id.* at 7–8 (testimony of Division Director Linda Hall).

13 Committee Minutes, House Labor & Commerce Committee hearing on HB 147 (Mar. 30, 2005).

14 Transcript of House Finance Committee Meeting, at 1, 10 (Apr. 15, 2005).

15 *Id.* at 11–12 (testimony of Division Director Hall).

16 *Id.* at 12.

17 Committee Minutes, Senate Labor & Commerce Committee, at 7 (Apr. 12, 2005) (testimony of Division Director Hall).

18 Committee Minutes, Senate Finance Committee, at 26–27, (May 1, 2005) (testimony of Division Director Hall).

19 *Id.* at 27 (statement of Co–Chairperson Green).

20 The Division and Liberty Mutual subsequently entered into a stipulation settling all compliance issues except those relating to Count One.

21 *See* AS 21.36.065(b)(2).

22 *See* AS 44.64.060(e) (outlining procedure for filing proposal for action with agency after administrative law judge issues decision).

23 *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.,* 171 P.3d 1110, 1115 (Alaska 2007) (citing *Alaska Trademark Shellfish, LLC v. State,* 91 P.3d 953, 956 (Alaska 2004)).

24 *L.D.G., Inc. v. Brown,* 211 P.3d 1110, 1118 (Alaska 2009) (citing *Alaskans for Efficient Gov't, Inc. v. Knowles,* 91 P.3d 273, 275 (Alaska 2004)).

25 AS 21.36.190(f) states: "Except as provided in AS 21.36.065, an insurer, whether authorized or unauthorized, may not underwrite an owner controlled insurance program or contractor controlled insurance program. In this subsection, 'owner controlled insurance program' and 'contractor controlled insurance program' have the meanings given in AS 21.36.065."

26 *Expressio unius* is a doctrine of statutory construction, instructing "that when the legislature expressly enumerates included terms, all others are impliedly excluded." *Vanvelzor v. Vanvelzor,* 219 P.3d 184, 188 (Alaska 2009) (citing *Ranney v. Whitewater Eng'g,* 122 P.3d 214, 218–19 (Alaska 2005)).

27 *Premera Blue Cross,* 171 P.3d at 1115 (citing *W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc.,* 101 P.3d 1047, 1050 (Alaska 2004)).

28 *Gov't Emp. Ins. Co. v. Graham–Gonzalez,* 107 P.3d 279, 284 (Alaska 2005) (quoting *Muller v. BP Exploration (Alaska) Inc.,* 923 P.2d 783, 787–88 (Alaska 1996)).

29 *See Curran v. Progressive Nw. Ins. Co.*, 29 P.3d 829, 831–32 (Alaska 2001) (citing *Progressive Ins. Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1998)). *But see Benavides v. State*, 151 P.3d 332, 335 (Alaska 2006) (quoting *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 537 (Alaska 2002)) ("*If a statute is ambiguous* 'we apply a sliding scale of interpretation ....' ") (emphasis added).

30 *See McKee v. Evans*, 490 P.2d 1226, 1230 n. 18 (Alaska 1971).

31 *Cf. Anderson v. Alyeska Pipeline Serv. Co.*, 234 P.3d 1282, 1287–88 (Alaska 2010) (interpreting "project owner" under AS 23.30.045 and emphasizing we "look first to see if the word or phrase to be construed has a specific definition") (citing *Ranney*, 122 P.3d at 218).

32 We note that AS 21.36.190(f) states " 'owner controlled insurance program' ... ha[s] the meaning[ ] given in AS 21.36.065." Because AS 21.36.190(f) incorporates the meaning given in AS 21.36.065 generally, and therefore incorporates all of the definitions in subsections .065(c)(1)–(6) and not merely subsections .065(c)(2) and (4), we reject the Division's argument that "[t]he definition of OCIP ... do[es] not include any reference to 'construction.' " Nor does *expressio unius* support the Division's position; that maxim "expresses the concept that when people say one thing they do not mean something else." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:25 (7th ed. 2007). For the reasons stated, the language expressly adopted by the legislature does not support the Division's interpretation.

33 *See State v. Campbell*, 536 P.2d 105, 111 (Alaska 1975), *overruled on other grounds by Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978) ("At some point, it must be assumed that the legislature means what it says.").

34 *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (quoting *Campbell*, 536 P.2d at 111) (noting that separation of powers " 'prohibits this court from enacting legislation or redrafting defective statutes' "); *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978) (declining to save overbroad statute "because in doing so we would be stepping over the line of interpretation and engaging in legislation"); *see also* 73 AM.JUR.2D*Statutes* § 121 (2010) ("Generally, courts will not undertake correction of legislative mistakes in statutes notwithstanding the fact that the court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact.") (citations omitted).

35 *See Interior Cabaret, Hotel, Rest. & Retailers Ass'n v. Fairbanks N. Star Borough*, 135 P.3d 1000, 1006 (Alaska 2006) (observing legislature mistakenly deleted statutory language, realized error, and enacted new language to correct it).

36 In light of our decision we decline to address Alyeska's cross-appeal.

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251 P.3d 990
Supreme Court of Alaska.

Carol CALVERT, Appellant,
v.
STATE of Alaska, DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT, EMPLOYMENT SECURITY DIVISION, Appellee.

No. S–13721. | April 15, 2011.

Synopsis

Background: Claimant quit her job and filed for unemployment benefits. The Department of Labor's unemployment insurance claim center determined that claimant was statutorily ineligible for unemployment benefits, and she appealed. The Department of Labor's Appeal Tribunal affirmed the claim center's determination, and claimant appealed. The Commissioner of the Department of Labor affirmed, and claimant appealed. The Superior Court, Third Judicial District, Anchorage, Stephanie E. Joannides, J., affirmed, and claimant appealed.

Holdings: The Supreme Court, Christen, J., held that:
1 claimant did not show that her job was unsuitable;
2 because claimant did not discuss her transportation problems with employer, she did not exhaust all reasonable alternatives prior to quitting and, therefore, left without good cause;
3 claimant did not show good cause for leaving work on basis of personality conflicts; and
4 Department of Labor did not neglect legal duty or deny claimant due process by not informing her of its policies more directly.

Affirmed.

West Headnotes (39)

1 **Administrative Law and Procedure**
Substantial evidence

When reviewing administrative decisions, appellate courts apply substantial evidence test to questions of fact.

2 **Administrative Law and Procedure**
Law questions in general

When reviewing administrative decisions, appellate courts apply reasonable basis test for questions of law involving agency expertise, and when no expertise is involved, questions of law are reviewed under the substitution of judgment test.

3 **Administrative Law and Procedure**
Legislative questions; rule-making

The reasonable and not arbitrary test applies to appellate review of administrative regulations.

4 **Unemployment Compensation**
Voluntary abandonment of employment

Whether unemployment compensation claimant voluntarily quit suitable work for good cause would be reviewed as a question of fact. AS 23.20.379(a)(2).

5 **Administrative Law and Procedure**
Inferences or conclusions from evidence in general
Administrative Law and Procedure
Substantial evidence
Administrative Law and Procedure
Weight of evidence

In applying the substantial evidence test to question of fact, appellate court, when reviewing administrative decision, must determine whether there exists such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; appellate court does not reweigh the evidence or choose between competing inferences.

6 **Administrative Law and Procedure**
⇐Constitutional questions
Administrative Law and Procedure
⇐Law questions in general

Due process and evidentiary arguments in the administrative context raise questions of law which appellate courts review de novo. U.S.C.A. Const.Amend. 14.

7 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

Unemployment compensation claimant who voluntarily leaves unsuitable work leaves with good cause and need not make a separate showing of good cause to quit. AS 23.20.379(a).

8 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

Factors relevant to suitability are distinguishable from those affecting good cause, in that "suitability" is based on circumstances surrounding the job, and usually involves a comparison of the offered work with other similar work in the locality, whereas "good cause" is based on personal circumstances surrounding unemployment compensation claimant and not directly related to the conditions of the work. AS 23.20.379(a).

9 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

While unemployment compensation claimant may leave unsuitable work without further efforts to remedy the situation, establishing good cause for leaving work that is otherwise suitable requires a two-step showing: not only must the underlying reason for leaving work be compelling, but claimant must exhaust all reasonable alternatives before leaving the work. AS 23.20.379(a).

10 **Unemployment Compensation**
⇐Compensation and payment thereof
Unemployment Compensation
⇐Working Conditions or Assignments
Unemployment Compensation
⇐Suitability of work in general
Unemployment Compensation
⇐Voluntary abandonment of employment

Although suitability of work may not be presumed, it need not be analyzed in all unemployment compensation cases, and instead, suitability of work must be examined if: (1) claimant objects to the suitability of wages, hours, or other conditions of work; (2) claimant specifically raises the issue of suitability of work; or (3) facts appear during investigation of claimant's claim that put the Department of Labor on notice that wages or other conditions of work may be substantially less favorable than prevailing conditions for similar work in the locality. AS 23.20.385.

11 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

Good cause for leaving work depends on the precipitating event and the other reasons for unemployment compensation claimant's quitting are irrelevant, and by contrast, the determination of whether work is unsuitable is a separate inquiry that is not similarly limited. AS 23.20.379(a).

12 **Unemployment Compensation**

Suitability of work in general

The fact that a circumstance did or did not precipitate unemployment compensation claimant's decision to quit is not relevant to whether the circumstance may render work unsuitable. AS 23.20.379(a), 23.20.385.

13 **Unemployment Compensation**
Length of commute in general

Unemployment compensation claimant's transportation issues did not give rise to a question of suitability of work; claimant's ten-mile commute was not unreasonably distant by any objective measure, she had easily made the commute by bike during the previous summer and would have had no problem getting to work at other times of year if her means of transportation had been less limited, employer had not asked claimant to relocate or done anything else to change the distance she had to travel to get to work, and claimant's difficulties stemmed from personal circumstances and not from an inherent characteristic of her job. AS 23.20.379(a), 23.20.385.

14 **Unemployment Compensation**
Problems with co-workers
Unemployment Compensation
Dangerousness of work; safety issues

Workplace hostility and safety breaches that unemployment compensation claimant described in her Voluntary Leaving Statement and brief could be considered circumstances surrounding the job, rather than merely personal circumstances surrounding claimant, and thus, hearing officer was obligated to analyze the suitability of claimant's job before determining that she had failed to show good cause for quitting. AS 23.20.379(a), 23.20.385.

15 **Unemployment Compensation**
Criticism by or problems with supervisor
Unemployment Compensation
Problems with co-workers
Unemployment Compensation
Dangerousness of work; safety issues

Unemployment compensation claimant did not show that her job was unsuitable; the level of hostility claimant described, while no doubt uncomfortable, did not rise to the level of unsuitability, claimant's personality conflicts with manager did not pose a risk to her health, safety, and morals, claimant described tensions of the type that commonly develop in a workplace as a result of poor communication and the suspicion that coworkers are receiving preferential treatment, and single incident of unsafe practices did not indicate health and safety risks sufficient to demonstrate unsafe conditions rendering work unsuitable. AS 23.20.379(a), 23.20.385.

16 **Unemployment Compensation**
Good cause in general
Unemployment Compensation
Good cause

If the work that unemployment compensation claimant has left is determined to be suitable, then claimant's eligibility for unemployment benefits depends on whether she left for good cause, and to show good cause, a claimant must demonstrate that the underlying reason for leaving work was compelling, and that claimant exhausted all reasonable alternatives before leaving the work, and burden of demonstrating both elements of good cause is on claimant. AS 23.20.379(a).

17 **Unemployment Compensation**
Voluntary Abandonment of Employment

In order to exhaust all reasonable alternatives to quitting, unemployment compensation claimant must notify the employer of the problem and request adjustment.

1 Cases that cite this headnote

18 **Unemployment Compensation**
⇐Voluntary Abandonment of Employment
Unemployment Compensation
⇐Good cause in general

In order to exhaust all reasonable alternatives to quitting, unemployment compensation claimant must bring the problem to the attention of someone with the authority to make the necessary adjustments, describe the problem in sufficient detail to allow for resolution, and give the employer enough time to correct the problem, and at the same time, claimant is not expected to do something futile or useless in order to establish good cause for leaving employment.

1 Cases that cite this headnote

19 **Unemployment Compensation**
⇐Good cause in general

Whether unemployment compensation claimant has shown good cause for quitting is to be analyzed in reference only to the event that directly led claimant to quit and not to any other events or circumstances.

20 **Unemployment Compensation**
⇐Good cause in general

First element of good cause requires that unemployment compensation have a compelling reason for leaving work, and in contrast to the requirements for determining suitability, there is no requirement that claimant's reasons for leaving work be connected with the work; either work-connected or personal factors may present sufficiently compelling reasons. AS 23.20.379(a).

21 **Unemployment Compensation**
⇐Transportation Issues

Unemployment compensation claimant's transportation problems provided a compelling reason to quit; actual mileage from claimant's home to work was not unusual, but the time and expense involved in her commute were significant, claimant's bike was gradually breaking down to the point where her commute took an hour and a half each way, and taxi fare was prohibitively expensive. AS 23.20.379(a).

22 **Unemployment Compensation**
⇐Transportation Issues

Because unemployment compensation claimant did not discuss her transportation problems with her employer or request an adjustment to her work schedule, she did not exhaust all reasonable alternatives prior to quitting and, therefore, left without good cause. AS 23.20.379(a).

23 **Unemployment Compensation**
⇐Voluntary Abandonment of Employment
Unemployment Compensation
⇐Working Conditions or Assignments

Employer's limited authority or expressed refusal to accommodate unemployment compensation claimant can establish that requesting an adjustment to work conditions would be futile; if the employer has already made it known that the matter will not be adjusted to claimant's satisfaction, or if the matter is one which is beyond the power of the employer to adjust, then claimant is not expected to perform a futile act.

24 **Unemployment Compensation**
⇐Raising contentions below; preservation of claim; exhaustion

Employee's claim that unemployment compensation hearing officer relied on "hearsay" to find that she had not exhausted her alternatives to quitting work was waived, for purposes of appeal, since employee raised this argument for the first time in the superior court.

25 **Unemployment Compensation**
⇐Hearsay

In the absence of a hearsay objection, hearsay evidence is competent evidence which may be considered in unemployment compensation proceedings.

26 **Administrative Law and Procedure**
⇐Judicial procedure; applicability of rules of evidence
Administrative Law and Procedure
⇐Admissibility
Administrative Law and Procedure
⇐Particular Questions, Review of

The strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative hearings, and appellate court will not reverse an administrative judgment based on hearsay unless the hearsay was inherently unreliable or jeopardized the fairness of the proceedings.

27 **Unemployment Compensation**
⇐Harmless error

Any error in unemployment compensation hearing officer's admitting witness's hearsay testimony that manager had reported attempting to call claimant after she quit was harmless; hearing officer relied on witness's testimony primarily in support of the general finding that claimant never informed her employers of her transportation problems, a finding that was amply supported by other evidence in the record, including claimant's own testimony, rather than as evidence of manager's willingness to accommodate claimant.

28 **Unemployment Compensation**
⇐Change in time of employment, shift, or days worked

To the extent that the change in unemployment compensation claimant's work schedule motivated her decision to quit, it did not constitute a compelling reason.

29 **Unemployment Compensation**
⇐Change in time of employment, shift, or days worked

Change in unemployment compensation claimant's hours, shifts, or days of work initiated by the employer is seldom a sufficient breach of the contract of hire to give a compelling reason to quit.

30 **Unemployment Compensation**
⇐Reduction or increase in number of hours worked in general

Unemployment compensation claimant who leaves work merely because the work is less than full-time has voluntarily left work without good cause, and a reduction in hours is not good cause for voluntarily leaving work, even where that reduction results in reduced earnings.

31 **Unemployment Compensation**
⇐Problems with co-workers

Unemployment compensation claimant's dislike for co-worker did not constitute good cause for leaving work; co-worker's behavior toward claimant did not endanger her health and, if anything, decreased the amount of work demanded of her, and it did not rise to the level of abuse.

32 **Unemployment Compensation**
⇐Problems with co-workers

Even if unemployment compensation claimant's personality conflicts with co-workers qualified as "abuse," she made only limited efforts to remedy the situation, and because claimant was required to take more active steps to exhaust her alternatives before quitting and she failed to do so, claimant did not show good cause for leaving work on basis of personality conflicts; claimant spoke to manager about reducing her hours but never directly asked him to address the issue of personality conflicts and never described the full extent of her conflicts with co-worker, and by her own admission, claimant never explicitly sought a remedy for her problem.

33 **Unemployment Compensation**
⇐Raising contentions below; preservation of claim; exhaustion

Because unemployment compensation claimant's due process arguments were raised for the first time in her appeal to the superior court, rather than in her initial post-hearing appeal to the Commissioner of the Department of Labor, they were waived for purposes of appeal, and similarly, claimant's argument that the hearing officer improperly admitted hearsay evidence was waived, for purposes of appeal, because she raised it for the first time on appeal to the superior court. U.S.C.A. Const.Amend. 14.

34 **Unemployment Compensation**
⇐Bias of ALJ

To show the bias of unemployment compensation hearing officer, a party must demonstrate that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence.

35 **Unemployment Compensation**
⇐Matters related to compensation proceedings

Unemployment compensation claimant failed to demonstrate bias sufficient to overcome the presumption of the hearing officer's impartiality; claimant did not show that the hearing officer was predisposed to find against her, claimant's assertion that hearing officer selected evidence to support her findings was insufficient to show actual bias, hearing transcript did not suggest that hearing officer interfered in any way with the presentation of evidence, and hearing officer's questions were thorough and objective.

36 **Administrative Law and Procedure**
⇐Substantial evidence
Administrative Law and Procedure
⇐Weight of evidence

In applying the substantial evidence test to review an administrative determination, a reviewing court may not reweigh evidence.

37 **Unemployment Compensation**
⇐Voluntary abandonment of employment

Superior court did not reweigh the evidence when it relied on the hearing officer's findings for its conclusion that there was no evidence that the work was inconsistent with unemployment compensation claimant's physical capability, training, experience, earning capacity, or skill and that the work was therefore suitable.

38 **Unemployment Compensation**
⇐Proceedings

Unemployment compensation had notice of the Department of Labor's basic eligibility requirements and directions for accessing additional information, both prior to her Appeal Tribunal Hearing and throughout the appeals process; Department's Wage and Hour Information brochure included detailed information about the relevant statutes and regulations, as well as directions for accessing past unemployment insurance appeals decisions

online, and the "Voluntary Leaving Statement" that claimant filled out and submitted after she filed for unemployment benefits gave notice to claimants that they had to show reasons for quitting so compelling as to leave no reasonable alternative.

39 **Constitutional Law**
Unemployment compensation
Unemployment Compensation
Proceedings

Department of Labor did not neglect a legal duty or deny unemployment compensation claimant due process by not informing her of its policies more directly; all of the statutes, regulations, and internal policy documents governing eligibility for unemployment insurance benefits were publicly available documents that were easily accessible and identified in Department-published materials, and claimants would be presumed to be familiar with the provisions of those documents. U.S.C.A. Const.Amend. 14.

Attorneys and Law Firms

***994** Carol Calvert, pro se, Soldotna, Appellant.
Erin Pohland, Assistant Attorney General, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

OPINION

CHRISTEN, Justice.

I. INTRODUCTION

Carol Calvert quit her job at a seafood processing plant and filed for unemployment insurance benefits. Her reasons for quitting included difficulties with transportation to work and personality conflicts with coworkers. The Department of Labor's unemployment insurance claim center determined that Calvert voluntarily left work without good cause; as a result, she was statutorily ineligible for unemployment benefits for the first six weeks of her unemployment, and her maximum potential benefits were reduced by three times the weekly benefit amount.

Calvert appealed to the Department of Labor's Appeal Tribunal where the assigned Hearing Officer found that transportation problems were the "precipitating event" in Calvert's decision to quit. The Hearing Officer concluded that, although Calvert's transportation problems may have provided a compelling reason to quit, Calvert had not "exhaust[ed] all reasonable alternatives prior to quitting," as is required in order to show good cause. The Hearing Officer affirmed the claim center's determination.

The Commissioner of the Department of Labor affirmed the Hearing Officer's decisions, as did the superior court. For the reasons explained below, we affirm.

II. FACTS AND PROCEEDINGS

Carol Calvert was a seasonal employee of Snug Harbor Seafoods in Kenai. She worked there for the first time during the summer of 2007. She was rehired on March 10, 2008, and quit on April 6, 2008. She filed for unemployment benefits on April 6.

The Department of Labor's (Department) unemployment insurance claim center sent Calvert a "Voluntary Leaving Statement" to complete and return in order to provide additional information about her separation from employment. Calvert returned the Voluntary Leaving Statement on May 9. In her explanation of why she quit, she cited conflicts that had begun during the 2007 season with a supervisor, Mike, and his girlfriend, ***995** Hope (also a Snug Harbor employee). Calvert alleged that the conflict began when the plant manager asked Calvert to run the "gear department" and planned to move Hope out of her position in that department. Calvert also described her disappointment at the March 2008 departure of Brandi O'Reagan, who was the plant manager during the 2007 season and who had encouraged Calvert to return for the 2008 season. Calvert reported that Mike cut her hours immediately after O'Reagan left, allegedly in retaliation for Calvert's conflicts with Hope. Calvert was also concerned that Richard King, the plant manager who replaced O'Reagan, was aligned with Mike and Hope, and shared their hostility toward her.

Calvert also described transportation difficulties. She

biked ten miles each way to get to Snug Harbor, so she required ample notice of the start times for her shifts. Work shifts were announced via a "hotline." In 2007, shifts were posted so there was typically a three-hour lead time. According to Calvert, in 2008 the hotline was updated less frequently, later in the day, and sometimes as little as half an hour in advance. Calvert argued, "[i]t became a cruel guessing game whether [she] should start for work on [her] bike." She found the local public transit agency to be "relentlessly uncooperative" in arranging transportation, her bike broke, and she anticipated increased difficulties associated with springtime road construction on her route to work.

In addition, Calvert expressed concern on her Voluntary Leaving Statement about the new plant manager's attitude toward workplace safety. During the 2007 season, a co-worker standing next to Calvert was "badly shocked" after water hit an electric box. When Calvert was asked later that season to coil an extension cord lying in several inches of water, she expressed her safety concerns in King's presence. According to Calvert, King "looked at [her], turned his back on [her], and has not spoken to [her] since," except when she approached him about her hours.

The Department's claim center contacted Calvert on May 13 to ask what "final incident" caused her to quit. Calvert reiterated the reasons cited in her Voluntary Leaving Statement:

> There was really no final incident, just a compilation of everything that happened, the old branch manager quitting without telling me, and then problems with the new manager. I quit because my hours week [sic] being cut, and problems with co-workers, and transportation problems.... I talked to the owner my last day about them cutting my hours, and he didn't seem like he wanted to do anything about it.... I don't know if it was any one thing, just everything piled together.

On May 14, the claim center issued a notice of determination finding that Calvert "quit work at Snug Harbor Seafoods because [she was] unhappy with the new manager's supervisory style and apportionment of work." The claim center reasoned that because Calvert had not provided information demonstrating that the manager's actions were "hostile or discriminatory," she had not established "good cause for leaving." As a result, Calvert was denied waiting-week credit for the first week of employment and benefits for the next five weeks,[1] and her maximum potential benefits were reduced by three times the weekly benefit amount.[2]

On June 16, Calvert filed a Notice of Unemployment Insurance Appeal with the Department of Labor's Anchorage Appeal Tribunal. In her appeal, she argued: (1) the claim center did not establish that the work she left was "sufficient and suitable," and she was therefore not required to show good ***996** cause for leaving it; (2) "good cause" for leaving the job existed in any case based on Calvert's insufficient work hours, transportation issues, lack of notice by the employer regarding work hours, and the patterns of "[w]orkplace violence" she experienced; and (3) the Department of Labor has a duty to better inform employees on the rules and requirements for unemployment insurance benefits. In addition to her brief, Calvert submitted a request for subpoenas to the Appeal Tribunal.

Hearing Officer Kathy A. Thorstad conducted the Appeal Tribunal hearing telephonically on July 29, 2008. The Hearing Officer observed that, under AS 23.20.379, a person who quits a job without good cause is ineligible for full unemployment insurance benefits. She also explained that the burden of showing good cause is on the employee seeking benefits and that a worker has "good cause" when she has a compelling reason for leaving work and has exhausted all reasonable alternatives to quitting.

During the hearing, the Hearing Officer heard testimony from Calvert, Snug Harbor plant manager King, and the president of Snug Harbor, Paul Dale. Calvert testified that she quit her job on April 6 because she was "upset all day long" and made her decision "based on the amount of stress ... [and] based on the problems [she] was having with transportation." In response to the Hearing Officer's questions about her transportation difficulties, Calvert stated that she had not realized that biking to work "would be much more difficult" during March than it had been when she worked at Snug Harbor the previous summer. She noted that her bike broke down and weather conditions were bad in March and April, forcing her to rely on the Central Area Rural Transit System (CARTS). CARTS requires its passengers to book trips hours in advance, which was difficult for Calvert given her unpredictable work schedule and King's habit of posting the hours for the following day after 6:00 p.m., when CARTS had stopped answering its phones for the evening. According to Calvert, her only other transportation option was to take a taxi, which she stated would not be cost-effective given the amount of money she was making at her job.

The Hearing Officer also questioned Calvert about her work-related stress. Calvert stated that Mike cut her hours after O'Reagan's departure and told her that the decision had been sanctioned by Dale. Calvert noted that she had not asked Mike why her hours were being cut but later asked King, the plant manager, who told her he would "see that the work got done." She also recounted a subsequent conversation with Dale, who told her he had not authorized Mike to cut her hours. Calvert told the Hearing Officer that she did not directly ask Dale to address the situation with Mike, explaining that she

"didn't feel that it was necessary" because she assumed someone in Dale's position would "look into it and ... find out exactly what happened." Calvert also stated that she did not directly confront Mike after learning that Dale had not authorized the reduction in her hours.

When the Hearing Officer asked Calvert what efforts she made to keep her job, Calvert responded that she tried to get CARTS to provide her with transportation to work and that she asked King and Dale about the reduction to her hours, "and that's about it." The Hearing Officer asked Calvert whether she explicitly informed King or Dale that Mike's "messing with [her] hours was creating enough of a hardship that [she] would not be able to continue to work if it wasn't corrected"; Calvert confirmed that she did not. The Hearing Officer then asked Calvert whether it was her transportation difficulties or her problems with Mike that caused her to quit. Calvert answered, "It's both of them.... I don't know if one ... had been taken away, if the other one could have been solved and vice versa." The Hearing Officer rephrased her question and asked, "If CARTS had not been giving you any difficulty on that day, would you still have quit your job?" Calvert replied, "I think I would have gone to work, yes. I think I would have given it another week.... I might have complained harder."

Plant manager King testified that he became aware of Calvert's problems with Mike after Mike reported having had a confrontation ***997** with Calvert about her hours. He claimed that Calvert's impression that she was being singled out for reduced hours was incorrect, and that the company was trying to "keep hours at a minimum" based on its "limited product" in April. He also stated that he had not known why Calvert quit her job until he saw the exhibits she presented at the hearing.

Dale testified that he did not recall the conversation Calvert reported having had with him about whether Mike had been authorized to cut her hours, but that he "wouldn't dispute it" and it "sound[ed] plausible." Dale added that, after Calvert quit, he asked King "on at least four occasions" if he had contacted her "to discuss her concerns regarding employment"; King reportedly told Dale that he had left messages for Calvert but had not heard back from her. In subsequent appeals, Calvert denied receiving any calls or messages, but she did not raise this point before the Hearing Officer.

The Hearing Officer affirmed the claim center's determination. Because she found that Calvert's transportation problems were the "precipitating event" in her decision to quit, the Hearing Officer did not address Calvert's conflicts with supervisors and co-workers.[3] The Hearing Officer determined that, although the loss of transportation can create a compelling reason for a worker to quit a job, Calvert had not "exhaust[ed] all reasonable alternatives prior to quitting." She found that "[t]he claimant did not discuss her transportation problems with the employer nor did she request a possible adjustment to her work schedule which would have enabled her to use the transit system and continue working." The Hearing Officer concluded that Calvert had not established that she had "good cause for quitting suitable work." The Hearing Officer ruled that Calvert was not entitled to waiting-week benefits under AS 23.20.379.

Calvert appealed the Hearing Officer's decision to the Commissioner of the Department of Labor. In her appeal, she argued that the Hearing Officer had confused the facts; that her phone bills contradicted King's claim that he had attempted to call her after she quit; that the Hearing Officer's reliance on Calvert's testimony about her decision to quit on April 6 was "sleight of hand"; and that there had been no reason to believe talking to her employer about her transportation problems would lead to an adjustment of hours or other resolution. On October 3, 2008, the Commissioner affirmed the Hearing Officer's decision, finding that any factual errors in the decision were not prejudicial and adopting the Hearing Officer's finding that Calvert did not give Snug Harbor a chance to adjust "by making known her problems in getting to work." The Commissioner upheld the Hearing Officer's conclusion that Calvert failed to show good cause for quitting.

Calvert subsequently appealed to the superior court, which held that "[t]here was substantial evidence to support the Hearing Officer's ... conclusion that Calvert did not exhaust all reasonable alternatives before voluntarily quitting, a requirement for finding good cause." The superior court decision also found that the Department had adequately informed Calvert of the law regarding unemployment benefit eligibility. Calvert appeals.

III. STANDARD OF REVIEW

Calvert appeals the decision of the superior court, which affirmed the decisions of the Commissioner of the Department of Labor and the Appeal Tribunal for the Department of Labor. As we have noted, "when the superior court acts as an intermediate court of appeal, no deference is given to the lower court's decision"; rather, we "independently scrutinize directly the merits of the administrative determination."[4] In this case, our ***998** independent review has led us to substantial agreement with the superior court's carefully considered decision.

1 2 3 We apply four standards of review to administrative decisions. The "substantial evidence" test applies to questions of fact.[5] The "reasonable basis" test is used for questions of law involving agency expertise.[6] Where no

expertise is involved, questions of law are reviewed under the "substitution of judgment" test.[7] Finally, the "reasonable and not arbitrary" test applies to review of administrative regulations.[8]

4 5 We have held that the question of whether a person was dismissed from her job for "misconduct" (one of the grounds for disqualification for waiting-week credits under AS 23.20.379(a)(2)) is a question of fact to be reviewed under the "substantial evidence" test.[9] Consistent with that holding, whether Calvert voluntarily quit suitable work for good cause is reviewed here as a question of fact.[10] In applying this test, we must determine whether there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"[11]; the court "does not reweigh the evidence or choose between competing inferences."[12]

6 "[D]ue process and evidentiary arguments raise questions of law which we will review *de novo.*"[13]

IV. DISCUSSION

A. The Unemployment Insurance Benefits Eligibility Framework

7 8 9 Under AS 23.20.379(a), a worker may be partially disqualified from receiving benefits if she "left ... suitable work voluntarily without good cause" or was "discharged for misconduct." These rules are further detailed in the Department's Benefit Policy Manual.[14] The BPM clarifies that suitability and good cause are independent inquiries. "A worker who voluntarily leaves unsuitable work leaves with good cause"[15] and need not make a separate showing of good cause to quit.[16] The factors relevant to ***999** suitability are distinguishable from those affecting good cause: "[s]uitability is based on circumstances surrounding the job, and usually involves a comparison of the offered work with other similar work in the locality.... Good cause is based on personal circumstances surrounding the claimant ... and not directly related to the conditions of the work."[17] And while a worker may leave unsuitable work without further efforts to remedy the situation, establishing good cause for leaving work that is otherwise suitable requires a two-step showing: not only must "[t]he underlying reason for leaving work ... be compelling," but "[t]he worker must exhaust all reasonable alternatives before leaving the work."[18]

B. The Hearing Officer Correctly Determined That Calvert Left Suitable Work.

1. The Hearing Officer was required to analyze the suitability of Calvert's job at Snug Harbor.

In finding that Calvert failed to establish good cause for quitting suitable work, the Hearing Officer did not explicitly discuss whether Calvert's job at Snug Harbor was suitable. Calvert argues that the hearing officer improperly "abandoned the issue of suitable work" and therefore did not correctly analyze whether she was required to show good cause for leaving. We agree that the Hearing Officer was required to analyze the suitability of Calvert's work. But we hold that the Hearing Officer's decision implicitly found that Calvert's work was suitable.

10 Alaska Statute 23.20.385 provides that the suitability of work depends on a range of factors, including whether wages, hours, or other conditions of work are substantially less favorable than prevailing conditions in the locality; the degree of risk to a claimant's health, safety, and morals; the claimant's physical fitness for the work; the distance of the work from the claimant's residence; "and other factors that influence a reasonably prudent person in the claimant's circumstances."[19] Although suitability of work may not be presumed, it need not be analyzed in all cases.[20] Suitability of work must be examined if: (1) a worker objects to the suitability of wages, hours, or other "conditions of work"; (2) a worker specifically raises the issue of suitability of work; or (3) facts appear during investigation of a worker's claim that put the Department on notice that wages or other conditions of work may be substantially less favorable than prevailing conditions for similar work in the locality.[21]

Calvert raised the issue of suitability in her initial appeal to the Appeal Tribunal, arguing that the Department "makes no claim of sufficient and suitable work from my employer." She did not provide explicit justification for the claim that her work at Snug Harbor was unsuitable, but elsewhere in her appeal and in her initial Voluntary Leaving Statement, Calvert did identify a number of concerns that might be considered objections to "conditions of work" sufficient to place the Hearing Officer on notice that conditions were potentially unfavorable. Specifically, Calvert cited safety concerns, "workplace violence," personality conflicts, and difficulties with transportation to work.

11 12 The Department contends that none of the issues Calvert raised other than transportation could render her work unsuitable ***1000** because they were not found to be the "precipitating event" that led Calvert to quit. We disagree with this reasoning. The "precipitating event" analysis described in the BPM identifies which of a worker's reasons for leaving is to be analyzed for good cause: "good cause depends on the precipitating event and the other reasons [for quitting] are irrelevant."[22] By contrast, the determination of whether work is unsuitable is a separate inquiry that is not similarly limited; if work is unsuitable, a worker has good cause to leave it without

having to make a separate showing.[23] The fact that a circumstance did or did not precipitate a worker's decision to quit is not relevant to whether the circumstance may render work unsuitable.

The Department also argues that none of the issues Calvert raised can properly be considered "conditions of work" as the term is used in the BPM. It contends that this term should be interpreted to refer not to work conditions generally, but to "an essential aspect of the job."[24] The Department argues that workplace hostility and transportation problems of the type Calvert claims are not properly categorized as "essential aspects" of a job and should instead be considered under the good cause rubric.[25]

13 We find this argument convincing as it applies to Calvert's transportation problems. The BPM provides that "[w]ork that is unreasonably distant from a worker's residence is unsuitable and the worker has good cause for leaving it."[26] The BPM illustrates this rule with a case involving a claimant whose employer assigned him to work in a community 118 miles from his home; the Commissioner found this to be an "unreasonable commuting distance" and concluded that the job was unsuitable, giving the claimant good cause for quitting.[27] But as the Department argues, there is "a subtle but logical distinction" between distance to work and personal factors affecting a commute; "[p]ersonal circumstances that render a reasonable, customary commute no longer feasible cannot make a job unsuitable." Here, Calvert's ten-mile commute was not "unreasonably distant" by any objective measure; she had easily made the commute by bike during the previous summer and would have had no problem getting to work at other times of year if her means of transportation had been less limited. And unlike the case described in the BPM, Calvert's employer had not asked her to relocate or done anything else to change the distance she had to travel to get to work. Her difficulties stemmed from personal circumstances, not from an inherent characteristic of her job at Snug Harbor; they did not give rise to a question of suitability.

14 In contrast with Calvert's transportation issues, the workplace hostility and safety breaches Calvert described in her Voluntary Leaving Statement and Appeal Tribunal brief may be considered "circumstances surrounding the job," rather than merely "personal circumstances surrounding the claimant."[28] By mentioning suitability and raising workplace hostility and safety issues, Calvert objected to conditions of her work, raised the issue of suitability, and put the Department on notice that conditions at Snug Harbor might be less favorable than standard conditions in the locality. Thus, the Hearing Officer was obligated to analyze the suitability of Calvert's job before determining ***1001** that she had failed to show good cause for quitting.

2. Calvert did not show that her job at Snug Harbor was unsuitable.

15 Although the Hearing Officer did not explicitly address the question of suitability in reviewing Calvert's appeal, her determination that Calvert "did not establish that she had good cause for quitting suitable work" implicitly concluded that Calvert's work was suitable. Upon independent review of the evidence, we agree with the Hearing Officer's implied finding that Calvert did not show that her job at Snug Harbor was unsuitable.

Calvert mentioned "workplace violence" in her written appeal to the Hearing Officer, but she neither explained what she meant by this term nor provided any evidence of "physical violence" at Snug Harbor. Construing this phrase in light of Calvert's oral testimony, we understand her to refer to workplace hostility and to the personality conflicts she had with Mike and plant manager King. We hold that the level of hostility Calvert describes at Snug Harbor, while no doubt uncomfortable, did not rise to the level of unsuitability. Calvert's personality conflicts did not pose a risk to her "health, safety, and morals."[29] And she does not claim she experienced threats or even serious verbal altercations. Rather, she describes tensions of the type that commonly develop in a workplace as a result of poor communication and the suspicion that coworkers are receiving preferential treatment based on personal relationships. Although certainly not ideal, these workplace conditions did not render Calvert's job "unsuitable."

Nor does Calvert's description of unsafe practices indicate that her work was unsuitable. The incident Calvert described in her Voluntary Leaving Statement took place in 2007. The BPM provides that "[i]f the conditions of work violate a state or federal law concerning wages, hours, safety, or sanitation, the worker has good cause for leaving, regardless of the length of time that the worker has worked under the objectionable condition."[30] Therefore, the fact that Calvert continued to work at Snug Harbor the following year does not, by itself, imply that the work was suitable. But Calvert did not describe any safety-related incidents in 2008 or offer evidence that unsafe practices were an ongoing condition of work. The single 2007 incident cited by Calvert does not provide evidence of health and safety risks sufficient to demonstrate unsafe conditions rendering work at Snug Harbor unsuitable in 2008.

C. Calvert Did Not Show Good Cause For Voluntarily Leaving Work.

16 If the work a claimant has left is determined to be suitable, that claimant's eligibility for unemployment insurance benefits depends on whether she left for good cause.[31] To show good cause, a worker must demonstrate that the underlying reason for leaving work was compelling, and that the worker exhausted all reasonable alternatives before leaving the work.[32] The burden of demonstrating both elements of good cause is on the worker.[33] The BPM provides that "[a] compelling reason is one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment."[34]

17 **18** The BPM further notes that "[a] reasonable and prudent worker sincerely interested in remaining at work attempts to correct any condition or circumstance that interferes with continued employment."[35] In order to exhaust all reasonable alternatives, the worker must notify the employer of the problem and request adjustment; the worker must also bring the problem to the attention of someone with the authority to ***1002** make the necessary adjustments, describe the problem in sufficient detail to allow for resolution, and give the employer enough time to correct the problem.[36] At the same time, "a worker is not expected to do something futile or useless in order to establish good cause for leaving employment."[37]

We agree with the Hearing Office that Calvert failed to exhaust alternatives to quitting and therefore did not demonstrate good cause for leaving work.

1. We analyze both transportation problems and workplace hostility as potential precipitating causes.

19 The Hearing Officer identified transportation problems as the precipitating cause of Calvert's decision to quit. The BPM provides that, where a worker gives multiple reasons for quitting, "the one reason that was the precipitating event is the real cause of the quit, with the other reasons being incidental. In such cases, good cause depends on the precipitating event and the other reasons are irrelevant."[38] In other words, whether a worker has shown good cause for quitting is to be analyzed in reference *only* to the event that directly led the worker to quit and not to any other events or circumstances.

Throughout her application for unemployment benefits and subsequent appeals process, Calvert identified two major factors—transportation obstacles and workplace hostility—in her decision to quit. During the hearing on her administrative appeal, the Hearing Officer asked Calvert whether it was her transportation difficulties or personality conflicts that caused her to quit. Calvert answered, "It's both of them ... I don't know if one ... had been taken away, if the other one could have been solved and vice versa." The Hearing Officer then asked, "If CARTS had not been giving you any difficulty on that day, would you still have quit your job?" Calvert replied, "I think I would have gone to work, yes. I think I would have given it another week.... I might have tried the new schedule. I might have complained harder." Based on this testimony, the Hearing Officer concluded that the precipitating event in Calvert's quitting was the loss of transportation, and she therefore limited her good cause analysis to transportation issues.

In her brief to our court, Calvert objects that the Hearing Officer took her words out of context, focusing on "[t]he one comment [she] elicited which was speculative, retrospective, and in conflict with prior testimony and actions." While there is no indication that the Hearing Officer's question was intentionally designed to "trick" Calvert—indeed, the question's structure simply reflected the BPM's emphasis on determining which event led a worker to "quit at [a] particular time"[39]—we nonetheless acknowledge that the Hearing Officer's question may have elicited a different answer than Calvert would have provided in response to an alternatively worded or more open-ended inquiry.[40] Therefore, we analyze both transportation problems and workplace hostility to determine whether Calvert demonstrated good cause for leaving work on the basis of either issue.

2. Calvert did not show good cause for leaving work on the basis of her transportation problems.

a. Calvert's transportation problems did provide a compelling reason to quit.

20 **21** The first element of good cause requires that a worker have a "compelling ***1003** reason" for leaving work.[41] In contrast to the requirements for determining suitability, "[t]here is no requirement that [a] worker's reasons for leaving work be connected with the work. Either work-connected or personal factors may present sufficiently compelling reasons."[42] 8 AAC 85.095 provides a limited list of factors the Department may consider in determining the existence of good cause, including those factors identified in AS 23.20.385(b). One such factor is "distance of ... available work from the claimant's residence."[43] The BPM clarifies that, for purposes of determining good cause, "[t]he actual mileage from the worker's residence to work is never the determining factor in establishing compelling reasons. It is the time and expense of commuting which must be considered."[44]

The Hearing Officer concluded in her decision that "[t]he loss of transportation can create a compelling reason for a worker to quit [his or her] job." We agree that Calvert

demonstrated that her transportation difficulties gave her a compelling reason to quit. The "actual mileage" from Calvert's home to Snug Harbor was not unusual, but the "time and expense" involved in her commute were significant: her bike was gradually breaking down to the point where her commute took an hour and a half each way, CARTS would not allow her to schedule open-ended trips or make last-minute arrangements to fit her work schedule, and taxi fare was prohibitively expensive. These facts provide substantial evidence that meets the standard for showing a compelling reason to quit: left unresolved, they would cause a "reasonable and prudent person of normal sensitivity ... to leave employment."[45]

b. Calvert did not exhaust all reasonable alternatives before leaving work due to transportation problems.

22 The Hearing Officer noted in her findings of fact that Calvert had never told her supervisor that her work schedule—and particularly the lack of notice regarding working hours—was creating transportation problems for her. The Hearing Officer also found that Snug Harbor made repeated attempts to contact Calvert after she quit and was not aware of her reasons for quitting until the hearing. The Hearing Officer concluded that, because Calvert did not discuss her transportation problems with her employer or request an adjustment to her work schedule, she did not exhaust all reasonable alternatives prior to quitting and therefore left without good cause. We agree.

Calvert argues that the primary alternative envisioned by the Hearing Officer, i.e., talking to her supervisors and seeking adjustments to her schedule, was "neither reasonable nor proved to be viable." First, she suggests that the Hearing Officer's failure to investigate why Snug Harbor's representatives (presumably King and Dale) "did not talk to [Calvert] when she brought problems to them" casts doubt on whether her employers would have been willing to accommodate her requests. Second, she contends that "her work schedule was reliant upon the schedule of everyone else" and was therefore not amenable to adjustment.[46] Finally, Calvert contends that the Hearing Officer erroneously relied upon Dale's unreliable "hearsay" report that King had attempted to contact Calvert several times after she quit, a claim that Calvert disputed in earlier stages of the proceeding.[47]

***1004 23** An employer's limited authority or expressed refusal to accommodate an employee can establish that requesting an adjustment to work conditions would be futile: "[i]f the employer has already made it known that the matter will not be adjusted to the worker's satisfaction, or if the matter is one which is beyond the power of the employer to adjust, then the worker is not expected to perform a futile act."[48] That does not appear to be the situation here. King and Dale apparently had the authority to assign work hours and adjust employee schedules. Even taking into account the limited flexibility of hours in the gear department, giving Calvert more advance notice of her hours would have significantly mitigated her transportation problems; alternatively, her supervisors may have been able to transfer her to one of the other departments at Snug Harbor where she had worked in the past.

Moreover, neither King nor Dale (or any other Snug Harbor employee) had explicitly "made it known"[49] that they would not accommodate Calvert. Calvert's claim that her employers "did not talk to [her] when she brought problems to them" seems to refer to King's and Dale's failure to follow up on her inquiries about Mike cutting her hours. But as Calvert acknowledged to the Hearing Officer, she did not actually "ask [Dale] to do anything" to address her problems with Mike or the reduction in her hours, on the assumption that to do so would be "presumptuous." When the Hearing Officer asked if Calvert told "Richard [King], Paul [Dale] or Mike that if they didn't stop messing with [her] hours, [she was] going to quit," Calvert said she had not. Nor did she ever raise the issue of her transportation difficulties. There is no indication that Calvert's inquiries about her hours were framed as complaints demanding a response, or that King and Dale would have ignored more direct requests for assistance. Although she reports general "hostility," Calvert presented no evidence beyond her own subjective belief to suggest that her employers' attitudes toward her would make them unwilling to help resolve her transportation problems had they known she was otherwise likely to quit.[50]

24 25 26 27 Calvert's claim that the Hearing Officer relied on "hearsay" to find that she had not exhausted her alternatives is also unconvincing. First, Calvert raised this argument for the first time in the superior court; we therefore consider it to have been waived.[51] Second, even if this argument had not been waived, the hearsay claim would be misplaced. Calvert did not object at the Appeal Tribunal hearing to Dale's testimony that King had reported attempting to call Calvert after she quit. "In the absence of a hearsay objection, hearsay evidence is competent evidence which may be considered."[52] Moreover, "[t]he strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative hearings, and [this court] will not reverse an administrative judgment based on hearsay unless the hearsay was inherently unreliable or jeopardized the fairness of the proceedings." ***1005** [53] Here, the admission of Dale's testimony does not appear to have "jeopardized the fairness" of Calvert's appeal proceedings. It is not clear from the Hearing Officer's decision that Dale's testimony was, in fact, used to lay a foundation for the viability of the proposed alternative.

The Hearing Officer stated in her Finding of Facts that "[a]t no time did the claimant approach the supervisor and explain that the new work schedule created transportation issues for her.... [T]he employer made repeated attempts to contact [Calvert] in an attempt to discover why she had not returned." This context suggests that the Hearing Officer relied on Dale's testimony primarily in support of the general finding that Calvert never informed her employers of her transportation problems (a finding that is amply supported by other evidence in the record, including Calvert's own testimony), rather than as evidence of Dale's and King's willingness to accommodate Calvert.

We hold that there is substantial evidence in support of the Hearing Officer's finding that Calvert failed to exhaust all reasonable alternatives to quitting on the basis of transportation problems and therefore did not show good cause for leaving suitable work.

3. Calvert did not show good cause for leaving work on the basis of workplace hostility.

a. Calvert's personality conflicts did not provide a compelling reason to quit.

28 29 30 31 Under the BPM, dislike for a fellow employee may only be considered good cause for leaving work if "[t]he worker establishes that the actions of the fellow worker subjected the worker to abuse, endangered the worker's health, or caused the employer to demand an unreasonable amount of work from the worker."[54] Mike's behavior toward Calvert did not endanger her health and, if anything, decreased the amount of work demanded of her (although with correspondingly decreased wages). Nor did it rise to the level of "abuse" as the Department has used the term in the past. Cases in which the Commissioner has found dislike of a fellow employee to be a compelling reason for quitting involve much more serious conflicts, such as threats of physical violence to the claimant.[55] To the extent that the change in Calvert's schedule motivated her decision to quit, it also did not constitute a compelling reason. "A change in [a] worker's hours, shifts, or days of work initiated by the employer is seldom a sufficient breach of the contract of hire to give a compelling reason to quit."[56] A reduction in hours is rarely considered compelling for purposes of establishing good cause: "a worker who leaves work merely because the work is less than full-time has voluntarily left work without good cause" and a "reduction in hours is not good cause for voluntarily leaving work" even where that reduction results in reduced earnings.[57]

b. Calvert did not exhaust all reasonable alternatives before leaving work due to personality conflicts.

32 Even if the personality conflicts Calvert describes were to qualify as "abuse," she made only limited efforts to remedy the situation. As we have already noted, Calvert spoke to King and Dale about Mike reducing her hours but never directly asked either of them to address the issue or, as far as the ***1006** record indicates, described the full extent of her conflicts with Mike. By her own admission, Calvert never explicitly sought a remedy for her problem. She contended that Dale and King "should have known ... what [she] was saying to them without [her] having to challenge them to do something about [her] problem." But without more information about precisely what Calvert said to her supervisors, there was little basis for a finding that they should have guessed or intuited what Calvert failed to articulate. Calvert was required to take more active steps to exhaust her alternatives before quitting; because she failed to do so, we agree with the Hearing Officer that she did not show good cause for leaving work on the basis of personality conflicts.

D. Calvert Received A Fair Hearing.

33 Calvert makes a number of arguments relating to the procedural adequacy of her administrative hearing. We review these arguments *de novo*.[58] We note at the outset that Calvert has waived a number of her due process arguments by not raising them earlier in the appeals process. For example, she argues that the Hearing Officer "[n]eglected the fair hearing principle of discovery to claimant by employer" and "declined to obtain discovery from the employer, disregarding claimant's request for it." She also contends that "[d]ue [p]rocess requires notice of evidence to be used against claimant and an appropriate amount of time to develop a challenge and answer to any information from any source" and claims that she did not have sufficient notice of the evidence to be presented at the Appeal Tribunal hearing. Because these arguments were raised for the first time in Calvert's appeal to the superior court, rather than in her initial post hearing appeal to the Commissioner, we consider them waived.[59] Similarly, Calvert's argument that the Hearing Officer improperly admitted hearsay evidence is waived because she raised it for the first time on appeal to the superior court.

1. Calvert did not demonstrate actual bias by the Hearing Officer.

34 35 Calvert alleges that the hearing was biased,

claiming that "[t]he hearing officer picked what she wanted out of the evidence and used it to try to prove her point" and that "[t]he reasonings and conclusions of the Tribunal were not fairly and impartially supported by the record." But as the Department notes in its brief, administrative officers are "presumed to be honest and impartial until a party shows actual bias or prejudgment."[60] To show the bias of a hearing officer, a party must demonstrate that the hearing officer "had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence."[61] This is a demanding standard. The United States Supreme Court has found a "probability of actual bias ... too high to be constitutionally tolerable" in cases where "the adjudicator has a pecuniary interest in the outcome" or "has been the target of personal abuse or criticism from the party before him,"[62] but not where a decisionmaker merely performs combined investigative and adjudicative functions.[63] Similarly, we have held that a hearing officer's failure to disclose his position as an AFL–CIO president during a worker's compensation hearing was insufficient to show actual or probable bias.[64]

Calvert has not presented any evidence that the Hearing Officer was predisposed to find against her. The assertion that the ***1007** Hearing Officer selected evidence to support her findings is insufficient to show actual bias. Nor does the hearing transcript suggest that the Hearing Officer interfered in any way with the presentation of evidence. The Hearing Officer's questions were thorough and objective; the only evidence she excluded was related to Calvert's efforts to find work after quitting at Snug Harbor, an issue irrelevant to the question of whether Calvert quit suitable work with good cause. Calvert failed to demonstrate bias sufficient to overcome the presumption of the Hearing Officer's impartiality.

2. The superior court did not improperly reweigh evidence.

36 **37** In applying the substantial evidence test to review an administrative determination, a reviewing court may not reweigh evidence.[65] Calvert argues that "[t]he Superior Court erred when it improperly reweighed evidence concerning transportation: Transportation problems DID present insurmountable difficulties.... This would affect the issue of suitable work." Though the meaning of this argument is somewhat unclear, Calvert seems to be referring to the superior court's conclusion that, notwithstanding Calvert's expressed concerns regarding transportation (among other issues), "the record does not support a finding that the work at Snug was unsuitable." But this statement does not suggest that the superior court "reweighed" evidence. The superior court clearly indicated that its conclusion regarding suitability was based on the record created by the Hearing Officer. And although the Hearing Officer did not explicitly address the question of suitability, her factual findings provide sufficient evidence to support the conclusion that Calvert's work was suitable. The superior court presumably relied on the Hearing Officer's findings for its conclusion that "there is no evidence that the work was inconsistent with Calvert's physical capability, training, experience, earning capacity, or skill" and that the work was therefore suitable; this did not constitute a reweighing of the evidence.

E. The Department Of Labor Did Not Fail To Inform Calvert Regarding Eligibility For Unemployment Insurance Benefits.

Calvert argues that "[t]he Department of Labor & Workforce Development neglected [its] duty" by failing to "inform the public or claimant adequately concerning its requirements for separation from employment regarding eligibility for full benefits before separation takes place." This argument reiterates Calvert's claim in her brief to the Appeal Tribunal that "[t]he DOL neglects to make known its presence [and] expectations ... regarding [unemployment insurance] benefits"[66] and that, although "[a] reasonably prudent person would believe they had been completely informed by orientation, handbook, practices, and notices posted," the materials distributed to new employees do not in fact provide sufficient information on unemployment insurance eligibility.

38 To the extent Calvert is arguing that she lacked access to the policies governing unemployment benefits eligibility, we find her argument unconvincing. The Department's Wage and Hour Information brochure, which Calvert submitted as an exhibit in her appeal to the Commissioner, includes detailed information about the relevant statutes and regulations as well as directions for accessing past unemployment insurance appeals decisions online and reviewing the BPM at Department offices. And as the Department notes, the BPM is also available online. The "Voluntary Leaving Statement" that Calvert filled out and submitted after she filed for unemployment benefits gives notice to claimants that they must show "reasons for quitting ... so compelling" as to leave "no reasonable alternative." The Hearing Officer also explained the eligibility requirements to Calvert at the start of the ***1008** Appeal Tribunal hearing. As a result, Calvert had notice of the Department's basic eligibility requirements and directions for accessing additional information, both prior to her Appeal Tribunal Hearing and throughout the appeals process.

39 To the extent Calvert contends that the Department

had a duty to inform her, while she was working, of how she might quit her job and maintain her eligibility for unemployment benefits, we find this argument equally unavailing. We have held that "[a]s a general rule, people are presumed to know the law" without being specifically informed of it.[67] The United States Supreme Court has required explicit notice of hearing procedures only where "the administrative procedures at issue were not described in any publicly available document."[68]

All of the statutes, regulations, and internal policy documents governing eligibility for unemployment insurance benefits are "publicly available documents" that are easily accessible and identified in Department-published materials, such as the Wage and Hour Information brochure and the unemployment insurance section of the Department's website.[69] Workers may be presumed to be familiar with the provisions of those documents. In this case, Calvert has not demonstrated that any circumstance prevented her from informing herself about the Department's eligibility requirements before she left work. The Department did not neglect a legal duty or deny Calvert due process by not informing her of its policies more directly.

V. CONCLUSION

We AFFIRM the decision of the superior court. Calvert did not demonstrate good cause for leaving suitable work voluntarily.

Parallel Citations

Unempl.Ins.Rep. (CCH) P 8176

Footnotes

1 Under AS 23.20.379(a)(1), "[a]n insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment" if the worker left the "last suitable work voluntarily without good cause." "Waiting-week credit" refers to credit received for the initial week of unemployment, during which the worker does not immediately receive unemployment insurance benefits but still accrues benefits eligibility. *See* Alaska Department of Labor, Frequently Asked Questions: Filing for Unemployment Insurance, *available at* http://labor. state.ak.us/esd_ unemployment_insurance/faq.htm.

2 AS 23.20.379(c).

3 The Department of Labor's Benefit Policy Manual (hereinafter BPM) provides that "A worker may give two or more reasons for quitting. However, the one reason that was the precipitating event is the real cause of the quit, with the other reasons being incidental. In such cases, good cause depends on the precipitating event and the other reasons are irrelevant." Department of Labor, BPM at VL 385–2 (Nov.2009), *available at* http://labor.state.ak.us/esd_unemployment_insurance/ui-bpm.htm.

4 *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.,* 746 P.2d 896, 903 (Alaska 1987); *see also Handley v. State, Dep't of Revenue,* 838 P.2d 1231, 1233 (Alaska 1992).

5 *Handley,* 838 P.2d at 1233 (citing *Jager v. State,* 537 P.2d 1100, 1107 n. 23 (Alaska 1975)).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Smith v. Sampson,* 816 P.2d 902, 904 (Alaska 1991) (applying the substantial evidence test to the "factual determination" of whether an employee was dismissed from his job for "misconduct" for purposes of AS 23.20.379); *see also Risch v. State,* 879 P.2d 358, 363 n. 4 (Alaska 1994).

10 Though the Hearing Officer's Appeal Tribunal Decision separates its "Findings of Fact" from its "Conclusion," the conclusion section includes the Hearing Officer's finding that Calvert quit without good cause. The Hearing Officer's conclusion appears to be entirely fact-based; the determinative factual question was "whether the claimant exhausted all reasonable alternatives prior to quitting her job."

11 *Storrs v. State Medical Bd.,* 664 P.2d 547, 554 (Alaska 1983) (citing *Keiner v. City of Anchorage,* 378 P.2d 406, 411 (Alaska 1963)).

12 *Id.* (citing *Interior Paint Co. v. Rodgers,* 522 P.2d 164, 170 (Alaska 1974)).

13 *Smith,* 816 P.2d at 904; *see also Childs v. Kalgin Island Lodge,* 779 P.2d 310, 313 (Alaska 1989) (holding that findings of the

Alaska Workers' Compensation Board will not be vacated when supported by substantial evidence, but "independent review of the law is proper" where "the Board's decision rests on an incorrect legal foundation").

14 The BPM fulfills 8 AAC 85.360's mandate that "the department ... maintain a policy manual interpreting the provisions of AS 23.20 and this chapter." We have looked to the BPM to interpret AS 23.20 in the past, and continue to do so here. *See, e.g., Wescott v. State, Dep't of Labor,* 996 P.2d 723 (Alaska 2000) (adopting the BPM's criteria for determining good cause and citing the BPM throughout). The *Wescott* opinion refers to the BPM as the "Precedent Manual." The BPM is divided into eight sections: Able & Available, Evidence, Labor Dispute, Miscellaneous, Misconduct, Suitable Work, Total & Partial Unemployment, and Voluntary Leaving. Content within each section is indicated by an combination of the abbreviated section title (e.g., "VL" for Voluntary Leaving, "EV" for Evidence) and a numbered subsection (e.g., VL 385–2). Individual subsections may have different dates based on their most recent updates.

15 BPM at VL 425–1 (Nov.2009).

16 *Id.* at VL 5–2 (Apr.2004); *see also Wescott,* 996 P.2d at 726.

17 BPM at SW 5–4 to 5–5 (Aug.2008).

18 *Id.* at VL 210–1 (Oct.1999). The language of the statute and the BPM, while defining suitability and good cause as separate inquiries, creates significant overlap in the criteria applicable to each. AS 23.20.385(b), for example, identifies a single set of factors to be used "[i]n determining whether work is suitable for a claimant and in determining the existence of good cause for leaving or refusing work." Similarly, the BPM includes statements such as "work that is unreasonably distant from a worker's residence is unsuitable, and the worker has good cause for leaving it," *id.* at VL 150–2 (Nov.2010), followed by a discussion addressing distance from work primarily in terms of good cause. As a result, it can be difficult to draw a clear line between the two concepts in practice.

19 AS 23.20.385(a)-(b); *see also* BPM at VL 425–1 to 425–3 (Nov.2009).

20 BPM at EV 190.3–1 (July 1999).

21 *Id.* at VL 425–1 (Nov.2009); *see also id.* at EV 190.3–1 to 190.3–2 (July 1999).

22 *See id.* at VL 385–2 (Nov.2009).

23 *Id.* at VL 5–2 (Apr.2004); *see also Wescott,* 996 P.2d at 726.

24 In support of this reading, the Department cites the fact that a suitability inquiry does not require a claimant to show that she exhausted reasonable alternatives before leaving a job, "presumably because an issue that makes work unsuitable is a fundamental attribute of the job itself" and cannot be easily changed. By contrast, a worker who quits for "good cause" unrelated to suitability is required to demonstrate that she explored alternatives, which implies that good cause is determined by factors that are at least potentially within the worker's power to control or adjust.

25 The Department's brief does not address the safety concerns raised by Calvert in her Voluntary Leaving Statement.

26 BPM at VL 425–2 (Nov.2009).

27 *Id.* (citing Appeal Tribunal Decision, Docket No. 99–1253, September 2, 1999).

28 *See* BPM at SW 5–4 to 5–5 (Aug.2008).

29 *Id.* at VL 425–1 (Nov.2009).

30 *Id.* at VL 425–3 (Nov.2009).

31 *Id.* at VL 210–1 (Oct.1999).

32 *Id.*

33 *Id.* at VL 5–3 (Apr.2004); *id.* at EV 5–1 (July 1999); *see also Wescott v. State, Dep't of Labor,* 996 P.2d 723, 727 (Alaska 2000) (citing *Reedy v. M.H. King Co.,* 128 Idaho 896, 920 P.2d 915, 918 (1996)).

34 BPM at VL 210–1 (Oct.1999).

35 *Id.* at VL 210–2 (Oct.1999).

36 *Id.* at VL 160–2 (Nov.2010).

37 *Id.* at VL 210–2 (Oct.1999). The BPM quotes the Commissioner of Labor: "The 'good cause' test only requires a worker to exhaust all reasonable alternatives. An alternative is reasonable only if it has some assurance of being successful.... [T]here must be a foundation laid that the alternative does have some chance of producing that which the employee desires." *Id.* at VL 160–1 (Nov.2010).

38 *Id.* at VL 385–2 (Nov.2009); *see also id.* at VL 385–3 (Nov.2009) ("[T]he precipitating event is the reason for the separation, although the combined effect of the reasons may be taken into account in determining good cause.").

39 *Id.* at VL 385–2 (Nov.2009).

40 For instance, as Calvert pointed out in her appeal brief to the Commissioner of Labor, "[t]he Hearing Officer did not ask the opposite question: Would you have quit if your job security and agreement with your employer had not been tampered with [as a result of personality conflicts]?"

41 BPM at VL 210–1 (Oct.1999).

42 *Id.*

43 AS 23.20.385(b).

44 *Id.* at VL 150–2 (Nov.2010). The BPM also explains "if the time and expense of commuting is customary in the worker's occupation and locality, the worker generally does not have good cause." *Id.*

45 *Id.* at VL 210–1 (Oct.1999).

46 Calvert worked in the "gear" department, where she was responsible for ensuring that other employees' lab coats and other specialized clothing were cleaned daily and ready to be handed out at the start of the work day. This required her to get to Snug Harbor an hour before most employees started work to "start coffee and ... make sure that there was enough gear to hand out and ... everything was ready to go."

47 In her appeal to the Commissioner of the Department of Labor, Calvert argued that her phone bill did not reflect that she had received any calls from King during the relevant period. And in her appeal to the superior court, she contended that "[t]he claim by employer of attempting to phone claimant four times is unsupported HEARSAY and there is a preponderance of credible evidence (my phone bill and written statements) in opposition to that claim."

48 BPM at VL 160–3 (Nov.2010).

49 *Id.*

50 At least one prior decision of the Commissioner of Labor has held that where an employer's actions established a "pattern of abuse and hostility" toward his employee, it would have been futile for the employee to confront the employer about his offensive behavior. *See* Decision of the Comm'r, Docket No. 98–0321, April 30, 1998. But the situation in Docket No. 98–0321 is distinguishable from the present case. There, the employer was the sole owner of the business, was verbally abusive, and had proven hostile to previous attempts by the employee to resolve other problems. Here, Calvert does not allege a relationship with her employers of such open hostility. She also had multiple levels of authority within Snug Harbor management from whom to seek assistance, and she does not appear to have been refused accommodation (upon direct request) on prior occasions.

51 *See, e.g., Wagner v. Stuckagain Heights,* 926 P.2d 456, 459 (Alaska 1996).

52 *Smith v. Sampson,* 816 P.2d 902, 907 (Alaska 1991).

53 *Button v. Haines Borough,* 208 P.3d 194, 201 (Alaska 2009) (internal quotation marks and citations omitted).

54 BPM at VL 515.4–1 (Nov.2009). The worker must also "present [ ] the grievance to the employer and allow[ ] the employer an opportunity to adjust the situation." *Id.* This requirement is addressed below.

55 *See, e.g.,* Decision of the Comm'r, Docket No. 95–1484, August 1, 1995 (implying that verbal threats by a fellow employee gave worker "adequate reason" for leaving work, though still finding an absence of good cause based on the worker's failure to attempt to remedy the situation); Appeal Tribunal Decision, Docket No. 98–0392, March 20, 1998 (finding that a worker had good cause

to quit after a fellow employee threatened to get in a gun fight with him, and the worker reported the incident to his employer).

56 BPM at VL 450.05–5 (Nov.2009).

57 *Id.* at VL 450.4–1 (Nov.2009) (noting that a worker whose hours are reduced to part-time "is able to seek other work without leaving the existing employment").

58 *Smith v. Sampson,* 816 P.2d 902, 904 (Alaska 1991); *see also Childs v. Kalgin Island Lodge,* 779 P.2d 310 (Alaska 1989).

59 *See, e.g., Wagner v. Stuckagain Heights,* 926 P.2d 456, 459 (Alaska 1996).

60 *AT & T Alascom v. Orchitt,* 161 P.3d 1232, 1246 (Alaska 2007) (citing *Bruner v. Petersen,* 944 P.2d 43, 49 (Alaska 1997)); *see also Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

61 *AT & T Alascom,* 161 P.3d at 1246 (citing *Tachick Freight Lines, Inc. v. State, Dep't of Labor, Emp't Sec. Div.,* 773 P.2d 451, 452 (Alaska 1989)).

62 *Withrow,* 421 U.S. at 47, 95 S.Ct. 1456.

63 *Id.* at 58, 95 S.Ct. 1456.

64 *AT & T Alascom,* 161 P.3d at 1246.

65 *Bollerud v. State, Dep't of Pub. Safety,* 929 P.2d 1283, 1286 (Alaska 1997).

66 Similarly, in her brief on appeal to the superior court, Calvert contended that she "was never properly warned or informed by the employer or DOL that her OWN judgments regarding good cause for leaving work ... was not the standard for which she could voluntarily quit her job and still be eligible for [unemployment insurance] benefits."

67 *Hutton v. Realty Executives, Inc.,* 14 P.3d 977, 980 (Alaska 2000) (citing *Ferrell v. Baxter,* 484 P.2d 250, 265 (Alaska 1971)).

68 *City of W. Covina v. Perkins,* 525 U.S. 234, 241–42, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999) (distinguishing *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), from *West Covina,* because the state law remedies at issue in *West Covina* were "established by published, generally available state statutes and case law").

69 *See* http://labor.state.ak.us/esd_unemployment_insurance/home. htm.

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254 P.3d 341
Supreme Court of Alaska.

Kenneth MONZULLA, Appellant,
v.
VOORHEES CONCRETE CUTTING and Alaska National Insurance Company, Appellees.

No. S–13640. | June 24, 2011.

Synopsis

Background: Employer filed a motion for extraordinary review of Workers' Compensation Board's interlocutory order denying employer's petition to change venue. The Workers' Compensation Appeals Commission, Kristin S. Knudsen, Commission Chair, reversed the Board's venue decision. Claimant appealed.

Holdings: The Supreme Court, Carpeneti, C.J., held that:
1 claimant's challenge to Commission's subject matter jurisdiction to review Board's interlocutory order denying employer's petition to change venue was not untimely;
2 Commission has implied jurisdiction to review interlocutory Board orders; and
3 Commission had jurisdiction to stay Board's decision denying employer's petition to change venue while Commission reviewed the decision.

Affirmed.

West Headnotes (17)

1 **Workers' Compensation**
Scope and Extent of Review in General

In an appeal from the Workers' Compensation Appeals Commission, The Supreme Court reviews the Commission's decision rather than the Workers' Compensation Board's decision.

2 **Workers' Compensation**
In general; questions of law or fact

In an appeal from the Workers' Compensation Appeals Commission, the Supreme Court applies its independent judgment to questions of law that do not involve agency expertise.

3 **Statutes**
Particular State Statutes

In an appeal from the Workers' Compensation Appeals Commission, Supreme Court applies its independent judgment to questions of statutory interpretation.

4 **Workers' Compensation**
Taking and Perfecting Proceedings for Review

Workers' compensation claimant's challenge to Workers' Compensation Appeals Commission's subject matter jurisdiction to review Workers' Compensation Board's interlocutory order denying employer's petition to change venue was not untimely, even though claimant did not raise it until he moved for reconsideration of Commission's decision on the merits.

5 **Courts**
Time of making objection

The question of subject matter jurisdiction can be raised at any time.

6 **Courts**
Determination of questions of jurisdiction in general

A court can raise the issue of its subject matter jurisdiction sua sponte.

7 **Statutes**
⇐General Rules of Construction
Statutes
⇐Intention of Legislature
Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

Courts interpret a statute according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.

8 **Statutes**
⇐Intention of Legislature
Statutes
⇐Meaning of Language

A court's goal in interpreting a statute is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.

9 **Statutes**
⇐Policy and purpose of act

Courts construe a statute in light of its purpose.

10 **Statutes**
⇐Meaning of Language
Statutes
⇐Legislative history of act

In construing a statute, courts look at the meaning of the words used and the legislative history.

11 **Statutes**
⇐Words used

Courts will presume that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.

12 **Statutes**
⇐Statute as a Whole, and Intrinsic Aids to Construction

All sections of a statute should be construed together so that all have meaning and no section conflicts with another.

13 **Workers' Compensation**
⇐Decisions reviewable

Workers' Compensation Appeals Commission has implied jurisdiction to review interlocutory Workers' Compensation Board orders.

14 **Workers' Compensation**
⇐Purpose of legislation

The goal of the statutory amendment that established the Workers' Compensation Appeals Commission was to increase the efficiency and flexibility of the workers' compensation system and reduce some of its costs. AS 23.30.007(a).

15 **Workers' Compensation**
⇐Purpose of legislation

Creation of the Workers' Compensation Appeals Commission was intended to provide consistent, legally precedential decisions in an expeditious manner.

16 **Workers' Compensation**

Nature and form of remedy

Workers' Compensation Appeals Commission had jurisdiction to stay Workers' Compensation Board's decision denying employer's petition to change venue while Commission reviewed the decision. AS 23.30.125(c).

17 **Workers' Compensation**
Powers and duties in general

Workers' Compensation Appeals Commission's power to issue stays is not confined to compensation orders. AS 23.30.125(c).

Attorneys and Law Firms

***342** James M. Hackett, Law Office of James M. Hackett, Fairbanks, for Appellant.
Richard L. Wagg and Vicki A. Paddock, Russell, Wagg, Gabbert & Budzinski, P.C., Anchorage, for Appellees.

Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

OPINION

CARPENETI, Chief Justice.

I. INTRODUCTION

Does the Alaska Workers' Compensation Appeals Commission have subject matter jurisdiction to review interlocutory orders of the Alaska Workers' Compensation Board before a final Board decision? In 2006 the Commission decided that it had implied jurisdiction to hear motions for extraordinary review, which are similar to petitions for review in the appellate courts. In 2008 an employer asked the Commission to review and to stay the Board's non-final order denying a change of venue from Fairbanks. The Commission first issued a partial stay, permitting the case to go forward in any venue other than Fairbanks. It later reviewed the merits of the Board's decision to deny the change of venue and reversed it. The employee contends that the Commission did not have subject matter jurisdiction over motions for extraordinary review because the legislature only granted the Commission jurisdiction to hear appeals of final Board orders. Because we find that jurisdiction to hear interlocutory appeals is necessarily incident to the Commission's express power to hear appeals from final Board decisions, we affirm the Commission's decision.

II. FACTS AND PROCEEDINGS

Kenneth Monzulla hurt his back in 1999 when he was working for Voorhees Concrete Cutting in Fairbanks. As the Board noted in one of its decisions in the case, "[t]he medical and legal records in this case are voluminous." In September 2001, the parties entered a partial compromise and release agreement to settle all issues except future medical care for his lumbar and thoracic spine; their more recent substantive disputes have involved the extent of this medical care.

The parties have also disagreed about venue for the proceedings. Because Monzulla injured his back in Fairbanks, venue for Board proceedings related to his injury was initially in Fairbanks.[1] Monzulla moved to the Kenai Peninsula in 2002, and his treating ***343** physician at the time of the Board proceeding was in Soldotna. Voorhees twice asked the Board to change venue from Fairbanks to Anchorage, arguing that it would be less costly and time consuming to have hearings in Anchorage. Monzulla, appearing pro se, opposed Voorhees's requests to change venue because the Fairbanks office was already familiar with his case.

Voorhees's first petition for a change of venue was filed in November 2006. After a hearing, the Board denied the petition, finding that "Fairbanks [would] better serve the balanced interests of the parties, witnesses, and the [Board], and would provide a speedier remedy." The Board held a hearing on March 1, 2007, on various claims raised by Monzulla; in its decision, it granted some claims and denied others. Voorhees appealed the Board's final decision to the Commission and at the same time appealed the interlocutory order denying its petition for change of venue. On February 4, 2008, the Commission affirmed in part and reversed in part the Board's orders. On the venue issue, the Commission affirmed the Board's denial of a change of venue with a cautionary instruction to the Board not to consider its own interest when evaluating a change of venue request.

On July 16, 2008, Voorhees again petitioned the Board to change venue; the Board again denied the petition.

Voorhees filed a motion for extraordinary review and request for stay with the Commission on October 24, 2008. The Commission granted extraordinary review of the venue question, stayed the Board proceedings "in the northern venue, but not proceedings in other venues," and invited the participation of the director of the Division of Workers' Compensation because of the question's potential impact on Board procedure.2 Monzulla filed a letter with the Commission, which it construed as a motion for reconsideration of its grant of extraordinary review. The Commission denied reconsideration.

In its decision on the merits, the Commission decided that the Board had abused its discretion in failing to change venue to Anchorage "because it relied on an impermissible consideration, its own interest, under 8 [Alaska Administrative Code] 45.072(2) and because it lacked sufficient evidence to find that Fairbanks was a more convenient forum than Anchorage for the parties and witnesses."

After the Commission reversed the Board's venue decision, an attorney entered an appearance on behalf of Monzulla and moved for reconsideration of the Commission's decision. He argued that the Commission did not have subject matter jurisdiction to consider the motion for extraordinary review and had misconstrued the case law in its discussion of the law of the case doctrine. The Commission declined to consider Monzulla's challenge to its subject matter jurisdiction because he had not raised it previously in the appeal and had not distinguished Commission precedent on the subject. But it ordered briefing on whether it had misconstrued our case law. Monzulla filed an appeal in this court related to the Commission's subject matter jurisdiction on October 2, 2009. On October 8, 2009, the parties filed a stipulation with the Commission dismissing Monzulla's motion for reconsideration; the Commission issued an order dismissing the motion for reconsideration and indicating that its decision dated August 6, 2009, was the final decision of the appeals commission. Monzulla appeals the Commission's exercise of jurisdiction over the motion for extraordinary review and its partial stay of the Board's venue order.

III. STANDARD OF REVIEW

1 2 3 In an appeal from the Alaska Workers' Compensation Appeals Commission, we review the Commission's decision rather than the Board's decision.3 We apply our independent judgment to questions of law that do not involve agency expertise.4 ***344** We likewise apply our independent judgment to questions of statutory interpretation.5

IV. DISCUSSION

A. Monzulla's Challenge To Subject Matter Jurisdiction Was Timely.

4 Monzulla contends that the Commission erred because it did not consider whether it had jurisdiction to hear interlocutory appeals. He asserts that his "failure to object to the Commission's lack of subject matter jurisdiction [before reconsideration] is immaterial."

The Commission refused to consider Monzulla's challenge to its subject matter jurisdiction because he did not raise it until he moved for reconsideration of its decision on the merits and had not established "that there [were] grounds to distinguish or overturn" *Eagle Hardware & Garden v. Ammi.*6 The Commission stated that "AS 23.30.180(f) [did] not permit [Monzulla] to raise a legal issue for the first time on reconsideration, especially one that [was] not closely related to any points raised or decided in the appeal."

5 6 The question of subject matter jurisdiction can be raised at any time,7 and a court can raise the issue of its subject matter jurisdiction sua sponte.8 Therefore, we conclude that Monzulla's challenge was not untimely.9 But any error was harmless, as set out below in Part IV.C.

B. The Legislature Did Not Explicitly Grant Interlocutory Review Jurisdiction To The Commission.

Monzulla's appeal raises the question whether the Commission has jurisdiction to review interlocutory Board orders before the Board issues a final decision. He argues, based on the statutory language, that the legislature did not grant the Commission this power. Monzulla contends that the legislature "was aware of how to fashion broad extraordinary discretionary review power when it enacted the Commission's statutory powers and authority" but chose to limit the Commission's jurisdiction to review of final decisions. Because the legislature in AS 23.30.007(a) limited the Commission's jurisdiction to administrative appeals,10 Monzulla insists that the legislature did not intend to give the Commission power to review non-final Board decisions.

Voorhees responds that the legislature directly granted jurisdiction over interlocutory appeals to the Commission. Voorhees asks us to interpret the statute, particularly AS 23.30.125(b)11 and AS 23.30.128(b),12 as giving the Commission authority to hear motions ***345** for extraordinary review. According to Voorhees, these statutory sections are meaningless unless construed as

granting the Commission interlocutory appellate jurisdiction.

7 8 9 We interpret a statute "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[13] Our goal in interpreting a statute is "to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[14] We construe a statute "in light of its purpose."[15]

10 11 12 In construing a statute, we look at the meaning of the words used and the legislative history.[16] "[W]e will presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.' "[17] All sections of a statute should "be construed together so that all have meaning and no section conflicts with another."[18]

As noted, Voorhees argues that in AS 23.30.125(b) and AS 23.30.128(b) the legislature specifically granted the Commission jurisdiction to review interlocutory orders. According to Voorhees, these statutory subsections are meaningless unless they grant the Commission discretionary review jurisdiction. Voorhees contends that if they are not interpreted this way, they would be in conflict with AS 23.30.007(a) and AS 23.30.008(a).

The parties agree that "all sections of an act are to be construed together so that all have meaning and no section conflicts with another."[19] Voorhees contends that the statutory subsections at issue here—AS 23.30.007(a), AS 23.30.008(a), AS 23.30.125(b), and AS 23.30.128(b)—cannot be construed together unless they are read as a direct grant of interlocutory review jurisdiction to the Commission. We disagree.

The statutory subsections at issue here can be harmonized. Alaska Statute 23.30.007(a) is the express grant of jurisdiction to the Commission; its jurisdiction is "limited to administrative appeals." Alaska Statute 23.30.008(a) provides that the Commission's decisions are final and conclusive and have the force of precedent for the Commission and the Board; it expressly limits the Commission's jurisdiction to workers' compensation cases. Alaska Statute 23.30.125(b) clarifies that review of Board decisions is done by the Commission, not the superior court. Alaska Statute 23.30.128(b) sets out the Board actions the Commission can review and the standards of review for the Commission to apply.[20] Thus, nothing in the statutory language explicitly gives the Commission jurisdiction over discretionary review of non-final Board decisions.

C. The Commission Has Implied Jurisdiction To Hear Interlocutory Appeals.

We next consider whether the Commission has implied jurisdiction to hear interlocutory ***346** appeals. We have previously held that the Board has implied powers. In *Wausau Insurance Cos. v. Van Biene* we decided that the Board had implied jurisdiction to apply equitable principles, such as estoppel, in workers' compensation proceedings.[21] And we decided that the Board had implied jurisdiction to set aside a compromise and release agreement because of fraud in *Blanas v. Brower*.[22] In both instances we determined that the implied power was necessarily incident to the Board's express powers.[23]

In deciding whether an administrative agency has properly exercised an implied power, other courts have considered whether the implied power is consistent with the legislature's objectives in granting powers to the administrative agency,[24] the nature of the administrative proceeding,[25] and "whether the circumstances, in relation to the type of proceeding, require the agency to exercise its implied and incidental powers."[26]

13 Applying these principles here, we hold that the Commission has implied jurisdiction to review interlocutory Board orders. The Commission "performs a quasi-judicial function that is akin to appellate review."[27] In some circumstances, delay of review until a final decision on the merits can make review pointless. This case is one example: Review of an improper refusal to change venue is pointless after a final decision on the merits when there may be no further proceedings. Similarly, if the Board improperly required an employee to undergo a psychiatric examination, a delay in review could subject the employee to an intrusive and unnecessary examination.[28] Discretionary appellate review of non-final orders may at times be necessary to ensure fundamental fairness to the parties.

14 15 The goal of the statutory amendment that established the Commission was "to increase the efficiency and flexibility of the current system ... and reduce some of its costs."[29] The legislation eliminated superior court review of workers' compensation cases and substituted review by the Commission.[30] Creation of the Commission was intended "to provide 'consistent, legally precedential decisions in an expeditious manner.' "[31]

Discretionary review jurisdiction in the Commission can further all of these goals: increasing efficiency, providing precedential decisions from a body with expertise in workers' compensation, and reducing costs in workers' compensation appeals. Discretionary review can speed the ultimate resolution of a case when review concerns a controlling legal issue.[32] In this case, the ultimate decision on the merits may have been delayed,[33] but we agree with Voorhees that the venue question was one which would evade meaningful ***347** review without interlocutory appellate jurisdiction.

We have already noted that, in creating the Commission, the legislature intended to replace review by the superior

court with review by the Commission. We agree with Voorhees that the legislature wanted those seeking review of Board decisions to have the same procedural rights of review that they had in the superior court. We recognize, as Monzulla argues, that the discretionary review previously available in the superior court has a different origin[34] than the Commission's authority to hear interlocutory appeals, but nothing in the legislative history indicates that the legislature wanted employers or employees to have fewer rights of review before the Commission than before the superior court. We conclude that the Commission had implied jurisdiction to grant discretionary review of the venue decision.[35]

D. The Commission Had Authority To Stay The Board's Decision.

16 Monzulla argues separately that the Commission was without jurisdiction to stay the Board's decision because the workers' compensation statute and the Commission's regulations only permit stays of "compensation orders," which are a limited class of Board orders. Voorhees does not address this argument separately.

The only provision of the Alaska Workers' Compensation Act related to stays by the Commission is AS 23.30.125(c), which states:

> If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

Monzulla does not dispute that the legislature gave the Commission some power to stay Board decisions; he argues that because a compensation order refers only to a Board order denying a claim or making an award of compensation,[36] the statute permits the Commission to stay only compensation orders, not other Board decisions. **17** Given the purposes of the legislation, we do not think that the legislature intended the Commission's power to issue stays to be confined to compensation orders. The statutory language does not expressly limit stays to compensation orders nor does it prohibit stays of other Board orders. The statute sets out the standards the Commission must apply when a party seeks to stay a monetary award from the Board.[37] Although "[t]here is a presumption that the same words used twice in the same act have the same meaning,"[38] the legislature appears not to have distinguished compensation orders from other decisions in the legislation establishing the Commission. Alaska Statute 23.30.127, which sets out deadlines for appeals and ***348** cross-appeals to the Commission, uses the term "compensation order" when referring to the time for filing an appeal[39] and "decision" when referring to the time for filing a cross-appeal.[40]

In addition, without authority to stay Board decisions while review is pending, the Commission's discretionary review jurisdiction would be meaningless. If the Commission could not stay a Board order while it reviewed the order, issues could become moot while review was pending.

V. CONCLUSION

Because discretionary review of non-final Board orders is necessarily incident to the Commission's express power to hear appeals from final Board decisions, we AFFIRM the Commission's decision that it had jurisdiction to stay and review the Board's venue decision in this case.

Footnotes

1 8 Alaska Administrative Code (AAC) 45.072 (2011) (setting venue in "the city nearest the place where the injury occurred" unless circumstances justify change of venue).

2 The director filed a *Notice of Limited Intervention for Purposes of Supplementing the Record* with an attached affidavit on January 12, 2009, but did not participate further.

3 *Barrington v. Alaska Comm'ns Sys. Grp., Inc.*, 198 P.3d 1122, 1125 (Alaska 2008).

4 *Id.*

5 *Grimm v. Wagoner,* 77 P.3d 423, 427 (Alaska 2003).

6 AWCAC Dec. No. 003 (Feb. 21, 2006), *available at* http://labor. state. ak.us/WCcomm/orders.htm. In *Ammi,* the Commission decided that it had implied jurisdiction to review interlocutory Board orders before a final decision of the Board. *Id.* at 8–9.

7 *Nw. Med. Imaging, Inc. v. State, Dep't of Revenue,* 151 P.3d 434, 438 n. 5 (Alaska 2006) (citing *Hydaburg Coop. Ass'n v. Hydaburg Fisheries,* 925 P.2d 246, 248 (Alaska 1996)) (noting that challenge to agency jurisdiction was raised during second appeal to superior court).

8 *See Hydaburg Coop. Ass'n,* 925 P.2d at 248 (quoting *Burrell v. Burrell,* 696 P.2d 157, 162 (Alaska 1984)) (noting that subject matter jurisdiction must be raised by the court if noticed and not raised by one of the parties).

9 To the extent the Commission implied that Monzulla had to raise a subject matter jurisdiction challenge at a specific time, it erred.

10 AS 23.30.007(a) provides, in relevant part:

> The commission has jurisdiction to hear appeals from final decisions and orders of the board under this chapter. Jurisdiction of the commission is limited to administrative appeals arising under this chapter.

11 AS 23.30.125(b) states:

> Notwithstanding other provisions of law, a decision or order of the board is subject to review by the commission as provided in this chapter.

12 AS 23.30.128(b) states:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

13 *Grimm v. Wagoner,* 77 P.3d 423, 427 (quoting *Native Vill. of Elim v. State,* 990 P.2d 1, 5 (Alaska 1999)).

14 *Muller v. BP Exploration (Alaska) Inc.,* 923 P.2d 783, 787 (Alaska 1996) (quoting *Tesoro Alaska Petroleum, Co. v. Kenai Pipe Line Co.,* 746 P.2d 896, 905 (Alaska 1987)).

15 *Beck v. State, Dep't of Transp. & Pub. Facilities,* 837 P.2d 105, 117 (Alaska 1992) (citing *Vail v. Coffman Eng'rs, Inc.,* 778 P.2d 211 (Alaska 1989)).

16 *Alaskans for a Common Language v. Kritz,* 170 P.3d 183, 192 (Alaska 2007) (citing *State v. Alex,* 646 P.2d 203, 208 n. 4 (Alaska 1982)).

17 *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety,* 91 P.3d 240, 248 (Alaska 2004) (quoting *Kodiak Island Borough v. Exxon Corp.,* 991 P.2d 757, 761 (Alaska 1999)).

18 *In re Hutchinson's Estate,* 577 P.2d 1074, 1075 (Alaska 1978).

19 *Id.*

20 Because we agree with Monzulla that the statutory sections can be harmonized, we do not need to consider whether one section is more specific. *Nat'l Bank of Alaska v. State, Dep't of Revenue,* 642 P.2d 811, 817–18 (Alaska 1982) (quoting *State, Dep't of Highways v. Green,* 586 P.2d 595, 602 (Alaska 1978)).

21 847 P.2d 584, 588 (Alaska 1993).

22 938 P.2d 1056, 1061–62 (Alaska 1997).

23 *Id.; Van Biene,* 847 P.2d at 588.

24 *Unite Here! Local 5 v. City & Cnty. of Honolulu,* 123 Hawai'i 150, 231 P.3d 423, 449 (2010).

25 *Hawes v. Colo. Div. of Ins.,* 65 P.3d 1008, 1017–18 (Colo.2003) (en banc) (holding that the legislature had established a type of cy pres proceeding so that Division of Insurance had implied authority to award common fund attorney's fees).

26 *Id.*

27 *Alaska Pub. Interest Research Grp. v. State,* 167 P.3d 27, 36 (Alaska 2007).

28 *Cf. BP Exploration Alaska, Inc. v. Stefano,* AWCAC Dec. No. 76 (Alaska 2008) (denying extraordinary review of protective order preventing employer from compelling employee to attend psychiatric medical evaluation).

29 2005 Senate Journal 465.

30 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 37, 40.

31 *Id.* at 39 (quoting 2005 Senate Journal 465).

32 *Cf. Thurston v. Guys With Tools, Ltd.*, 217 P.3d 824, 825 (Alaska 2009) (granting review to ensure that proper legal standard was applied on remand).

33 The Board hearing in Fairbanks on the merits of the claim was scheduled for November 14, 2008. The Commission issued its decision reversing the Board on August 6, 2009. The Board issued its final decision and order on reconsideration in the case on December 7, 2010. *Monzulla v. Voorhees Concrete Cutting,* AWCB Dec. No. 10–0200 (Dec. 7, 2010).

34 *See* AS 22.10.020(d); AS 23.30.129; Alaska R.App. P. 610.

35 Monzulla did not appeal the merits of the Commission's venue decision or its application of the law of the case doctrine to his case, so we express no opinion on these issues.

36 AS 23.30.110(e).

37 AS 23.30.125(c).

38 *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1123 (Alaska 1995) (quoting *Kulawik v. ERA Jet Alaska,* 820 P.2d 627, 634 (Alaska 1991)).

39 AS 23.30.127(a).

40 AS 23.30.127(c).

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Don Bullock

254 P.3d 1078
Supreme Court of Alaska.

MARATHON OIL COMPANY, Appellant,
v.
STATE of Alaska, DEPARTMENT OF NATURAL RESOURCES, Appellee.

No. S–13771. | June 10, 2011.

Synopsis

Background: Company that leased land from State for the purpose of producing natural gas appealed Department of Natural Resources' (DNR's) denial of its request for retroactive application of contract pricing. The Superior Court, Third Judicial District, Anchorage, John Suddock, J., affirmed. Company appealed.

Holdings: The Supreme Court, Fabe, J., held that:
1 reasonable basis standard of review applied to DNR's interpretation of statute governing contract pricing;
2 DNR's interpretation of statute as permitting DNR to approve contract pricing only for future production was longstanding and reasonable, and thus Supreme Court would defer to it;
3 DNR's interpretation of statute was a rule of internal agency procedure, and thus DNR was not required to promulgate its interpretation in a regulation; and
4 company's due process rights were not violated.

Affirmed.

West Headnotes (14)

1 **Statutes**
- General Rules of Construction

Statutes
- Intention of Legislature

Statutes
- Policy and purpose of act

Statutes
- Meaning of Language

Courts interpret statutes according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.

2 **Statutes**
- Legislative history in general

Courts decide questions of statutory interpretation on a sliding scale: the plainer the language of the statute, the more convincing contrary legislative history must be.

3 **Statutes**
- Executive Construction

Courts reviewing agency interpretations of statutes apply the "reasonable basis standard," under which they give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions.

4 **Statutes**
- Executive Construction

Courts reviewing agency interpretations of statutes apply the "independent judgment standard," under which the court makes its own interpretation of the statute at issue, where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute.

5 **Statutes**
- Long continuance of construction, and approval or acquiescence

Courts give more deference to agency interpretations of statutes that are longstanding and continuous.

6 **Statutes**
- Particular State Statutes

Whether statute governing gas leasing permitted retroactive application of contract pricing to compute State's royalty on a natural gas lease implicated Department of Natural Resources' (DNR's) expertise, and thus reasonable basis standard of review applied

to DNR's interpretation of statute. AS 38.05.180(aa).

7 **Statutes**

Policy and purpose of act

Statutes

Meaning of Language

To establish the meaning of a statute, courts examine both its text and its purpose.

8 **Mines and Minerals**

State Leases

Statute listing reasons Department of Natural Resources can reject a lessee's request to use contract pricing to calculate State's royalty on an oil and gas lease is exclusively concerned with objections to the price a lessee submits as its contract price; other non-price related reasons for rejecting a request may still exist. AS 38.05.180(aa)(2).

9 **Mines and Minerals**

State Leases

The overall purpose of the Alaska Land Act is to maximize revenue for the state. AS 38.05.005 et seq.

10 **Mines and Minerals**

State Leases

Department of Natural Resources' (DNR's) interpretation of statute governing contract pricing as permitting DNR to approve contract pricing to calculate State's royalty on a natural gas lease only for future production was longstanding and reasonable, and thus Supreme Court would defer to it. AS 38.05.180(aa).

11 **Mines and Minerals**

State Leases

Department of Natural Resources's (DNR's) interpretation of statute governing contract pricing as permitting DNR to approve contract pricing to calculate State's royalty on a natural gas lease only for future production was a rule of internal agency procedure, and thus DNR was not required to promulgate its interpretation in a regulation. AS 38.05.180(aa).

12 **Administrative Law and Procedure**

Legislative questions; rule-making

Supreme Court uses its independent judgment in deciding whether an agency action is a regulation for purposes of the Administrative Procedure Act. AS 44.62.010 et seq.

13 **Constitutional Law**

Sale or lease in general

Mines and Minerals

State Leases

Lessee had adequate notice, for due process purposes, that Department of Natural Resources (DNR) could interpret statute governing contract pricing, which was silent on the issue of retroactivity, as permitting DNR to approve contract pricing to calculate State's royalty on a natural gas lease only for future production; fact that statute did not expressly prohibit retroactive requests did not mean that lessee could assume that the statute allowed retroactivity. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 7; AS 38.05.180(aa).

14 **Constitutional Law**

Sale or lease in general

Mines and Minerals

State Leases

Lessee had both adequate notice of Department of Natural Resources' (DNR's) decision on its request to use contract pricing to calculate State's royalty on natural gas lease and a fair opportunity to present its claims that statute permitted retroactive approval of contract pricing, and thus lessee's due process rights were not violated by DNR's denial of lessee's retroactive request for contract pricing. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 7; AS 38.05.180(aa).

Attorneys and Law Firms

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Before: CARPENETI, Chief Justice, FABE, WINFREE, and STOWERS, Justices.

Opinion

OPINION

FABE, Justice.

I. INTRODUCTION

Gas producers that lease land from the State of Alaska must pay royalties calculated on the value of the gas produced from the leased area. This royalty payment can be calculated under one of two methods: (1) "higher of" pricing or (2) contract pricing. "Higher of" pricing is the default. Computing the royalty owed under "higher of" pricing involves sophisticated calculations using market data and the prices of other producers. The Department of Natural Resources (DNR) usually does not calculate the royalty payment under "higher of" pricing until years after the time of production, once an audit can be completed. In order to pay royalties under contract pricing, the lessee must first request that form of payment calculation from DNR. Under contract pricing, the lessee's price at which it sells gas is used to determine the lessee's royalty payment.

Marathon Oil Corporation (Marathon) began production in the Ninilchik gas field in 2003. In 2008, before completion of the audit to determine the "higher of" royalty payment for 2003–2008, Marathon requested contract pricing from DNR. Marathon requested contract pricing for the period of 2008 onward and sought retroactive application of contract pricing to the 2003–2008 period. DNR approved Marathon's request for contract pricing from 2008 onward but denied the request to apply contract pricing to production prior to 2008. Marathon appealed to the superior court, which affirmed DNR's ruling. Marathon appeals.

Marathon has three arguments. First, Marathon argues that the statute that governs contract pricing—AS 38.05.180(aa)—permits retroactive application of contract pricing and that DNR was wrong to deny Marathon's request. We conclude that the statute is ambiguous, and because DNR's interpretation is longstanding and has a reasonable basis in the statute, we defer to its interpretation. Second, Marathon argues in the alternative that even if DNR's interpretation of the statute is valid, DNR was obliged to promulgate its interpretation as a ***1081** regulation before applying it to any party. We conclude that DNR's interpretation is a rule of internal agency procedure and therefore did not have to be issued as a regulation. Third, Marathon argues that DNR's treatment of Marathon violated due process. We conclude that Marathon's due process rights were not violated. We therefore affirm the superior court's decision upholding DNR's order.

II. FACTS AND PROCEEDINGS

Marathon leases land from the State of Alaska for the purpose of producing natural gas. Marathon has many natural gas leases on the Kenai Peninsula, including one at Ninilchik.

Gas lessees must pay a royalty to the State in the amount of 12.5% of the value of the gas produced in the leased area. Determining the value of the gas produced for the purpose of calculating this royalty is usually done through "higher of" pricing. The value of the gas produced is deemed to be the highest of four possible prices. [1]

Lessees must deliver royalty payments on or before "the last day of the calendar month following the month in which the oil, gas, or associated substances are produced." But the four values needed to calculate the royalty under "higher of" pricing are usually not determined until several years after the time of production, after DNR performs an audit. After the audit, a lessee's royalty liability is often "re-adjusted upward."

In 1986 the legislature amended the royalty statute. [2] The amendments, codified in AS 38.05.180(aa) and AS 38.05.180(bb), allowed lessees to request contract pricing rather than the default "higher of" pricing. Contract pricing permits lessees to use the price at which they sell gas to Alaska utilities as the price on which royalties will be calculated. The stated purpose of the 1986 amendments was to benefit utility consumers. [3] The contracts between gas producers like Marathon and gas-purchasing utilities had historically allocated the risk of higher royalty payments to the utilities. That is, producers sold gas to utilities under a long-term

contract with a fixed price for gas. If the market price of gas rose above the contract price, producers had to pay higher royalties. Under the terms of their contracts with utilities, they could pass on this added expense to utilities. Utilities would then pass the expense along to their consumers. The 1986 amendments allowed lessee-producers to use their contract price as the royalty price, thus avoiding this possible increase in consumers' utility bills.

In 1995 DNR leased lands in the Ninilchik Unit on the Kenai Peninsula to Marathon for the purposes of gas production. Marathon began production on this land in 2003. In 2008 Marathon requested contract pricing from DNR, both for future production and for past production between 2003 and 2008. DNR approved Marathon's request for contract pricing from 2008 forward but rejected the request for the 2003–2008 period. The ***1082** commissioner stated that he "decline[d] to grant retroactive approval under the terms of the statute." Marathon requested reconsideration, arguing that AS 38.05.180(aa) permitted retroactive approval. DNR affirmed its earlier decision, reasoning that "AS [3]8.05.180(aa) does not authorize the Department of Natural Resources to grant retroactive approval." Marathon appealed, and the superior court affirmed DNR's order. Marathon appeals.

III. STANDARD OF REVIEW

1 2 3 4 5 We interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[4] We decide questions of statutory interpretation on a sliding scale: "[T]he plainer the language of the statute, the more convincing contrary legislative history must be."[5] We use one of two standards to review agency interpretations of statutes.[6] We apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions.[7] We apply the independent judgment standard, under which "the court makes its own interpretation of the statute at issue, ... where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute."[8] We give more deference to agency interpretations that are "longstanding and continuous."[9]

6 It is DNR's job to manage the state's resources and to collect royalties from gas lessees.[10] We have explained that the reasonable basis standard is appropriate when an agency's adjudication of a regulated party's claim "requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision."[11] The question whether to allow retroactivity lies within DNR's expertise. Allowing retroactivity could have important consequences for how royalties are assessed and paid. The state royalty and audit system is complicated, and DNR has expertise in deciding when retroactive application makes sense within that system.[12] In *Alaska International Construction v. Earth Movers of Fairbanks*, we explained that " 'the comparative qualification of court and agency to decide the particular issue' [is] the most important factor for whether a court should substitute its judgment for that of an agency's."[13] Here, where the question implicates "special agency expertise" and is not "merely ... a question of statutory interpretation," we use the reasonable basis standard.[14]

IV. DISCUSSION

A. DNR's Interpretation Of AS 38.05.180(aa) Is Reasonable.

In 1959, shortly after statehood, the legislature passed the Alaska Land Act and gave DNR the responsibility for managing state- ***1083** owned land.[15] The Alaska Land Act provided that state lands were open to oil and gas development and gave DNR the power to lease state lands for that purpose.[16] The Alaska Land Act required that DNR, when it leased state land, collect a royalty of at least 12.5% of the value of all oil and gas produced.[17] To determine a lessee's royalty obligation, DNR must calculate the value of the oil and gas produced by the lessee. To determine the value of the oil and gas produced by a lessee, DNR historically has not used the price at which the lessee actually sold its oil or gas. Rather, DNR has used an approximation of market price. In its lease agreements, DNR has obligated lessees to pay 12.5% of the "higher of" four different values.[18] These four values are designed to estimate the market price of oil and gas. The goal of "higher of" pricing is to ensure the state's royalty is not based on a below-market sales price.

The 1986 amendments to the Alaska Land Act allowed lessees to calculate their royalty obligations using a different, potentially more favorable method. The amendments permitted lessees to use the price at which they contracted to sell gas to Alaska utilities as the basis for calculating the

state's royalty. [19] To use this "contract" price, the lessee must apply and receive permission from DNR. [20]

The question presented is whether a lessee must apply for contract pricing before production actually occurs. For at least ten years, DNR has interpreted the 1986 amendments as permitting DNR to approve contract pricing only for future production. Thus, a lessee can apply to have contract pricing used to calculate its royalties for future production, but not for gas production that has already occurred. Marathon disputes this interpretation, arguing that the statute permits DNR to use contract pricing for past production. Marathon offers alternative statutory interpretations, proposing several cutoff points after which a lessee would no longer be permitted to apply for contract pricing. Marathon even suggests that a lessee could apply for contract pricing after the completion of the audit to determine its "higher of" royalty liability so long as the lessee applied "before the statute of limitations ran."

7 To establish the meaning of a statute, we examine both its text and its purpose. [21] We will give the appropriate deference to DNR, deferring to its interpretation "so long as it has a reasonable basis in the law." [22]

1. The text of the statute

a. The meaning of "prospective"

Alaska Statute 38.05.180(aa)(2)(B) provides that DNR should not approve a request for contract pricing if "the *prospective* reduction in royalty receipts would not be balanced by increased benefits to in-state gas and electric consumers." (Emphasis added.) DNR notes that Black's Law Dictionary defines "prospective" as meaning "[i]n the future." [23] According to DNR, "prospective" refers to the "future period after the application is approved" and therefore AS 38.05.180(aa) only allows contract pricing for future production. DNR maintains that AS 38.05.180(aa) does not permit application of contract pricing to past production.

Marathon argues that the word "prospective" has a different meaning within the context of the statute. In Marathon's view, the legislature's reference to "prospective reduction in royalty receipts" is "not the same as requiring that a request be made in advance of or commensurate in time with first gas production." Marathon instead argues that ***1084** the word refers to the future effects of DNR's decision to approve or deny a request for contract pricing. According to Marathon, DNR can decide to approve contract pricing for any period, past or future, but DNR must consider the "prospective" effects of that decision. Marathon contends that "DNR may still consider the 'prospective reduction in royalty receipts' resulting from use of the contract price even if the royalty would [correlate] with gas deliveries and production occurring in the past."

The term "prospective" could plausibly have either meaning. The use of the word could signify that the legislature only intended contract pricing to be available for future gas production; or the use of the word could be incidental "and the timing of the [application] ... immaterial." We agree with the superior court that "the phrase 'prospective reduction in royalty receipts' is ambiguous."

b. The scope of AS 38.05.180(aa)(2)

8 Marathon argues that AS 38.05.180(aa)(2) provides an exhaustive list of the reasons that DNR may reject a request for contract pricing. Alaska Statute 38.05.180(aa)(2) provides that DNR should reject a lessee's request for contract pricing if the commissioner makes a finding that

> (A) the contract price or transfer price is unreasonably low;
>
> (B) the prospective reduction in royalty receipts would not be balanced by increased benefits to in-state gas and electric consumers;
>
> (C) the lessee and the utility are related in management, ownership, or other aspect and, in the case of a transfer price, that relationship is not regulated under AS 42.05; and
>
> (D) the contract price or transfer price is not in the best interest of the state.

Marathon contends that because retroactivity is not among the listed reasons for rejection, DNR had no right to refuse Marathon's request for retroactive application. Marathon claims that AS 38.05.180(aa) creates a presumption in favor of approval and that DNR did not respect this presumption. But AS 38.05.180(aa)(2)'s core scope is more limited than Marathon contends. Alaska Statute 38.05.180(aa)(2) provides an exhaustive list of the *price-related* reasons DNR can reject requests for contract pricing, but the statute does not address other grounds for rejection. The legislative history of the 1986 amendments indicates that AS 38.05.180(aa)(2) is exclusively concerned with objections to the price a lessee submits as its contract price. [24] Other non-price related reasons for rejecting a request may still exist. If DNR is

correct that the statute does not authorize retroactive contract pricing, then DNR is justified in rejecting such a request even though the statute does not specifically list that reason for rejection. Therefore, AS 38.05.180(aa) would not preclude DNR from rejecting Marathon's request. As we will discuss below, agencies are generally given discretion to manage such procedural matters.

2. The purpose of the statute

a. The pro-consumer purpose of the 1986 amendments

Both parties agree that the purpose of the 1986 amendments was to benefit consumers: The statute lowers the amount of royalties paid by gas producers, and the savings are passed on to consumers. Marathon points to this pro-consumer purpose of the 1986 amendments and argues that allowing retroactivity would further this legislative purpose. Marathon argues that (1) the purpose of the statute is to benefit consumers by using contract pricing; (2) retroactivity results in more contract pricing; and (3) therefore, retroactivity is consistent with the purpose of the statute. Marathon cites extensive legislative history to support its argument, but while this legislative history generally recognizes the benefits of contract pricing, it does not answer the question whether the statute permits retroactivity.

9 Although it is true that the stated purpose of the 1986 amendments was to benefit consumers, the 1986 amendments exist ***1085** within the larger goals of the Alaska Land Act. Alaska Statute 38.05.180(a) recites the goals of the Alaska Land Act:

> (a) The legislature finds that
>
> (1) the people of Alaska have an interest in the development of the state's oil and gas resources to
>
> (A) maximize the economic and physical recovery of the resources;
>
> (B) maximize competition among parties seeking to explore and develop the resources; [and]
>
> (C) maximize use of Alaska's human resources in the development of the resources.

As we have recognized, the overall purpose of the Alaska Land Act is to maximize revenue for the state: In *Chevron v. LeResche* we pointed out that the purpose of the Alaska Land Act was "to provide for orderly oil and gas leasing that maximizes state return on its oil and gas resources," and that this fact should influence the statute's construction.[25] And as Marathon acknowledges, AS 38.05.180(aa) is "an exception to the goal of maximum royalty recovery."

Though the 1986 amendments' purpose of benefiting a smaller subset of Alaska's utility consumers would arguably support Marathon's interpretation, the Alaska Land Act's overall purpose of maximizing revenue for all Alaskan citizens would support DNR's interpretation. The 1986 amendments and their legislative history do not provide guidance as to which purpose should predominate in this case.

b. The legislative tolerance for retroactivity

Marathon points to the retroactivity that exists elsewhere in the statute and the fact that audits and royalty calculations occur well after the time of production. Royalty calculations involve amounts, such as "tax reimbursement amounts," that cannot be known until some time after production.[26] Marathon argues that the 1986 amendments reflect a tolerance for retroactivity and that, therefore, the statute allows retroactive requests for contract pricing. But Marathon ignores a crucial distinction between the type of retroactivity it seeks and the retroactivity built into the statute's structure. The statute recognizes that royalties will be *calculated* retroactively, but that is different than allowing the method used to calculate royalties to be *applied* retroactively. Royalties are necessarily calculated after the fact because the amount of gas production and other inputs will not be known until after production has occurred. Selecting which royalty calculation method to apply, however, can be accomplished before production has occurred.[27]

3. We defer to DNR's longstanding interpretation.

10 The key to our decision is the standard of review. We conclude that the statute is ambiguous and provides no direct answer whether retroactive contract pricing is permitted. We have recognized that "an agency's interpretation of a law within its area of jurisdiction can help resolve lingering ambiguity."[28] We therefore defer to DNR's interpretation that both the 1986 amendments' use of the word "prospective" and the Alaska Land Act's purpose of maximizing revenue prohibit it from approving retroactive contract pricing and we therefore conclude that it has a reasonable basis in the statute.

We are especially inclined to defer when an agency's statutory interpretation is longstanding. DNR has been applying its

interpretation for at least a decade. In multiple *1086 cases, we have recognized the special deference that is due to longstanding agency statutory interpretations. In *Bullock v. State*, we afforded a Department of Revenue interpretation "great weight" because it was "long-standing" and "continuous."[29] In *Bartley v. State*, we also emphasized how deference was due "when the agency's interpretation is longstanding."[30] In *Premera v. State*, we explained that we "apply a more deferential standard of review where an agency action is longstanding and continuous."[31] Since DNR's interpretation has been "longstanding and continuous," we apply this deferential standard of review and conclude that DNR's interpretation is reasonable.

B. DNR Was Not Required To Promulgate Its Interpretation In A Regulation.

11 12 Marathon argues that DNR's interpretation of the statute, even if valid, must be promulgated through a regulation before being applied to Marathon or any other party.[32] We use our independent judgment in deciding whether an agency action is a regulation.[33] Alaska Statute 38.05.020 provides that DNR may "establish reasonable procedures and adopt reasonable regulations necessary to carry out this chapter." Alaska Statute 38.05.020 requires that regulations so adopted must comply with Alaska's Administrative Procedure Act (APA).[34]

We have been hesitant to force agencies to promulgate all statutory interpretations as regulations.[35] Other courts have been similarly reluctant to require agencies to convert statutory interpretations into regulations, especially in matters that the agency would have had difficulty foreseeing. The United States Supreme Court in *SEC v. Chenery* explained this limitation: "[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."[36] We stated in *Alyeska Pipeline Service Co. v. State* that a "requirement that each [agency] interpretation be preceded by rulemaking would result in complete ossification of the regulatory state."[37] It would be counterproductive to require DNR to devote its resources to promulgating regulations on every possible eventuality. We have previously explained that "absent statutory restrictions and due process limitations, administrative agencies have the discretion to set policy by adjudication *1087 instead of rulemaking."[38] Here, DNR made its statutory interpretation in the context of adjudicating applications for contract pricing. Because we permit agencies to make new statutory interpretations in adjudications and because DNR's interpretation does not impose "any new substantive requirements,"[39] we hold that DNR was not required to promulgate its interpretation in a regulation.

C. Due Process

Marathon claims that "[d]ue process considerations are triggered by DNR's refusal to consider Marathon's request under the legislative criteria." But, as the State notes, it is somewhat difficult to discern what due process violation Marathon is alleging. The Alaska Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[40] The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." We have held that the "crux of due process is the opportunity to be heard and the right to adequately represent one's interests."[41]

Marathon did have sufficient notice and the opportunity to represent its interests. Marathon argues that DNR did not adequately "apprise" Marathon of the grounds on which DNR would make its decision. Marathon argues that because it did not have adequate notice of DNR's earlier interpretation of the statute, Marathon was therefore denied the "opportunity to defend its request and have its merits judged."

13 But DNR has relied on its interpretation of AS 38.05.180(aa) for over a decade. As we explained in *Alyeska Pipeline Service Co. v. State*, a statute itself can provide constructive notice of an agency's interpretation.[42] The statute in *Alyeska Pipeline*, like AS 38.05.180(aa), was silent on the issue in question. Nevertheless, we explained that, since the agency's interpretation was reasonable, a "careful reading" of that statute "should have alerted Alyeska to the possibility" that the agency could interpret the statute the way it did.[43] The fact that AS 38.05.180(aa) does not expressly prohibit retroactive requests does not mean that Marathon can assume that the statute allows retroactivity. Accordingly, we conclude that Marathon did have adequate notice that DNR could interpret AS 38.05.180(aa) as not allowing retroactive contract pricing.

14 Moreover, DNR did provide Marathon with notice of its decision on Marathon's request, and Marathon had the opportunity to present its arguments to DNR. After Marathon submitted its request, DNR rejected the request because

it was retroactive. Marathon requested reconsideration and argued that AS 38.05.180(aa) does permit retroactivity. DNR affirmed its earlier decision and explained its interpretation that "AS [3]8.05.180(aa) does not authorize the Department of Natural Resources to grant retroactive approval." Because Marathon had both adequate notice and a fair opportunity to present its claims, we conclude that its due process rights were not violated.

V. CONCLUSION

For the foregoing reasons, we AFFIRM the superior court's decision.

CHRISTEN, Justice, not participating.

Footnotes

1 The four prices are: (1) "the field price received by the lessee for the oil, gas, or associated substances"; (2) "the volume-weighted average of the three highest field prices received by other producers in the same field or area for oil of like grade and gravity, gas of like kind and quality, or associated substances of like kind and quality at the time the oil, gas, or associated substances are sold or removed from the leased or unit area or the gas is delivered to an extraction plant if that plant is located on the leased or unit area; if there are less than three prices reported by other producers, the volume-weighted average will be calculated using the lesser number of prices received by other producers in the field or area"; (3) "the lessee's posted price in the field or area for the oil, gas, or associated substances"; or (4) "the volume-weighted average of the three highest posted prices in the same field or area of the other producers in the same field or area for oil of like grade and gravity, gas of like kind and quality, or associated substances of like kind and quality at the time the oil, gas, or associated substances are sold or removed from the leased or unit area or the gas is delivered to an extraction plant if that plant is located on the leased land or unit area; if there are less than three prices posted by other producers, the volume-weighted average will be calculated using the lesser number of prices posted by other producers in the field or area." STATE OF ALASKA, DEP'T OF NATURAL RES., COMPETITIVE OIL AND GAS LEASE (ADL No. 384372), ¶ 38 (1995).

2 Ch. 55, SLA 1986.

3 Letter from Esther C. Wunnicke, Comm'r, Dep't of Natural Res., to Rep. Richard Schultz (Apr. 22, 1986).

4 *Native Village of Elim v. State,* 990 P.2d 1, 5 (Alaska 1999).

5 *Alaskans For Efficient Gov't, Inc. v. Knowles,* 91 P.3d 273, 275 (Alaska 2004) (quoting *Ganz v. Alaska Airlines, Inc.,* 963 P.2d 1015, 1019 (Alaska 1998)).

6 *Matanuska-Susitna Borough v. Hammond,* 726 P.2d 166, 175 (Alaska 1986).

7 *Id.*

8 *Id.*

9 *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.,* 171 P.3d 1110, 1119 (Alaska 2007).

10 AS 38.05.020, .180.

11 *Earth Res. Co. v. State, Dep't of Revenue,* 665 P.2d 960, 964 (Alaska 1983).

12 *See Kelly v. Zamarello,* 486 P.2d 906, 917 (Alaska 1971) (holding that reasonable basis deference is appropriate in areas with "complex subject matter").

13 697 P.2d 626, 633 (Alaska 1985) (quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 30.14, at 269 (1958)).

14 *Union Oil Co. of California v. State,* 804 P.2d 62, 64 (Alaska 1990).

15 Ch. 169, SLA 1959.

16 Ch. 169, Art. VIII, § 3, SLA 1959; Ch. 169, Art. II, § 4, SLA 1959.

17 Ch. 169, Art. VIII, § 3, SLA 1959.

18 *See supra* note 1.

19 AS 38.05.180(aa), (bb).

20 AS 38.05.180(aa).

21 *Borg-Warner Corp. v. Avco Corp.,* 850 P.2d 628, 633 n. 12 (Alaska 1993) ("Statutory construction begins with an analysis of the language of the statute construed in view of its purpose.").

22 *Wilber v. State, Commercial Fisheries Entry Comm'n,* 187 P.3d 460, 465 (Alaska 2008).

23 BLACK'S LAW DICTIONARY 1222 (6th ed. 1990).

24 Letter from Esther C. Wunnicke, Comm'r, Dep't of Natural Res., to Rep. Drue Pearce (Apr. 28, 1986).

25 663 P.2d 923, 931 (Alaska 1983).

26 AS 38.05.180(bb).

27 Moreover, the 1986 amendments provide that contract pricing can only be applied to gas sales made after the legislation's passage. The 1986 session law adopting AS 38.05.180(aa) includes a note stating that the statute is only to be applied prospectively: "The legislature finds that this authorization should apply prospectively and does not intend the authorization to apply to the valuation for royalty purposes of gas sold by a lessee under a gas sales contract entered into before the effective date of this Act." Ch. 55, § 1, SLA 1986.

28 *Wilson v. State, Dep't of Corr.*, 127 P.3d 826, 829 (Alaska 2006) (quoting *Bartley v. State, Dep't of Admin., Teacher's Ret. Bd.*, 110 P.3d 1254, 1261 (Alaska 2005)).

29 19 P.3d 1209, 1210, 1215 (Alaska 2001).

30 110 P.3d at 1261.

31 171 P.3d 1110, 1119 (Alaska 2007).

32 The Administrative Procedure Act defines a "regulation." AS 44.62.640(a)(3) (" 'regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; 'regulation' does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; 'regulation' includes 'manuals,' 'policies,' 'instructions,' 'guides to enforcement,' 'interpretative bulletins,' 'interpretations,' and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public").

33 *Alaska Ctr. for the Env't v. State*, 80 P.3d 231, 243 (Alaska 2003) ("Whether the agency action is a regulation is a question of law that does not involve agency expertise, so we apply our independent judgment.").

34 AS 38.05.020(b)(1).

35 *See Burke v. Houston NANA*, 222 P.3d 851, 867 (Alaska 2010); *see also* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.9, at 504 (5th ed. 2010) ("Courts cannot require agencies to make 'rules' only through rulemaking because sometimes an agency is justified in eschewing rulemaking in favor of gradual development of 'rules' through adjudication of cases....").

36 332 U.S. 194, 202–03, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

37 145 P.3d 561, 573 (Alaska 2006).

38 *Amerada Hess Pipeline Corp. v. Alaska Pub. Utils. Comm'n*, 711 P.2d 1170, 1178 (Alaska 1986).

39 *Smart v. State, Dep't of Health & Soc. Servs.*, 237 P.3d 1010, 1017 (Alaska 2010).

40 Alaska Const. art. I, § 7.

41 *Groom v. State, Dep't of Transp.*, 169 P.3d 626, 635 (Alaska 2007).

42 145 P.3d at 571.

43 *Id.*

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1/28/11 OVERVIEWS: DEPARTMENT OF PUBLIC SAFETY & ALASKA COURT SYSTEM

<TARGET><BILL></BILL><SUBJECT>1-28-11 OVERVIEWS DEPARTMENT OF PUBLIC SAFETY and ALASKA COURT SYSTEM</SUBJECT><COMM>HJUD27</COMM></TARGET>

Commissioner Joseph Masters
Department of Public Safety

Commissioner Masters was raised in Unalaska. Following his graduation from high school, the Commissioner pursued a career in law enforcement that spanned more than 24 years. He began his career as a Village Public Safety Officer in Unalakleet. Following his time as a VPSO, Masters served as police officer in both Unalakleet and Unalaska. The majority of his law enforcement career was within the ranks of the Alaska State Troopers, serving in both rural and urban Alaska. However, Commissioner Masters has also served with the division of Fish and Wildlife Protection. Shortly after retirement from the Alaska State Troopers in 2005, Commissioner Masters began working for Doyon Universal Services, where he was the Director of Security for Petrochemical Operations.

In September of 2008, then Governor Sarah Palin appointed Joseph Masters to Commissioner of the Department of Public Safety in September.

Commissioner Masters has served on many Boards, commissions, and committees. Commissioner Masters has served on the Board of the Alaska Native Justice Center, the Alaska Inter-Tribal Council, the Committee on Government to Government Relations, the Matanuska-Susitna Commission on Police Powers, the Board of Western Community Oriented Policing, and the Civil Air Patrol. Masters is a member of the International Association of Chiefs of Police, the Alaska Association of Chiefs of Police, the Alaska Peace Officers Association, the American Society of Law Enforcement Trainers, the Fraternal Order of Alaska State Troopers and the Aircraft Owners and Pilots Association. In Alaska, he is considered an expert in the area of law enforcement policy, procedures, training and management.

Commissioner Masters currently lives in Anchorage with his wife, Michelle. Together they have three children who are now grown.

Department of Public Safety

Department Overview

presented to

House Judiciary Committee

January 28, 2011

Department of Public Safety

"The mission of DPS is to ensure public safety and enforce

fish and wildlife laws"

DIVISIONS

- Administrative Services
- Statewide Services
- Fire & Life Safety
- Alaska State Troopers (AST)
- Alaska Wildlife Troopers (AWT)

BOARDS & COUNCILS

- Alcoholic Beverage Control Board (ABC)
- Council on Domestic Violence and Sexual Assault (CDVSA)
- Alaska Police Standards Council (APSC)
- Alaska Fire Standards Council (AFSC)

Alaska State Troopers

"preserve public peace, protect life, property, and resources"

Detachments

Bureau of Alcohol and Drug Enforcement

Bureau of Investigations

Bureau of Judicial Services

Bureau of Highway Patrol

Village Public Safety Officer Program

DPS Training Academy

- 133,401 calls for service
- 18 Homicides in 2010, 9 DV related, 1 SA related; all but one are solved, actively worked.
- 78 open cold cases, 30 cases have been solved, 11 have resulted in arrests for 1st Degree Murder, 20 are actively being worked.
- Jimmy Eacker: killer of Toni Lister was found guilty of Murder - First Degree by a Kenai jury in March 2010.
- Rita (Coville) Reth: killer of Scott Coville plead out to Murder in November 2010.
- Kenneth Dion: killer of Bonnie Craig is going to trial May 9th 2011.
- Marijuana grow operations, CY10 = 75. Prescription drug abuse cases increased from 216 in CY09 to 410 in CY10.
- Alcohol importation arrests CY10 = 234 arrests
- 400 Sexual Assaults and 363 Sexual Abuse of Minor cases (CY10)
- 63,099 Prisoner transports, 8,302 Arrest Warrants served or closed, 20,459 Writs served or closed
- 789 SARs, 389 Saves (CY10)
- 57 highway fatalities, 16 alcohol related (CY10)
- 4 Highway Safety Corridors –2 fatalities CY10, 1 alcohol related

VPSO Program

"preserve public peace and protect life and property in rural villages"

VPSO Contracts

- Aleutian Pribilof Island Association
- Bristol Bay Native Association
- Chugachmiut
- Tlingit-Haida Central Council
- Kawerak
- Tanana Chiefs Council
- Association of Village Council Presidents
- Kodiak Area Native Association
- Northwest Arctic Borough
- Copper River Native Association

- As of November 2010; 83 of 86 funded positions were filled.
- 24 VPSO's are currently at Academy
- Study; 40% reduction in the rate of serious injury from assault in communities with VPSO or VPO
- Prosecution for SA is 3.5 times higher in communities with VPSO or VPO
- Governors commitment to place VPSO's in communities. 15 Per Year
- VPSO AHFC Housing projects in Iguigig, Sleetmute, and Akiak approved
- Rural Grants – equipment, supplies and training
- Trooper Support - Village visits 4,113
- VPSO's investigated 6,020 incidents
- 173 DV and Assault arrests, 52 DUI arrests
- Probation and Parole
- 10 VPSO's attended DARE Sponsored Training
- Established Regional VPSO Support Trooper in Bethel – 3 additional positions projected for FY12

Alaska Wildlife Troopers

"enforce fish and game laws; preserve public peace; protect life, property, and resources"

Detachments

Wildlife Investigations Unit

Marine Enforcement

Aircraft Section

- 89,312 resource user contacts
- 4.3% violation to contact rate
- Boating Safety – 10,702 contacts
- Deaths: 2010 = 11 2009 = 12 2008 = 14 2007 = 17
- Cooperative Agreements with USFWS, NMFS-JEA, NPS
- Aircraft section participation in the Medallion Aviation Safety Program
- Lake Hood Hangar is complete

Recent Enforcement Success -

- **Illegal Guiding and Outfitting; Same Day Airborne; Sport Fish Guide Violations** – Kurt Lepping :700 days jail, fined $45,000, forfeited both Cessna 206 and Piper Super-cub used in commission of the violations.
- **Father, Son Plead Guilty to Big Game Guiding Violations in Brooks Range** - Michael H. Vanning Sr and Michael C. Vanning Jr. Each fined $7,000, forfeited Piper Super-cub used in the commission of the violations.
- **Ninilchik Sport Fishing Guide's License Revoked and Jail imposed for illegal Acts** - Arthur C. Aho, halibut sport fishing guide, Sentenced with 90 days in jail, fined $5,000, 40 hours of community work service, and six years probation.

Fire & Life Safety

"prevent the loss of life and property from fire and explosion"

Life Safety Inspections Bureau

Plan Review Bureau

Training & Education Bureau

Office of Rural Fire Protection

Joint Pipeline Office

- Fire Deaths: 24 in 2007, 19 in 2008, 22 in 2009, 12 in 2010.
- In 2010 1,940 building inspections were completed which was a 7% increase over 2009 (1,485)
- In 2010 1,356 plans were reviewed which was an 11% increase from 2009 (1,188)
- 1,299 students trained in 2009, 1,028 in 2010
- 11 deferred jurisdictions, audited every 2 years. Just completed first two year cycle.
- Fire and Building Officials Forum – 4th annual to be held in April.
- Office of Oil & Gas Systems and Facilities – in process of hiring plans examiner. Office to be fully staffed before end of session.
- Designed and implemented home fire safety iPhone "App". Available for free in iTunes.

Statewide Services

"preserve public peace, protect life, property, and resources"

Alaska Public Safety Information Network (APSIN)

Statewide Information Services

Network Support Group

Criminal Records and Identification Bureau

Automated Fingerprint Identification System (AFIS)

Permits and Licensing

- -Security Guard Licensing
- -Civilian Process Server
- -Concealed Handgun Permits

Sex Offender Registration

- APSIN re-design in final development stages
- Statewide Records Management System Development
- Statewide Traffic and Criminal Software (TraCS) System and Support
- Information Sharing Initiatives with Criminal Justice Partners:
  - DMV/Courts/Corrections/
  - Infrastructure planning and support for all hazards Fusion Center
- 2756 Registered Sex Offenders, 98 non-compliant
- 7086 Active Concealed Handgun Permits
- 77,971 Fingerprint cards received in 2010
- Fingerprint background backlog was 13,000 with 150 day turn time. This was eliminated and current turn time is 3-5 business days.
- Challenge; Digital Network Storage and migration to new technologies

Office of the Commissioner

"provide support and policy direction to divisions and agencies within the department"

Office of Professional Standards

Alaska Police Standards Council

Alaska Fire Standards Council

Council on Domestic Violence and Sexual Assault

Alcoholic Beverage Control Board

Crime Detection Laboratory

- Office of Professional Standards (OPS) is fully operational.
- Software tool now in place for managing citizen complaints and internal investigations. Also tracks uses of force, pursuits, and employee commendations.
- Web link in place for public reporting of employee conduct directly to OPS.
- Continue Training of 3,171 persons in statewide law enforcement.
- Training & Certification is offered to 6100 career firefighters and volunteers
- CDVSA funding to 21 Victim Service and 8 Batterers Intervention programs across Alaska; 10,657 victims accessed services.
- Funded 61 DV/SA Training sessions for Law Enforcement, Advocates, Prosecutors, First Responders, Court Personnel.
- Statewide prevention strategies employed: Real Alaska Men Choose Respect; Stand Up Speak Up; the 4th R (relationship) school curriculum started 34 teachers trained in 20 schools.
- Licensing of approx. 1800 liquor licensees and enforcement to ensure compliance with alcohol laws and regulations.

Crime Detection Laboratory

"provide forensic services to the Alaskan community"

SECTIONS

Breath Alcohol

Blood Alcohol

Biological Screening

DNA

Controlled Substances

Fire Debris (Arson)

Firearm/Toolmarks

Latent Prints

Shoe/Tire Impressions

Evidence

- 4756 cases submitted
  - 15% increase

  78% turned in 30 days or less
  - 8% improvement
- Cases over 120 days old 2%
  - 9% reduction
- Biological screening (pre-DNA) backlog eliminated
- Implemented a new sexual assault evidence collection kit
- 30 day turnaround time for CODIS samples
- 71 database hits
- DNA Backlog Reduction
  - Eliminated all sexual assault cases awaiting analysis prior to 2009
- New Crime Laboratory Construction on Schedule
  - June 2012 move in date

QUESTIONS ?

Doug Wooliver
Alaska Court System

Doug Wooliver is a lifelong Alaskan who has served as an administrative attorney for the court system since 1995. Doug has served as a legislative liaison for the court since 1997. This is Doug's 15th session in this role.

Doug served the legislature from 1993 -1994 as the staff attorney for the House Majority Caucus under Speaker Ramona Barnes.

Doug has a BA in psychology from the University of Northern Colorado and a law degree from the University of Washington.

2/04/11 OVERVIEW: DEPARTMENT OF CORRECTIONS

<TARGET><BILL></BILL><SUBJECT>2-04-11 OVERVIEW
DEPARTMENT OF
CORRECTIONS</SUBJECT><COMM>HJUD27</COMM></TARGET>

Summary of the Alaska Department of Correction's Presentation to House Judiciary
February 4, 2011

Cost Effective Justice: What's at Stake for Alaska?

The Alaska Department of Corrections (ADOC) is committed to providing for the secure confinement of offenders and providing for their rehabilitative programming and supervised community reentry. The ADOC 's overarching mission is to improve public safety while being a sound steward of state resources.

Alaska has the 11th fastest growing prison population in the United States. [1]

From 2000 to 2007, the Alaska prison population increased by 106 prisoners per 100,000 residents. Only Kentucky and West Virginia had a greater increase in per capita prison population. During that same period of time, the per capita prison population of twelve states actually decreased, while nationally the rate of incarceration increased by only 28 prisoners per 100,000 residents.[2] Alaska's prison growth has greatly exceeded its population growth.

From 2004 to 2009 the ADOC's total bookings have increased.

Year	CY 2004	CY 2005	CY 2006	CY 2007	CY 2008	CY 2009
Total Admissions	35,472	35,328	36,715	37,688	37,655	38,897

From 2004 to 2009, the number of prisoners occupying a state paid custodial bed or on Electronic Monitoring has steadily increased.

Year	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Daily annual average of state prisoners	4,769	4,805	4,999	5,204	5,383	5,320	5,602

[1] The PEW Center on the States, One in 31, the Long Reach of American Corrections, at 43, March 2009.
[2] Bureau of Justice Statistics, United States Department of Justice, Prisoners in 2007.

The January 2009, ISER Research Summary report, "The Cost of Crime" requested by the Senate Judiciary Committee found that, with no change in the level of intervention and prevention programs in place at the time of the study, Alaska's prison population was projected to grow to 10,513 by 2030. Such an increase in Alaska's prison population would require the state to fund an unsustainable number of new prisons, not to mention the costs of substantial increases in the state court system, and prosecution, defense, and public safety departments to handle Alaska's growing number of offenders.

95% of Alaska's prisoners are eventually released from prison.

As the number of prisoners grows so does the number of prisoners released. In 2000, there were 2,427 prisoners admitted into an Alaskan correctional facility and 2,599 released. In 2008, there were 3,635 prisoners admitted and 3,741 released. [3]

- In 2009, the ADOC released, on average, **295 convicted felons every month, up from 289 per month in 2008.**
- Of the 3,436 prisoners released in 2008, approximately 1,735 were released to Anchorage, 290 to Fairbanks and 106 to Juneau.

In summary, as of 2009, 1 out 36 Alaskans was under the jurisdiction of the ADOC.[4]

Year	1982	2007	2009
# of Alaskans under ADOC jurisdiction	1 out of 90	1 out of 38	1 out of 36

The question is: Are Alaskans getting good value for the criminal justice dollars spent? As of 2008, the state is doing better, but we could do better yet.

- In 2011, ADOC expects to spend $136.00 per day to incarcerate a prisoner or $49,800 per year per individual.
- In FY 2010, ADOC's annual budget was $261,160,400.[5]
- Yet, 2 out of 3 former prisoners return to prison within the first 3 years of release for either a probation violation or for the alleged commission of a new crime.[6]

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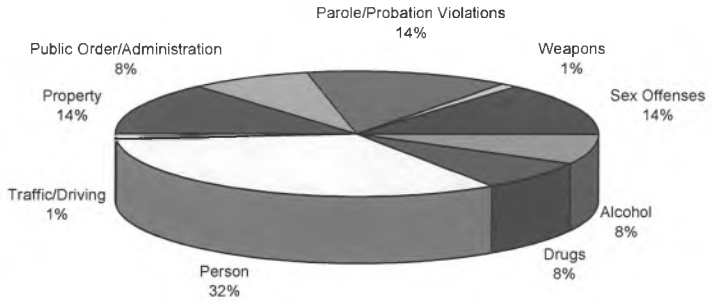
[3] Bureau of Justice Statistics, Alaska prisoner admissions and releases in 2008.
[4] The PEW Center on the States, One in 31, the Long Reach of American Corrections, pg 43, March 2009, available at:
http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf
[5] Departmental FY2010 FINAL Authorized (ADOC Management Plan with Supplemental)
[6] 2007 Alaska Judicial Council Recidivism Study.

As the pie chart below reflects, a snapshot of the ADOC's prison population in 2009 shows that less than 50% of offenders committed crimes against the person or a sex offense.[7]

Institutional Offenders
by Offense Class
December 31, 2009



Yet, 8% of its population consisted of offenders who had committed Public Order/Administration offenses. The majority of offenses in this category included bail condition violations, failure to appear and contempt of court. These are offenses that certainly require consequences, but, at what cost to the state, and is it possible to create less expensive alternatives that will serve to reaffirm societal norms and protect the public?

What's at stake for Alaska?

Currently, the ADOC is constructing the Goose Creek Correctional Center (GCCC) which will have a maximum capacity of 1536 prisoners. The cost to build this facility is approximately $250 million and the annual operating budget is estimated to be approximately $50 million per year.

The ADOC's goal, along with its other stakeholder partners, is to employ cost-effective measures that will promote public safety, reduce Alaska's prison growth rate and successfully reintegrate newly released prisoners back into their communities.

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[7] ADOC Offender Profile 2009, page 18 available at:
http://www.correct.state.ak.us/corrections/admin/docs/profile2009final.pdf

If Alaska expands recent efforts to reduce recidivism, and employs best practice measures that have been proven successful in other states, it stands the greatest chance to slow its prison system growth while improving public safety.

Collaboration and the identification of a leader is the key to success.

Current collaborative efforts are:

- The Criminal Justice Work Group
    - Sub-group: The Alaska Prisoner Reentry Task Force
    - Alaska's Five-Year Prisoner Reentry Strategic Plan, 2011-2016, Purpose is to identify approaches to reduce recidivism in Alaska.
- Probationer Accountability with Certain Enforcement (PACE), Superior Court Pilot Project in Anchorage, July 2010 to the present.[8]
- The National Governor's Association Cross-Governmental Sentencing & Corrections Policy Forum in Annapolis Maryland, Summer 2010.
- The September 18, 2010, Cost Effective Justice Forum, Anchorage, Alaska
    - Pew Public Safety Project
    - National Governor's Association

The Texas Experience

In 2007, the famously "tough on crime" Texas legislature took dramatic, bipartisan action to control crime and corrections costs. This initiative was led by Republican Jerry Madden who was appointed by the majority leader as Chairman of the Corrections Committee. The then speaker of the house instructed Rep. Madden to develop new approaches to slow Texas' rapid prison growth. "Don't build new prisons. They cost too much".[9] With that directive in mind, Rep. Madden, an engineer and graduate from West Point, gathered the data and the facts to develop a systematic approach to break the cycle of crime.

In 2007, Texas' prison population exceeded 100,000 persons.[10]At the start of 2007, the state's corrections department projected a shortfall of 17,000 prison beds over the next five years and recommended the construction of 4,000 new beds at a cost of more than $900 million. Texas legislators requested assistance from the Pew Center on the States' Public Safety Performance Project and its partner, the Council of State Governments Justice Center (CSG), to identify options to avert prison growth while protecting public safety.

Based on their nonpartisan research and the menu of policy options they prepared, the 2007 Texas legislature approved a plan that provided an historic investment of

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[8] For more information on the probation model go to: http://akdocpio.wordpress.com/

[9] Anchorage Daily News editorial, *Be tough, be smart*, September 19, 2010.

[10] Recent & Projected Growth of the Texas Prison Population, Justice Center (2007), The Council of State Governments, found at: http://justicereinvestment.org/files/texas-growth.pdf

just over $241 million in treatment and diversion facilities and substance abuse treatment services (just over a quarter of what was being requested to build new prisons) both behind prison walls and in community-based programs.

The components of Texas' new approach included:

- Funding for probation officers to use for outpatient substance abuse treatment for offenders.
- Funding for a mental health Pre-Trial Diversion Program
- Expansion of in-custody substance abuse Therapeutic Communities (like ADOC's RSSAT program).
- A prison dedicated to providing DWI offenders with intensive substance abuse treatment.
- Use of Intermediate sanction facilities for probationers who violate probation conditions.
- Early school intervention programs
- The Nurse Family Partnership program

With these and other measures, the Texas legislature successfully averted construction of all of the previously planned prison beds through 2012.[11]

According to Rep. Madden, who spoke at the September Cost-Effective Justice Forum held in Anchorage, the Texas prison population completely leveled off as a result of these initiatives. No shortfall in capacity is predicted until 2013, when the system may need a relatively small number of prison beds compared to the previously predicted need for eight prisons. Moreover, following the adoption of these reforms, Texas' crime rate did not increase, but continued to fall.

Summing it up:

The Texas experience is illustrative of what Alaska is clearly able to accomplish with leadership, vision and commitment to invest wisely today in best practices that have been shown to reduce prison growth, cut state corrections spending and serve to make Alaska's community safer and healthier places to live. This is the Cost-Effective justice approach.

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[11] The Texas "justice reinvestment" approach was a dramatic turn in Texas' criminal justice policies. The state legislature committed to ensuring accountability and the continued success of these new measures. Accordingly, the Texas legislature established the Criminal Justice Legislative Oversight Committee to monitor and evaluate the implementation of the new policies and programs and to evaluate their impact on state prison populations.

2/14/11 OVERVIEW: DEPARTMENT OF LAW

<TARGET><BILL></BILL><SUBJECT>2-14-11 OVERVIEW
DEPARTMENT OF LAW</SUBJECT><COMM>HJUD27</COMM></TARGET>

Department of Law

Photo by Sheena Scott, Department of Law Webmaster ©

Civil Division Overview
for the Joint Senate-House Judiciary Committees of the 27th Alaska Legislature
Attorney General Designee John J. Burns

1

MISSION

The mission of the Alaska Department of Law is to prosecute crime and provide legal services to state government for the protection and benefit of Alaska's citizens.

2

DEPARTMENT OF LAW ORGANIZATIONAL CHART

CRIMINAL DIVISION

Special Prosecution & Appeals
Juneau DA's Office
Ketchikan DA's Office
Sitka DA's Office
Barrow DA's Office
Kotzebue DA's Office
Nome DA's Office
Anchorage DA's Office
Kodiak DA's Office
Fairbanks DA's Office
Dillingham DA's Office
Palmer DA's Office
Kenai DA's Office
Bethel DA's Office

ADMINISTRATIVE SERVICES DIVISION

Management & Financial Forecasting
Budgeting
Fiscal and Accounting
Procurement
Timekeeping and Billing
Information Services

CIVIL DIVISION

Child Protection
Collections & Support
Commercial & Fair Business
Environmental Law
Human Services
Information & Project Support
Labor & State Affairs
Legislation & Regulations
Natural Resources
Oil, Gas & Mining
Opinions, Appeals & Ethics
Regulatory Affairs & Public Advocacy
Torts & Workers' Compensation
Transportation

3

Core Services

- I. Protecting the Safety and Financial Well Being of Alaskans
- II. Fostering Conditions for Responsible Development of Our Natural Resources
- III. Protecting the Fiscal Integrity of the State
- IV. Promoting Good Governance

4

Key Statistics

Attorneys	FY12	FY11	Change
Civil	163	162	1*
Criminal	122	121	1**
Administrative Services	1	1	0
Total	286	284	2

Support Staff	FY12	FY11	Change
Civil	140	139	1
Criminal	118	118	0
Administrative Services	21	21	0
Total	279	278	1

Department offices: *Anchorage, Barrow, Bethel, Dillingham, Fairbanks, Juneau, Kenai, Ketchikan, Kodiak, **Kotzebue, Nome, Palmer, and Sitka

5

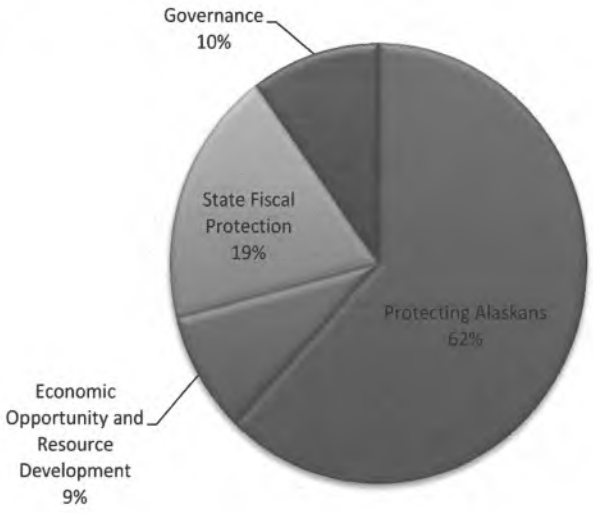
FY 12 Budget Request by Core Service

(In Millions)

Priority Programs	UGF Funds	DGF Funds	Other Funds	Federal Funds	Total Funds	Percentage of Total Funds
Protecting Alaskans	39.1	2.0	10.6	1.5	53.2	62.0%
Economic Opportunity and Resource Development	4.2	-0-	3.2	.1	7.5	8.7%
State Fiscal Protection	8.1	.7	7.6	-0-	16.4	19.2%
Governance	4.4	-0-	4.2	-0-	8.6	10.1%
Department Totals	55.8	2.7	25.6	1.6	85.7	100%

6

Core Services



7

FY 10 Return on Investment

(Millions)

	Awards & Collections	Costs (FY 10 Authorized)	Benefit to Cost Ratio
Return on Total Department Budget	$576.0	$85.4	6.75
Return on the Civil Division Budget	$576.0	$48.9	11.77

8

Criminal Division

- Carries out core function of Protecting Alaskans
  - **13 District Attorney's Offices** - Ketchikan to Kodiak to Kenai to Kotzebue, Barrow to Bethel, Anchorage, Dillingham, Palmer, Fairbanks, Nome and Sitka
  - **Office of Special Prosecutions** – Cold cases; Medicaid, welfare, PFD and insurance and workers' compensation fraud; cybercrimes; fish and game crimes; environmental crimes; alcohol interdiction; criminal non-payment of child support; violations of state tax law
  - **Appeals**
  - **Rural Prosecution Unit** – assists rural offices when work load demands outstrip available prosecutor resources

9

I. Protecting Alaskans Criminal Division

- *State v. Lepping*
  - Fish and Game prosecutor Andrew Peterson tried and convicted Wasilla guide Keith Lepping on 23 counts of fishing and hunting violations including bear baiting
    - Lepping jailed for almost a year, forfeited a C-206 and Super Cub, fined $85,500, lost his guide and transporter licenses
- *State v. Torian*
  - Cold case prosecutor Paul Miovas charged former Anchorage resident with murder in 2000 stabbing death of Genevieve Tetpon
    - One of a series of alleged murders involving Alaska Native women in 1999 and 2000

10

Prosecutors in Statewide Offices

11

How the Civil Division Supports the Department of Law's Four Core Missions

12

Assistant AG's in Statewide Offices

13

I. Protecting Alaskans Civil Division

- Child Protection (23 attorneys)
- Commercial and Fair Business (18 attorneys)
- Human Services (9 attorneys)
- Regulatory Affairs and Public Advocacy (3 attorneys)
- Environmental (10 attorneys)
- Labor and State Affairs (19 attorneys)

14

I. Protecting Alaskans
Child Protection Section

- Child Protection attorneys represent the Office of Children's Services when the welfare of a child is at risk
  - 3,000 Child in Need of Aid cases yearly
    - 2,000 cases ongoing at any time
  - Child protection attorney case load is 113 per attorney—exceeding the recommended national average of 100 cases

15

I. Protecting Alaskans
Child Protection Section

- Prevailed in **all eleven recent Alaska Supreme Court appeals** of superior court orders terminating parental rights, thereby freeing children for adoption by safe families

16

I. Protecting Alaskans
Commercial and Fair Business Section

- Consumer Protection Unit suits or settlements
  - Publishers Clearing House, DIRECTV, Dannon Yogurt, "Average Wholesale Price" Drug litigation
  - Local auto dealer making illegal advertisments about "guaranteed trade in allowances"
  - Juneau jewelers falsely advertising "40-75% off" sales

17

I. Protecting Alaskans
Commercial and Fair Business Section

- 2010 Department of Law Fuel Price study
  - Why are rural fuel costs so high?
    - Small volumes
    - Remote locations
    - Difficult weather
  - No evidence of price-fixing
    - ISER concurred in separate Western Alaska report

Rural Alaska fuel storage tanks

18

I. Protecting Alaskans

Human Services Section, Labor and State Affairs Section
Commercial and Fair Business Section

- *Patient Protection and Affordable Care Act (PPACA)*
  - Litigating constitutionality with 25 other states
- Ongoing advice to DHSS and Divisions of Insurance and Retirement and Benefits on how PPACA—if constitutional -- will affect Alaska
  - AlaskaCare, the state health care plan
  - Insurance exchange
  - Medicaid expansion

ALASKACARE

19

I. Protecting Alaskans
Human Services Section

- Defending State DHSS in lawsuits for program payments
  - Medicaid
  - Foster care
  - Public assistance
- Representing DHSS in facilities licensing investigations and enforcement actions
  - Hospitals
  - Nursing homes
  - Assisted living facilities
  - Child Care centers
  - Foster homes
- Representing DHSS in Medicaid overpayments
  - Independent auditor said provider service charges excessive
  - Potential recoupment $1.9 million+

20

I. Protecting Alaskans Environmental Section

- *State v. BP Exploration Alaska (BPXA)*
  - Suit to recover civil assessments and revenue losses from the 2006 Prudhoe Bay pipeline shutdown due to corrosion

Leak and spill

Sludge buildup prevented corrosion detection equipment from working

21

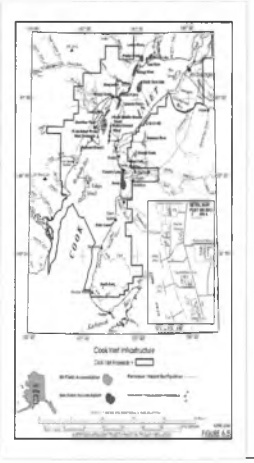
I. Protecting Alaskans Environmental Section

- *Cruise Ship Initiative*
- HB 134 regulating wastewater discharges allows cruise ship owners and operators until 2016 to fully comply with new water quality standards
  - State defending lawsuit challenging DEC's new permit

22

I. Protecting Alaskans
Regulatory Affairs and Public Advocacy Section

- RAPA advocates public interests in regulated utility matters before the Regulatory Commission of Alaska (RCA)
  - *Cook Inlet Natural Gas Storage Alaska* (CINGSA)
    - RCA's decision approving underground gas storage facility issued January 31, 2011



23

I. Protecting Alaskans
Regulatory Affairs and Public Advocacy Section

- *Enstar* Billing Error Refunds
  - RCA ordered Enstar to pay $5.7 in refunds
  - RAPA monitoring to assure refunds paid to eligible customers

ENSTAR
Natural Gas Company

24

I. Protecting Alaskans Civil and Criminal Division

- Played a key role in developing the 10-year Sexual Assault/Domestic Violence Initiative
- Collaborating with agencies and non-profits to support the Initiative
- Coordinated PSA's for the "Choose Respect" campaign
- Sponsored pro-bono summits

25

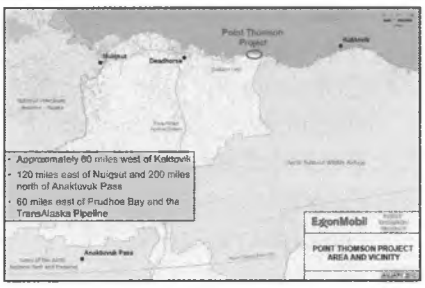
II. Fostering Responsible Development

- Oil Gas and Mining (14 attorneys)
- Transportation and Public Facilities (8 attorneys)
- Environmental (10 attorneys)
- Natural Resources (13 attorneys)

26

II. Fostering Responsible Development
Oil Gas and Mining Section

- *Point Thomson litigation*
  - Continuing to pursue resolution with ExxonMobil



27

II. Fostering Responsible Development
Transportation and Public Facilities Section

- Advising DOTPF and defending state on building projects
  - Goose Creek Prison
  - Alaska Marine Highway System HQ and Ketchikan dry dock expansion
  - Juneau Access Road
  - Knik Arm Crossing
  - In-state gas pipeline and propane projects

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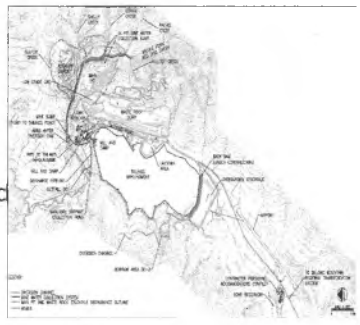
II. Fostering Responsible Development
Environmental Section

- Joined Couer Alaska and defended Army Corps of Engineers Clean Water Act permit authorizing disposal of mine tailings
- Prevailed in the United States Supreme Court, allowing **Kensington Mine** to open
- **Mine opening created and preserved hundreds of jobs**

29

II. Fostering Responsible Development
Environmental Section

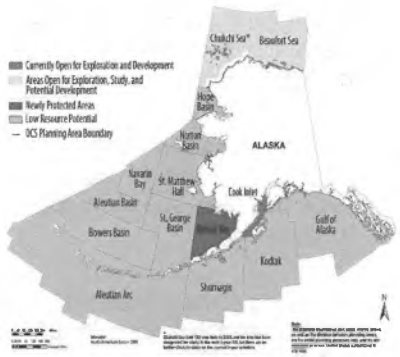
- Red Dog Mine
  - EPA withdrew key components of water pollution discharge permit
  - Assisted DEC in promulgating new regulations
    - Incorporated into a revised Clean Water Act permit
  - Mine operations continued
  - Jobs preserved



30

II. Fostering Responsible Development Oil Gas and Mining Section

- **Defended Outer Continental Shelf (OCS) leases in court challenges**
  - Opposed a challenge to Interior's grant of Lease 193 to lessees
    - Court clarified that injunction on Lease Sale 193 pending further Interior review did not enjoin seismic testing
  - Defended Interior's approval of Shell's Beaufort and Chukchi Sea OCS exploration plans in lawsuits in federal courts
  - Filed an amicus brief in support of Interior's approval of OCS 5-year plan

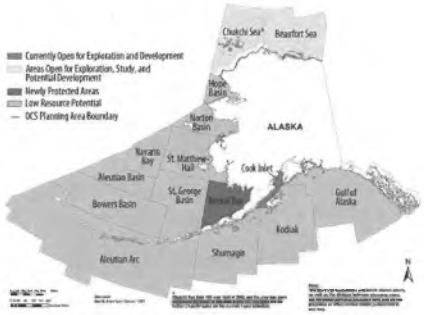


April 6, 2010 Department of Interior Outer Continental Shelf Strategy

31

II. Fostering Responsible Development Oil Gas and Mining Section

- Challenged Interior's purported imposition of a "moratorium" on development in Alaska OCS
  - In *Alaska v. Salazar,* based on Interior's unequivocal denial of a "moratorium," clarity achieved



32

II. Fostering Responsible Development Natural Resources Section

- **Tongass Timber**
  - State partners with U.S. Forest Service in management of Tongass National Forest
    - State intervenes to defend timber sales where appropriate
      - Supported "Tongass Exemption" to USFS "Roadless Rule"
      - Supported Forest Service authorization of Logjam sale

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II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act Developing Comprehensive Strategy**
  - Challenging unwarranted listings
  - Challenging unwarranted critical habitat designations
- Listings and designations can affect shipping, transportation, oil and gas development, mining, commercial, sport and subsistence fishing and hunting

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II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act**
  - Listing petitions
    - Polar bears
    - Beluga whales in Cook Inlet
    - Steller sea lions
    - Humpback whales
    - Pacific walrus
    - Seals (ringed and bearded)
    - SE Alaska Pacific herring

  - Critical Habitat Designations
    - Polar bear
    - Cook Inlet Beluga whale

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II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act**
  - Pending Lawsuits and appeals
    - Polar bear
    - Beluga whales
    - Steller sea lions
    - Humpback whales
    - Ribbon seal

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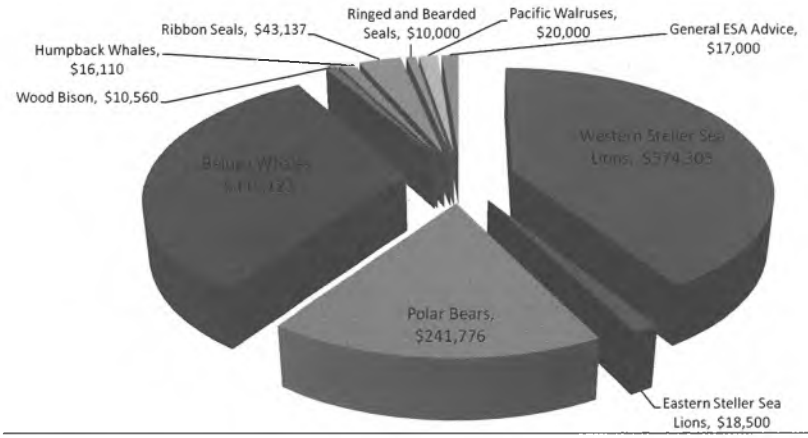
II. Fostering Responsible Development Natural Resources Section

- **Endangered Species Act**
  - Threatened lawsuits
    - State's notice of intent to sue to challenge 187,000 square miles of critical habitat designation for polar bear

37

ESA
FY11 Budget Expenditures ($1,396,875)



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II. Fostering Responsible Development Oil Gas and Mining Section

- Assisting DNR and DEC in requesting prompt federal review of challenges to petroleum exploration in the **National Petroleum Reserve-Alaska** (NPR-A)
  - Clean Water Act wetlands fill permit for CD-5 project

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II. Fostering Responsible Development Natural Resources Section

- Advising DNR on response to BLM Wilderness and "Wild Lands" designations
  - Interior Secretary Salazar ordered the evaluation of 72 **million+ acres of federal land in Alaska for wilderness characteristics, potentially** allowing federal government to create de-facto wilderness in Alaska without congressional oversight
  - Affects permitting and right of way determinations
    - Changes the multiple use mandate otherwise applicable to BLM lands
  - U.S. Fish and Wildlife Service revisions to the Arctic National Wildlife Refuge (ANWR) Comprehensive Conservation Plan, evaluating wilderness
    - Dept. of Law provided legal advice to Governor who wrote President Obama urging him to respect ANILCA

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II. Fostering Responsible Development
Environmental Section

- Assisting DEC's request for prompt EPA action on Shell's Clean Air Act permit application after Environmental Appeals Board (EAB) remanded application for further work
  - EAB questioned EPA's analysis of impacts of nitrogen dioxide emissions from drill ships
  - Shell now postponing plans to drill exploratory wells this summer

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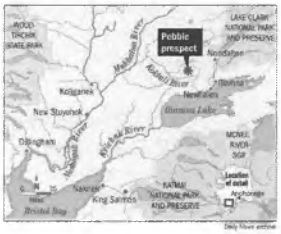
II. Fostering Responsible Development
Environmental and Natural Resources Sections

- Clean Water Act 404(c)
  - EPA by MOA with Corps of Engineers may invoke 404(c) to veto some Corps permit decisions
    - EPA usually exercises veto authority sparingly (only 13 time since 1972)
  - Southwest Alaskans asking EPA to invoke 404(c) process before companies at Pebble prospect apply for development permits on state mining claims
  - Assisting DEC and DNR in evaluating response to EPA's agreement to review



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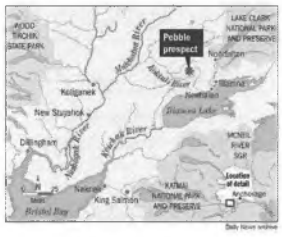
II. Fostering Responsible Development

Environmental Section

- *Nunamta Aulukestai v. State*: Defending the State in a suit alleging constitutional violations in statutes and regulations that authorize temporary land and water use permits for mineral exploration at the Pebble project



II. Fostering Responsible Development

Natural Resources Section

- Defending Alaska's Fisheries Management
  - *In Upper Cook Inlet Drift Association v. Locke*, state intervened (with U.S.) in lawsuit where UCIDA wanted to preempt *state* management of salmon fisheries in Cook Inlet (state waters)
  - UCIDA and U.S. settlement requires UCIDA to submit allocation proposals to state Board of Fisheries
- ADF&G request exclusive management

III. Protecting Fiscal Integrity

- Collections and Support (8 attorneys)
- Oil Gas and Mining (14 attorneys)
- Labor and State Affairs (19 attorneys)
- Torts and Workers' Compensation (15 attorneys)

45

III. Protecting Fiscal Integrity
Collections and Support Section

- Collects criminal fines and surcharges owed the State and restitution owed to 3rd parties
  - Collected $7.3 million in FY 10, of which $1.1 million was for victim restitution

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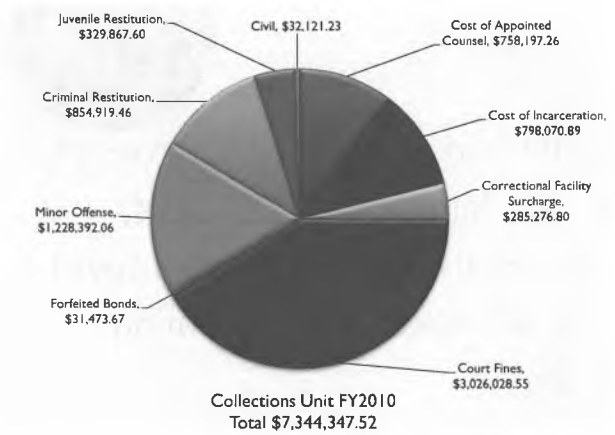
Collections and Support Recoveries FY 10



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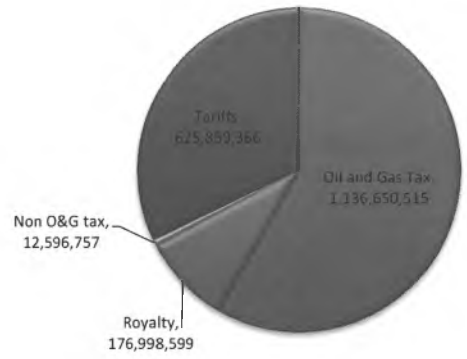
III. Protecting Fiscal Integrity Oil Gas & Mining Section

- Oil and Gas Royalties and Taxes - Summary
  - State operating revenues come from oil and gas corporate income taxes, production taxes, property taxes and royalties on Alaska North Slope crude oil
- Collected nearly $82 million in additional taxes and royalties in *calendar* year 2010
- Collected $95.9 million in FY 11 through February 8, 2011

48

Oil, Gas and Mining Decisions and Settlements FY00-FY10 ($1.95 billion)



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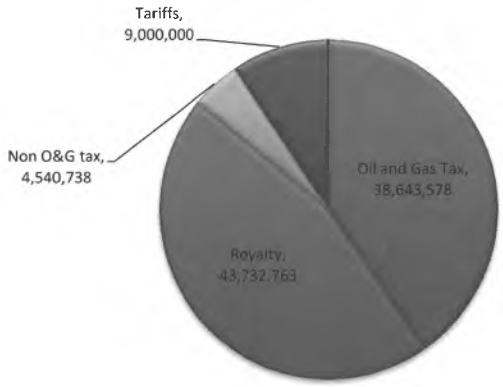
Oil, Gas and Mining Decisions and Settlements FY11 Though February 8, 2011 ($95.9 million)



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III. Protecting Fiscal Integrity
Oil Gas and Mining Section

- TAPS Tariff Litigation
  - State protested TAPS tariff rates for 2005 and following years before the Federal Energy Regulatory Commission (FERC) and Regulatory Commission of Alaska (RCA)
  - TAPS Strategic Reconfiguration case concurrently before FERC and the RCA
    - State challenge to TAPS' Owners inclusion of hundreds of millions of dollars in imprudently incurred capital project expenditures in the tariffs.
    - Eight-week hearing before the FERC and RCA scheduled for November 2011

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III. Protecting Fiscal Integrity
Oil Gas and Mining Section

- TAPS Property Tax Litigation
  - Represented Dept of Revenue in Superior court trial on 2006 TAPS property tax valuation
  - Court said State Assessment Review Board (SARB) methodology correct
  - Outcome increased property tax revenues for affected municipalities and state
    - TAPS Owners appealed
      - assessment too high
    - Municipalities also appealed
      - assessment too low

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III. Protecting Fiscal Integrity
Oil Gas and Mining Section

- More TAPS Property Tax litigation
  - Representing Dept of Revenue in Superior Court appeals from SARB's 2007-2009 TAPS property tax assessments
  - Eight-week trial in September 2011

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III. Protecting Fiscal Integrity
Commercial and Fair Business and Labor and State Affairs Sections

- Cruise Ship Initiative Passenger Tax
  - Cruise ship initiative made income from cruise ship water activities subject to Alaska Net Income Tax and imposed a gambling tax and a "head" tax of $46
  - Cruise industry sued state over the "head tax"
  - Defended Dept of Revenue and assisted in negotiating a settlement
  - Legislature passed new law reducing the tax rate to $34.50
  - Preserves payment of about $34 million per year to defray costs of services and facilities to accommodate passenger visits

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III. Protecting Fiscal Integrity
Labor and State Affairs Section

- State lawsuit against Mercer, actuary for state pension plans (PERS) and (TERS)
  - Lawsuit settled
  - Mercer paid $500 million

55

III. Protecting Fiscal Integrity
Natural Resources Section

- *Carlson v. State*
  - 26 year old lawsuit by non-resident fishermen
    - They sought refunds of commercial fishing permit fees
      - Nonresident fees used to be 3x higher than resident fees
  - Court ruled against state
    - Judgment is $12 million in principal
      - $82.3 million total
      - Much of it due to 11% prejudgment interest compounded quarterly
      - plus attorney's fees
  - Case on appeal to Supreme Court
  - Successful outcome could be worth $60 million in savings

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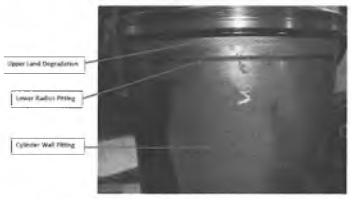
III. Protecting Fiscal Integrity
Transportation Section

- State suing the boat builder and the manufacturer of the state's two fast ferries (*M/V Fairweather* and *M/V Chenega*) for engine defects

Gruenberg: "consequential damages"

- Engine defects have cost the state hundreds of thousands of dollars in repairs
- *M/V Fairweather* still out of service



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III. Protecting Fiscal Integrity
Tort and Workers' Compensation Defense Section

- In 2010, Department successfully defended over 200 tort claims with **no adverse judgments** against the state

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IV. Promoting Good Governance

- Natural Resources (13 attorneys)
- Opinions, Appeals and Ethics (11 attorneys)
- Labor and State Affairs (19 attorneys)

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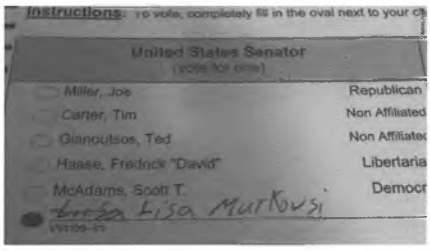
IV. Promoting Good Governance
Labor and State Affairs Section

- Defended Federal Elections (November 2010) lawsuits
  - Write-in candidate's name lawsuit
  - Miller public records lawsuit
  - Miller federal lawsuit (part 1)
  - Miller state lawsuit
  - Miller federal lawsuit (part 2)
  - Other lawsuits
    - Voting Rights Act lawsuit
    - Fairbanks suit filed 1/10/11 (state moved to dismiss as untimely)
- Law advised and defended Division of Elections



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IV. Promoting Good Governance
Labor and State Affairs Section

- *Nick v. State*
  - Defended and settled elections lawsuit in Western Alaska
  - Enhancements to language assistance for Yup'ik speaking voters will be available at elections in Bethel area

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IV. Promoting Good Governance
Opinions, Appeals and Ethics, Labor and State Affairs Sections

- Defending the Initiative Process
  - *Planned Parenthood v. Campbell*
    - State defended lawsuit to overturn certification of ballot initiative to require parental notification of minor daughter's abortion
      - Alaska Supreme Court ruled initiative should appear on the ballot
      - Alaska voters enacted parental notification law by initiative in 2010
        - Constitutionality of that law now being challenged in *Planned Parenthood v. State*
  - *Natural Right to Life (10NRTL)*
    - Department opined initiative should not be certified because proposal "clearly unconstitutional" under federal and state law

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IV. Promoting Good Governance
Opinions, Appeals and Ethics Section

- *Executive Branch Ethics Act* advice and enforcement
  - Adopted new regulations, including standards governing state reimbursement of attorneys fees incurred by state officers exonerated in an ethics complaint proceeding
    - Similar to Rep. Gruenberg's HB 14 authorizing state reimbursement only after exoneration
  - Ethics training for senior managers and boards
  - Advisory opinions and investigations

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IV. Promoting Good Governance
Opinions, Appeals and Ethics Section

- Public Records Requests
  - 26,500 pages of former Governor Palin's emails
    - Legal review to be completed by 3/31/11
    - Governor's Office review to be completed by 5/31/11
  - In 2010, Department of Law
    - Addressed 43 separate voluminous public records requests directed to Law
    - Provided privilege reviews for records requests to other state agencies

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CHALLENGES AND OPPORTUNITIES

WHAT'S AHEAD FY 12 AND BEYOND

65

- Continue to Advance Core Services
- State-Federal Relations
  - Areas where state and federal cooperation is working well
  - Areas where a core state interest requires federal challenge

66

General Examples where State-Federal Cooperation is Working Well

- Department of Environmental Conservation's (DEC) air permitting program
- DEC assumption of National Pollutant Discharge Elimination System (NPDES) permit program under the federal Clean Water Act
- Cleanups at federal facilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other federal and state laws

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Specific Examples of State Cooperation with Federal Programs

- Defended Army Corps of Engineers Clean Water Act permit authorizing disposal of mine tailings, allowing Kensington Mine to open
- Worked with EPA to incorporate revised DEC regulations into Red Dog Mine Clean Water Act permit
- Intervened on side of U.S. in *Point Hope v. Salazar* and *Center for Biological Diversity v. U.S.*
  - Outer Continental Shelf cases
    - challenging the OCS 5-year plan
    - challenging to OCS Lease Sale 193 (Chukchi Sea)
    - Challenging Shell's Beaufort and Chukchi Sea OCS exploration plans
- Supported U.S. Forest Service authorization of Logjam timber sale

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Areas Where a Core State Interest Requires Challenge Because of Federal Overreach

- **Endangered Species Act**
  - U.S. Fish and Wildlife Service
    - Species listings
    - Critical habitat designations
- **Clean Water Act**
  - Environmental Protection Agency
    - Wetlands fill permit 404(c) elevated scrutiny
      - CD-5
      - Tanana River Bridge
    - Pre-permit scrutiny
      - Pebble prospect
- **Clean Air Act**
  - Environmental Protection Agency
    - Offshore oil and gas exploration
      - Shell Beaufort Sea drilling plans
- **Wilderness and "Wild Lands" designations**
  - Bureau of Land Management
    - Designations could tighten permit requirements
- **Patient Protection and Affordable Care Act**
  - Constitutionality

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Challenges and Opportunities

- Support--as legally appropriate--**responsible resource development**
  - Develop a comprehensive long term development strategy
    - Endangered Species Act
      - Unwarranted listings
      - Unwarranted designations of critical habitat
    - Outer Continental Shelf exploration
      - Challenges when warranted
    - Clean Air and Water Acts
      - Challenges when warranted

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Challenges and Opportunities

- Develop a 5-year **interdepartmental** plan
- Coordinate and cooperate
  - Legislative and executive branches of state government
  - All executive agencies
    - Department of Natural Resources
    - Department of Environmental Conservation
    - Department of Commerce Community and Economic Development
    - Department of Law
    - Department of Fish and Game

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Challenges and Opportunities

- Cooperate and coordinate with stakeholders **outside** *and* **inside** state government
  - Municipalities
  - Boroughs
  - Native corporations and tribes
  - Other states
    - Washington and Oregon joined to de-list the Stellar sea lions
  - Allies like National Association of Attorneys General and Association of Fish and Wildlife Agencies

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- Thank you

Attorney General Designee
John J. Burns

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74

2/06/12 OVERVIEW: BALLOT INITIATIVE 11ACMP – ESTABLISHING THE ALASKA COASTAL MANAGEMENT PROGRAM

<TARGET><BILL></BILL><SUBJECT>2-06-12 OVERVIEW BALLOT INITIATIVE 11ACMP - ESTABLISHING THE ALASKA COASTAL MANAGEMENT PROGRAM</SUBJECT><COMM>HJUD27</COMM></TARGET>

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET

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received
2/27/2012 PS

(Dent to Court. 2/23/12)

February 22, 2012

The Honorable Hollis French
Chairman, Senate Judiciary
Alaska State Legislature
State Capitol, Room 417
Juneau, AK 99801-1182

The Honorable Carl Gatto
Chairman, House Judiciary
Alaska State Legislature
State Capitol, Room 118
Juneau, AK 99801-1182

Dear Senator French/Representative Gatto,

Thank you for the opportunity to present the cost statement for the ACMP initiative before the Joint Judiciary Committee on February 6, 2012. The following is in response to questions posed by the Committee during the presentation for distribution to the members.

Questions from the Joint Judiciary Committee meeting Feb. 6

1. *Senator Wielechowski asked why a fiscal note for HB106 showed that the former ACMP federal program had shown $4.0 million in federal funding, while the statement of cost indicated available federal funding was $2.0 million.*

A fiscal note prepared on 05/13/2011 by the Senate Finance Committee for HB106 shows $4.0 million in federal funding for ACMP. (See Attachment 1) However, this level of federal funding appears well in excess of any recently available federal funding for coastal management programs.

Federal funding for Coastal Management Program administrative grants are governed by 16 U.S.C. § 1455. Since federal fiscal year 2008 (FFY2008) federal funding has come in three funding streams referred to as Sections 306/306A (tiered federal match up to 1:1); Section 309 (no match required); and the Coastal Non Point (CNP) or Section 310 (requires 1:1 match and not funded in FFY 2010).

Federal funding streams in the three programs are subject to maximum awards based upon the availability of federal funds. Alaska has typically received the maximum allowed for these programs. Below is a table showing federal funding from FFY2008-FFY2010. In these years, no more than $2.6 million was available for federal funding of state coastal management programs. Copies of the US

printed on recycled paper

Department of Commerce's program allocation letter are provided for your review. (Attachments 2-4.)

Federal Fiscal Year 2008	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$55,542,000	$10,000,000	$1,428,000	$66,970,000
Maximum State Funding	$1,967,000	$536,000	$42,000	$2,545,000
Alaska Allocation	**$1,967,000**	**$536,000**	**$42,000**	**$2,545,000**

Federal Fiscal Year 2009	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$56,079,000	$10,000,000	$2,345,000	$68,424,000
Maximum State Funding	$1,995,000	$536,000	$75,000	$2,606,000
Alaska Allocation	**$1,995,000**	**$536,000**	**$75,000**	**$2,606,000**

Federal Fiscal Year 2010	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$57,085,000	$10,000,000	$0	$67,085,000
Maximum State Funding	$2,030,000	$536,000	$0	$2,566,000
Alaska Allocation	**$2,030,000**	**$536,000**	**$0**	**$2,566,000**

As indicated during testimony, the total cost estimate of $5.4 million annually could be shared by the federal government provided that the state becomes eligible for federal funding. Uncertainty remains about the timing and availability of the federal funding stream, and all of the funds that would be requested for the budget are subject to legislative appropriation.

2. *Senator French and Representative Holmes asked for more specifics about the costs included in the overall cost estimate. They were specifically interested in information about ongoing versus one-time costs.*

Please see the summary below that itemizes costs by category. Comments about ongoing versus one-time costs are included in the narrative section. The estimates currently allow flexibility for the state to address one-time costs, however should the initiative pass, program implementation costs are likely to be different than those presented. All proposed costs will be subject to appropriation by the legislature.

CATEGORY	Description	
Personal Services	This expenditure would be an ongoing cost to support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program In the first two years, it is likely that personal services costs will be lower than this estimate due to the program beginning from scratch. However, there will be many other activities associated with the initial gear up of the program though, so there is significant uncertainty about what percentage of these resources will be needed in the first two years.	$3,260,000
Travel	The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. Some portion of these travel resources would likely be redeployed to other program activities after the program is approved.	$267,900
Services	This expenditure is an ongoing cost to support contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors. This estimate also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, and other start up activities.	$1,815,300
Commodities	This is an ongoing expenditure estimate that supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment. In the first two years, actual costs in this category are likely to be significantly	$56,800

	higher as the office acquires all of the office furnishings, office equipment and other commodities necessary to build an office from scratch.	

3. *Senator French asked for more specificity about the costs included in the estimate of costs to support implementation of the 13-member Coastal Policy Board governance structure.*

The estimate of additional costs was based largely on cost estimates provided by the Department of Natural Resources (DNR) in their fiscal note for HB106 dated 04/15/2011. (Attachment 5) This fiscal note was chosen as a basis due to its somewhat similar nature to the initiative envisioned program. Comments on whether these are expected to be ongoing or one-time costs are also included.

As indicated during the testimony, these estimates assume a program that is substantially similar to the previous program with a 13-member board meeting in person 4 times annually. Significant uncertainty remains about the program that the board would ultimately implement and the associated costs. It should be noted that not all of the increased costs are directly attributable to the board members.

The costs in the table below are presented as subsets of the estimates presented in the prior table.

CATEGORY	Description	
Personal Services	One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing. This is an ongoing cost and would be directly attributable to the Coastal Policy Board.	$109,800
Travel	This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. These travel resources would likely be redeployed to other program related travel or review activities after the program is approved. These costs are not directly attributable to the addition of a board. This expenditure estimate also includes $60,000 in ongoing travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two staff members at approximately $1,000 per trip. This is an ongoing cost directly attributable to addition of a Coastal Policy Board.	$164,000

Services	This expenditure supports an additional $300,000 in ongoing services agreements with other state agencies services that DNR indicated would be needed to successfully implement the ACMP program. This would be an ongoing cost. These costs are not directly attributable to the addition of a board. The estimates include $60.000 estimate for regulations review by the Department of Law that would be of limited duration. Length of need is uncertain and dependent upon the complexity of the regulations and the time it takes to promulgate and implement them, this could be a cost for 2-4 years, however these resources would likely be redeployed to reviews and other program support after that time. Other ongoing services costs included $20,000 in postage, teleconference services, and other miscellaneous board and coastal district support such as conducting elections in coastal districts. This would be an ongoing cost directly attributable to the addition of the board.	$380,000
Commodities	This estimate includes some $5,600 in one-time costs such as the purchase of a recorder and sound equipment for the board. Ongoing costs include $10,000 in supplies needed to support the presentation of materials at the board meetings. These costs are directly attributable to the addition of a board.	$15,600

Attachments:
Attachment 1 Sen Finance ACMP Fiscal Note 05.13.2011.pdf
Attachment 2 CZMA Allocation memo FY2008.pdf
Attachment 3 CZMA Allocation memo FY2009.pdf
Attachment 4 CZMA Allocation memo FY2010.pdf
Attachment 5 DNR ACMP Fiscal Note 04.15.2011.pdf

Fiscal Note

State of Alaska
2011 Legislative Session

Fiscal Note Number: 10
Bill Version: SCS CSHB 106(FIN)
(S) Publish Date: 5/13/11

Identifier: CSHB106(FIN)-DNR-DCOM-4-15-11
Title: COASTAL MANAGEMENT PROGRAM
Sponsor: RLS BY REQUEST OF THE GOVERNOR
Requester: CONF COMM
Submitted: SENATE FINANCE for SCS CSHB 106(FIN)

Department: Department of Natural Resources
Appropriation: Land & Water Resources
Allocation: Alaska Coastal and Ocean Management
OMB Component Number: 2680

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	3,260.0		3,260.0	3,260.0	3,260.0	3,260.0	3,260.0
Travel	251.6		251.6	141.8	141.8	121.8	121.8
Services	3,144.4		3,144.4	3,084.4	3,084.4	3,084.4	3,084.4
Commodities	59.8		54.2	54.2	54.2	54.2	54.2
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**
Capital Expenditures							
Change in Revenues ( )							
Fund Source (Operating Only)							
1002 Fed Rcpts	4,039.0		4,039.0	4,039.0	4,039.0	4,039.0	4,039.0
1003 G/F Match	1,672.6		1,672.6	1,672.6	1,672.6	1,672.6	1,672.6
1004 Gen Fund	664.1		658.5	488.7	488.7	468.7	468.7
1007 I/A Rcpts	95.5		95.5	95.5	95.5	95.5	95.5
1061 CIP Rcpts	244.6		244.6	244.6	244.6	244.6	244.6
Total	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**

Estimate of any current year (FY2011) cost: 0.0

Positions

Full-time	34.0		34.0	34.0	34.0	34.0	34.0
Part-time							
Temporary							

Reason For Change:

CC: This fiscal note combines the additional funding requested with FY12 program funding removed by the Senate. Additionally, this fiscal note is updated to reflect changes made in the House Finance committee substitute.

This revised fiscal note includes $1.36 million capital authorization (federal) for operating grants to communities so they have the funding necessary for local participation.

Analysis:

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. The annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's administration of the grants was removed from the Senate version of the FY12 Capital Budget making it subject to conference committee.

The Alaska Coastal Management Program (ACMP) will automatically terminate on July 1, 2011 (SLA2005, CH31, Sec 22). CSHB106(FIN) would extend the termination date to July 1, 2017.

Submitted By: Senate Finance for SCS CSHB 106(FIN)

Prepared By: Conference Committee

Date: 05/04/2011

This fiscal note reflects the increased fiscal impacts due to the additional Division of Coastal and Ocean Management (DCOM) duties, including the administration and implementation of the Alaska Coastal Policy Board (CPB). Those increased fiscal impacts are detailed below:

Personal Services
One additional position, a Project Coordinator (range 20), will be required to cover the additional work associated with the CPB and the coordination of district planning functions and information sharing.

Travel
The CPB will meet four times in-person in the first two years following establishment of the board, and will meet in-person twice annually after that. The CPB will need to meet more frequently in-person for the first two years in order to establish board protocols, review coastal district plans, and address issues of interest to ACMP participants. CPB travel includes nine members and two DCOM support staff.

In addition, recognizing coastal districts will be amending their district plans based on CSHB106(FIN), two DCOM staff will travel 5-6 different districts per year for four years to assist the districts with their plan amendments.

Five DCOM staff will travel to regional locations for two years to provide ACMP training and education on program changes and the revised ACMP implementing regulations.

The DCOM Director will travel to Washington, DC three times annually for two years to work with NOAA on program change approvals and NEPA requirements.

Contractual
The CPB will meet two times annually by teleconference, with each 2-day teleconference lasting 8 hours each day (including 20 phone lines). CSHB106(FIN) will require a substantial revision to all three chapters of the implementing ACMP regulations (11 AAC 110, 112, and 114). Contractual services will be required to develop and complete those revisions, including the Department of Law final review. The coordination and distribution of district planning and consistency review data and information requires postage and other fees. DCOM will also reimburse state agencies for their participation and implementation of the ACMP program.

Supplies
Supplies will be required for supporting the CPB (dictation/recorder equipment, packet materials and binders) and support staff (office

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

(2)

MAR 10 2008

NA08N05419042B

MEMORANDUM FOR: Commonwealth, State, and Territorial Coastal Program Managers

THROUGH: Eric Wolfe
Acting Chief Financial Officer
National Ocean Service

FROM: John R. King
Chief, Coastal Programs Division

SUBJECT: FY 2008 Final Funding Guidance and Allocations
Coastal Zone Management Act Sections 306/306A, 309 and 310

This final funding guidance is based on the funding levels contained in the Consolidated Appropriations Act, 2008 (P.L. 110-161). This Act contains funding for sections 306/306A; 309; and 310. This memorandum provides guidance on the allocation and uses of these funds. Questions or comments should be directed to me, and I can be reached at (301) 713-3155 extension 188 or via e-mail at john.king@noaa.gov.

Funding Facts

	2007	2008
Section 306/306A/309*	$ 65,780,000	$ 64,358,577
CNPCP Implementation**	0	1,974,000
Deobligated Funds***	0	1,183,423
Totals	$ 65,780,000	$ 67,516,000

* - Figures reflect the FY08 Appropriation less assessments for the Hollings Scholarship program
**- Figures reflect the FY08 Appropriation less assessments for the Hollings Scholarship program and administrative costs.
*** - Total deobligated funds added to section 306 funding.

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As you can see from the above table, appropriations for sections 306/309 are down by approximately $1.4M. This is partially offset by the availability of $1.2M in prior year deobligations. There is also almost $2M available for the Coastal Nonpoint Pollution Control Program.

Section 306/306A and Section 309 Allotments

For FY 2007, there is $65,542,000 in appropriated and deobligated funds available for sections 306/306A and 309. The CZMA requires that between ten and twenty percent of the section 306/309 appropriation be directed toward section 309, up to a maximum of $10,000,000. We will direct the statutory maximum of $10,000,000 (15.1%) of the appropriation toward section 309, leaving $55,542,000 for section 306/306A. The section 306/306A funds require a 1 to 1 match and are available to states with federally-approved coastal zone management programs. State allocations are provided in the attached table (attachment 1).

The states that have successfully completed section 309 assessments and strategies are eligible for section 309 funding. These funds require no match. All of the section 309 funds will be awarded through the weighted formula. The primary focus of this year's section 309 effort will be to implement the third year of the new enhancement strategies.

Implementation of Section 6217 Programs

There is a total of $1,974,000 available for the Coastal Nonpoint Program. The funds are being allocated as follows: 1. $42,000 for each state with a conditionally or fully approved 6217 program; 2. an additional $26,000 for each state with a fully approved program.

As in past years, Congress has provided these funds to support program implementation activities. Any remaining program development activities (i.e., addressing remaining conditions of approval) should be supported with the $100,000 in section 319 Clean Water Act funding identified initially in EPA's supplemental FY 2001 grants guidance for this purpose. Section 309 funds may also be used to support program development activities and states can utilize section 306 funding to support a variety of CNPCP development and implementation activities.

The CNPCP implementation funds require a 1 to1 match. The state coastal zone management lead agency is the only entity eligible to receive these awards, and may in turn make sub-awards. For states with conditional approval, these funds must be used to implement the approved portions of the CNPCP.

Application Procedures

The current application schedule is attached. July 1 start date awards are due in OCRM by April 10, 2008; and October 1 start date awards are due in OCRM by May 20, 2008 (attachment 2). This schedule may be revised pending discussions with the Grants Management Division. As with FY 2007, use of the electronic grants application system is required.

Notice Information

According to the Coastal Zone Management Act of 1972, as amended (CZMA), the Secretary of Commerce may make grants to eligible coastal states. Coastal states are defined as states that are in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of the CZMA, the term also includes Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. This notice is being distributed to all eligible parties, and substitutes for the Federal Register notice required for Federal grant programs.

cc: EScheffler, NOS
BBlum, GCOS
RLiogys, NFA
JPiercy, NOS
LZuckerberg,OCRM
TMorris, OCRM
KBarba, OCRM
DFlynn, DOC/FALD
OCRM/CPD Staff
DKennedy, OCRM
DWieting, OCRM
ASimpson Porter, GMD
KFletcher, CSO

Parameter	Section 306/306A	Section 309	CNP Standard	CNP Full Approval
Total Funding	55,542,000	10,000,000	1,428,000	546,000
Base Funding	672,000	70,000	42,000	26,000
Maximum Funding	1,967,000	536,000	42,000	26,000

STATE	Section 306	Section 309	CNP Standard	CNP Full Approval	Total
Alabama	1,278,000	104,000	42,000	0	1,424,000
Alaska	1,967,000	536,000	42,000	0	2,545,000
American Samoa	779,000	76,000	42,000	26,000	923,000
California	1,967,000	536,000	42,000	26,000	2,571,000
Connecticut	1,848,000	177,000	42,000	26,000	2,093,000
Delaware	1,211,000	101,000	42,000	26,000	1,380,000
Florida	1,967,000	536,000	42,000	26,000	2,571,000
Georgia	1,967,000	270,000	42,000	0	2,279,000
Guam	803,000	77,000	42,000	26,000	948,000
Hawaii	1,821,000	174,000	42,000	0	2,037,000
Indiana	966,000	86,000	42,000	0	1,094,000
Louisiana	1,967,000	536,000	42,000	0	2,545,000
Maine	1,967,000	409,000	42,000	26,000	2,444,000
Maryland	1,967,000	521,000	42,000	26,000	2,556,000
Massachusetts	1,967,000	413,000	42,000	26,000	2,448,000
Michigan	1,967,000	536,000	42,000	0	2,545,000
Minnesota	885,000	82,000	42,000	26,000	1,035,000
Mississippi	1,046,000	91,000	42,000	0	1,179,000
New Hampshire	900,000	83,000	42,000	26,000	1,051,000
New Jersey	1,967,000	536,000	42,000	0	2,545,000
New York	1,967,000	536,000	42,000	26,000	2,571,000
North Carolina	1,967,000	392,000	42,000	26,000	2,427,000
Northern Mariana Islands	837,000	80,000	42,000	26,000	985,000
Ohio	1,869,000	180,000	42,000	0	2,091,000
Oregon	1,967,000	216,000	42,000	0	2,225,000
Pennsylvania	1,815,000	172,000	42,000	26,000	2,055,000
Puerto Rico	1,967,000	215,000	42,000	26,000	2,250,000
Rhode Island	1,307,000	106,000	42,000	26,000	1,481,000
South Carolina	1,967,000	349,000	42,000	26,000	2,384,000
Texas	1,967,000	536,000	42,000	0	2,545,000
U.S. Virgin Islands	831,000	79,000	42,000	26,000	978,000
Virginia	1,967,000	536,000	42,000	26,000	2,571,000
Washington	1,967,000	532,000	42,000	0	2,541,000
Wisconsin	1,940,000	191,000	42,000	26,000	2,199,000
TOTALS	55,542,000	10,000,000	1,428,000	546,000	67,516,000

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MAR 31 2009

MEMORANDUM FOR: Commonwealth, State, and Territorial Coastal Program Managers

THROUGH: Chris Cartwright, Chief Financial Officer
National Ocean Service

FROM: John R. King
Chief, Coastal Programs Division

SUBJECT: FY 2009 Final Funding Guidance and Allocations
Coastal Zone Management Act Sections 306/306A, 309 and 310

Given the lateness of the appropriation and the need to get the funds out to the recipients, we are forgoing the normal process of issuing draft funding guidance. This final funding guidance is based on the funding levels contained in the Consolidated Appropriations Act, 2008 (P.L. 110-161). This Act contains funding for sections 306/306A; 309; and 310. This memorandum provides guidance on the allocation and uses of these funds. Questions or comments should be directed to me, and I can be reached at (301) 713-3155 extension 188 or via e-mail at john.king@noaa.gov.

In spite of the late appropriation, our goal is to get you your funds in a timely manner. To meet this goal, we must keep an application schedule similar to last year (Attachment 2). We recognize that this is a difficult schedule, however, it is critical that we get applications in as quickly as possible, so that we can get funds out the door in time to meet your start dates. We will work with you to get this done as efficiently as possible.

Funding Facts

	2008	2009
Section 306/306A/309*	$ 64, 358,577	$ 66,079,000
CNPCP Implementation**	1,974,000	3,362,000
Deobligated Funds***	1,183, 423	0
Totals	$ 67,516,000	$ 69,441,000

* - Figures reflect the Appropriation less assessments for the Hollings Scholarship program
**- Figures reflect the Appropriation less assessments for the Hollings Scholarship program and administrative costs.
*** - Total deobligated funds added to section 306 funding in 2008

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As you can see from the above table, appropriations for sections 306/309 are up by approximately $1.4M, however, deobligated funds are down by almost $1.2M. There is also almost $3.4M available for the Coastal Nonpoint Pollution Control Program.

Section 306/306A and Section 309 Allotments

For FY 2009, there is $66,079,000 in appropriated funds available for sections 306/306A and 309. The CZMA requires that between ten and twenty percent of the section 306/309 appropriation be directed toward section 309, up to a maximum of $10,000,000. We will direct the statutory maximum of $10,000,000 (15.1%) of the appropriation toward section 309, leaving $56,079,000 for section 306/306A. The section 306/306A funds require a 1 to 1 match and are available to states with federally-approved coastal zone management programs. State allocations are provided in the attached table (attachment 1).

The states that have successfully completed section 309 assessments and strategies are eligible for section 309 funding. These funds require no match. All of the section 309 funds will be awarded through the weighted formula. The primary focus of this year's section 309 effort will be to continue developing program changes outlined in the current strategies and to begin developing revised assessments and strategies.

Implementation of Section 6217 Programs

There is a total of $3,362,000 available for the Coastal Nonpoint Program. The funds are being allocated as follows: 1. $2,345,000 allocated by formula to each state with a conditionally or fully approved 6217 program. Each state will see an increase of at least $19,000 over FY08 in these funds. 2. an additional $46,200 for each state with a fully approved program.

As in past years, Congress has provided these funds to support program implementation activities. Please consult the CNP Funding Guidance for additional information. (http://coastalmanagement.noaa.gov/nonpoint/docs/6217grantsguidance_FY06Final.pdf)

Any remaining program development activities (i.e., addressing remaining conditions of approval) should be supported with the $100,000 in section 319 Clean Water Act funding identified initially in EPA's supplemental FY 2001 grants guidance for this purpose. Section 309 funds may also be used to support program development activities and states can utilize section 306 funding to support a variety of CNPCP development and implementation activities.

The CNPCP implementation funds require a 1 to1 match. The state coastal zone management lead agency is the only entity eligible to receive these awards, and may in turn make sub-awards. For states with conditional approval, these funds must be used to implement the approved portions of the CNPCP.

Application Procedures

The current application schedule is attached. July 1 start date awards are due in OCRM by April 3, 2009; and October 1 start date awards are due in OCRM by May 20, 2009 (attachment 2). As with FY 2008, use of the electronic grants application system is required.

Notice Information

According to the Coastal Zone Management Act of 1972, as amended (CZMA), the Secretary of Commerce may make grants to eligible coastal states. Coastal states are defined as states that are in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of the CZMA, the term also includes Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. This notice is being distributed to all eligible parties, and substitutes for the Federal Register notice required for Federal grant programs.

cc: CCartwright, NOS
BBlum, GCOS
RLiogys, NFA
JPiercy, NOS
LZuckerberg,OCRM
TMorris, OCRM
KBarba, OCRM
DFlynn, DOC/FALD
OCRM/CPD Staff
DKennedy, OCRM
DWieting, OCRM
ASimpson Porter, GMD
KFletcher, CSO

Attachment 1

FINAL FY 2009 Allocations
Sections 306/306A and 309 and
Coastal Nonpoint Implementation

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Parameter	Section 306/306A	Section 309	CNP Standard	CNP Full Approval
Total Funding	56,079,000	10,000,000	2,345,000	1,016,400
Base Funding	675,000	70,000	60,000	46,200
Maximum Funding	1,995,000	536,000	75,000	NA

STATE	Section 306	Section 309	CNP Standard	CNP Full Approval	Total
Alabama	1,280,000	104,000	63,000	0	1,447,000
Alaska	1,995,000	536,000	75,000	0	2,606,000
American Samoa	781,000	76,000	61,000	46,200	964,200
California	1,995,000	536,000	75,000	46,200	2,652,200
Connecticut	1,849,000	177,000	67,000	46,200	2,139,200
Delaware	1,213,000	101,000	63,000	46,200	1,423,200
Florida	1,995,000	536,000	75,000	46,200	2,652,200
Georgia	1,995,000	270,000	70,000	0	2,335,000
Guam	804,000	77,000	61,000	46,200	988,200
Hawaii	1,824,000	174,000	67,000	0	2,065,000
Indiana	969,000	86,000	62,000	0	1,117,000
Louisiana	1,995,000	536,000	75,000	0	2,606,000
Maine	1,995,000	409,000	75,000	46,200	2,525,200
Maryland	1,995,000	521,000	75,000	46,200	2,637,200
Massachusetts	1,995,000	413,000	75,000	46,200	2,529,200
Michigan	1,995,000	536,000	75,000	0	2,606,000
Minnesota	889,000	82,000	61,000	46,200	1,078,200
Mississippi	1,050,000	91,000	62,000	0	1,203,000
New Hampshire	903,000	83,000	61,000	46,200	1,093,200
New Jersey	1,995,000	536,000	75,000	46,200	2,652,200
New York	1,995,000	536,000	75,000	46,200	2,652,200
North Carolina	1,995,000	392,000	75,000	46,200	2,508,200
Northern Mariana Islands	840,000	80,000	61,000	46,200	1,027,200
Ohio	1,869,000	180,000	67,000	0	2,116,000
Oregon	1,995,000	216,000	68,000	0	2,279,000
Pennsylvania	1,816,000	172,000	67,000	46,200	2,101,200
Puerto Rico	1,995,000	215,000	68,000	46,200	2,324,200
Rhode Island	1,309,000	106,000	64,000	46,200	1,525,200
South Carolina	1,995,000	349,000	74,000	46,200	2,464,200
Texas	1,995,000	536,000	75,000	0	2,606,000
U.S. Virgin Islands	833,000	79,000	61,000	46,200	1,019,200
Virginia	1,995,000	536,000	75,000	46,200	2,652,200
Washington	1,995,000	532,000	75,000	0	2,602,000
Wisconsin	1,940,000	191,000	67,000	46,200	2,244,200
TOTALS	56,079,000	10,000,000	2,345,000	1,016,400	69,440,400

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

(4)

MAR - 3 2010

MEMORANDUM FOR: Commonwealth, State, and Territorial Coastal Program Managers

THROUGH: Chris Cartwright, Chief Financial Officer
National Ocean Service

FROM: John R. King
Chief, Coastal Programs Division

SUBJECT: FY 2010 Draft Funding Guidance and Allocations
Coastal Zone Management Act Sections 306/306A and 309

This draft funding guidance is based on the funding levels contained in the Consolidated Appropriations Act, 2010 (P.L. 111-117). This Act contains funding for sections 306/306A and 309. This memorandum provides guidance on the allocation and uses of these funds. Questions or comments should be directed to me, and I can be reached at (301) 713-3155 extension 188 or via e-mail at john.king@noaa.gov. Comments are due by March 8, 2010.

Our goal is to get you your funds in a timely manner, and to meet this goal, we must keep an application schedule similar to last year (Attachment 2). We recognize that this is a difficult schedule, however, it is critical that we get applications in as quickly as possible, so that we can get funds out the door in time to meet your start dates. We will work with you to get this done as efficiently as possible.

Funding Facts

	2009	2010***
Section 306/306A/309*	$ 66,079,000	$ 68,077,854
CNPCP Implementation**	3,362,000	0
Deobligated Funds	0	7,146
Totals	$ 69,441,000	$ 68,085,000

* - Figures reflect the Appropriation less assessments for the Hollings Scholarship program
**- Figures reflect the Appropriation less assessments for the Hollings Scholarship program and administrative costs.
*** - Includes report language addressing the increase in 306/309 funding

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As you can see from the above table, appropriations for sections 306/309 are up by approximately $2.0M, however, there is no funding available for the Coastal Nonpoint Pollution Control Program. There is also a small amount of deobligated funds available for re-allocation.

Report Language

Report language accompanying the FY10 Appropriations Act requires that a portion of the increase in the Coastal Zone Management Grants funding be used for a competitive grants program. Specifically, the report states:

> *The conference agreement provides $2,000,000 above the request, and NOAA is directed to use a portion of the increase provided for a competitive program for efforts to modernize and improve State information systems to assess, track and manage permitting and land-use tracking procedures. (* FY2010 Appropriations Conference Report (p27))

In addition, the Appropriations Act continues to include the following language regarding allocations:

> *Provided further, That in allocating grants under sections 306 and 306A of the Coastal Zone Management Act of 1972, as amended, no coastal State shall receive more than 5 percent or less than 1 percent of increased funds appropriated over the previous fiscal year,* (FY2010 Appropriations Act (p17))

Proposed Approach

Our challenge is to meet both existing statutory and regulatory requirements, and Congressional direction contained in the Conference Report. To do this, we are proposing to allocate $1,000,000 of the funding increase towards section 306 allocations, and $1,000,000 of the funding increase towards a competitive process for the purposes described in the Conference Report. There will be a separate call for proposals for the competitive funds, as well as separate cooperative agreements. This approach meets the requirements described above, and allows the standard annual CZM cooperative agreement process to move forward in a timely manner.

Section 306/306A and Section 309 Allotments

For FY 2010, there is $67,085,000 in appropriated and deobligated funds available for sections 306/306A and 309. The CZMA requires that between ten and twenty percent of the section 306/309 appropriation be directed toward section 309, up to a maximum of $10,000,000. We will direct the statutory maximum of $10,000,000 (14.9%) of the appropriation toward section 309, leaving $57,085,000 for section 306/306A. The section 306/306A funds require a 1 to 1 match and are available to states with federally-approved coastal zone management programs. State allocations are provided in the attached table (attachment 1).

The states that have successfully completed section 309 assessments and strategies are eligible for section 309 funding. These funds require no match. All of the section 309 funds will be awarded through the weighted formula. The primary focus of this year's section 309 effort will

be to develop revised assessments and strategies.

Implementation of Section 6217 Programs

No funding was appropriated for this program for FY 2010. We understand that this presents difficulties for some states, and we will provide flexibility in funding CNP implementation projects with 306 or 309 funds.

Application Procedures

The current application schedule is attached. July 1 start date awards are due in OCRM by April 5, 2010; and October 1 start date awards are due in OCRM by May 20, 2010 (attachment 2). As with FY 2009, use of the electronic grants application system is required.

NOAA Strategic Priorities

NOAA is currently in the process of finalizing its "Next Generation Strategic Plan" intended to guide Agency actions through 2017. The draft goals articulated in this plan align nicely with CZMA goals, OCRM office priorities, and the priorities of many of your programs. This provides a good opportunity to demonstrate the connection between the CZM program and funding and NOAA priorities. Towards this end, we thought it worthwhile to provide a brief description of the NOAA strategic priorities, as they will likely provide greater visibility for the CZM program and new opportunities for states to access a broader array of NOAA resources.

NOAA intends to focus its efforts on the following four (4) overarching goals:

1. Climate Adaptation & Mitigation: An informed society anticipating and responding to a changing climate and its impacts.
2. Weather Resilience: Society prepares for and responds to high-impact events that jeopardize individuals, government, and businesses.
3. Sustainable Coastal Communities and Economies: Environmentally and economically sustainable oceans, coasts, and Great Lakes communities and ecosystem services.
4. Sustainable and Resilient Fisheries, Species, and Habitats: Biodiversity protected and restored and fisheries sustained within healthy and productive ecosystems

By using the following means, familiar to coastal programs, to improve management of our coasts and oceans:

- Promoting partnerships and collaboration at all levels
- Engaging regional ocean governance bodies
- Enabling data integration and delivery
- Improving tools and technology for decision support
- Using local expertise and ecological knowledge

We anticipate that OCRM's support of coastal program engagement in regional ocean governance, climate change adaptation, and the development and use of coastal and marine spatial planning will support the NOAA strategic priorities. We encourage you to consider these priorities in the development of your annual work programs; 309 Assessments and Strategies; and in reporting your program's success stories (Section C of the Performance Reporting Guidelines). Additional information related to NOAA's Strategic Plan can be found here: http://www.ppi.noaa.gov/ngsp.html; and the current OCRM strategic plan can be found here: http://coastalmanagement.noaa.gov/resources/docs/ocrm_strategicplan.pdf.

Notice Information

According to the Coastal Zone Management Act of 1972, as amended (CZMA), the Secretary of Commerce may make grants to eligible coastal states. Coastal states are defined as states that are in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of the CZMA, the term also includes Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. This notice is being distributed to all eligible parties, and substitutes for the Federal Register notice required for Federal grant programs.

cc: CCartwright, NOS
BBlum, GCOS
JPiercy, NOS
LZuckerberg,OCRM
TMorris, OCRM
KBarba, OCRM
DFlynn, DOC/FALD
OCRM/CPD Staff
DWieting, OCRM
ASimpson Porter, GMD
KFletcher, CSO

Parameter	Section 306/306A	Section 309
Total Funding	57,085,000	10,000,000
Base Funding	700,000	70,000
Maximum Funding	2,030,000	536,000

STATE	Section 306	Section 309	Total
Alabama	1,305,000	104,000	**1,409,000**
Alaska	2,030,000	536,000	**2,566,000**
American Samoa	807,000	76,000	**883,000**
California	2,030,000	536,000	**2,566,000**
Connecticut	1,871,000	177,000	**2,048,000**
Delaware	1,237,000	101,000	**1,338,000**
Florida	2,030,000	536,000	**2,566,000**
Georgia	2,030,000	270,000	**2,300,000**
Guam	830,000	77,000	**907,000**
Hawaii	1,844,000	174,000	**2,018,000**
Indiana	993,000	86,000	**1,079,000**
Louisiana	2,030,000	536,000	**2,566,000**
Maine	2,030,000	409,000	**2,439,000**
Maryland	2,030,000	521,000	**2,551,000**
Massachusetts	2,030,000	413,000	**2,443,000**
Michigan	2,030,000	536,000	**2,566,000**
Minnesota	913,000	82,000	**995,000**
Mississippi	1,073,000	91,000	**1,164,000**
New Hampshire	927,000	83,000	**1,010,000**
New Jersey	2,030,000	536,000	**2,566,000**
New York	2,030,000	536,000	**2,566,000**
North Carolina	2,030,000	392,000	**2,422,000**
Northern Mariana Islands	865,000	80,000	**945,000**
Ohio	1,891,000	180,000	**2,071,000**
Oregon	2,030,000	216,000	**2,246,000**
Pennsylvania	1,837,000	172,000	**2,009,000**
Puerto Rico	2,030,000	215,000	**2,245,000**
Rhode Island	1,331,000	106,000	**1,437,000**
South Carolina	2,030,000	349,000	**2,379,000**
Texas	2,030,000	536,000	**2,566,000**
U.S. Virgin Islands	858,000	79,000	**937,000**
Virginia	2,030,000	536,000	**2,566,000**
Washington	2,030,000	532,000	**2,562,000**
Wisconsin	1,963,000	191,000	**2,154,000**
TOTALS	**57,085,000**	**10,000,000**	**67,085,000**

2010 Grants Schedule

ACTIVITY	States with July 1 Start Dates	States with October 1 Start Dates
1. Initial discussions between state and OCRM - submission of preliminary work plan (optional)	January - February	February
2. State submits draft application package for CZMA cooperative agreement. OCRM provides comments to State as appropriate	March 12, 2010	April 15, 2010
3. State submits final application, budget and narrative to OCRM for review and approval.	April 5, 2010	May 18, 2010
4. OCRM completes review and circulates Cooperative Agreement package within OCRM.	April 9, 2010	May 25, 2010
5. OCRM submits Cooperative agreement package to NOAA Grants office.	April 16, 2010	June 1, 2010

5

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number 9
Bill Version CSHB 106(FIN)
(H) Publish Date 4/15/11

Identifier (file name) CSHB106(FIN)-DNR-DCOM-4-15-11
Title Act extending termination of the Alaska Coastal Mgmt Pgm
Sponsor Rules Committee by Request of Governor
Requester House Finance

Dept. Affected Natural Resources
Appropriation Resource Development
Allocation Coastal and Ocean Management
OMB Component Number 2680

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	109.8	3,150.2	3,260.0	3,260.0	3,260.0	3,260.0	3,260.0
Travel	155.7	95.9	251.6	141.8	141.8	121.8	121.8
Contractual	380.0	1,404.4	1,784.4	1,724.4	1,724.4	1,724.4	1,724.4
Supplies	18.6	41.2	54.2	54.2	54.2	54.2	54.2
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**664.1**	**4,691.7**	**5,350.2**	**5,180.4**	**5,180.4**	**5,160.4**	**5,160.4**
CAPITAL EXPENDITURES		**1,360.0**	**1,360.0**	**1,360.0**	**1,360.0**	**1,360.0**	**1,360.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts		2,679.0	2,679.0	2,679.0	2,679.0	2,679.0	2,679.0
1003 GF Match		1,672.6	1,672.6	1,672.6	1,672.6	1,672.6	1,672.6
1004 GF	664.1		658.5	488.7	488.7	468.7	468.7
1005 GF/Program Receipts							
1061 CIP receipts		244.6	244.6	244.6	244.6	244.6	244.6
1007 Interagency Receipts		95.5	95.5	95.5	95.5	95.5	95.5
TOTAL	**664.1**	**4,691.7**	**5,350.2**	**5,180.4**	**5,180.4**	**5,160.4**	**5,160.4**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time	1	33	34	34	34	34	34
Part-time							
Temporary							

Why this fiscal note differs from previous version

The fiscal note is updated to reflect changes made in the House Finance committee substitute.
(1) Based on language in the CSHB106 (FIN), this fiscal note reflects the removal of one full time Natural Resource Specialist II position and only an additional $10.0 in supplies for dissemination of projects in review by hard copy.

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. This fiscal note also includes the annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's adminstration of the grants which was removed from the budget making it subject to conference committee.

Prepared by Randy Bates, Director — Phone 465-8797
Division Coastal and Ocean Management — Date/Time 4/15/11 12:00 AM
Approved by Dan Sullivan, Commissioner — Date 4/15/2011
Natural Resources

(Revised 12/29/2010 OMB)

FISCAL NOTE #9

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 106(FIN)

Analysis

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. The annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's administration of the grants was removed from the Senate version of the FY12 Capital Budget making it subject to conference committee.

The Alaska Coastal Management Program (ACMP) will automatically terminate on July 1, 2011 (SLA2005, CH31, Sec 22). CSHB106(FIN) would extend the termination date to July 1, 2017.

This fiscal note reflects the increased fiscal impacts due to the additional Division of Coastal and Ocean Management (DCOM) duties, including the administration and implementation of the Alaska Coastal Policy Board (CPB). Those increased fiscal impacts are detailed below:

Personal Services
One additional position, a Project Coordinator (range 20), will be required to cover the additional work associated with the CPB and the coordination of district planning functions and information sharing.

Travel
The CPB will meet four times in-person in the first two years following establishment of the board, and will meet in-person twice annually after that. The CPB will need to meet more frequently in-person for the first two years in order to establish board protocols, review coastal district plans, and address issues of interest to ACMP participants. CPB travel includes nine members and two DCOM support staff.

In addition, recognizing coastal districts will be amending their district plans based on CSHB106(FIN), two DCOM staff will travel 5-6 different districts per year for four years to assist the districts with their plan amendments.

Five DCOM staff will travel to regional locations for two years to provide ACMP training and education on program changes and the revised ACMP implementing regulations.

The DCOM Director will travel to Washington, DC three times annually for two years to work with NOAA on program change approvals and NEPA requirements.

Contractual
The CPB will meet two times annually by teleconference, with each 2-day teleconference lasting 8 hours each day (including 20 phone lines). CSHB106(FIN) will require a substantial revision to all three chapters of the implementing ACMP regulations (11 AAC 110, 112, and 114). Contractual services will be required to develop and complete those revisions, including the Department of Law final review. The coordination and distribution of district planning and consistency review data and information requires postage and other fees. DCOM will also reimburse state agencies for their participation and implementation of the ACMP program.

Supplies
Supplies will be required for supporting the CPB (dictation/recorder equipment, packet materials and binders) and support staff (office equipment).

Questions from the Joint Judiciary Committee meeting Feb. 6

Senator Wielechowski asked why a fiscal note for HB106 showed that the former ACMP federal program had shown $4.0 million in federal funding, while the statement of cost indicated available federal funding was $2.0 million.

A fiscal note prepared on 05/13/2011 by the Senate Finance Committee for HB106 shows $4.0 million in federal funding for ACMP. (See Attachment 1) However, this level of federal funding appears well in excess of any recently available federal funding for coastal management programs.

Federal funding for Coastal Management Program administrative grants are governed by 16 U.S.C. § 1455. Since federal fiscal year 2008 (FFY2008) federal funding has come in three funding streams referred to as Sections 306/306A (tiered federal match up to 1:1); Section 309 (no match required); and the Coastal Non Point (CNP) or Section 310 (requires 1:1 match and not funded in FFY 2010).

Federal funding streams in the three programs are subject to maximum awards based upon the availability of federal funds. Alaska has typically received the maximum allowed for these programs. Below is a table showing federal funding from FFY2008-FFY2010. In these years, no more than $2.6 million was available for federal funding of state coastal management programs. Copies of the US Department of Commerce's program allocation letter are provided for your review. (Attachments 2-4.)

Federal Fiscal Year 2008	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$55,542,000	$10,000,000	$1,428,000	$66,970,000
Maximum State Funding	$1,967,000	$536,000	$42,000	$2,545,000
Alaska Allocation	**$1,967,000**	**$536,000**	**$42,000**	**$2,545,000**

Federal Fiscal Year 2009	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$56,079,000	$10,000,000	$2,345,000	$68,424,000
Maximum State Funding	$1,995,000	$536,000	$75,000	$2,606,000
Alaska Allocation	**$1,995,000**	**$536,000**	**$75,000**	**$2,606,000**

Federal Fiscal Year 2010	Section 306 Section 306A	Section 309	CNP	TOTAL Funds
Total Funding	$57,085,000	$10,000,000	$0	$67,085,000
Maximum State Funding	$2,030,000	$536,000	$0	$2,566,000
Alaska Allocation	**$2,030,000**	**$536,000**	**$0**	**$2,566,000**

As indicated during testimony, the total cost estimate of $5.4 million annually could be shared by the federal government provided that the state becomes eligible for federal funding. Uncertainty remains about the timing and availability of the federal funding stream, and all of the funds that would be requested for the budget are subject to legislative appropriation.

Senator French and Representative Holmes asked for more specifics about the costs included in the overall cost estimate. They were specifically interested in information about ongoing versus one-time costs.

Please see the summary below that itemizes costs by category. Comments about ongoing versus one-time costs are included in the narrative section. The estimates currently allow flexibility for the state to address one-time costs, however should the initiative pass, program implementation costs are likely to be different than those presented. All proposed costs will be subject to appropriation by the legislature.

CATEGORY	Description	
Personal Services	This expenditure would be an ongoing cost to support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program In the first two years, it is likely that personal services costs will be lower than this estimate due to the program beginning from scratch. However, there will be many other activities associated with the initial gear up of the program though, so there is significant uncertainty about what percentage of these resources will be needed in the first two years.	$3,260,000
Travel	The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. Some portion of these travel resources would likely be redeployed to other program activities after the program is approved.	$267,900

Services	This expenditure is an ongoing cost to support contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors. This estimate also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, and other start up activities.	$1,815,300
Commodities	This is an ongoing expenditure estimate that supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment. In the first two years, actual costs in this category are likely to be significantly higher as the office acquires all of the office furnishings, office equipment and other commodities necessary to build an office from scratch.	$56,800

Senator French asked for more specificity about the costs included in the estimate of costs to support implementation of the 13-member Coastal Policy Board governance structure.

The estimate of additional costs was based largely on cost estimates provided by the Department of Natural Resources (DNR) in their fiscal note for HB106 dated 04/15/2011. (Attachment 5) This fiscal note was chosen as a basis due to its somewhat similar nature to the initiative envisioned program. Comments on whether these are expected to be ongoing or one-time costs are also included.

As indicated during the testimony, these estimates assume a program that is substantially similar to the previous program with a 13-member board meeting in person 4 times annually. Significant uncertainty remains about the program that the board would ultimately implement and the associated costs. It should be noted that not all of the increased costs are directly attributable to the board members.

The costs in the table below are presented as subsets of the estimates presented in the prior table.

CATEGORY	Description	
Personal Services	One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing. This is an ongoing cost and would be directly attributable to the Coastal Policy Board.	$109,800
Travel	This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC. These travel resources would likely be redeployed to other program related travel or review activities after the program is approved. These costs are not directly attributable to the addition of a board. This expenditure estimate also includes $60,000 in ongoing travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two staff members at approximately $1,000 per trip. This is an ongoing cost directly attributable to addition of a Coastal Policy Board.	$164,000
Services	This expenditure supports an additional $300,000 in ongoing services agreements with other state agencies services that DNR indicated would be needed to successfully implement the ACMP program. This would be an ongoing cost. These costs are not directly attributable to the addition of a board. The estimates include $60.000 estimate for regulations review by the Department of Law that would be of limited duration. Length of need is uncertain and dependent upon the complexity of the regulations and the time it takes to promulgate and implement, this could be a cost for 2-4 years. However, these resources would likely be redeployed to reviews and other program support after that time. Other ongoing services costs included $20,000 in postage, teleconference services, and other miscellaneous board and coastal district support. This would be an ongoing cost directly attributable to the addition of the board.	$380,000
Commodities	This estimate includes some $5,600 in one-time costs such as the purchase of a recorder and sound equipment for the board. Ongoing costs include $10,000 in supplies needed to support the presentation of materials at the board meetings. These costs are directly attributable to the addition of a board.	$15,600

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT

Sean Parnell, Governor
Susan K. Bell, Commissioner

MEMORANDUM

TO: Representative Gatto, Chair
Senator French, Chair
House/Senate Judiciary Committee

DATE: February 22, 2012

FROM: Susan K. Bell, Commissioner
Department of Commerce, Community,
and Economic Development

RE: ACMP

Representative Gatto and Senator French,

We have provided responses to questions raised during the recent hearing on the ACMP initiative. Please contact me if you have any further questions.

1. How long will it take for previously reviewed plans to be adopted at the onset of the new program?
   - The initiative language includes AS 46.41.040(b) which states; "*...approved coastal management plans that were in effect as of June 30, 2011 are in effect and are incorporated into the Alaska Coastal Management Program.*" Upon creation of the program, all existing approved plans would be in effect. Of the existing 28 coastal districts, there were two districts that did not have approved plans: the Northwest Arctic Borough and the North Slope Borough. It appears from the language of the initiative that those two boroughs would not have an approved plan until a new plan was submitted to the board for review and approval.

2. Will previously reviewed plans, or newly adopted plans expire?
   - Under previous versions of the ACMP program, district plans were required to be reviewed and reapproved every 10 years. Additionally, the statutory amendments to the program passed in 2003 and 2005 required all coastal districts to revise and submit their coastal plans for review and approval. The deadline for this submittal was March 1, 2006. The wording in the initiative does not include a mandatory review period where the plan would expire if not reviewed and approved. The initiative language includes AS 46.41.070 which requires coastal districts to review their plans within one year of adoption of regulations to see if they meet the requirement of the regulations and to make any changes and submit revised plans, but it does not state that the plans would expire if not revised or submitted.

3. Will plans need to have a NEPA review?
   - Under the previous program, there was a "State Coastal Management Plan" that was reviewed and approved under NEPA. The individual coastal plans were a part of the State Plan, and thus were not required to undergo individual review. We expect that this same hierarchy would be put in place under a new program.

4. How would formation of Coastal Resource Districts in the Unincorporated Borough take place?
   - The initiative language states in AS 46.41.060(b) that "*Coastal Districts, Coastal District Boundaries ...that were in effect as of June 30, 2011 are in effect and incorporated into the Alaska Coastal Management Program.*" Those municipalities in the unorganized borough that were their own coastal districts (Bethel, Cordova, Craig, Hoonah, Nome, Pelican, Thorne Bay, Valdez, and Whittier) will continue to be coastal districts. In addition, the four Coastal Resource Service Areas (Aleutians West, Bering Straits, Bristol Bay, and Ceñaliulriit) will also be coastal districts. The initiative also provides a method for areas in the unorganized borough (Regional Education Attendance Areas – REAA) that contain part of the coastal area, and that are not already formed into a coastal district, to form a district. This process is outlined starting at AS 46.41.110. Areas that would be affected by this are limited to Prince William Sound REAA (excluding Cordova, Valdez, and Whittier), Chatham REAA (excluding Hoonah and Pelican), and Southeast Island REAA (excluding Craig and Thorne Bay).

Fiscal Note

State of Alaska
2011 Legislative Session

Fiscal Note Number: 10
Bill Version: SCS CSHB 106(FIN)
(S) Publish Date: 5/13/11

Identifier: CSHB106(FIN)-DNR-DCOM-4-15-11
Title: COASTAL MANAGEMENT PROGRAM
Sponsor: RLS BY REQUEST OF THE GOVERNOR
Requester: CONF COMM
Submitted: SENATE FINANCE for SCS CSHB 106(FIN)

Department: Department of Natural Resources
Appropriation: Land & Water Resources
Allocation: Alaska Coastal and Ocean Management
OMB Component Number: 2680

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	3,260.0		3,260.0	3,260.0	3,260.0	3,260.0	3,260.0
Travel	251.6		251.6	141.8	141.8	121.8	121.8
Services	3,144.4		3,144.4	3,084.4	3,084.4	3,084.4	3,084.4
Commodities	59.8		54.2	54.2	54.2	54.2	54.2
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**
Capital Expenditures							
Change in Revenues ( )							
Fund Source (Operating Only)							
1002 Fed Rcpts	4,039.0		4,039.0	4,039.0	4,039.0	4,039.0	4,039.0
1003 G/F Match	1,672.6		1,672.6	1,672.6	1,672.6	1,672.6	1,672.6
1004 Gen Fund	664.1		658.5	488.7	488.7	468.7	468.7
1007 I/A Rcpts	95.5		95.5	95.5	95.5	95.5	95.5
1061 CIP Rcpts	244.6		244.6	244.6	244.6	244.6	244.6
Total	**6,715.8**	**0.0**	**6,710.2**	**6,540.4**	**6,540.4**	**6,520.4**	**6,520.4**

Estimate of any current year (FY2011) cost: 0.0

Positions

Full-time	34.0		34.0	34.0	34.0	34.0	34.0
Part-time							
Temporary							

Reason For Change:

CC: This fiscal note combines the additional funding requested with FY12 program funding removed by the Senate. Additionally, this fiscal note is updated to reflect changes made in the House Finance committee substitute.

This revised fiscal note includes $1.36 million capital authorization (federal) for operating grants to communities so they have the funding necessary for local participation.

Analysis:

NOTE: The base budget ($4,691.7 and 33 positions) was removed from the Senate version of the FY12 operating budget, making it subject to conference committee. The annual capital project request for the federal grant funds that are shared with DCCED for grants to communities and for DCCED's administration of the grants was removed from the Senate version of the FY12 Capital Budget making it subject to conference committee.

The Alaska Coastal Management Program (ACMP) will automatically terminate on July 1, 2011 (SLA2005, CH31, Sec 22). CSHB106(FIN) would extend the termination date to July 1, 2017.

Submitted By: Senate Finance for SCS CSHB 106(FIN)

Prepared By: Conference Committee

Date: 05/04/2011

This fiscal note reflects the increased fiscal impacts due to the additional Division of Coastal and Ocean Management (DCOM) duties, including the administration and implementation of the Alaska Coastal Policy Board (CPB). Those increased fiscal impacts are detailed below:

Personal Services
One additional position, a Project Coordinator (range 20), will be required to cover the additional work associated with the CPB and the coordination of district planning functions and information sharing.

Travel
The CPB will meet four times in-person in the first two years following establishment of the board, and will meet in-person twice annually after that. The CPB will need to meet more frequently in-person for the first two years in order to establish board protocols, review coastal district plans, and address issues of interest to ACMP participants. CPB travel includes nine members and two DCOM support staff.

In addition, recognizing coastal districts will be amending their district plans based on CSHB106(FIN), two DCOM staff will travel 5-6 different districts per year for four years to assist the districts with their plan amendments.

Five DCOM staff will travel to regional locations for two years to provide ACMP training and education on program changes and the revised ACMP implementing regulations.

The DCOM Director will travel to Washington, DC three times annually for two years to work with NOAA on program change approvals and NEPA requirements.

Contractual
The CPB will meet two times annually by teleconference, with each 2-day teleconference lasting 8 hours each day (including 20 phone lines). CSHB106(FIN) will require a substantial revision to all three chapters of the implementing ACMP regulations (11 AAC 110, 112, and 114). Contractual services will be required to develop and complete those revisions, including the Department of Law final review. The coordination and distribution of district planning and consistency review data and information requires postage and other fees. DCOM will also reimburse state agencies for their participation and implementation of the ACMP program.

Supplies
Supplies will be required for supporting the CPB (dictation/recorder equipment, packet materials and binders) and support staff (office

Melanie Lesh

From: Will Vandergriff
Sent: Wednesday, February 08, 2012 8:15 PM
Subject: FW: PR 12-004 ACMP Initiative Petition Meets Signature Requirements 020812
Attachments: PR 12-004 ACMP Initiative Petition Meets Signature Requirements 020812.pdf

FYI – in case some of you don't receive the 3rd floor media.

W

Will Vandergriff | House Majority Press Secretary
Office of the Speaker | Alaska State Legislature
907.465.5284 direct | 907.317.9755 mobile
will.vandergriff@legis.state.ak.us
housemajority.org | mobile.housemajority.org
@houmaj | @willvandergriff

From: Cox, Colleen M (GOV) [mailto:colleen.cox@alaska.gov]
Sent: Wednesday, February 08, 2012 5:48 PM
To: Colleen Cox
Subject: PR 12-004 ACMP Initiative Petition Meets Signature Requirements 020812

Mead Treadwell
Lieutenant Governor
550 W. 7th Avenue, Suite 1700
Anchorage, AK 99501
Press Release

STATE OF ALASKA
OFFICE OF THE
LIEUTENANT GOVERNOR

Michelle Tooh
Chief of S
907.269.7
fax: 907.269.0
www.ltgov.alaska.g

ACMP Initiative Petition Meets Signature Requirements

February 8, 2012, Anchorage, AK – The citizen initiative to establish an Alaska Coastal Management Program appears to have gathered more than the minimum number of qualified signatures required for a determination of proper filing, Lt. Governor Mead Treadwell announced today. As of today, the Division of Elections has determined that at least 25,875 qualified subscribers, from at least 30 out of 40 legislative districts, signed the initiative petition.

For legal reasons, all signatures that were submitted by petition sponsors on January 17, 2012 are still being reviewed by the Division of Elections. In accordance with AS 15.45.150, the lieutenant governor has 60 days from the date the sponsors filed their petition to make a final determination of proper or improper filing. In addition, all signatures on a petition for a ballot measure must be examined for purposes of voter registration list maintenance pursuant to AS 15.07.130.

Under AS 15.45.190, upon a determination of proper filing, the initiative may appear on the next statewide general, special, or primary election that is held 120 days after a legislative session

has convened and adjourned and a period of 120 days has expired since the adjournment of the legislative session.

"Whether the measure actually appears on the primary or general election ballot depends on the timing of the legislature's adjournment, and whether they take action on 'substantially similar' legislation," Treadwell said.

# # #

JuneauEmpire.com

Coastal Management cost estimates challenged

Election director says initiative close to qualifying for ballot

Posted: February 7, 2012 - 12:02am

By Pat Forgey

JUNEAU EMPIRE

Juneau Mayor Bruce Botelho told a legislative committee Monday the Parnell administration significantly overstated the cost of restoring the Coastal Management program in Alaska.

An initiative to do that looks increasingly likely to make the ballot later this year.

Botelho chairs the Alaska Sea Party, a group of coastal communities trying to resurrect the program the Legislature let die last year. He was invited to testify over the objections of some legislators.

Botelho told a joint meeting of the House and Senate Judiciary committees the state's estimated fiscal impact of restoring the program was too high.

"I believe the fiscal note overstated the cost fairly dramatically, at least in the first few years of the program," Botelho said.

The state's official estimate said the state would have to absorb the full cost of the $5.4 million program initially, until partial federal funding would be likely to kick in.

Botelho said it would take some time, probably 2-3 years before the program could begin reviewing projects, which would be what much of its staff does. That would limit its initial cost.

An economist with the Office of Management and Budget, part of the Parnell administration, said because the timing and extent of the program are still in flux, cost estimates are difficult.

"Should the initiative pass it is likely that the actual costs will be different," said OMB economist John Boucher.

Sen. Bill Wielechowski, D-Anchorage, asked why the state was only projecting $2 million a year in federal support for the program, despite the state's previously receiving $4 million a year.

Boucher said he'd have to look into it and respond to the committee later.

Rep. Carl Gatto, R-Palmer, questioned whether the state was being overly optimistic projecting the federal government would have enough money to fund Coastal Management in the future.

Boucher said he couldn't speculate about the availability of the funds in the future, but they are part of federal law now.

One new aspect of the program is it creates a new board to oversee Coastal Management. Botelho said the state's $700,000 cost for that board was high, far higher than similar statewide panels, such as the Board of Game.

State Elections Director Gail Fenumiai said the Elections Division was working its way through the process of confirming the initiative had received the required 24,875 valid signatures from registered voters, and was getting close to doing so.

Of the more than 33,000 signatures submitted, 24,350 have already been validated, with more than 8,800 left to check.

She also said the signatures came from enough districts to satisfy a requirement for initiative petitions. Under state law, a minimum number of signatures must come from at least 30 of 40 House districts. Fenumiai said the Alaska Sea Party had actually collected the minimum number of signatures in 37 of the state's 40 districts, the first time the division has confirmed publicly that hurdle was met.

Monday's committee hearing was required by a new state law mandating an initiative proposal be heard in at least one committee of each house of the Legislature before it goes to the ballot. The House and Senate Judiciary committees were designated to conduct the hearings.

Rep. Kyle Johansen, R-Ketchikan, chief sponsor of the initiative requiring the hearings, had urged the committees to only hear from the administration about how they'd implement the program.

At the hearing itself, one committee member, Rep. Lance Pruitt, R-Anchorage, told Botelho he was "uncomfortable with you being here" as they weren't also hearing from initiative opponents.

The chairmen of the two committees, Gatto and Sen. Hollis French, D-Anchorage, said they decided whom to invite.

The Legislature can head off an election restoring Coastal Management by adopting a substantially similar program on its own. No such legislation has been proposed.

Also testifying were legislative attorneys who discussed the "substantially similar" requirement.

Doug Gardner, director of the Legislative Legal Services Division, said lawmakers would have wide latitude in putting together a substantially similar program, given Coastal Management's complexity, the Associated Press reported.

• Contact reporter Pat Forgey at 523-2250 or at patrick.forgey@juneauempire.com.

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ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
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REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

DATE: February 1, 2012

TO: Suzie Lowell, Chief Clerk
Alaska House of Representatives

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

RE: House Judiciary Committee Hearing Notice

Joint House/Senate Judiciary Committee Agenda

Monday, February 6, 2012 at 1:00 p.m. in Room 205.

Legislative hearing on initiatives certified by the lieutenant governor

11ACMP: "An Act establishing the Alaska Coastal Management Program"

- Doug Gardner, Director, Legislative Legal Services Division, Legislative Affairs Agency
- Susan Bell, Commissioner, Department of Commerce, Community and Economic Development – invited
- John Boucher, Senior Economist, Office of Management and Budget
- Bruce Botehlo, Mayor of Juneau, Initiative Sponsor – available for questions
- Gail Fenumiai, Director, Division of Elections, Office of the Lieutenant Governor

Testimony by invitation only

Lieutenant Governor Mead Treadwell
STATE OF ALASKA

January 17, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, AK 99801

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, AK 99801

Gary + Mike —

Dear President Stevens and Speaker Chenault:

In light of the Alaska Coastal Management Program Initiative (11ACMP) recently filed with the Division of Elections, I am writing the presiding officers of each body of the legislature regarding the legislative hearing requirement of AS 24.05.186.

On January 17, 2012, the sponsors of this initiative timely filed their petition with the Division of Elections (Division) under AS 15.45.140. The Division has determined that the petition, on its face, contains a sufficient number of presumptively valid signatures – over 25,875— to be accepted for filing. The Division is now in the process of verifying those signatures as required under AS 15.45.150 -- 15.45.160. The Division has 60 days to complete the signature verification process and to notify the initiative committee of the results of that process.

Under AS 24.05.186, a standing committee of the legislature, selected jointly by the presiding officers of the House and Senate, must hold at least one hearing on an initiative that my office has determined was properly filed. The legislative hearing must occur within 30 days after the convening of the legislative session at which the proposition would appear on the ballot. In this case, if the review finds that the statutory signature requirement is met, the proposition may appear on the August 2012 primary election ballot.

Based on the 60-day signature verification requirement of AS 15.45.150 and the 30-day legislative hearing requirement of AS 24.05.186(b), the required legislative hearing will need presumably to occur before the time for signature verification has elapsed.

Please let me know of any questions or issues regarding this process.

Sincerely,

Mead Treadwell
Lieutenant Governor

Juneau Office: Post Office Box 110015 • Juneau, Alaska 99811 • 907.465-3520 voice • 907-465-5400 fax
Anchorage Office: 550 West 7th Avenue, Suite 1700 • Anchorage, Alaska 99501 • 907.269.7460 voice • 907-269-0263 fax
lt.governor@alaska.gov • www.ltgov.alaska.gov

Cc: The Honorable Sean Parnell, Governor
Mike Nizich, Chief of Staff, Office of Governor Sean Parnell
Cindy Sims, Deputy Chief of Staff, Office of Governor Sean Parnell
The Honorable Susan Bell, Commissioner, Department of Commerce Community and Economic Development
The Honorable Cora Campbell, Commissioner, Department of Fish and Game
The Honorable Larry Hartig, Commissioner, Department of Environmental Conservation
The Honorable Dan Sullivan, Commissioner, Department of Natural Resources
The Honorable Rick Svobodny, Acting Attorney General, State of Alaska
Heather Brakes, Legislative Director, Office of Governor Sean Parnell

Alaska State Legislature

received
1-24-12
3:05 p.m.

January 24, 2012

Senator Hollis French, Chair Senate Judiciary
Representative Carl Gatto, Chair House Judiciary

Chairmen:

As we understand, your committees have been chosen by the presiding officers to review the initiative regarding Coastal Zone Management.

We write this letter clarifying the intent in adding this provision to the legislation as co-prime sponsors two years ago.

The intent of the Legislative hearing language was to gauge the impact on the agencies charged with duties by an initiative. It has been our experience that, while well intended, language forwarded by initiative sponsors may not fully anticipate implementation challenges faced by regulators.

Therefore, we ask that you consider limiting testimony for this required meeting to the agencies affected by this measure.

While we understand the possible desire for public testimony on the issue, nothing precludes either of you (or other committees) from holding additional hearings.

Our offices can provide you with a copy of the relevant minutes from committee testimony on House Bill 36 regarding the intent of this section of the bill, if necessary.

Respectfully,

Kyle B Johansen

Representative Kyle Johansen

Charisse Millett

Representative Charisse Millett

11ACMP STATEMENT OF COSTS

Summary:

The estimated total cost of this program during the next five years is $27.0 million. Of that estimated cost, the minimum expenditure by the State of Alaska under this initiative during the next five years, if it becomes law, is $22.3 million. The program has no expiration date, and the estimate – developed by the Governor's Office of Management and Budget – does not provide for inflation.

Expenses of the proposed program may be shared with the federal government in year three or later if the U.S. Department of Commerce approves the program and provides partial funding, and Congress makes the required appropriation. **Of the annual estimated program cost of $5.4 million, federal support is estimated to be up to a maximum of $2.0 million per year after year five.** The program is not required by federal law.

Expenditures for this program are subject to legislative appropriation. The estimate excludes potential litigation expenses and revenue impacts to the State of Alaska.

The overall cost estimate may be high or low, depending on decisions made by the new Board proposed in the initiative. The number of days that Board and Coastal District Boards decide to meet, the number and kind of consistency reviews, elevations and appeals over natural resource permits that the program may authorize, and the potential duplication of permitting reviews at the Department of Environmental Conservation and at the Coastal District level are among the major cost uncertainties.

Costs or savings the program would provide in the management or protection of public trust resources or permit coordination cannot be estimated at this time, nor can the estimate include the costs or savings the program would provide in the process of allowing the State and local districts to comment on or condition federal permits issued in Alaska's coastal regions.

The complete budget estimate prepared by the Office of Management and Budget is below:

Statement of Costs for Initiative:
Establishment of Alaska Coastal Management Program
Prepared by the Office of Management and Budget

As required by AS 15.45.090(a)(4), the Office of Management and Budget has prepared the following estimate of costs to the State of implementing the law proposed by this ballot initiative.

This ballot initiative would establish a coastal management program for Alaska. To govern the envisioned program, the initiative creates a new thirteen-member Coastal Policy Board, referred to as the Alaska Coastal Policy Board, which would be responsible for overseeing the proposed coastal management program. Among its principal duties are reviewing and approving regulations for the program and the management plans and enforceable policies prepared by local coastal district boards. The Coastal Policy Board is also to "initiate an interagency program of strategic coastal and ocean planning for each geographic region of the state."

Administrative support for the program and board would be provided by the Alaska Department of Commerce, Community & Economic Development. The department, under the direction of the board, would contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out its duties and responsibilities. To provide the structure for the administrative support, the initiative creates within the department a Division of Ocean and Coastal Management. Among its other duties, the division would be responsible for rendering determinations whether projects subject to the program would be "consistent" with applicable statewide standards and enforceable policies of an affected coastal district.

The initiative would create a coastal management program with a number of substantive differences from the most recent federally approved Alaska Coastal Management Program that existed up until July 1, 2011. If the initiative is approved by the voters, a new administrative structure for the program would be built from scratch. This would include recruiting and hiring personnel, acquiring office space, equipment and supplies. It would also include tasks such as developing implementing regulations and guidance to administer the program. There is insufficient detail in the initiative to identify all of the costs to implement the program – this represents an estimate of the costs and the actual costs are likely to be different.

As a basis for providing cost estimates, it was assumed that the operation and procedural requirements of the Coastal Management Program envisioned by the initiative would include most if not all of the costs that existed before July 1, 2011. The initiative provides the board with broad power to create a program or procedures that could vary widely from the previous program. Substantive differences in the management or procedural requirements of the program could result in the costs varying substantially from the costs presented. Areas of program implementation difference that increase costs to the state include but are not limited to: Costs of additional board meetings should the board be required to meet more than the estimated four times annually; the level and timing of federal funding for the program; potential costs to state agencies in implementing the coastal management program and administering other state programs due to an increase in the number and/or complexity of local enforceable policies and other plan requirements; an increase in the amount and complexity of coordination and enforcement

of actions taken by the board; and an increase in the level of financial and other support for local coastal districts.

Expenditures for the program would be subject to legislative appropriation. The estimate excludes litigation expenses and potential revenue impacts to the State of Alaska.

In 2011, the budget estimate for renewing the State's previous federally approved coastal management program was approximately $4,700,000 annually, a portion of the program was funded with federal funds and a portion was funded with state funds.

The cost associated with the administration and implementation of the new Coastal Policy Board was not anticipated in the estimate above. The estimate to provide administrative support to the Coastal Policy Board is approximately $700,000 annually, and the additional cost is assumed to be state funded.

Until the new coastal management program is federally approved and becomes eligible to receive federal funds, the State would expect to initially absorb the entire cost. This would be followed by a period of gradually increasing federal participation in sharing of the costs until the program met eligibility requirements for full federal funding. Typically, it takes a coastal management program approximately two years from initial application to federal approval and an additional three years before qualifying for a full program cost share. During the initial two years, the State could expect to support the program at its anticipated annual funding level of $5,400,000. The amount of federal funds available in the out years is unknown, however given the current federal program; the state would anticipate federal participation to top out at $2,000,000 in year five.

A year by year estimate of federal and state funding is presented below:

	General Funds	Federal Funds	Total Funds
Year 1	$ 5,400,000	$ 0	$ 5,400,000
Year 2	$ 5,400,000	$ 0	$ 5,400,000
Year 3	$ 4,320,000	$ 1,080,000	$ 5,400,000
Year 4	$ 3,763,633	$ 1,636,634	$ 5,400,000
Year 5	$ 3,400,000	$ 2,000,000	$ 5,400,000
Year 6	$ 3,400,000	$ 2,000,000	$ 5,400,000

Administrative support for the new agency would be provided by a new division in the Alaska Department of Commerce and Community Development. It is assumed that the new agency would be similarly structured to the previous Alaska Coastal and Ocean Management component in the Alaska Department of Natural Resources.
Alaska Coastal Management Program estimate by category

TOTAL	$5,400,000
Personal Services	$3,260,000

This expenditure would support salaries and benefits for 34 full time positions ranging from a Division Director to an Office Assistant. The majority of the positions are Natural Resource Specialists supporting the envisioned Alaska Coastal Management Program. One additional position was added to the previously configured program to cover the additional work associated with the administration of the Alaska Coastal Policy Board and coordinating district planning functions and information sharing.

Travel $267,900

The projected travel expenditure would support employee and board related in-state and out of state travel to coastal districts and includes hotel, per diem, airfare and reimbursement for Alaska Coastal Management Program district assistance, staff training, mediation, public education, conferences and other travel supporting the program. This estimate anticipates increased travel costs in the first two years following the establishment of the board in order to assist coastal districts with their plans and advocate for the federal approval of the plan in Washington DC.

This estimate assumes travel costs associated with four annual in-person meetings of the 13-member Alaska Coastal Policy Board and two support staff members.

Services $1,815,300

This expenditure supports contracts in the form of Reimbursable Services Agreements (RSA) to agencies participating in the Alaska Coastal Management Program. These contracts would support the implementation of the Alaska Coastal Management Program by the participating state agencies, coastal management areas and other contractors.

It also supports purchased services from other state agencies including centralized telecommunication, mail and human resource services, legal services, professional services to support monitoring & compliance activities and development and implementation activities for the Alaska Coastal Management Program. In the initial years, additional contractual services will be needed to draft and review implementing program regulations, conduct district elections, and other start up activities.

Commodities $56,800

This expenditure estimate supports purchases related to office supplies, office furnishings and equipment, software as well as minor repairs to office equipment.

Additional one-time costs associated with the initiative

Statement of Costs for Initiative
"An Act establishing the Alaska Coastal Management Program"
Costs to certify the initiative application and review the initiative petition
Prepared by the Office of Lieutenant Governor and the
Division of Elections

Elections cost statement
The minimum cost to the Division of Elections associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition, is estimated to be $66,821. This statement is required under AS 15.45.090(a) (3).

Total $66,821

Elections estimate by category

Personal Services $65,521
Expenses associated with certification of the initiative application and review of the initiative petition:
Three full-time employees at 522 hours is $26,067
8 temporary employees at 2520 hours is $39,454

Services $ 1,300
Printing of booklets is $1,300

Lt. Governor's Office Cost statement
The minimum cost to conduct public hearings concerning the initiative in two communities in each of four judicial districts is estimated to be $4,470. This statement is required under 15.45.195.

Total $4,470

Lt. Governor's Office Estimate by category

Travel $ 4,270
Average round trip airfare for the Lieutenant Governor and one staff member to travel to seven communities in Alaska: Average airfare: $310 * 7 locations * 2 staff = $4,270. It is assumed one of the hearings would be in Anchorage which would not involve travel costs.

Services $ 200
Cost breakdowns for teleconferencing services:
$25.00 X 8 meetings = $200.00 as a minimum cost estimate

Alaska Coastal Management Program Initiative
Comparison of Initiative Provisions with Past Programs and Legislation

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
Location	DCCED	DNR	Governor's Office	DNR
Board	13-member board of 9 public members and 4 commissioners (DNR, DFG, DEC and DCCED).	No board - DNR commissioner responsible for all ACMP decisions with no checks and balances.	15-member board of 9 public members (local elected officials), the director of the Office of Management and Budget, and the commissioners of DCED, DEC, DFG, DNR, and DOTPF.	9-member board with 5 public members (one representing industry or a Native corporation), a deputy commissioner of DNR, and the commissioners of DEC, DFG, and DOTPF.
	Quorum: 5 public members and 2 agency members.	n/a	Quorum: 4 public members & 3 agency members.	Quorum: 3 public members and 3 agency members.
	Decisions made by a majority of members present and voting.	n/a	Decisions made by majority vote of those present.	Decisions require 2/3 vote of entire board.
	Governor appoints 9 public members from list of nominations from coastal districts.	n/a	Governor appoints 9 public members from a list of nominees from municipalities.	Governor appoints 5 public members; 4 members nominated by districts (may request subsequent lists of nominees).
	Board may recommend the Governor remove a public member for cause.	n/a	Public members removed only if they cease to meet qualifications.	Governor may remove public members for cause.
	Authority to approve regulations, direct DCCED to seek federal approval of program, approve district programs, establish interagency coordination, and evaluate effectiveness of district programs.	n/a	Authority for grants, adopting regulations (guidelines, standards and consistency reviews), interagency coordination, reviewing district plans, and developing procedures for coordination and consultation with federal agencies.	Advisory board makes recommendations, provides a forum for discussion, comments on regulations and directs districts to resubmit its coastal plan if policies duplicate new laws. Board annually solicits changes to state and federal laws.
Boundaries	Incorporates coastal zone boundaries approved by	Coastal zone boundaries were approved by former Coastal	Coastal Policy Council responsible for approving	Coastal zone boundaries were approved by former Coastal

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
	former Coastal Policy Council.	Policy Council.	coastal zone boundaries.	Policy Council.
Regional Planning	Board to initiate a program of strategic regional coastal and ocean planning.	DNR to initiate an interagency program of comprehensive coastal resource planning for each geographic region of state.	Coastal Policy Board to initiate an interagency program of comprehensive coastal resource planning for each geographic region of state.	DNR to initiate an interagency program of comprehensive coastal resource planning for each geographic region of state.
Enforceable policies	Policies cannot unreasonably or arbitrarily restrict a use of state concern.			
	Policies cannot duplicate, restate, or incorporate by reference state or federal statutes or regulations.			Policies cannot duplicate, restate, incorporate by reference, rephrase, or adopt state or federal statutes or regulations.
	Policies must be clear and concise, cannot address matters preempted by state or federal law, may be prescriptive or performance based, and may address a matter of local concern.	Policies must be clear and concise, address a matter of local concern, be prescriptive, and address a matter of local concern (not adequately addressed by state or federal law).	District programs must be consistent with the standards and guidelines adopted by the Coastal Policy Council.	Policies may not address matters preempted or in conflict with federal law and employ the least restrictive means to achieve objective. State agencies have broad authority to object to a policy.
	Designated areas not required.	Designated areas are optional but required by regulation for many subjects of enforceable policies (e.g., subsistence and habitat). DNR denied many of the designated areas proposed by districts.	Designated areas are not required.	Not specifically addressed in statute but DNR testified to the Legislature that it will not require designations in order to establish enforceable policies.
	Districts may establish Areas Meriting Special Attention and establish enforceable policies that are applicable only in those areas.			
Regulations	Board will approve new regulations for project reviews, statewide standards and district plan criteria.	According to DNR testimony to the Legislature, regulations were more stringent than intended by the Legislature.	Regulations were not more stringent than intended by the Legislature.	Amendments to the regulations would be required to implement amendments to the ACMP.
Citizen Appeals	Citizen appeals not addressed in bill.	Citizen appeals prohibited.	Citizen lawsuits allowed and pre-decision project petitions allowed pre-2002.	Citizen appeals prohibited.

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
ACMP Sunset	No sunset provision.	July 1, 2011 sunset date. No sunset prior to 2005.	No sunset provision.	ACMP sunsets July 2017 unless extended.
District Plan Amendments	Plans approved as of June 2011 incorporated into new program. No requirement to resubmit plans.	Districts must resubmit plans every 10 years.	No requirement to resubmit plan every 10 years.	This bill did not change the existing statutory requirement that requires districts to resubmit plans every 10 years. A new provision in the bill requires the board to review all new state and federal laws each year. If a district policy duplicates the new law, the board must direct the district to submit a new plan.
DEC Participation	DEC participates in the program the same as DNR and DFG.	DEC Carveout removed DEC permits from ACMP consistency reviews. Legislative intent was for DEC to participate in reviews, it but seldom did. DNR testimony to Legislature indicated districts could establish policies to fill gaps in DEC laws, but none were approved.	DEC participated in the program the same as DNR and DFG.	DEC permits excluded from ACMP project consistency reviews. Board to prepare a report about the DEC Carveout by 2/1/14 and include recommendations for changes to AS 46.40.
Review Timelines	Not addressed in bill.	Most reviews must be completed within 90-days even if there is not adequate information for decision	No 90-day limit.	Most reviews must be completed within 90-days even if there is not adequate information for decision.
	For reviews with federal permits, federal regulations require notification why there is a delay at 3 months, and review must be completed in 6 months.			
Elevations (pre-decision appeals)	No details about consistency review process. Regulations would be developed for reviews.	DNR commissioner has sole authority to make decision on elevations.	DEC, DFG & DNR made decision by consensus.	DEC, DFG & DNR decide elevations by written order signed by two resource agencies within 60 days.

Topic	Initiative	June 2011 Program	Pre-2003 Program	CS SB 45 (CRA) am (failed House 6/11)
Inland Projects	Review of inland projects not addressed.	Projects inland of the coastal zone cannot be reviewed for consistency with the ACMP.	Projects inland of the coastal zone reviewed only if there are impacts to coastal resources or uses.	Projects inland of the coastal zone cannot be reviewed for consistency with the ACMP.
	Federally-initiated activities inland of coastal zone reviewed only if there are coastal effects.			
Outer Continental Shelf (OCS)	Activities in the OCS may be reviewed for consistency with the ACMP.	Activities in the OCS may be reviewed for consistency with the ACMP, but impacts to coastal resources/uses in OCS cannot be considered because of the designated area requirement in the ACMP regulations.	Activities in the OCS may be reviewed for consistency with the ACMP.	Activities in the OCS may be reviewed for consistency with the ACMP. DNR testified to the Legislature that it would remove the designated area requirements.
Activities on federal lands & waters	In addition to activities onshore and in state waters, the federal Coastal Zone Management Act (CZMA) allows states to review activities occurring in federal waters or on federal land (i.e., activities initiated or permitted by a federal agency). As described below, the ACMP regulations limited this ability.			
	The bill does not limit provisions in the CZMA for reviewing activities on federal lands and water.	Due to the designated area requirements in regulation, impacts to coastal resources and lands could only be considered within the designated area. Since the designated areas could not include federal land, the regulation limited powers given to the state in the CZMA.	No limits in bill on provisions in the CZMA for reviewing activities on federal lands and water.	No limits in bill on review of activities on federal lands or waters. Assuming the designated area requirement would be removed from the regulations, this bill would allow consideration of impacts to coastal resources and uses on federal lands and waters.

Paid for and approved by the Alaska Sea Party: Restoring Coastal Management
217 Second Street, Suite 200, Juneau, Alaska 99801
Bruce Botelho, Chair
Top Contributors: North Slope Borough-Alaska Conference of Mayors-Alaska Municipal League
www.alaskacoastalmanagement.org

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 6, 2012

SUBJECT: Sectional Summary of Coastal Management Program Initiative 11 ACMP (Work Order No. 27-LS1329)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Alpheus Bullard 1493
Legislative Counsel

You have requested a sectional summary of the above-described initiative.

As a preliminary matter, note that a sectional summary of an initiative should not be considered an authoritative interpretation of the initiative and the initiative itself is the best statement of its contents.

Sec. 46.41.010. Coastal Policy Board. Establishes an Alaska Coastal Policy Board ("board") in the Department of Commerce, Community, and Economic Development ("department"). The board consists of nine public members, and their alternates, appointed by the governor from the coastal regions of the state, as well as the commissioners of the Department of Environmental Conservation, the Department of Fish and Game, the Department of Natural Resources, and the Department of Commerce, Community and Economic Development. It specifies membership terms, quorum and meeting requirements, board structure and governance details, and that the department will provide administrative support for the board.

4 of the 7 quorum can make decisions

Sec. 46.41.020. Powers and duties of the board. Establishes the duties and powers of the board.

Sec. 46.41.030. Division of Coastal Management. Establishes a division of ocean and coastal management within the department. Provides the duties of the division.

Sec. 46.41.040. Development of Alaska Coastal Management Program. Provides what regulations must be adopted under the Alaska Coastal Management Program ("program"). Directs that regulations relating to (1) program standards, (2) criteria for the preparation and approval of district coastal management plans, and (3) consistency review procedures for coastal activities and projects, be adopted. Further provides that the coastal management districts ("districts"), coastal district boundaries, and approved

coastal management plans ("plans") that were in effect on June 30, 2011, are restored and incorporated into the program.

Sec. 46.41.050. Objectives. Requires that the program be consistent with certain objectives.

Sec. 46.41.060. Development of district coastal management plans. Requires districts to develop and adopt plans. Provides plan requirements. Provides criteria for board approval of plans.

Sec. 46.41.070. Submission of district plans by coastal districts. Requires restored districts to review their plans within one year after the adoption of program regulations by the board. Provides that if plan changes are necessary, a revised plan must be submitted to the department for review by the board.

Sec. 46.41.080. Implementation of district coastal management plans. Requires districts to implement plans. Provides how a plan must be implemented. Provides that a plan for a district that does not exercise zoning or other controls "on the use of resources" within its coastal area will be implemented by "appropriate state agencies."

Sec. 46.41.090. Compliance and enforcement. Requires municipalities and state resource agencies to regulate land and water controls in conformity with district plans. Provides that the superior court has jurisdiction to enforce orders of the board and the department.

Sec. 46.41.100. Coastal management plans in the unorganized borough. States that coastal resource service areas ("service areas") established in the unorganized borough may exercise all authority and perform those duties required by the program.

Sec. 46.41.110. Coastal resource service areas. Provides for how service area boundaries will be determined.

Sec. 46.41.120. Organization of a coastal resource service area. Permits a service area (created under sec. 46.41.110) to be established by a vote at an election after either the submission to the board of (1) a petition from a certain percentage of the voters within the proposed service area or (2) a resolution from a certain percentage of the city and village councils in the proposed service area.

Sec. 46.41.130. Coastal resource service area boards. Requires each service area to have an elected service area board. Provides for board duties and powers, board composition and membership, election of board members, terms of office, vacancies, and the recall of board members.

Sec. 46.41.140. Elections in coastal resource service areas. Directs the lieutenant governor to administer the elections for service area board members under sec. 46.41.130 and the organization of service areas under sec. 46.41.120.

Sec. 46.41.150. Preparation of district coastal management program (sic.) by the Department of Commerce, Community and Economic Development. Permits the board to submit a district plan to the legislature for consideration if (1) the residents of a service area reject the organization of that service area at an election under sec. 46.41.120 and (2) the board finds that major economic activity has occurred, or will occur, in the proposed service area. Such plans are prepared by the department upon request of the board. Further permits the department, in consultation with the service area, to prepare a plan for a service area that has been organized under sec. 46.41.120, but that has not been able to make substantial progress in the preparation of an approvable plan.

Sec. 46.41.160. Approval of plans in coastal resource service areas. Establishes a process for a plan to be reviewed by cities and villages within a service area, prior to (1) adoption by the service area board and (2) approval by the (Coastal Policy) board. Establishes parameters for plan review by cities and villages.

Sec. 46.41.170. Cooperative administration. Provides that a city that is within the coastal area, but that is not part of a coastal service area, will be included within an adjacent service area, unless the city's governing body opts out. Provides that a municipality and a service area are not restricted from engaging in cooperative or joint administration of functions.

Sec. 46.41.180. Construction with other laws. States that the initiative's provisions (secs. 46.41.010 - 46.41.900) may not be construed to diminish various state and municipal powers and duties.

Sec. 46.41.900. Definitions. Provides definitions for the initiative's provisions (secs. 46.41.010 - 46.41.900).

TLAB:med
12-029.med

AN ACT ENTITLED

"An Act establishing the Alaska Coastal Management Program."

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

*** Section 1.** AS 46 is amended by adding a new chapter to read:

Chapter 41. Alaska Coastal Management Program

Sec. 46.41.010 Coastal Policy Board

(a) There is created in the Department of Commerce, Community and Economic Development the Alaska Coastal Policy Board. The board consists of the following:

(1) nine public members and alternates appointed by the governor from a list composed ~~of at least~~ three names from each region, nominated and submitted by the coastal districts of each region; one public member shall be appointed from each of the following regions:

(A) northwest Alaska, including, generally, the area of the North Slope Borough and the Northwest Arctic Borough;

(B) Bering Straits, including, generally, the area of the Bering Straits regional educational attendance area and the City of Nome;

(C) southwest Alaska, including, generally, the area within the Lower Yukon, Lower Kuskokwim, and Southwest regional educational attendance areas, the City of Bethel, and the Lake and Peninsula and Bristol Bay Boroughs;

(D) Kodiak-Aleutians, including the area of the Kodiak Island and Aleutian East Boroughs and the Aleutian, Adak and Pribilof regional educational attendance areas;

(E) Upper Cook Inlet, including the Municipality of Anchorage and the Matanuska-Susitna Borough;

(F) Lower Cook Inlet, including, generally, the area within the Kenai Peninsula Borough;

(G) Prince William Sound, including, generally, the area east of the Kenai Peninsula Borough to 141 W. longitude;

(H) northern Southeast Alaska, including the area southeast of 141 W. longitude and north of 57 N. latitude, including the entirety of the City and Borough

of Sitka; and

(I) southern Southeast Alaska, including that portion of southeastern Alaska not contained within the area described in (H) of this paragraph;

(2) each of the following:

(A) the commissioner of environmental conservation;

(B) the commissioner of fish and game;

(C) the commissioner of natural resources; and

(D) the commissioner of commerce, community, and economic development.

(b) Public members serve staggered terms of three years. Except as provided by (c) of this section, each member serves until a successor is appointed. A public member may be reappointed.

(c) The alternate for a commissioner serving under (a)(2) of this section shall be a deputy commissioner or the director of a division in the commissioner's department. The names of alternates shall be filed with the board.

(d) The board shall designate co-chairs, one of whom shall be selected from among the public members appointed under (a)(1) of this section and one from among the members designated in (a)(2) of this section.

(e) The board may recommend that the governor remove a public member for cause.

(f) Five public members and two designated members of the board constitute a quorum, but the board may delegate to one or more of its members the power to hold hearings. All decisions of the board shall be by a majority vote of the members present and voting.

(g) The board shall meet at least four times a year and as often as necessary to fulfill its duties under this chapter. Meetings may be held and members may vote telephonically, except one board meeting a year shall be held in person.

(h) Public members of the board or their alternates are entitled to per diem and travel expenses authorized by law for members of boards and commissions.

(i) Administrative support for the board shall be provided by staff of the department. The department, under the direction of the board shall contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out the board's duties and responsibilities.

Sec. 46.41.020. Powers and duties of the board.

(a) The board shall

(1) review and approve regulations necessary to implement the coastal management program in conformity with this chapter and 16 U.S.C. 1451 - 1464 (Coastal Zone Management Act of 1972);

(2) direct the department to seek approval of the Alaska coastal management program by the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management in conformity with 16 U.S.C. 1451 – 1464 (Coastal Zone Management Act of 1972);

(3) initiate an interagency program of strategic coastal and ocean planning for each geographic region of the state;

(4) review and approve coastal district management plans after receiving the department's recommendations, including local enforceable policies, that meet the provisions of this chapter and the district plan criteria.

(5) establish continuing coordination among state agencies to facilitate the development and implementation of the Alaska coastal management program;

(6) evaluate the effectiveness of district coastal management plans; and

(7) direct the department to apply for and accept grants, contributions, and appropriations, including application for and acceptance of federal funds that may become available for coastal planning and management.

(b) The board may

(1) contract for necessary services;

(2) take any reasonable action necessary to carry out the provisions of this chapter.

Sec. 46.41.030. Division of Coastal Management.

(a) There is created in the department the division of ocean and coastal management.

(b) The division shall

(1) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each conclusive state consistency determination when a project requires a permit, lease, or authorization from the department or from two or more state resource agencies.

(2) adopt regulations approved by the board necessary to implement this chapter under the provisions of AS 44.62 (Administrative Procedure Act).

(3) assure continued provision of data and information to coastal districts to carry

out their planning and management functions under the program.

(4) develop and maintain a program of financial assistance to aid coastal districts in the development and implementation of district coastal management plan.

Sec. 46.41.040. Development of Alaska coastal management program.

(a) The regulations developed under this chapter shall include

(1) statewide coastal program standards;

(2) the criteria and process for the preparation and approval of district coastal management plans; and

(3) consistency review procedures in accordance with this chapter, including provisions for

(A) review of activities proposed or permitted by a state or federal agency;

(B) the types of activities that will trigger a consistency review;

(C) review of phased activities and uses;

(D) public notice and opportunities for public comment;

(E) elevation of proposed consistency determinations to the resource agency commissioners;

(F) establishment of review timelines;

(G) exclusion from an individual project review aspects of activities that are covered by a general permit previously found consistent with the Alaska coastal management program;

(H) exclusion of routine activities with insignificant effects to coastal uses or resources from an individual consistency review.

b) The coastal districts, coastal district boundaries and approved coastal management plans that were in effect as of June 30, 2011 are in effect and are incorporated into the Alaska coastal management program.

Sec. 46.41.050. Objectives.

The Alaska coastal management program shall be consistent with the following objectives:

(1) the use, management, restoration, and enhancement of the overall quality of the coastal environment for this and succeeding generations;

(2) the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;

(3) the orderly, balanced utilization and protection of the resources of the coastal

area consistent with sound conservation and sustained yield principles;

(4) the management of coastal land and water uses in such a manner that, generally, those uses that are economically or physically dependent on a coastal location are given higher priority when compared to uses that do not economically or physically require a coastal location;

(5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;

(6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;

(7) the recognition of the need for a continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs; and

(8) the full and fair evaluation of all demands on and uses of the land and water in the coastal area.

(9) the coordination of planning and decision-making in the coastal area among levels of government and citizens engaging in or affected by activities involving the coastal resources of the state;

(10) the participation of the public, local governments, and agencies of the state and federal governments in the development and implementation of a coastal management program; and

(11) the requirement that state resource agencies carry out their duties, powers and responsibilities that affect the use of coastal area resources in accordance with the coastal program adopted pursuant to this Act.

Sec. 46.41.060. Development of district coastal management plans.

(a) Coastal districts shall

(1) develop and adopt district coastal management plans in accordance with the provisions of this chapter. The plan adopted by a coastal district shall be based upon a municipality's existing comprehensive plan or a new comprehensive resource use plan or comprehensive statement of needs, policies, objectives, and standards governing the use and conservation of resources within the coastal area of the district. The plan must meet the district plan criteria adopted under AS 46.41.040 and must include

(A) a delineation within the district of the boundaries of the coastal area subject

to the district coastal management plan;

(B) a statement, list, or definition of the land and water uses and activities subject to the district coastal management plan;

(C) a designation of any special management areas;

(D) enforceable policies to be applied to all the land and water uses subject to the district coastal management plan as well as policies that apply to special management areas.

(b) The board shall approve an initial or amended district coastal management plan if the

(1) district coastal management plan meets the requirements of this chapter and the district plan criteria in regulation adopted by the department; and

(2) enforceable policies of the district coastal management plan

(A) do not duplicate, restate, or incorporate by reference state or federal statutes or regulations;

(B) are not preempted by federal or state law;

(C) do not arbitrarily or unreasonably restrict a use of state concern;

(D) are clear and concise as to the activities and persons affected by the policies and the requirements of the policies;

(E) use prescriptive or performance-based standards that are written in precise and enforceable language; and

(F) address a coastal use or resource of concern to the residents of the coastal resource district as demonstrated by local knowledge or supported by scientific evidence

(c) In (b)(2)(B) of this section, an enforceable policy of the district coastal management plan is preempted

(1) by federal statutes or regulations if the United States Congress expressly declares that local law or regulation is preempted, if the United States Congress demonstrates the intent to occupy the field exclusively, or if there is an actual conflict between federal and local law or regulation;

(2) by state law if it is prohibited, either by express legislative direction or direct conflict with a state statute or regulation, or where a local law or regulation substantially interferes with the effective functioning of a state statute or regulation or the underlying

purposes of a state statute or regulation.

Sec. 46.41.070. Submission of district plans by coastal districts.

(a) Within one year after the effective date of regulations implementing this chapter, coastal districts shall review their coastal management plans and if changes are necessary to meet the requirements of this chapter and implementing regulations, submit to the department a revised district coastal management plan.

Sec. 46.41.080. Implementation of district coastal management plans.

(a) A district coastal management plan approved under this chapter for a coastal district that does not have and exercise zoning or other controls on the use of resources within the coastal area shall be implemented by appropriate state agencies. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.

(b) A coastal district that has and exercises zoning or other controls on the use of resources within the coastal area shall implement its district coastal management plan. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.

Sec. 46.41.090. Compliance and enforcement.

see: 46.40.100

(a) Municipalities and state resource agencies shall administer land and water use regulations or controls in conformity with district coastal management plans approved under this chapter and in effect.

(b) The superior courts of the state have jurisdiction to enforce lawful orders of the board and the department under this chapter.

Sec. 46.41.100. Coastal management plans in the unorganized borough.

(a) A coastal resource service area incorporated into the coastal management program under this chapter shall exercise those authorities and perform those duties required under this chapter.

Sec. 46.41.110. Coastal resource service areas.

(a) Except as otherwise provided in this section, each regional educational attendance area established under AS 14.08.031 containing a part of the coastal area may be organized as a coastal resource service area.

(b) The commissioner of the department may, after public hearings held in the affected area, consolidate two or more regional educational attendance areas as a single

coastal resource service area

(1) if a substantial portion of the coastal area contains land and water area owned by the federal government over which it exercises exclusive jurisdiction or land held in trust by the federal government for Alaska Natives over which the state would not exercise control as to use; or

(2) if, after giving due consideration to the standards applicable to incorporation of borough governments and the likelihood that a borough will be incorporated within the area, the commissioner determines that the functions to be performed under this chapter could be undertaken more efficiently through the combination of two or more regional education attendance area as a single coastal resource service area.

(c) A determination under (b) of this section shall be made before the organization of the coastal resource service area.

(d) or purposes of coastal management only, the commissioner of the department may, after public hearings held in the regional education attendance area affected, divide an existing regional education attendance area into no more than three coastal resource service areas according to geographic, cultural, economic, environmental, or other features relevant to coastal management planning. However,

(1) each coastal resource service area formed by dividing an existing regional education attendance must contain at least one first class city or home rule city; and

(2) a city within a coastal resource service area formed by dividing an existing regional education attendance area may not elect to exclude itself from the coastal resource service area.

Sec. 46.41.120. Organization of a Coastal Resource Service Area.

(a) Organization of a coastal resource service area may be initiated by

(1) submission to the coastal policy board of a petition signed by a number of registered voters equal to 15 percent of the number of votes cast within the coastal resource service area at the last state general election; or

(2) by submission to the board of a resolution approved by the city council or traditional village council of not less than 25 percent of the number of cities and villages within the coastal resource service area.

(b) Acting at the request of the council, the lieutenant governor, not less than 60 nor more than 90 days after receipt of a proper petition under (a)(1) of this section, a proper

resolution under (a)(2) of this section, or at the direction of the council under (a)(3) of this section, shall conduct an election on the question of organization of a coastal resource service area.

Sec. 46.41.130. Coastal resource service area boards

(a) Each coastal resource service area shall have an elected board representing the population of the service area. The board shall have the powers and duties and perform the functions prescribed for or required of coastal districts.

(b) A coastal resource service area board shall contain seven members. Board members shall be elected at large by the qualified voters of the coastal resource service area.

(c) The term of office of a member of a coastal resource service area board is three years. Members serve until their successors are elected and have qualified. This section does not prohibit the reelection of a board member.

(d) The lieutenant governor shall provide for the election of the members of coastal resource service area boards.

(e) Election of members of coastal resource service area boards shall be held annually on the date of election of members of regional educational attendance area boards under AS 14.08.071(b). If no candidate files for election to a seat on the coastal resource service area board, the seat is considered vacant at the time a newly elected member would have taken office.

(f) A seat on a coastal resource service area board shall be declared vacant by the board if the criteria under AS 14.08.045 (a) apply to the person elected. A vacancy on a coastal resource service area board shall be filled by appointment as provided in AS 14.12.070 for vacancies in the membership of regional educational attendance area boards.

(g) Members of coastal resource service area boards are subject to recall on the same grounds and in the same manner as provided for recall of municipal officials in AS 29.26.240 - 29.26.350. The lieutenant governor functions in place of the assembly or council and municipal clerk for receipt and review of recall petitions and the conduct of recall elections.

(h) Members of a coastal resource service area board are entitled to per diem and travel expenses authorized by law for members of boards and commissions and for honorariums for meetings attended in person.

Sec. 46.41.140. Elections in coastal resource service areas.

Elections under AS 46.41.100 - 46.41.160 shall be administered by the lieutenant

governor in the general manner provided in AS 15 (Election Code). In addition, the lieutenant governor may adopt regulations necessary to the conduct of coastal resource service area board elections. The state shall pay all election costs.

Sec. 46.41.150. Preparation of district coastal management program by the Department of Commerce, Community and Economic Development

(a) If residents of a coastal resource service area reject organization of the service area at an election called for the purpose and the coastal policy board finds, after public hearing, that major economic development activity has occurred or will occur within the service area, the board may direct the department to prepare and recommend for consideration by the ~~council~~ board and for submission to the legislature a district coastal management plan for the service area.

(b) At the request of the coastal policy board, the department shall complete the district coastal management plan in accordance with this chapter and the guidelines and standards adopted by the board for a coastal resource service area that has been organized but that has failed to make substantial progress in the preparation of an approvable district costal management program within 18 months of certification of the results of an organization election or that has not submitted for approval to the board a program within 30 months of certification of the results of its organization election. Preparation of the program shall be conducted in consultation with the coastal resource service area and shall, to the maximum extent consistent with this chapter, reflect the expressed concerns of the residents of the service area.

(c) Before requesting the department to complete the district coastal management plan under (b) of this section, the board shall meet with members of the coastal resource service area board to determine whether the board is able to complete a district coastal management program within the time limitations established in this section.

Sec. 46.41.160. Approval of plans in coastal resource service areas.

(a) Before adoption by a coastal resource service area board, a district coastal management plan shall be submitted for review to each city or village within the coastal resource service area. The council of a city or traditional village council shall consider the plan submitted for review. Within 60 days of submission, the council of a city or traditional village council shall either approve the plan or enter objections to all or any portion of the plan.

(b) If a city or village within a coastal resource service area fails to approve a portion of the district coastal management plan prepared and submitted for approval under (a) of this section, the governing body shall advise the coastal resource service area board of its objections to the proposed plan and suggest alternative elements or components for inclusion in the district coastal management plan. New matter submitted by a city or village that meets the district plan criteria adopted under this chapter may be accepted by the district and the district coastal management plan modified accordingly. If a city or village fails to provide objections and suggested alternatives within the time limits established in this section, the coastal resource service area board may adopt the district coastal management plan as initially offered.

(c) Objection by a city council under (b) of this section is limited to objection to elements of the plan affecting resources or the use of resources within the corporate limits of the city. Objection by a traditional village council under (b) of this section is limited to objection to elements of the plan affecting resources or the use of resources within the village or within two miles of the village.

(d) For purposes of this section, "village" means an unincorporated community where at least 25 persons reside as a social unit as determined by the Department of Commerce, Community, and Economic Development.

Sec. 46.41.170. Cooperative administration.

(a) A city within the coastal area that is not part of a coastal resource service area shall be included for purposes of this chapter within an adjacent coastal resource service area unless its governing body, by resolution adopted by a majority of its membership, chooses to exclude the city from an adjacent coastal resource service area and a copy of the resolution is filed with the commissioner of commerce, community, and economic development.

(b) This chapter does not restrict or prohibit cooperative or joint administration of functions between a municipality and a coastal resource service area organized under the provisions of this chapter upon initiation of a mutual agreement for the purpose.

Sec. 46.41.180. Construction with other laws.

Nothing in this chapter shall be construed to

(1) diminish state jurisdiction, responsibility, or rights in the field of planning, development, or control of land or water resources, submerged land, or navigable water;

(2) affect in any way any state requirement imposed under a federal authorization or

federal waiver of sovereign immunity; or

(3) diminish the zoning or planning authority of municipalities under AS 29.

Sec. 46.41.900. Definitions.

In this chapter, unless the context otherwise requires,

(1) "affected coastal district" means a coastal district with a publically reviewed draft or approved plan in which a project is proposed to be located or that may experience a direct and significant impact from a proposed project;

(2) "board" means the Alaska Coastal Policy Board established in AS 46.41.010;

(3) "coastal district" means each of the following that contains a portion of the coastal area of the state:

(A) unified municipalities;

(B) organized boroughs of any class that exercise planning and zoning authority;

(C) home rule and first class cities of the unorganized borough or within boroughs that do not exercise planning and zoning authority;

(D) second class cities of the unorganized borough, or within boroughs that do not exercise planning and zoning authority, that have established a planning commission, and that, in the opinion of the commissioner of commerce, community, and economic development, have the capability of preparing and implementing a comprehensive district coastal management plan under AS 46.41.030;

(E) coastal resource service areas established and organized under AS 29.03.020 an AS 46.41.100 - 46.41.160;

(4) "coastal use or resource" means any land or water use or natural resource of the coastal zone. Land and water uses include, but are not limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance;

(5) "coastal zone" means the coastal water including land within and under that water,

and adjacent shoreland, including the water within and under that shoreland, within the boundaries approved by the former Alaska Coastal Policy Council and by the United States Secretary of Commerce under 16 U.S.C. 1451 - 1465 (Coastal Zone Management Act of 1972, as amended); "coastal zone" includes areas added as a result of any boundary changes approved by the board and by the United States Secretary of Commerce under 16 U.S.C. 1451 - 1465; "coastal zone" does not include

(A) those lands excluded under 16 U.S.C. 1453(1); or

(B) areas deleted as a result of any boundary changes by the board in conformance with 16 U.S.C. 1451 - 1465;

(6) "consistency review" means the evaluation of a proposed project against the statewide standards and the approved enforceable policies of an affected coastal district under the process developed by the board;

(7) "department" means the Department of Commerce, Community and Economic Development;

(8) "direct and significant impact" means an activity which proximately contributes to a material change or alteration in the natural or social characteristics of a part of the state's coastal area and in which

(A) would have a net adverse effect on the quality of the resources of the coastal area;

(B) would limit the range of alternative uses of the resources of the coastal area; or

(C) would, of itself, constitute a tolerable change or alteration of the resources within the coastal area but which, cumulatively, would have an adverse effect;

(9) "district coastal management plan" means a plan developed by a coastal district, including enforceable policies of that plan, setting out policies and standards to guide public and private uses of land and water within that district and approved by the board as meeting the requirements of this chapter and the regulations adopted under this chapter;

(10) "enforceable policy" means a policy established by this chapter or approved by the board as a legally binding policy of the Alaska coastal management program applicable to public and private activities;

(11) "local knowledge" means a body of knowledge or information about the coastal environment or the human use of that environment, including information passed down

through generations, if that information is

(A) derived from experience and observations; and

(B) generally accepted by the local community;

(12) "project" means all activities that will be part of a proposed development and includes all federal agency activities as defined in 15 C.F.R. 930.31, including lease sales and development projects affecting a coastal use or resource;

(13) "resource agency" means

(A) the Department of Environmental Conservation;

(B) the Department of Fish and Game; or

(C) the Department of Natural Resources.;

(14) "scientific evidence" means facts or data that are

(A) premised upon established chemical, physical, biological, or ecosystem management principles as obtained through scientific method and submitted to the department to furnish proof of a matter required under this chapter;

(B) in a form that would allow resource agency review for scientific merit; and

(C) supported by one or more of the following:

(i) written analysis based on field observation and professional judgment along with photographic documentation;

(ii) written analysis from a professional scientist with expertise in the specific discipline; or

(iii) site-specific scientific research that may include peer-review level research or literature.

(15) "special management area" includes areas meriting special attention and means a delineated geographic area within the coastal area which is sensitive to change or alteration and which, because of plans or commitments or because a claim on the resources within the area delineated would preclude subsequent use of the resources to a conflicting or incompatible use, warrants special management attention, or which, because of its value to the general public, should be identified for current or future planning, protection, or acquisition;

(16) "use of state concern" means a land and water use that would significantly affect the long-term public interest; a "use of state concern" includes

(A) uses of national interest, including the use of resources for the siting of ports

and major facilities that contribute to meeting national energy needs, construction and maintenance of navigational facilities and systems, resource development of federal land, and national defense and related security facilities that are dependent upon coastal locations;

(B) uses of more than local concern, including those land and water uses that confer significant environmental, social, cultural, or economic benefits or burdens beyond a single coastal district;

(C) the siting of major energy facilities, activities pursuant to a state oil and gas lease, a state gas only lease, or a federal oil and gas lease, or large-scale industrial or commercial development activities that are dependent on a coastal location and that, because of their magnitude or the magnitude of their effect on the economy of the state or the surrounding area, are reasonably likely to present issues of more than local significance;

(D) facilities serving statewide or interregional transportation and communication needs; and

(E) uses in areas established as state parks or recreational areas under AS 41.21 or as state game refuges, game sanctuaries, or critical habitat areas under AS 16.20.

GPVD090P X3QR VIEW PETITION TOTALS 02/06/2012 07:59
GVREMS GMC516A GDIRECTR
PETITION ID: 11ACMP TYPE: INITIATIVE
NAME: AN ACT ESTABLISHING THE COASTAL MANAGEMENT PROGRAM

	REQUIRED SIGNATURES:	25,875	(A)	ADDRESS NOT PROVIDED: 130
			(B)	DOB NOT MATCHED.....: 168
	NUMBER OF QUALIFIED:	24,350	(D)	DUPLICATE.....: 209
(Q)	COMPUTER QUALIFIED:	20,152	(I)	INACTIVE.....: 10
(M)	MANUALLY QUALIFIED:	4,196	(J)	NOT IN JURISDICTION.: 1
(H)	INACTIVE QUALIFIED:	2	(K)	PETITION SIGNATURE..: 125
			(N)	NAME NOT MATCHED....: 5,161
	NUMBER OF UNQUALIFIED:	8,833	(R)	NOT REGISTERED.....: 1,079
			(S)	SSN NOT MATCHED.....: 37
			(T)	DUPLICATE SSN.....:
	TOTAL SIGNATURES:	33,183	(U)	UNABLE TO IDENTIFY..: 97
			(V)	VTR NUM NOT FOUND...: 59
			(X)	NOT YET COUNTED.....:
	QUALIFIED SPONSORS:	265	(Z)	ADL NOT MATCHED.....: 1,583
	UNQUALIFIED SPONSORS:	15	( )	OTHER.....: 174
			(W)	WITHDRAWN.....:

F1=MENU, F9=QUIT

About The Totals Report

The first qualification phase is a computer qualification of the signatures submitted. The information provided by the signers such as voter number, last name and last four of social security number, Alaska driver's license number, etc. and signature date is entered into the statewide voter registration system. The computer qualification is run each night. If there is an exact match, the system automatically qualifies signers and they appear in the *(Q) Computer Qualified:* column. When the system does not match the information entered for signers, they appear in the *Number of Unqualified* column and the reasons why signatures are not qualified are listed on the right-hand column.

After the division completes the computer qualification phase, the division will manually review each signer that was not qualified during the computer qualification phase. This involves a manual search of the voter registration system for each signer to determine if they are a registered voter. If a successful match is found, the signer will be manually qualified and will appear in the *(M) Manually Qualified* column.

If a voter's registration record is inactivated before the receipt of the petition booklets, such as a voter who may have signed a booklet and then passed away after signing, they will appear in the *(H) Inactive Qualified* column. Since the signer was a qualified registered voter at the time of signing the petition, they are an eligible signature.

Restoring Coastal Management

217 Second Street, Suite 200
Juneau, AK 99801
(907) 957-4540

Me

February 2, 2012

The Honorable Kyle Johansen
Alaska House of Representatives
Alaska State Capitol
Juneau, AK 99811

Compliments of:
Representative Beth Kerttula

Dear Representative Johansen:

In recent public statements, you have expressed an interest in learning more about the Alaska Sea Party's financial contributors. As you have acknowledged, our group has complied fully with all reporting and other requirements for pursuing a ballot initiative in the State of Alaska. We will continue to do so.

While it is unclear to us why disclosing donors since our last report on January 10 should affect your consideration of the merits of the initiative petition, we set forth below a one-time interim update of donors since the end of the last reporting period (December 31, 2011).

Since January 1, 2012, these entities have donated funds to the Alaska Sea Party in excess of the $500 threshold which requires their disclosure to the Alaska Public Offices Commission (APOC):

Sealaska Corporation- $5,000;
Bristol Bay Native Corporation- $5,000; and
Bering Straits Native Corporation- $2,500

We will, of course, make a full and detailed accounting of our revenues and expenses in our first quarter APOC filing, which is due April 10, 2012. We trust that this extraordinary disclosure will remove any impediment to your active engagement on coastal zone management.

Sincerely yours,

Bruce Botelho
Steering Committee Chair
Alaska Sea Party

This message is approved by Bruce Botelho, Chair
Paid for by the Alaska Sea Party: Restoring Coastal Management
217 Second St. Ste. 200 Juneau, AK 99801
Top contributors: North Slope Borough Alaska Conference of Mayors Aleutian Pribilof Island Community Development Association

Joint Judiciary Committee Hearing on 11ACMP:
Coastal Management Program Initiative
– February 2012 –
Relevant Laws

The Alaska Constitution (Article XI)

§ 1. Initiative and Referendum
The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.

§ 2. Application
An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.

§ 3. Petition
After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters who are equal in number to at least ten per cent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.

§ 4. Initiative Election
An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

§ 6. Enactment
If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

§ 7. Restrictions
The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

Alaska Statutes on Initiatives

Article 01. INITIATIVE

Sec. 15.45.010. Provision and scope for use of the initiative.

The law-making powers assigned to the legislature may be exercised by the people through the initiative. However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

Sec. 15.45.020. Filing application.

An initiative is proposed by filing an application with the lieutenant governor. A deposit of $100 must accompany the application. This deposit shall be retained if a petition is not properly filed. If a petition is properly filed, the deposit shall be refunded.

Sec. 15.45.030. Form of application.

The application must include the

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

Sec. 15.45.040. Form of proposed bill.

The proposed bill shall be in the following form:

(1) the bill shall be confined to one subject;

(2) the subject of the bill shall be expressed in the title;

(3) the enacting clause of the bill shall be: "Be it enacted by the People of the State of Alaska;"

(4) the bill may not include subjects restricted by AS 15.45.010.

Sec. 15.45.050. Manner of notice.

Notice to the initiative committee on any matter pertaining to the application and petition may be served on any member of the committee in person or by mail addressed to a committee member as indicated on the application.

Sec. 15.45.060. Designation of sponsors.

The qualified voters who subscribe to the application in support of the proposed bill are designated as sponsors. The initiative committee may designate additional sponsors by giving written notice to the lieutenant governor of the names, addresses, and numerical identifiers of those so designated.

Sec. 15.45.070. Review of application for certification.

Within 60 calendar days after the date the application is received, the lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial.

Sec. 15.45.080. Bases of denial of certification.

The lieutenant governor shall deny certification upon determining in writing that

(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form;

(2) the application is not substantially in the required form; or

(3) there is an insufficient number of qualified sponsors.

Sec. 15.45.090. Preparation of petition.

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

(1) a copy of the proposed bill;

(2) an impartial summary of the subject matter of the bill;

(3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of implementing the proposed law;

(5) the statement of warning prescribed in AS 15.45.100;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and

(7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

(b) Upon request of the initiative committee, the lieutenant governor shall report to the committee the number of persons who voted in the preceding general election.

Sec. 15.45.100. Statement of warning.

Each petition shall include a statement of warning that a person who signs a name other than the person's own on the petition, or who knowingly signs more than once for the same proposition at one election, or who signs the petition when knowingly not a qualified voter, is guilty of a class B misdemeanor.

Sec. 15.45.105. Qualifications of circulator.

To circulate a petition booklet, a person shall be

(1) a citizen of the United States;

(2) 18 years of age or older; and

(3) a resident of the state as determined under AS 15.05.020.

Sec. 15.45.110. Circulation of petition; prohibitions and penalty.

(a) The petitions may be circulated throughout the state only in person.

(b) *[Repealed, Sec. 92 ch 82 SLA 2000].*

(c) A circulator may not receive payment or agree to receive payment that is greater than $1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than $1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.

(f) In this section,

(1) "organization" has the meaning given in AS 11.81.900;

(2) "other valuable thing" has the meaning given in AS 15.56.030(d);

(3) "person" has the meaning given in AS 11.81.900.

Sec. 15.45.120. Manner of signing and withdrawing name from petition.

Any qualified voter may subscribe to the petition by printing the voter's name, a numerical identifier, and an address, by signing the voter's name, and by dating the signature. A person who has signed the initiative petition may withdraw the person's name only by giving written notice to the lieutenant governor before the date the petition is filed.

Sec. 15.45.130. Certification of circulator.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on

petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

(1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;

(2) that the person is the only circulator of that petition;

(3) that the signatures were made in the circulator's actual presence;

(4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);

(7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

Sec. 15.45.140. Filing of petition.

(a) The sponsors must file the initiative petition within one year from the time the sponsors received notice from the lieutenant governor that the petitions were ready for delivery to them. The petition may be filed with the lieutenant governor only if it meets all of the following requirements: it is signed by qualified voters

(1) equal in number to 10 percent of those who voted in the preceding general election;

(2) resident in at least three-fourths of the house districts of the state; and

(3) who, in each of the house districts described in (2) of this subsection, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.

(b) If the petition is not filed within the one-year period provided for in (a) of this section, the petition has no force or effect.

Sec. 15.45.150. Review of petition.

Within not more than 60 days of the date the petition was filed, the lieutenant governor shall review the petition and shall notify the initiative committee whether the petition was properly or improperly filed, and at which election the proposition shall be placed on the ballot.

Sec. 15.45.160. Bases for determining the petition was improperly filed.

The lieutenant governor shall notify the committee that the petition was improperly filed upon determining that

(1) there is an insufficient number of qualified subscribers;

(2) the subscribers were not resident in at least three-fourths of the house districts of the state; or

(3) there is an insufficient number of qualified subscribers from each of the house districts described in (2) of this section.

Sec. 15.45.170.Submission of supplementary petition. [Repealed, Sec. 7 ch 80 SLA 1998].

Repealed or Renumbered

Sec. 15.45.180. Preparation of ballot title and proposition.

(a) If the petition is properly filed, the lieutenant governor, with the assistance of the attorney general, shall prepare a ballot title and proposition. The ballot title shall, in not more than 25 words, indicate the general subject of the proposition. The proposition shall give a true and impartial summary of the proposed law. The total number of words used in the summary may not exceed the product of the number of sections in the proposed law multiplied by 50. In this subsection, "section" means a provision of the proposed law that is distinct from other provisions in purpose or subject matter.

(b) The proposition prepared under (a) of this section shall comply with AS 15.80.005 and shall be worded so that a "Yes" vote on the proposition is a vote to enact the proposed law.

Sec. 15.45.190. Placing proposition on ballot.

The lieutenant governor shall direct the director to place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after

(1) the petition has been filed;

(2) a legislative session has convened and adjourned; and

(3) a period of 120 days has expired since the adjournment of the legislative session.

Sec. 15.45.195. Public hearings.

(a) At least 30 days before the election at which an initiative is to appear on the ballot, the lieutenant governor or a designee of the lieutenant governor shall hold two or more public hearings concerning the initiative in each judicial district of the state. Each public hearing under this section shall include the written or oral testimony of one supporter and one opponent of the initiative.

(b) The lieutenant governor shall provide reasonable notice of each public hearing required under this section. The notice must include the date, time, and place of the hearing. The notice may be given using print or broadcast media. The lieutenant governor shall provide notice in a consistent fashion for all hearings required under this section.

(c) Penalties for a violation of this section may not include removal of an initiative from the ballot.

(d) If the lieutenant governor determines that it is technologically and economically feasible, the division shall provide a live audio and video broadcast of each hearing held under (a) of this section on the division's Internet website.

Sec. 15.45.200. Display of proposed law.

The director shall provide each election board with at least five copies of the proposed law being initiated, and the election board shall display at least one copy of the proposed law in a conspicuous place in the room where the election is held.

Sec. 15.45.210. Determination of void petition.

If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

Sec. 15.45.220. Adoption and effective date of proposed law.

If a majority of the votes cast on the initiative proposition favor its adoption, the proposed law is enacted, and the lieutenant governor shall so certify. The act becomes effective 90 days after certification.

Sec. 15.45.230.Insufficiency of application or petition. [Repealed, Sec. 7, ch 80 SLA 1998].

Repealed or Renumbered

Sec. 15.45.240. Judicial review.

Any person aggrieved by a determination made by the lieutenant governor under AS 15.45.010 - 15.45.220 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given.

Sec. 15.45.245. Delegation by lieutenant governor.

The lieutenant governor may delegate the duties imposed on the lieutenant governor by AS 15.45.010 - 15.45.240 to the director.

....

Legislative Powers

Sec. 24.05.186. Legislative hearings on initiatives certified by the lieutenant governor.

(a) A standing committee of the legislature, selected jointly by the presiding officers of the house of representatives and senate, shall hold at least one hearing on an initiative that the lieutenant governor has determined was properly filed under AS 15.45.160.

(b) The standing committee selected jointly by the presiding officers of the house of representatives and senate under (a) of this section shall hold at least one hearing under this section within 30 days after the convening of the legislative session preceding the statewide election at which the initiative proposition must appear on the election ballot under AS 15.45.190.

Melanie Lesh

From: Rep. Carl Gatto
Sent: Monday, February 06, 2012 9:40 AM
To: 'Carl Gatto (carljgatto@gmail.com)'; Melanie Lesh
Subject: ACTION: CZ INFO FROM TOM WRIGHT

Importance: High

From: Tom Wright
Sent: Monday, February 06, 2012 8:37 AM
To: Rep. Carl Gatto
Subject:

Carl:

Here is a good line to use for the ACMP hearings.

The public will have its chance to weigh in at the polls this fall. This is the legislature's opportunity to gather the background it needs in order fully understand the initiative implications and to decide whether it may be in the state's best interest to advance legislation this session. If legislation is heard, the public would have every opportunity to comment at that point.

Tom

Tom Wright, Senior Staff
Representative Mike Chenault
Speaker of the Alaska State House
(907) 465-6618

Bradners'

Alaska Legislative Digest

- Commentary on Alaska issues and policy

PUBLISHERS: Mike Bradner, Tim Bradner / Business Office: 522-0195 / 3037 South Circle Anchorage, AK 99507 / Fax: (907) 345-5683

Digest # 4/2012 February 5, 2012

Coastal initiative close to qualifying for ballot

As of Friday, Feb. 3, the Division of Elections had qualified 23,636 of the needed 25,875 voter signatures on the coastal management reinstatement initiative and had 9,513 waiting for manual review. A tally on the requirement that total signatures come from 7 percent of voters in 30 of the 40 House districts was not available. With the coastal zone initiative petition possibly on its way to final approval for the general election ballot there are back channel moves underway to clarifying or eliminate legislative options. Whether or not any bill to reinstate the program will be introduced remains to be seen.

The joint Judiciary Committees are meeting at 1 p.m. Feb. 6 for an informational hearing, required under state law, that will focus on operational impacts to state agencies. The invitation-only witness list is headed by Juneau Mayor Bruce Botelho, one of initiative's three prime sponsors; Susan Bell, commissioner of the Dept. of Commerce, which would house the revived program; and John Boucher, senior economist in the Office of Management and Budget. Elections director Gail Fenumiai and head legislative attorney Doug Gardner are also scheduled to speak. A legal opinion from Gardner seemed to confirm that the version of HB 106 passed by the House last year (which failed ultimately to pass) does not meet the "substantially similar" (to the

– *Continued on page 3*

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• Fish tax revenue sharing	Pg. 6
• Senate oil tax bill	Pg. 7

HB 298, tax-exemption for construction materials, moves fast

Legislation exempting sand, gravel, quarry rock and "marketable earth" extraction from the state mining license tax is moving quickly through the House. HB 298 was introduced on Jan. 25 and is scheduled for a Feb. 7 Finance Committee hearing. Sponsored by House Resources Committee Cochair Paul Seaton (R-Homer), the bill moved out of that committee after a Feb. 1 hearing where lawmakers, extraction companies and the Dept. of Revenue agreed that the levy is a net loss rather than an income source for the state.

Seaton said the Dept. of Transportation and local governments buy over 80 percent of the products covered by the bill so that the state is effectively paying most of the "nuisance tax." It raised only $320,360, or seven-tenths of one percent of total mining tax revenues in fiscal 2011, according to the Dept. of Revenue.

Continued on page 8

Want to subscribe ?

Email: *timbradner@pobox.alaska.net*

Analysis by Bob Tkacz

On coastal initiative, what does "substanially similar" mean?

"Substantially similar" is the standard – comfortably vague – in Alaska law that describes the requirement for a legislative bill that would replace an initiative petition on the general election ballot. What the phrase means will be debated intensely if lawmakers attempt to pass such a bill to reestablish the Alaska Coastal Management Program, replacing the ballot proposition now pending. A 1975 ruling by the Alaska Supreme Court, reaffirmed in 2005, established a three-part test to determine if a bill is "substantially similar." The ruling came in the *Warren v. Boucher* case, which addressed the process and conditions by which legislative action could prevent an initiative from appearing on the ballot. The high court reaffirmed the test in *State v. Trust The People*, over the initiative petition, now state law, that allows a governor to make only a temporary appointment of a U.S. senator when the post becomes vacant. That petition was launched after Gov. Frank Murkowski appointed his daughter Lisa to the U.S. Senate seat he vacated when he was elected governor in 2002.

The definition of the constitutional phrase "substantially the same," in Article 11, Sec. 4 of the Alaska Constitution is "not apparent" and nothing in the legislative history of the founders' debate on the subject "points to an agreed upon meaning or a consciously adopted definition," the high court's opinion in *Warren* declares. The first part of the test requires the court to "first determine the scope of the subject matter, and afford the Legislature greater or lesser latitude depending on whether the subject mater is broad or narrow." Secondly, the court must consider "whether the general purpose of the legislation is the same as the general purpose of the initiative." Finally, it must "consider whether the means by which that purpose is effectuated are the same" in the initiative and legislation.

The *Warren* decision also said lawmakers have "reasonably broad" discretion in writing a law to replace an initiative. "It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the Legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the permitted variance before the legislative act becomes no longer substantially the same," the decision declares.

Legislators ponder course on coastal management initiative (Cont.)

- Continued from page 1

petition) requirement. "If you want to draft legislation that will increase the odds of voiding the initiative and being considered 'substantially the same,' a bill that provides greater local control and participation than the former program did and HB 106 would have. It could only help the effort," the Jan. 31 opinion states.

House Speaker Mike Chenault and Senate Pres. Gary Stevens met Jan. 31 to discuss how legislation might proceed but seemed to reach no agreement. "We just have to find a vehicle we can agree to, if we can find one," Stevens (R-Kodiak) said on the way in to the hour-long session. After the meeting he said, "The important thing right now is to figure out how that petition is going to be finalized." If the petition is confirmed for the ballot "that will move us on," he added. Chenault said if the petition qualifies, "the House will have to look at it and see if it is an issue we're going to address or not." The House Majority has not had a serious discussion of the issue and Chenault added that he would not lead any initiative. "It's not me saying 'yes' or 'no.' Any legislator

- Continued on page 6

. . . Business/Rural . . .

Railroad's 95-year land leasing bill is derailed, in Senate at least

Senate Transportation Committee Chairman Donny Olson (D-Nome) said the bill to raise the time limit on Alaska Railroad leases to 95 from 55 years won't leave his committee "unless there's clear and convincing evidence we need it." Olson made the comment after the panel's 17-minute first hearing on SB 156, Feb. 2, had recessed. Jon Cook, chairman of railroad board's real estate committee had told the Transportation Committee that developers of three potential projects, including one on Ship Creek in Anchorage, had informed him they would not consider railroad land unless 95-year leases were available.

Cook also noted that land values for all leases are reappraised every five years and rates increased by eight percent for most of the railroad's roughly 400 properties. He said the board unanimously endorsed the bill, that 95-year leases would require exceptional circumstances and that the board would establish standards for the maximum term. At the bill's Senate Labor & Commerce Committee hearing he said $10 million valuation would be the minimum needed to qualify for 95-year terms. The bill was introduced by the Senate Labor & Commerce Committee at the request of the railroad and was reported out of that committee with four "do pass" recommendations on Jan. 27. Sen. Joe Paskvan (D-Fairbanks) gave it "no recommendation."

Bill clarifying auto price, advertising details moves from House, Senate committees

The Senate version of a multi-part proposal to broaden and clarify terms for new and used car advertising and promotions and consumer protection issues moved through the Senate Transportation Committee after a single hearing, Feb. 2. SB 122 awaits a Senate Labor & Commerce Committee review; parallel to HB 235, its companion bill in the House. Endorsed by Alaskan auto dealers and the Dept. of Law's consumer protection section, the bills require advertised prices show all dealer fees, excluding licensing and other government charges.

The bill breaks new ground by allowing used car dealers to publish comparative discount claims in ads if they are supported by comparisons to nationally recognized sources like the "Blue Book." It voids vehicle sales contracts if dealers or financing institutions change any terms after the buyer has signed. Consumers can be charged a mileage fee if a returned car has been driven more than 100 miles and would be required to pay for any damage, parking tickets, towing or storage fees and similar charges. The House version, HB 235, was reported out of the House Transportation Committee after a Jan. 26 hearing

Legislators ponder course on coastal management initiative (Cont.)

Continued from page 3

can put in a bill dealing with ACMP at any time," he said. "There's people talking about it in different groups, trying to decide do they want to put in something," he said. Rep. Beth Kerttula, House Minority Leader said a successful signature count would encourage lawmakers to pass a substantially similar bill. Rep. Charisse Millett (R-Anch.), who requested the legal opinion, also asked if the Legislature could amend an initiative petition that was approved by the voters but rejected by the National Oceanic and Atmospheric Administration, federal administrator of the coastal zone program. To that, the legal opinion said yes, if changes were actually amendments and not a repeal. Kerttula agreed but was confident the initiative meets federal standards. "This program was built on programs that were approved by NOAA," Kerttula said last Saturday. She added that NOAA allows "great latitude" in states programs. "All the different coastal programs are different," she said.

AN ACT ENTITLED

"An Act establishing the Alaska Coastal Management Program."

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

*** Section 1.** AS 46 is amended by adding a new chapter to read:

Chapter 41. Alaska Coastal Management Program

Sec. 46.41.010 Coastal Policy Board

(a) There is created in the Department of Commerce, Community and Economic Development the Alaska Coastal Policy Board. The board consists of the following:

(1) nine public members and alternates appointed by the governor from a list composed of at least three names from each region, nominated and submitted by the coastal districts of each region; one public member shall be appointed from each of the following regions:

(A) northwest Alaska, including, generally, the area of the North Slope Borough and the Northwest Arctic Borough;

(B) Bering Straits, including, generally, the area of the Bering Straits regional educational attendance area and the City of Nome;

(C) southwest Alaska, including, generally, the area within the Lower Yukon, Lower Kuskokwim, and Southwest regional educational attendance areas, the City of Bethel, and the Lake and Peninsula and Bristol Bay Boroughs;

(D) Kodiak-Aleutians, including the area of the Kodiak Island and Aleutian East Boroughs and the Aleutian, Adak and Pribilof regional educational attendance areas;

(E) Upper Cook Inlet, including the Municipality of Anchorage and the Matanuska-Susitna Borough;

(F) Lower Cook Inlet, including, generally, the area within the Kenai Peninsula Borough;

(G) Prince William Sound, including, generally, the area east of the Kenai Peninsula Borough to 141 W. longitude;

(H) northern Southeast Alaska, including the area southeast of 141 W. longitude and north of 57 N. latitude, including the entirety of the City and Borough

of Sitka; and

(I) southern Southeast Alaska, including that portion of southeastern Alaska not contained within the area described in (H) of this paragraph;

(2) each of the following:

(A) the commissioner of environmental conservation;

(B) the commissioner of fish and game;

(C) the commissioner of natural resources; and

(D) the commissioner of commerce, community, and economic development.

(b) Public members serve staggered terms of three years. Except as provided by (c) of this section, each member serves until a successor is appointed. A public member may be reappointed.

(c) The alternate for a commissioner serving under (a)(2) of this section shall be a deputy commissioner or the director of a division in the commissioner's department. The names of alternates shall be filed with the board.

(d) The board shall designate co-chairs, one of whom shall be selected from among the public members appointed under (a)(1) of this section and one from among the members designated in (a)(2) of this section.

(e) The board may recommend that the governor remove a public member for cause.

(f) Five public members and two designated members of the board constitute a quorum, but the board may delegate to one or more of its members the power to hold hearings. All decisions of the board shall be by a majority vote of the members present and voting.

(g) The board shall meet at least four times a year and as often as necessary to fulfill its duties under this chapter. Meetings may be held and members may vote telephonically, except one board meeting a year shall be held in person.

(h) Public members of the board or their alternates are entitled to per diem and travel expenses authorized by law for members of boards and commissions.

(i) Administrative support for the board shall be provided by staff of the department. The department, under the direction of the board shall contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out the board's duties and responsibilities.

Sec. 46.41.020. Powers and duties of the board.

(a) The board shall

(1) review and approve regulations necessary to implement the coastal management program in conformity with this chapter and 16 U.S.C. 1451 - 1464 (Coastal Zone Management Act of 1972);

(2) direct the department to seek approval of the Alaska coastal management program by the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management in conformity with 16 U.S.C. 1451 – 1464 (Coastal Zone Management Act of 1972);

(3) initiate an interagency program of strategic coastal and ocean planning for each geographic region of the state;

(4) review and approve coastal district management plans after receiving the department's recommendations, including local enforceable policies, that meet the provisions of this chapter and the district plan criteria.

(5) establish continuing coordination among state agencies to facilitate the development and implementation of the Alaska coastal management program;

(6) evaluate the effectiveness of district coastal management plans; and

(7) direct the department to apply for and accept grants, contributions, and appropriations, including application for and acceptance of federal funds that may become available for coastal planning and management.

(b) The board may

(1) contract for necessary services;

(2) take any reasonable action necessary to carry out the provisions of this chapter.

Sec. 46.41.030. Division of Coastal Management.

(a) There is created in the department the division of ocean and coastal management.

(b) The division shall

(1) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. 1456 (Sec. 307, Coastal Zone Management Act of 1972), and each conclusive state consistency determination when a project requires a permit, lease, or authorization from the department or from two or more state resource agencies.

(2) adopt regulations approved by the board necessary to implement this chapter under the provisions of AS 44.62 (Administrative Procedure Act).

(3) assure continued provision of data and information to coastal districts to carry

out their planning and management functions under the program.

(4) develop and maintain a program of financial assistance to aid coastal districts in the development and implementation of district coastal management plan.

Sec. 46.41.040. Development of Alaska coastal management program.

(a) The regulations developed under this chapter shall include

(1) statewide coastal program standards;

(2) the criteria and process for the preparation and approval of district coastal management plans; and

(3) consistency review procedures in accordance with this chapter, including provisions for

(A) review of activities proposed or permitted by a state or federal agency;

(B) the types of activities that will trigger a consistency review;

(C) review of phased activities and uses;

(D) public notice and opportunities for public comment;

(E) elevation of proposed consistency determinations to the resource agency commissioners;

(F) establishment of review timelines;

(G) exclusion from an individual project review aspects of activities that are covered by a general permit previously found consistent with the Alaska coastal management program;

(H) exclusion of routine activities with insignificant effects to coastal uses or resources from an individual consistency review.

b) The coastal districts, coastal district boundaries and approved coastal management plans that were in effect as of June 30, 2011 are in effect and are incorporated into the Alaska coastal management program.

Sec. 46.41.050. Objectives.

The Alaska coastal management program shall be consistent with the following objectives:

(1) the use, management, restoration, and enhancement of the overall quality of the coastal environment for this and succeeding generations;

(2) the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;

(3) the orderly, balanced utilization and protection of the resources of the coastal

area consistent with sound conservation and sustained yield principles;

(4) the management of coastal land and water uses in such a manner that, generally, those uses that are economically or physically dependent on a coastal location are given higher priority when compared to uses that do not economically or physically require a coastal location;

(5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;

(6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;

(7) the recognition of the need for a continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs; and

(8) the full and fair evaluation of all demands on and uses of the land and water in the coastal area.

(9) the coordination of planning and decision-making in the coastal area among levels of government and citizens engaging in or affected by activities involving the coastal resources of the state;

(10) the participation of the public, local governments, and agencies of the state and federal governments in the development and implementation of a coastal management program; and

(11) the requirement that state resource agencies carry out their duties, powers and responsibilities that affect the use of coastal area resources in accordance with the coastal program adopted pursuant to this Act.

Sec. 46.41.060. Development of district coastal management plans.

(a) Coastal districts shall

(1) develop and adopt district coastal management plans in accordance with the provisions of this chapter. The plan adopted by a coastal district shall be based upon a municipality's existing comprehensive plan or a new comprehensive resource use plan or comprehensive statement of needs, policies, objectives, and standards governing the use and conservation of resources within the coastal area of the district. The plan must meet the district plan criteria adopted under AS 46.41.040 and must include

(A) a delineation within the district of the boundaries of the coastal area subject

to the district coastal management plan;

(B) a statement, list, or definition of the land and water uses and activities subject to the district coastal management plan;

(C) a designation of any special management areas;

(D) enforceable policies to be applied to all the land and water uses subject to the district coastal management plan as well as policies that apply to special management areas.

(b) The board shall approve an initial or amended district coastal management plan if the

(1) district coastal management plan meets the requirements of this chapter and the district plan criteria in regulation adopted by the department; and

(2) enforceable policies of the district coastal management plan

(A) do not duplicate, restate, or incorporate by reference state or federal statutes or regulations;

(B) are not preempted by federal or state law;

(C) do not arbitrarily or unreasonably restrict a use of state concern;

(D) are clear and concise as to the activities and persons affected by the policies and the requirements of the policies;

(E) use prescriptive or performance-based standards that are written in precise and enforceable language; and

(F) address a coastal use or resource of concern to the residents of the coastal resource district as demonstrated by local knowledge or supported by scientific evidence

(c) In (b)(2)(B) of this section, an enforceable policy of the district coastal management plan is preempted

(1) by federal statutes or regulations if the United States Congress expressly declares that local law or regulation is preempted, if the United States Congress demonstrates the intent to occupy the field exclusively, or if there is an actual conflict between federal and local law or regulation;

(2) by state law if it is prohibited, either by express legislative direction or direct conflict with a state statute or regulation, or where a local law or regulation substantially interferes with the effective functioning of a state statute or regulation or the underlying

purposes of a state statute or regulation.

Sec. 46.41.070. Submission of district plans by coastal districts.

(a) Within one year after the effective date of regulations implementing this chapter, coastal districts shall review their coastal management plans and if changes are necessary to meet the requirements of this chapter and implementing regulations, submit to the department a revised district coastal management plan.

Sec. 46.41.080. Implementation of district coastal management plans.

(a) A district coastal management plan approved under this chapter for a coastal district that does not have and exercise zoning or other controls on the use of resources within the coastal area shall be implemented by appropriate state agencies. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.

(b) A coastal district that has and exercises zoning or other controls on the use of resources within the coastal area shall implement its district coastal management plan. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives, and standards adopted by the district.

Sec. 46.41.090. Compliance and enforcement.

(a) Municipalities and state resource agencies shall administer land and water use regulations or controls in conformity with district coastal management plans approved under this chapter and in effect.

(b) The superior courts of the state have jurisdiction to enforce lawful orders of the board and the department under this chapter.

Sec. 46.41.100. Coastal management plans in the unorganized borough.

(a) A coastal resource service area incorporated into the coastal management program under this chapter shall exercise those authorities and perform those duties required under this chapter.

Sec. 46.41.110. Coastal resource service areas.

(a) Except as otherwise provided in this section, each regional educational attendance area established under AS 14.08.031 containing a part of the coastal area may be organized as a coastal resource service area.

(b) The commissioner of the department may, after public hearings held in the affected area, consolidate two or more regional educational attendance areas as a single

coastal resource service area

(1) if a substantial portion of the coastal area contains land and water area owned by the federal government over which it exercises exclusive jurisdiction or land held in trust by the federal government for Alaska Natives over which the state would not exercise control as to use; or

(2) if, after giving due consideration to the standards applicable to incorporation of borough governments and the likelihood that a borough will be incorporated within the area, the commissioner determines that the functions to be performed under this chapter could be undertaken more efficiently through the combination of two or more regional education attendance area as a single coastal resource service area.

(c) A determination under (b) of this section shall be made before the organization of the coastal resource service area.

(d) or purposes of coastal management only, the commissioner of the department may, after public hearings held in the regional education attendance area affected, divide an existing regional education attendance area into no more than three coastal resource service areas according to geographic, cultural, economic, environmental, or other features relevant to coastal management planning. However,

(1) each coastal resource service area formed by dividing an existing regional education attendance must contain at least one first class city or home rule city; and

(2) a city within a coastal resource service area formed by dividing an existing regional education attendance area may not elect to exclude itself from the coastal resource service area.

Sec. 46.41.120. Organization of a Coastal Resource Service Area.

(a) Organization of a coastal resource service area may be initiated by

(1) submission to the coastal policy board of a petition signed by a number of registered voters equal to 15 percent of the number of votes cast within the coastal resource service area at the last state general election; or

(2) by submission to the board of a resolution approved by the city council or traditional village council of not less than 25 percent of the number of cities and villages within the coastal resource service area.

(b) Acting at the request of the council, the lieutenant governor, not less than 60 nor more than 90 days after receipt of a proper petition under (a)(1) of this section, a proper

resolution under (a)(2) of this section, or at the direction of the council under (a)(3) of this section, shall conduct an election on the question of organization of a coastal resource service area.

Sec. 46.41.130. Coastal resource service area boards

(a) Each coastal resource service area shall have an elected board representing the population of the service area. The board shall have the powers and duties and perform the functions prescribed for or required of coastal districts.

(b) A coastal resource service area board shall contain seven members. Board members shall be elected at large by the qualified voters of the coastal resource service area.

(c) The term of office of a member of a coastal resource service area board is three years. Members serve until their successors are elected and have qualified. This section does not prohibit the reelection of a board member.

(d) The lieutenant governor shall provide for the election of the members of coastal resource service area boards.

(e) Election of members of coastal resource service area boards shall be held annually on the date of election of members of regional educational attendance area boards under AS 14.08.071(b). If no candidate files for election to a seat on the coastal resource service area board, the seat is considered vacant at the time a newly elected member would have taken office.

(f) A seat on a coastal resource service area board shall be declared vacant by the board if the criteria under AS 14.08.045 (a) apply to the person elected. A vacancy on a coastal resource service area board shall be filled by appointment as provided in AS 14.12.070 for vacancies in the membership of regional educational attendance area boards.

(g) Members of coastal resource service area boards are subject to recall on the same grounds and in the same manner as provided for recall of municipal officials in AS 29.26.240 - 29.26.350. The lieutenant governor functions in place of the assembly or council and municipal clerk for receipt and review of recall petitions and the conduct of recall elections.

(h) Members of a coastal resource service area board are entitled to per diem and travel expenses authorized by law for members of boards and commissions and for honorariums for meetings attended in person.

Sec. 46.41.140. Elections in coastal resource service areas.

Elections under AS 46.41.100 - 46.41.160 shall be administered by the lieutenant

governor in the general manner provided in AS 15 (Election Code). In addition, the lieutenant governor may adopt regulations necessary to the conduct of coastal resource service area board elections. The state shall pay all election costs.

Sec. 46.41.150. Preparation of district coastal management program by the Department of Commerce, Community and Economic Development

(a) If residents of a coastal resource service area reject organization of the service area at an election called for the purpose and the coastal policy board finds, after public hearing, that major economic development activity has occurred or will occur within the service area, the board may direct the department to prepare and recommend for consideration by the council and for submission to the legislature a district coastal management plan for the service area.

(b) At the request of the coastal policy board, the department shall complete the district coastal management plan in accordance with this chapter and the guidelines and standards adopted by the board for a coastal resource service area that has been organized but that has failed to make substantial progress in the preparation of an approvable district costal management program within 18 months of certification of the results of an organization election or that has not submitted for approval to the board a program within 30 months of certification of the results of its organization election. Preparation of the program shall be conducted in consultation with the coastal resource service area and shall, to the maximum extent consistent with this chapter, reflect the expressed concerns of the residents of the service area.

(c) Before requesting the department to complete the district coastal management plan under (b) of this section, the board shall meet with members of the coastal resource service area board to determine whether the board is able to complete a district coastal management program within the time limitations established in this section.

Sec. 46.41.160. Approval of plans in coastal resource service areas.

(a) Before adoption by a coastal resource service area board, a district coastal management plan shall be submitted for review to each city or village within the coastal resource service area. The council of a city or traditional village council shall consider the plan submitted for review. Within 60 days of submission, the council of a city or traditional village council shall either approve the plan or enter objections to all or any portion of the plan.

(b) If a city or village within a coastal resource service area fails to approve a portion of the district coastal management plan prepared and submitted for approval under (a) of this section, the governing body shall advise the coastal resource service area board of its objections to the proposed plan and suggest alternative elements or components for inclusion in the district coastal management plan. New matter submitted by a city or village that meets the district plan criteria adopted under this chapter may be accepted by the district and the district coastal management plan modified accordingly. If a city or village fails to provide objections and suggested alternatives within the time limits established in this section, the coastal resource service area board may adopt the district coastal management plan as initially offered.

(c) Objection by a city council under (b) of this section is limited to objection to elements of the plan affecting resources or the use of resources within the corporate limits of the city. Objection by a traditional village council under (b) of this section is limited to objection to elements of the plan affecting resources or the use of resources within the village or within two miles of the village.

(d) For purposes of this section, "village" means an unincorporated community where at least 25 persons reside as a social unit as determined by the Department of Commerce, Community, and Economic Development.

Sec. 46.41.170. Cooperative administration.

(a) A city within the coastal area that is not part of a coastal resource service area shall be included for purposes of this chapter within an adjacent coastal resource service area unless its governing body, by resolution adopted by a majority of its membership, chooses to exclude the city from an adjacent coastal resource service area and a copy of the resolution is filed with the commissioner of commerce, community, and economic development.

(b) This chapter does not restrict or prohibit cooperative or joint administration of functions between a municipality and a coastal resource service area organized under the provisions of this chapter upon initiation of a mutual agreement for the purpose.

Sec. 46.41.180. Construction with other laws.

Nothing in this chapter shall be construed to

(1) diminish state jurisdiction, responsibility, or rights in the field of planning, development, or control of land or water resources, submerged land, or navigable water;

(2) affect in any way any state requirement imposed under a federal authorization or

federal waiver of sovereign immunity; or

(3) diminish the zoning or planning authority of municipalities under AS 29.

Sec. 46.41.900. Definitions.

In this chapter, unless the context otherwise requires,

(1) "affected coastal district" means a coastal district with a publically reviewed draft or approved plan in which a project is proposed to be located or that may experience a direct and significant impact from a proposed project;

(2) "board" means the Alaska Coastal Policy Board established in AS 46.41.010;

(3) "coastal district" means each of the following that contains a portion of the coastal area of the state:

(A) unified municipalities;

(B) organized boroughs of any class that exercise planning and zoning authority;

(C) home rule and first class cities of the unorganized borough or within boroughs that do not exercise planning and zoning authority;

(D) second class cities of the unorganized borough, or within boroughs that do not exercise planning and zoning authority, that have established a planning commission, and that, in the opinion of the commissioner of commerce, community, and economic development, have the capability of preparing and implementing a comprehensive district coastal management plan under AS 46.41.030;

(E) coastal resource service areas established and organized under AS 29.03.020 an AS 46.41.100 - 46.41.160;

(4) "coastal use or resource" means any land or water use or natural resource of the coastal zone. Land and water uses include, but are not limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance;

(5) "coastal zone" means the coastal water including land within and under that water.

and adjacent shoreland, including the water within and under that shoreland, within the boundaries approved by the former Alaska Coastal Policy Council and by the United States Secretary of Commerce under 16 U.S.C. 1451 - 1465 (Coastal Zone Management Act of 1972, as amended); "coastal zone" includes areas added as a result of any boundary changes approved by the board and by the United States Secretary of Commerce under 16 U.S.C. 1451 - 1465; "coastal zone" does not include

(A) those lands excluded under 16 U.S.C. 1453(1); or

(B) areas deleted as a result of any boundary changes by the board in conformance with 16 U.S.C. 1451 - 1465;

(6) "consistency review" means the evaluation of a proposed project against the statewide standards and the approved enforceable policies of an affected coastal district under the process developed by the board;

(7) "department" means the Department of Commerce, Community and Economic Development;

(8) "direct and significant impact" means an activity which proximately contributes to a material change or alteration in the natural or social characteristics of a part of the state's coastal area and in which

(A) would have a net adverse effect on the quality of the resources of the coastal area;

(B) would limit the range of alternative uses of the resources of the coastal area; or

(C) would, of itself, constitute a tolerable change or alteration of the resources within the coastal area but which, cumulatively, would have an adverse effect;

(9) "district coastal management plan" means a plan developed by a coastal district, including enforceable policies of that plan, setting out policies and standards to guide public and private uses of land and water within that district and approved by the board as meeting the requirements of this chapter and the regulations adopted under this chapter;

(10) "enforceable policy" means a policy established by this chapter or approved by the board as a legally binding policy of the Alaska coastal management program applicable to public and private activities;

(11) "local knowledge" means a body of knowledge or information about the coastal environment or the human use of that environment, including information passed down

through generations, if that information is

(A) derived from experience and observations; and

(B) generally accepted by the local community;

(12) "project" means all activities that will be part of a proposed development and includes all federal agency activities as defined in 15 C.F.R. 930.31, including lease sales and development projects affecting a coastal use or resource;

(13) "resource agency" means

(A) the Department of Environmental Conservation;

(B) the Department of Fish and Game; or

(C) the Department of Natural Resources.;

(14) "scientific evidence" means facts or data that are

(A) premised upon established chemical, physical, biological, or ecosystem management principles as obtained through scientific method and submitted to the department to furnish proof of a matter required under this chapter;

(B) in a form that would allow resource agency review for scientific merit; and

(C) supported by one or more of the following:

(i) written analysis based on field observation and professional judgment along with photographic documentation;

(ii) written analysis from a professional scientist with expertise in the specific discipline; or

(iii) site-specific scientific research that may include peer-review level research or literature.

(15) "special management area" includes areas meriting special attention and means a delineated geographic area within the coastal area which is sensitive to change or alteration and which, because of plans or commitments or because a claim on the resources within the area delineated would preclude subsequent use of the resources to a conflicting or incompatible use, warrants special management attention, or which, because of its value to the general public, should be identified for current or future planning, protection, or acquisition;

(16) "use of state concern" means a land and water use that would significantly affect the long-term public interest; a "use of state concern" includes

(A) uses of national interest, including the use of resources for the siting of ports

and major facilities that contribute to meeting national energy needs, construction and maintenance of navigational facilities and systems, resource development of federal land, and national defense and related security facilities that are dependent upon coastal locations;

(B) uses of more than local concern, including those land and water uses that confer significant environmental, social, cultural, or economic benefits or burdens beyond a single coastal district;

(C) the siting of major energy facilities, activities pursuant to a state oil and gas lease, a state gas only lease, or a federal oil and gas lease, or large-scale industrial or commercial development activities that are dependent on a coastal location and that, because of their magnitude or the magnitude of their effect on the economy of the state or the surrounding area, are reasonably likely to present issues of more than local significance;

(D) facilities serving statewide or interregional transportation and communication needs; and

(E) uses in areas established as state parks or recreational areas under AS 41.21 or as state game refuges, game sanctuaries, or critical habitat areas under AS 16.20.

PS!

Rep Gatto - expenses

SB — actions concurrently, Legislature
- would have to fund sequencing
  - Board
  - Fed agency

Coghill / NEPA ?

all questions about existing CZ organiz. are time'd out...

SB 4 follow up response

CG: ingrained in Fed budget?

3rd yr. 4:1 match (fed. match)

5th yr. John Boucher - cap @ 2.0 m.

Wielechowski 4.0 m. 2011 fed. receipts.

(f.n. HB130)

Why is OMB estimating so low?

French

cost of Board - how estimated 700.0

could have been ~~double~~ double counting on f.n JB? SB45 costs.

Lindsey fiscal note/ Otmt. of costs. where ramped up?

SB anticipate more than normal mtg level.

OMB 'offsetting cost? 1st yr. contracting for ci regnl.

Gatto Reps where would they meet.

Botelho Why does Ak. need a coastal pgm. From Congress allows States who participate in CZP to exercise, Fed. Govt has to Outsmt to State review

Joint Judiciary Committee Hearing on 11ACMP:
Coastal Management Program Initiative
– February 2012 –
Relevant Laws

The Alaska Constitution (Article XI)

§ 1. Initiative and Referendum
The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.

§ 2. Application
An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.

§ 3. Petition
After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters who are equal in number to at least ten per cent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.

§ 4. Initiative Election
An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

§ 6. Enactment
If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

§ 7. Restrictions
The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

Alaska Statutes on Initiatives

Article 01. INITIATIVE

Sec. 15.45.010. Provision and scope for use of the initiative.

The law-making powers assigned to the legislature may be exercised by the people through the initiative. However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

Sec. 15.45.020. Filing application.

An initiative is proposed by filing an application with the lieutenant governor. A deposit of $100 must accompany the application. This deposit shall be retained if a petition is not properly filed. If a petition is properly filed, the deposit shall be refunded.

Sec. 15.45.030. Form of application.

The application must include the

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

Sec. 15.45.040. Form of proposed bill.

The proposed bill shall be in the following form:

(1) the bill shall be confined to one subject;

(2) the subject of the bill shall be expressed in the title;

(3) the enacting clause of the bill shall be: "Be it enacted by the People of the State of Alaska;"

(4) the bill may not include subjects restricted by AS 15.45.010.

Sec. 15.45.050. Manner of notice.

Notice to the initiative committee on any matter pertaining to the application and petition may be served on any member of the committee in person or by mail addressed to a committee member as indicated on the application.

Sec. 15.45.060. Designation of sponsors.

The qualified voters who subscribe to the application in support of the proposed bill are designated as sponsors. The initiative committee may designate additional sponsors by giving written notice to the lieutenant governor of the names, addresses, and numerical identifiers of those so designated.

Sec. 15.45.070. Review of application for certification.

Within 60 calendar days after the date the application is received, the lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial.

Sec. 15.45.080. Bases of denial of certification.

The lieutenant governor shall deny certification upon determining in writing that

(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form;

(2) the application is not substantially in the required form; or

(3) there is an insufficient number of qualified sponsors.

Sec. 15.45.090. Preparation of petition.

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

(1) a copy of the proposed bill;

(2) an impartial summary of the subject matter of the bill;

(3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of implementing the proposed law;

(5) the statement of warning prescribed in AS 15.45.100;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and

(7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

(b) Upon request of the initiative committee, the lieutenant governor shall report to the committee the number of persons who voted in the preceding general election.

Sec. 15.45.100. Statement of warning.

Each petition shall include a statement of warning that a person who signs a name other than the person's own on the petition, or who knowingly signs more than once for the same proposition at one election, or who signs the petition when knowingly not a qualified voter, is guilty of a class B misdemeanor.

Sec. 15.45.105. Qualifications of circulator.

To circulate a petition booklet, a person shall be

(1) a citizen of the United States;

(2) 18 years of age or older; and

(3) a resident of the state as determined under AS 15.05.020.

Sec. 15.45.110. Circulation of petition; prohibitions and penalty.

(a) The petitions may be circulated throughout the state only in person.

(b) *[Repealed, Sec. 92 ch 82 SLA 2000].*

(c) A circulator may not receive payment or agree to receive payment that is greater than $1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than $1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.

(f) In this section,

(1) "organization" has the meaning given in AS 11.81.900;

(2) "other valuable thing" has the meaning given in AS 15.56.030(d);

(3) "person" has the meaning given in AS 11.81.900.

Sec. 15.45.120. Manner of signing and withdrawing name from petition.

Any qualified voter may subscribe to the petition by printing the voter's name, a numerical identifier, and an address, by signing the voter's name, and by dating the signature. A person who has signed the initiative petition may withdraw the person's name only by giving written notice to the lieutenant governor before the date the petition is filed.

Sec. 15.45.130. Certification of circulator.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on

petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

(1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;

(2) that the person is the only circulator of that petition;

(3) that the signatures were made in the circulator's actual presence;

(4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);

(7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

Sec. 15.45.140. Filing of petition.

(a) The sponsors must file the initiative petition within one year from the time the sponsors received notice from the lieutenant governor that the petitions were ready for delivery to them. The petition may be filed with the lieutenant governor only if it meets all of the following requirements: it is signed by qualified voters

(1) equal in number to 10 percent of those who voted in the preceding general election;

(2) resident in at least three-fourths of the house districts of the state; and

(3) who, in each of the house districts described in (2) of this subsection, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.

(b) If the petition is not filed within the one-year period provided for in (a) of this section, the petition has no force or effect.

Sec. 15.45.150. Review of petition.

Within not more than 60 days of the date the petition was filed, the lieutenant governor shall review the petition and shall notify the initiative committee whether the petition was properly or improperly filed, and at which election the proposition shall be placed on the ballot.

Sec. 15.45.160. Bases for determining the petition was improperly filed.

The lieutenant governor shall notify the committee that the petition was improperly filed upon determining that

(1) there is an insufficient number of qualified subscribers;

(2) the subscribers were not resident in at least three-fourths of the house districts of the state; or

(3) there is an insufficient number of qualified subscribers from each of the house districts described in (2) of this section.

Sec. 15.45.170.Submission of supplementary petition. [Repealed, Sec. 7 ch 80 SLA 1998].

Repealed or Renumbered

Sec. 15.45.180. Preparation of ballot title and proposition.

(a) If the petition is properly filed, the lieutenant governor, with the assistance of the attorney general, shall prepare a ballot title and proposition. The ballot title shall, in not more than 25 words, indicate the general subject of the proposition. The proposition shall give a true and impartial summary of the proposed law. The total number of words used in the summary may not exceed the product of the number of sections in the proposed law multiplied by 50. In this subsection, "section" means a provision of the proposed law that is distinct from other provisions in purpose or subject matter.

(b) The proposition prepared under (a) of this section shall comply with AS 15.80.005 and shall be worded so that a "Yes" vote on the proposition is a vote to enact the proposed law.

Sec. 15.45.190. Placing proposition on ballot.

The lieutenant governor shall direct the director to place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after

(1) the petition has been filed;

(2) a legislative session has convened and adjourned; and

(3) a period of 120 days has expired since the adjournment of the legislative session.

Sec. 15.45.195. Public hearings.

(a) At least 30 days before the election at which an initiative is to appear on the ballot, the lieutenant governor or a designee of the lieutenant governor shall hold two or more public hearings concerning the initiative in each judicial district of the state. Each public hearing under this section shall include the written or oral testimony of one supporter and one opponent of the initiative.

(b) The lieutenant governor shall provide reasonable notice of each public hearing required under this section. The notice must include the date, time, and place of the hearing. The notice may be given using print or broadcast media. The lieutenant governor shall provide notice in a consistent fashion for all hearings required under this section.

(c) Penalties for a violation of this section may not include removal of an initiative from the ballot.

(d) If the lieutenant governor determines that it is technologically and economically feasible, the division shall provide a live audio and video broadcast of each hearing held under (a) of this section on the division's Internet website.

Sec. 15.45.200. Display of proposed law.

The director shall provide each election board with at least five copies of the proposed law being initiated, and the election board shall display at least one copy of the proposed law in a conspicuous place in the room where the election is held.

Sec. 15.45.210. Determination of void petition.

If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

Sec. 15.45.220. Adoption and effective date of proposed law.

If a majority of the votes cast on the initiative proposition favor its adoption, the proposed law is enacted, and the lieutenant governor shall so certify. The act becomes effective 90 days after certification.

Sec. 15.45.230.Insufficiency of application or petition. [Repealed, Sec. 7, ch 80 SLA 1998].

Repealed or Renumbered

Sec. 15.45.240. Judicial review.

Any person aggrieved by a determination made by the lieutenant governor under AS 15.45.010 - 15.45.220 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given.

Sec. 15.45.245. Delegation by lieutenant governor.

The lieutenant governor may delegate the duties imposed on the lieutenant governor by AS 15.45.010 - 15.45.240 to the director.

....

Legislative Powers

Sec. 24.05.186. Legislative hearings on initiatives certified by the lieutenant governor.

(a) A standing committee of the legislature, selected jointly by the presiding officers of the house of representatives and senate, shall hold at least one hearing on an initiative that the lieutenant governor has determined was properly filed under AS 15.45.160.

(b) The standing committee selected jointly by the presiding officers of the house of representatives and senate under (a) of this section shall hold at least one hearing under this section within 30 days after the convening of the legislative session preceding the statewide election at which the initiative proposition must appear on the election ballot under AS 15.45.190.

LAWS OF ALASKA

2010

Source
SCS CSSSHB 36(JUD)

Chapter No.
73
SLA 10

AN ACT

Relating to ballot initiative proposal applications, to ballot initiatives and to those who file or organize for the purpose of filing a ballot initiative proposal, and to election pamphlet information relating to certain propositions.

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

THE ACT FOLLOWS ON PAGE 1

AN ACT

Relating to ballot initiative proposal applications, to ballot initiatives and to those who file or organize for the purpose of filing a ballot initiative proposal, and to election pamphlet information relating to certain propositions.

*** Section 1.** AS 15.13.040(k) is amended to read:

(k) Every individual, person, nongroup entity, or group contributing a total of $500 or more to a group organized for the principal purpose of influencing the outcome of a proposition**, and every individual, person, nongroup entity, or group contributing a total of $500 or more to a group organized for the principal purpose of filing an initiative proposal application under AS 15.45.020 or that has filed an initiative proposal application under AS 15.45.020,** shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and

employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or group during the calendar year.

*** Sec. 2.** AS 15.13.050(a) is amended to read:

(a) Before making an expenditure in support of or in opposition to a candidate or before making an expenditure in support of or in opposition to a ballot proposition or question **or to an initiative proposal application filed with the lieutenant governor under AS 15.45.020**, each person other than an individual shall register, on forms provided by the commission, with the commission.

*** Sec. 3.** AS 15.13.050 is amended by adding a new subsection to read:

(c) If a group intends to make more than 50 percent of its contributions or expenditures in support of or in opposition to a single initiative on the ballot, the title or common name of the initiative must be a part of the name of the group. If the group intends to make more than 50 percent of its contributions or expenditures in opposition to a single initiative on the ballot, the group's name must clearly state that the group opposes that initiative by using a word such as "opposes," "opposing," "in opposition to," or "against" in the group's name.

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*** Sec. 4.** AS 15.13.065(c) is amended to read:

(c) Except for reports required by AS 15.13.040 and 15.13.110 and except for the requirements of AS 15.13.050, 15.13.060, and 15.13.112 - 15.13.114, the provisions of AS 15.13.010 - 15.13.116 do not apply to limit the authority of a person to make contributions to influence the outcome of a ballot proposition. In this subsection, in addition to its meaning in AS 15.60.010, "proposition" includes

(1) an issue placed on a ballot to determine whether

(A) [(1)] a constitutional convention shall be called;

(B) [(2)] a debt shall be contracted;

(C) [(3)] an advisory question shall be approved or rejected; or

(D) [(4)] a municipality shall be incorporated**;**

(2) an initiative proposal application filed with the lieutenant governor under AS 15.45.020.

*** Sec. 5.** AS 15.13.110(e) is amended to read:

(e) A group formed to sponsor [AN INITIATIVE,] a referendum or a recall shall report 30 days after its first filing with the lieutenant governor. Thereafter, each group shall report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) of this section.

*** Sec. 6.** AS 15.13.110 is amended by adding a new subsection to read:

(g) An initiative committee, person, group, or nongroup entity receiving contributions exceeding $500 or making expenditures exceeding $500 in a calendar year in support of or in opposition to an initiative on the ballot in a statewide election or an initiative proposal application filed with the lieutenant governor under AS 15.45.020 shall file a report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) and (b) of this section. If the report is a first report, it must cover the period beginning on the day an initiative proposal application is filed under AS 15.45.020 and ending three days before the due date of the report.

*** Sec. 7.** AS 15.13.400(4) is amended to read:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made**, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party,** and that is made for the purpose of

(i) influencing the nomination or election of a candidate**;**

(ii) [, AND IN AS 15.13.010(b) FOR THE PURPOSE OF] influencing a ballot proposition or question**; or**

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020 [, INCLUDING THE PAYMENT BY A PERSON OTHER THAN A CANDIDATE OR POLITICAL PARTY, OR COMPENSATION FOR

THE PERSONAL SERVICES OF ANOTHER PERSON, THAT ARE RENDERED TO THE CANDIDATE OR POLITICAL PARTY];

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party;

*** Sec. 8.** AS 15.13.400(6) is amended to read:

(6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or

political party of compensation for the personal services of another person that are rendered to a candidate or political party; [OR]

(iv) influencing the outcome of a ballot proposition or question; **or**

(v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

*** Sec. 9.** AS 15.13.400(8) is amended to read:

(8) "group" means

(A) every state and regional executive committee of a political party; [AND]

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on

behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate; **and**

(C) any combination of two or more individuals acting jointly who organize for the principal purpose of filing an initiative proposal application under AS 15.45.020 or who file an initiative proposal application under AS 15.45.020;

*** Sec. 10.** AS 15.45.080 is amended to read:

Sec. 15.45.080. Bases of denial of certification. The lieutenant governor shall deny certification upon determining in writing that

(1) the proposed bill to be initiated is **not confined to one subject or is otherwise** not in the required form;

(2) the application is not substantially in the required form; or

(3) there is an insufficient number of qualified sponsors.

*** Sec. 11.** AS 15.45.090(a) is amended to read:

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

(1) a copy of the proposed bill [IF THE NUMBER OF WORDS INCLUDED IN BOTH THE FORMAL AND SUBSTANTIVE PROVISIONS OF THE BILL IS 500 OR LESS];

(2) an impartial summary of the subject matter of the bill;

(3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of implementing the proposed law;

(5) the statement of warning prescribed in AS 15.45.100;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition;

and

(7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

* **Sec. 12.** AS 15.45 is amended by adding a new section to read:

Sec. 15.45.195. Public hearings. (a) At least 30 days before the election at which an initiative is to appear on the ballot, the lieutenant governor or a designee of the lieutenant governor shall hold two or more public hearings concerning the initiative in each judicial district of the state. Each public hearing under this section shall include the written or oral testimony of one supporter and one opponent of the initiative.

(b) The lieutenant governor shall provide reasonable notice of each public hearing required under this section. The notice must include the date, time, and place of the hearing. The notice may be given using print or broadcast media. The lieutenant governor shall provide notice in a consistent fashion for all hearings required under this section.

(c) Penalties for a violation of this section may not include removal of an initiative from the ballot.

(d) If the lieutenant governor determines that it is technologically and economically feasible, the division shall provide a live audio and video broadcast of each hearing held under (a) of this section on the division's Internet website.

* **Sec. 13.** AS 15.58.010 is amended to read:

Sec. 15.58.010. Election pamphlet. Before each state general election, and before each state primary **or special** election at which a ballot proposition is scheduled to appear on the ballot, the lieutenant governor shall prepare, publish, and mail at least one election pamphlet to each household identified from the official registration list. The pamphlet shall be prepared on a regional basis as determined by the lieutenant governor.

* **Sec. 14.** AS 15.58.020(b) is amended to read:

(b) Each primary **or special** election pamphlet shall contain only the information specified in (a)(6) and (a)(9) of this section for each ballot measure scheduled to appear on the primary **or special** election ballot.

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM January 28, 2012

SUBJECT: Coastal Management Program Legislation
(Work Order No. 27-LS1217)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Doug Gardner
Director

Kathryn L. Kurtz
Assistant Revisor

Alpheus M. Bullard
Legislative Counsel

1. Will the coastal management program initiative appear on the primary election ballot, or the general election ballot?[1]

A. Summary

Taking certain assumptions into account,[2] the following bullet points explain when the coastal management program initiative will appear on the ballot this year, depending on when the legislature adjourns.

- If the legislature adjourns on April 15th (the 90th day), or on any day on or before April 29th (the 104th day), the initiative would appear on the primary election ballot.

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[1] You also asked whether we could identify any aspect of the ACMP initiative that is unconstitutional; specifically you asked whether the initiative is unconstitutional because if it ultimately appears on the ballot and is approved by the voters, the ACMP program could not, in reality, function without legislative appropriation. I note that the attorney general, in advising Lieutenant Governor Mead Treadwell by letter on November 29, 2011, discussed this issue at pages 7 through 10 of the attorney general's letter. I do not disagree with the analysis on these pages of the memorandum, and attach this discussion to this memorandum as it answers your constitutional inquiry regarding appropriation.

[2] The following assumptions apply:

1) the second regular session of the Twenty-Seventh Alaska State Legislature was the first legislative session to convene after the filing of the initiative;

2) there are no special sessions called during the course of the regular session; and

3) there are no special elections called prior to the general election.

- If the legislature adjourns on April 30th or May 1st, the initiative should appear on the general election ballot, but there is a possibility that the lieutenant governor would arrive at a different interpretation of the relevant statutes and constitutional provisions, and place the measure on the primary election ballot.
- If the legislature adjourns on or after May 2nd (the 107th day), the initiative would appear on the general election ballot.

The following analysis provides a detailed explanation of the basis for these conclusions.

B. Interpreting the statutory and constitutional provisions relating to timing of the placement of initiatives on the ballot

The key issue is how the lieutenant governor will calculate the 120-day period required under AS 15.45.190(3) and art. XI, sec. 4 of the state's constitution. AS 15.45.190 provides:

> **Sec. 15.45.190. Placing proposition on ballot.** The lieutenant governor shall direct the director to place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after
>
> (1) the petition has been filed;
>
> (2) a legislative session has convened and adjourned; and
>
> (3) a period of 120 days has expired since the adjournment of the legislative session.

Article XI, sec. 4 of the Constitution of the State of Alaska provides:

> **Section 4. Initiative Election.** An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

The statutory and constitutional provisions would require the lieutenant governor to count 120 days after the session adjourned and before the day of the election. If the legislature adjourned on or before April 29th, the lieutenant governor should place the initiative on the primary election ballot, since 120 days or more will have passed after adjournment and before the day of the primary election.[3] If the legislature adjourned on April 30, there would be only 119 days after adjournment and before the primary election (starting

[3] The primary election this year will be held on August 28th. If the legislature adjourned on April 29th, and the lieutenant governor began counting the 120-day period on April 30, he would count one day in April, 31 in May, 30 in June, 31 in July, and 27 in August, a total of 120 days.

May 1 and counting through August 27), so an initiative filed before the session convened should appear on the general election ballot.

However, it is possible that the lieutenant governor might interpret the 120-day period to include the day of the primary election, in which case he might still place the initiative on the primary election ballot. This reading is not persuasive, since the constitution says "*more than* one hundred-twenty days *after* adjournment," and this suggests that one must begin counting the day after adjournment, and that the election would have to be at least 121 days from that date. Nonetheless, it is a possibility you should consider.

Similarly, if the lieutenant governor reads the statute and constitution as permitting him to count both the last day of the legislative session and the day of the primary election in the 120-day period, he might place the measure on the primary election ballot even if the legislature adjourned on May 1.[4] Again, this reading is not supported by the language of the statute and the constitution, but the possibility of the lieutenant governor adopting this interpretation cannot be ruled out.

If the legislature adjourned on or after May 2, the measure could not be placed on the primary election ballot. Even counting both the last day of session and the day of the primary election, one only arrives at a period of 119 days,[5] which clearly does not satisfy the statutory and constitutional requirement.

C. The possibility of a special session

The discussion above assumes that there will not be a special session of the legislature held concurrently with the current regular session. The constitutional language requires placement on the ballot for "the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing." This language ("the") appears to anticipate a single legislative session. The statutory language is slightly different, requiring placement on the ballot after "a legislative session has convened and adjourned." If the legislature were to convene a special session during the current regular session, and adjourn that special session prior to adjournment of the regular session,[6] the lieutenant governor could arguably start counting the 120-day period after adjournment of the special session, rather than the regular session. However, the Alaska legislature has never, to our knowledge, held a concurrent special session.[7] Also, a court might insist on counting from the adjournment of the first legislative session convened after the initiative petition was filed rather than the first adjourned.

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[4] Counting 31 days in May, 30 in June, 31 in July, and 28 -- including the day of the primary -- in August, for a total of 120 days.

[5] Counting 30 days in May, 30 in June, 31 in July, and 28 in August, a total of 119.

[6] Special sessions are limited to 30 days under art. II, sec. 9 of the Constitution of the State of Alaska.

[7] Perhaps this is because questions might be raised about the permissibility of such a special session under the state constitution.

D. The possibility of a special election

The above discussion also assumes that there will *not* be a statewide special election held between the 2012 primary election and the 2012 general election. A special election could be called under AS 15.40.140 if there were a vacancy in the office of United States Senator or under AS 15.40.230 if a vacancy occurred in the office of the governor. For example, it is conceivable that if there were a vacancy in the office of United States Senator occurring 59 days or less before the primary election the governor might call a special election to be held after the primary but before the general election (if the general election were more than 90 days after the vacancy). Because the language of the constitution calls for placement of an initiative on the ballot at the first statewide election held more than 120 days after adjournment of the legislative session, if there were a special election held after the primary election but before the general election, an initiative could appear on the special election ballot.

Note that a special session held after the regular session convened and adjourned would not affect the analysis. AS 15.45.190 requires placement of the initiative on the ballot of the first statewide election that is held after "(2) *a* legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of *the* legislative session." (Emphasis added.) Although the use of "a" in paragraph two invites speculation about multiple legislative sessions, the use of "the" in paragraph three clearly relates to the single session referred to in paragraph two. A single session would have to convene and adjourn before the 120-day period would begin. If the current regular session were to last for 90 days, and if it were followed by a 30-day special session, an initiative filed before the convening of the regular session would be placed on the primary election ballot (see the analysis above). The occurrence of a subsequent special session should not affect the calculus, regardless of the date of adjournment of the subsequent special session.

E. The 90-day session limit

Obviously, a 107-day session would extend beyond the statutory 90-day session limit found in AS 24.05.150(b). However, it would fall well within the 121-day limit established in art. II, sec. 8 of the Constitution of the State of Alaska. Despite the statutory session limit, given the court's reluctance to interfere with matters of legislative procedure,[8] it is unlikely that a court would order the legislature to adjourn if it remained in session longer than 90 days. Also, the statute and the constitution require the lieutenant governor to count 120 days from adjournment of the legislature, not from the date of the 90-day session limit.

The bottom line is, to ensure that an initiative filed before the 2012 regular session appears on the 2012 general election ballot, rather than the primary election ballot, the legislature would need to adjourn May 2nd or later. That amounts to a session length of 107 days or longer.

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[8] *See Malone v. Meekins*, 650 P.2d 351 (Alaska 1980); *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987).

2. Would a bill modeled on the provisions of the former Alaska Coastal Management Program, as those provisions would have been amended by the substantive portions of SCS CSHB 106(FIN) ("HB 106"), be interpreted as "substantially the same" as the initiative entitled "An Act establishing the Alaska Coastal Management Program"?

While both HB 106 and the initiative have the same general purpose -- establishing a state coastal management program -- the means by which that purpose are effectuated would be different. Given the relative scarcity of prior court cases interpreting the state constitution's art. XI, sec. 4 "substantially the same" language, it's not clear to what degree this difference might result in HB 106 and the initiative being interpreted as not substantially the same.

Discussion

Under art. XI, sec. 4 of the Constitution of the State of Alaska, a proposed initiative is void if a law is enacted that is "substantially the same measure" as the proposed initiative.[9] Under AS 15.45.210, the lieutenant governor, with the concurrence of the attorney general, is responsible for determining whether an Act of the legislature is substantially the same as a proposed initiative.[10]

A. "Substantially the same" test in *Warren v. Boucher*

The test of how similar a bill and an initiative must be for the bill to invalidate the initiative was first set out in *Warren v. Boucher*, 543 P.2d 731 (Alaska 1975):

> It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the

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[9] Article XI, sec. 4, Constitution of the State of Alaska states:

> **INITIATIVE ELECTION.** An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

[10] AS 15.45.210 states:

> **Determination of void petition.** If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

> permitted variance before the legislative act becomes no longer substantially the same.
>
> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative.

543 P.2d at 736.

B. "Substantially the same" test revisited in *Trust the People*

In *State of Alaska v. Trust the People Initiative Committee*, 113 P.3d 613, 621 (Alaska 2005) (considering whether an initiative was void under art. XI, sec. 6 of the state constitution), the court cited the *Warren v. Boucher* test:

> A court must first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative; and finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.

1. Scope of subject matter

Turning to the first part of the test, as articulated by the court in *Trust the People*, it should be noted that the subject matter of this initiative, the establishment of an Alaska Coastal Management Program, is relatively complex and its reach is broad. Correspondingly, the legislature's discretion to vary from particular features of the initiative is broader in this instance than it might be in the context of a different initiative (i.e. the filling of a U.S. Senate vacancy in *Trust the People*). HB 106 would most likely be interpreted to satisfy this element of the test.

2. Purpose of legislation and initiative

The next part of the test consists of examining whether the purposes of the legislation and the initiative are the same. The *Warren v. Boucher* test asks whether "the legislative act achieves the same general purpose as the initiative." *Id.* The establishment of a state coastal management program under both HB 106 and the initiative would, if approved by the National Oceanic and Atmospheric Administration's (NOAA) Office of Ocean and Coastal Resource Management under the Coastal Management Act of 1972 (16 U.S.C. §§ 1451 - 1465), enable the state to formally review and influence federal activities affecting Alaska, allow the state to receive Coastal Zone Management Act grant funds, reestablish

a coordinated permitting process for projects requiring state and federal authorizations, and result in greater local participation in state and federal permitting processes. Additionally, it should be noted that for a state coastal management program to be approved, the Secretary of Commerce must find that the program includes certain program elements that are consistent with Congressional declaration of policy (purpose) found at 16 U.S.C. § 1452.[11] Both HB 106 and the initiative are likely to be found to meet these federal requirements. Because of this, the general purpose of HB 106 would likely be interpreted as the same as the general purpose of the initiative, satisfying the second element of the *Trust the People* test.

3. "Means"

The third prong of the test involves considering whether the means by which this general purpose is effectuated is the same in the bill and the initiative. It is here that HB 106 and the initiative could be found to differ, because the initiative provides for greater local participation and control than the state's former coastal management program as it would have been modified by HB 106.

The former program, at the time of its repeal, was housed within the Department of Natural Resources, and that department was responsible for coordinating consistency reviews, reviewing and approving coastal management plans, offering technical assistance to coastal resource districts, and offering statutory and regulatory changes to improve coastal management.[12] The initiative ends direct state agency control of the program, instead vesting control of the program in a Coastal Policy Board (board),[13] the majority of whose members are residents of the coastal regions of the state.[14] Similarly, the former program prevented coastal resource districts or areas from adopting enforceable policies relating to air, land, and water quality issues that were under the Department of Environmental Conservation's authority (colloquially known as the "DEC carve-out"),[15] whereas the initiative does not.

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[11] See 16 U.S.C. § 1455(d)(2) for a list of the program elements.

[12] The consistency review process, in which private and public land and water uses and natural resources in the coastal zone are managed in a manner consistent with the policies of a state's coastal management program, is the heart of the 1972 Coastal Management Act (16 U.S.C. §§ 1450 - 1464).

[13] While SCS CSHB 106(FIN) established a board, the board was advisory in nature. See secs. 3, 12, and 13 of 27-GH1965\H.

[14] The initiative's board would be located in the Department of Commerce, Community, and Economic Development.

[15] See former AS 46.40.040(b), AS 46.40.040(c), and AS 46.40.096(i). For a discussion of the "carve-out," see the Alaska Coastal Management Program Audit Part I, pages 25 - 27, available January 27, 2012 at: http://www.legaudit.state.ak.us/pages/digests/2011/30060adig.htm.

C. Conclusion

It is hard to predict how the lieutenant governor, or a court, would interpret the significance of this different balance of power between state agencies and local governments in determining whether the bill would be "substantially the same" as the initiative. However, if you want to draft legislation that will increase the odds of voiding the initiative and being considered "substantially the same," a bill that provides greater local control and participation than the former program did (and HB 106 would have) could only help the effort.

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12-057.ljw

Attachment

Sean Parnell, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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November 29, 2011

The Honorable Mead Treadwell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 11ACMP Initiative Application
A.G. File No. JU2011200659

Dear Lieutenant Governor Treadwell:

You have asked us to review an application for an initiative entitled "An Act establishing the Alaska Coastal Management Program." Despite numerous potential constitutional concerns with this initiative bill as discussed herein, and numerous irregularities involving draftsmanship, inconsistencies, and ambiguities in the bill itself, the application complies with the specific constitutional and statutory provisions governing the initiative process and we therefore recommend that you certify the application.

I. SUMMARY OF THE PROPOSED BILL

A. BRIEF SUMMARY AND BACKGROUND

The bill proposed by this initiative would create an Alaska Coastal Management Program (hereafter "ACMP"). In 2005, the legislature repealed the state's prior coastal management program with an effective sunset date of July 1, 2011.[1] On June 28, 2011, the legislature adjourned the second of two special sessions without passing legislation required to extend the prior coastal management program. Because the prior coastal management program was fully repealed, the similarities and differences between this initiative bill and the prior program are irrelevant unless expressly noted otherwise. Therefore we must analyze the initiative bill on its own merits.

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[1] *See* former AS 46.39.010-.040; AS 46.40.010-46.40.210 (repealed ch. 31, SLA 2005); AS 44.66.020- 44.66.030.

B. SECTIONAL SUMMARY

The bill proposed by this initiative is 15 pages long, double-spaced, and consists of one designated section containing 18 new statutory provisions. The bill amends Title 46 of the Alaska Statutes by adding a new chapter entitled "Alaska Coastal Management Program." The 18 new statutory provisions are summarized as follows:

- **AS 46.41.010. Coastal Policy Board.** This provision would create operational criteria for a 13-member Coastal Policy Board in the Department of Commerce, Community and Economic Development (hereafter "the Department of Commerce"). The 13 governor-appointed members would include nine coastal resource district representatives and the four state commissioners from the Alaska Department of Environmental Conservation, the Alaska Department of Fish and Game, the Alaska Department of Natural Resources, and the Alaska Department of Commerce.

- **AS 46.41.020. Powers and duties of the board.** This provision describes the proposed powers and duties of the Coastal Policy Board. In significant part, this provision would require the Coastal Policy Board to develop an interagency program of strategic coastal and ocean planning for each geographic region of the state. The provision also lists a number of other duties, such as to direct the Department of Commerce to seek required federal approval of the ACMP; to review, approve, and evaluate coastal district management plans; to establish coordination among state agencies to facilitate the ACMP; to contract for necessary services; to apply for and accept grants, contributions, and appropriations; and to review and approve regulations necessary to implement the coastal management program under this chapter and the federal Coastal Zone Management Act.

- **AS 46.41.030. Division of Coastal Management.** This provision would create a division of ocean and coastal management within the Department of Commerce. The division's duties would include issuing state consistency determinations and responding to federal consistency determinations and certifications; adopting regulations approved by the Coastal Policy Board; providing data and information to coastal districts to carry out their planning and management functions; and developing and maintaining a financial assistance program to help coastal districts.

- **AS 46.41.040. Development of Alaska Coastal Management Program.** This provision would direct the promulgation of regulations for statewide coastal standards, and the criteria and procedures for the preparation and approval of district coastal management plans and consistency review procedures for coastal projects. It would also restore the coastal districts, coastal district boundaries, and approved coastal management plans that were in effect as of June 30, 2011.

- **AS 46.41.050. Objectives.** This provision establishes objectives for the ACMP, which are largely the same as those in the prior coastal management program. The provision adds that the coast should be used, managed, restored, and enhanced "for this and succeeding generations." It also adds three objectives: (1) the coordination of coastal planning among government and citizens; (2) public and government participation in the program; and (3) the requirement that state agencies comply with the program.

- **AS 46.41.060. Development of district coastal management plans.** This provision would require coastal districts to develop and adopt district coastal management plans, and would provide requirements for the plans and for the plans' policies.

- **AS 46.41.070. Submission of district plans by coastal districts.** This provision would require coastal districts to review their coastal management plans within one year after the effective date of implementing regulations and submit any necessary changes to the plans to the Department of Commerce for review and approval by the Coastal Policy Board.

- **AS 46.41.080. Implementation of district coastal management plans.** This provision would require districts to implement plans when the district has and exercises zoning or other controls on the use of resources within the district. Where a district does not have or exercise zoning or other controls on the use of resources, state agencies would implement the district plan.

- **AS 46.41.090. Compliance and enforcement.** This provision would require municipalities and state resource agencies to administer land and water use regulations or controls in conformity with district plans, and

states that the superior court has jurisdiction to enforce lawful orders of the board and the Department of Commerce.

- **AS 46.41.100. Coastal management plans in the unorganized borough.** This provision would require coastal resource service areas in unorganized boroughs to exercise all authorities and perform duties required by the chapter.

- **AS 46.41.110. Coastal resource service areas.** This provision would provide for the establishment of coastal resource service areas and allow such areas to be geographically linked to pre-existing regional educational attendance areas established under AS 14.08.031.

- **AS 46.41.120. Organization of a coastal resource service area.** This provision would permit the organization of coastal resource service areas by petition of voters within the area or by resolution approved by the relevant city or village council and submitted to the voters at an election at the council's request.

- **AS 46.41.130. Coastal resource service area boards.** This provision would create elected boards consisting of seven members each, representing the population of the coastal resource service areas. The boards would have the powers and duties of coastal districts.

- **AS 46.41.140. Elections in coastal resource service areas.** This provision would establish that the lieutenant governor would administer elections of board members of coastal resource service areas and could adopt regulations for these elections.

- **AS 46.41.150. Preparation of district coastal management program by the Department of Commerce.** This provision would allow the Coastal Policy Board to submit a district plan to the legislature for consideration if a coastal resource service area rejects organization. At the request of the Coastal Policy Board, the Department of Commerce would complete a district plan for a coastal resource service area that has been organized but that has failed on its own to make substantial progress in the plan.

- **AS 46.41.160. Approval of plans in coastal resource service areas.** This provision would create a process through which district coastal

management plans would be submitted for review to each city or village within the applicable coastal resource service area, which would then have 60 days to approve or object to the plan.

- **AS 46.41.170. Cooperative administration.** This provision would include a city within an adjacent coastal resource service area if it is in a coastal area but is not part of the coastal resource service area, unless the city opts out by resolution. The provision further specifies that the chapter as a whole does not restrict or prohibit cooperative or joint administration of functions between a municipality and a coastal resource service area.

- **AS 46.41.180. Construction with other laws.** This provision would set forth the relationship between the new chapter and state jurisdiction, state requirements imposed under federal law, and municipal zoning and planning authority.

- **AS 46.41.900. Definitions.** This provision would set out definitions for the new chapter 41.

II. ANALYSIS

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative and within 60 calendar days of receipt either "certify it or notify the initiative committee of the grounds for denial." The application for the 11ACMP initiative was filed on October 7, 2011. The 60th calendar day after the filing date is December 6, 2011. Under AS 15.45.080, certification shall only be denied if: (1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors.

A. FORM OF THE PROPOSED BILL

In evaluating an initiative application, you must determine whether the application is in its "proper form."[2] Specifically, you must inquire whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the

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2 Alaska Const. art. XI, § 2.

initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[3]

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that: (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects, which are identified in AS 15.45.010 and article XI, section 7 of the Alaska Constitution, are: (1) dedication of revenue; (2) the making or repealing of appropriations; (3) the creation of courts, the definition of their jurisdiction, or prescribing rules of court; and (4) the enactment of local or special legislation.

This initiative bill meets the first three requirements. It is confined to one subject, the Alaska Coastal Management Program; the subject is expressed in the title, "An Act establishing the Alaska Coastal Management Program"; and the required enacting clause is present.

Although there are concerns as to whether the initiative bill complies with the requirement that it not contain a prohibited subject, the Alaska Supreme Court has adopted a "deferential attitude toward initiatives,"[4] and has consistently recognized that the constitutional and statutory provisions pertaining to the use of the initiative should be liberally construed in favor of allowing an initiative to reach the ballot.[5] Accordingly, we have analyzed the bill with these principles in mind and conclude that the initiative bill contains no prohibited subject. As such, the fourth requirement relating to the form of the bill is therefore satisfied.

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3 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988) (citing *Boucher v. Engstrom*, 528 P.2d 456, 460-61 (Alaska 1974) (overruled on other grounds)).

4 *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

5 *McAlpine*, 762 P.2d at 91 (Alaska 1988); *Yute Air*, 698 P.2d at 1181.

1. Does the Bill Make an Appropriation?

Six provisions of this initiative bill appear at first blush to implicate the restriction against making an appropriation by initiative.[6] When viewed in the context of the entire initiative bill and the case law governing appropriations in such bills, however, none of these six provisions constitutes a prohibited appropriation. In reaching this conclusion, we are mindful of the firmly-held principle that unless an initiative bill is "*clearly* unconstitutional," it should reach the ballot and be left to the voters to decide.[7] "Merely doubtful" legality is not enough.[8] Because no provision of the bill makes a clearly unconstitutional appropriation, certification should not be denied on that basis.

Under article XI, section 7 of the Alaska Constitution and AS 15.45.010, the initiative process may not be used to "make or repeal appropriations." The Alaska Supreme Court has held that these provisions "prohibit an initiative whose primary object is to require the outflow of state assets" in the form of either land or money.[9] A key element in determining whether an initiative makes an appropriation is whether the initiative bill would "designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action."[10] Specifically, the analysis is whether the initiative sets aside specific sums of money for a specific purpose that is "ascertainable" and "definite," as opposed to being "ancillary," "incidental," or "redundant."[11] The Alaska Supreme Court has found that laws that "merely create new government programs or liabilities do not constitute appropriations" in the context of

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6 Proposed AS 46.41.020(a)(7); Proposed AS 46.41.030; Proposed AS 46.41.030(b)(4); Proposed AS 46.41.010(h); Proposed AS 46.41.130(h); and Proposed AS 46.41.140.

7 *Kohlhaas v. State, Office of Lieutenant Governor,* 147 P.3d 714, 717 (Alaska 2006) (emphasis added); *see also Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003)(same).

8 *Yute Air*, 698 P.2d at 1181.

9 *Thomas v. Bailey,* 595 P.2d 1, 7 (Alaska 1979).

10 *McAlpine* ,762 P.2d at 91.

11 *Id.* at 89-90.

initiatives.[12] Indeed, the lieutenant governor must include in the petition booklets that circulate after certification "an estimate of the cost to the state of implementing the proposed law."[13] Moreover the legislature in fact anticipates that implementing a law appropriately enacted by initiative will have associated costs, and the existence of such costs does not alone constitute an appropriation.

The first provision in question would require the Department of Commerce "to apply for and accept grants, contributions, and appropriations, including application for and acceptance of federal funds that may become available for coastal planning and management."[14] This provision does not designate the use of state assets, but merely directs a state agency to seek funding sources for coastal planning and management. This provision therefore does not make an appropriation.

Second, the bill creates a Division of Ocean and Coastal Management.[15] This proposed division would have four tasks: (1) to respond to all federal consistency determinations and certifications authorized by the federal Coastal Zone Management Act and issue state consistency determinations; (2) to adopt regulations; (3) to assure continued provision of data and information to coastal districts to carry out planning and management functions; and (4) to develop and maintain a program of financial assistance.

Although this portion of the bill creates a new division in the Department of Commerce, as noted above the mere creation of a government program or entity does not of itself constitute a prohibited appropriation.[16] The Alaska Supreme Court adopted this principle in *McAlpine v. University of Alaska,* when it cited favorably to case law concluding that an initiative establishing a government program does not violate the prohibition against the use of initiatives for appropriation if the initiative itself commits no assets to the program. The funding level for the program still "rests within the power"

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12 *Id.* at 90.

13 AS 15.45.090(4).

14 Proposed AS 46.41.020(a)(7).

15 Proposed AS 46.41.030.

16 *McAlpine*, 762 P.2d at 90.

of the legislature, and that is dispositive.[17] The legislature would have complete discretion to determine what types and levels of funding the new division would receive, and further legislative action would be required to appropriate any funds for that purpose. The creation of this division does not "designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action."[18] Nor does creation of the division set aside specific sums of money for a specific purpose that is "ascertainable" and "definite."[19] Indeed, the provision designates the use of no state assets at all. An unfunded mandate is not an appropriation. The fact that a new agency would have costs, potentially including personnel and operating expenses, does not render the creation of the agency an appropriation. Accordingly, the creation of the division and its duties, without more, does not amount to a prohibited appropriation.

The third provision in question would require the Division of Ocean and Coastal Management to "develop and maintain a program of financial assistance to aid coastal districts in the development and implementation of district coastal management plan." [*sic*].[20] This provision simply directs the Division of Ocean and Coastal Management to develop and maintain a program of financial assistance. It creates a new government program, but says nothing about how, or from what source, such a program would be funded. And it does not designate the use of state assets at all, much less in a manner that is executable, mandatory, and reasonably definite with no further legislative action. This provision therefore does not make an appropriation.

The fourth and fifth such provisions provide that members and alternates of the Coastal Policy Board and members of the Coastal Resource Service Area Boards would be entitled to per diem and travel expenses "authorized by law for members of boards and commissions."[21] Although these provisions technically entitle board members to state funds in the form of per diem and travel expenses, these expenses are, by the express

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17 *Id.* (citing *Dist. of Columbia Bd. of Elections and Ethics v. Dist. of Columbia*, 520 A.2d 671, 675 (D.C.App. 1986)).

18 *Id.* at 91.

19 *Id.* at 89-90.

20 Proposed AS 46.41.030(b)(4).

21 Proposed AS 46.41.010(h) and Proposed AS 46.41.130(h).

terms of the provisions, no different than those already authorized for members of boards and commissions. The per diem expenses and travel expenses do not set aside any specific amount of state assets, but rather are incidental liabilities that flow from the creation of the new government program and its implementing boards, and by the express terms of the bill are no different from the state liability that accrues to any other board or commission. Further, the outflow of state assets is clearly not the primary object of this bill. Thus, this provision is likely not a prohibited appropriation.[22]

Finally, the bill provides that "the state shall pay all election costs" to administer and conduct the elections of coastal resource service area board members.[23] Again, the elections system created by this initiative bill and the costs of implementing that system are incidental and ancillary to the creation of the program rather than its primary objective, and no specific amount of state assets is set aside or dedicated to cover the costs of these elections. This is likewise not a prohibited appropriation.

2. Does the Bill Dedicate Revenue?

This initiative bill proposes a new "objectives" statute, providing in part that "[t]he Alaska coastal management program shall be consistent with the following objectives ... the recognition of the need for a ... contribution of a share of the state's resources to meet national energy needs."[24] Under article XI, section 7 of the Alaska Constitution, the initiative process may not be used to "dedicate revenues." Likewise, under AS 15.45.010, an initiative "may not be proposed to dedicate revenue."

The vague "objective" of "recognition" of an ongoing need to utilize an unspecified type or amount of state resources does not amount to the dedication of revenue, so this provision does not violate that prohibition.

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22 A similar analysis would apply to proposed AS 46.41.010(i), requiring department staff to provide administrative support for the board and requiring the department, at the board's direction, to contract with or employ personnel or consultants the department considers necessary to assist the board in carrying out its duties and responsibilities.

23 Proposed AS 46.41.140.

24 Proposed AS 46.41.050(7) (emphasis added).

3. Does the Bill Define the Jurisdiction of Courts?

This initiative bill contains a provision that would give Alaska's superior courts "jurisdiction to enforce lawful orders of the board and the department under this chapter."[25] Accordingly, this provision raises the question whether the initiative bill "defines the jurisdiction of courts" in violation of the constitutional and statutory provisions governing the use of the initiative. Because the provision neither limits nor expands the existing jurisdiction of the superior court, we conclude that it does not define the jurisdiction of courts.

Under article XI, section 7 of the Alaska Constitution and AS 15.45.010, the initiative process may not be used to "define the jurisdiction of courts." The Alaska Supreme Court has not interpreted this particular restriction, but minutes from the Alaska Constitutional Convention reveal that the delegates were concerned primarily with the creation of special courts for special purposes by use of the initiative.[26]

Article IV, section 3 of the Alaska Constitution establishes the superior court as "the trial court of general jurisdiction" in the state. This constitutional provision is implemented by statute at AS 22.10.010-AS 22.10.190. Alaska Statute 22.10.020(a) provides that "[t]he superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters ...." The Alaska Supreme Court has held that trial courts of general jurisdiction such as the superior court have "traditionally been regarded as having the power to hear all controversies which may be brought before a court within legal bounds of rights or remedies, except insofar as has been expressly and unequivocally denied by the state's constitution or statutes."[27]

In giving the superior court "jurisdiction to enforce lawful orders of the board and the department under this chapter,"[28] the initiative bill does not limit the existing

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25 Proposed AS 46.41.090(b).

26 1987 Inf. Op. Att'y Gen. (Mar. 23; 663-87-0323) at 4; 4 Proceedings of the Alaska Constitutional Convention 2854, 2967-2992 (1955-56).

27 *Matter of C.D.M.*, 627 P.2d 607, 610 (Alaska 1981).

28 Proposed AS 46.41.900 defines "board" as "the Alaska Coastal Policy Board established in AS 46.41.010" and "department" as "the Department of Commerce, Community and Economic Development."

jurisdiction of the superior court or confer upon the court any jurisdiction it does not already have under the Alaska Constitution and statutes." It is not clear from the bill exactly what "orders" of the board this provision intends to cover, but read in context, the provision seems aimed at ensuring access to judicial process—not at "defining" jurisdiction of the courts.

Although the precise meaning and intent of the proposed AS 46.40.090(b) is somewhat ambiguous, defining the jurisdiction of the court system is manifestly not an aim of this bill. Even a strict construction of the initiative restrictions in this case favors adherence to the long-standing principle that the people should generally have liberal access to the initiative process, and we have previously resolved similar ambiguities in favor of certification.[29] So we conclude that the initiative bill does not contain a prohibited subject with respect to defining the jurisdiction of courts.

4. Does the Bill Raise Any Additional Constitutional Concerns?

We note that this initiative bill is long and complex. In places, the bill is not clearly drafted and contains a number of typographical errors, inconsistencies, and ambiguities. Also, some provisions potentially raise specific constitutional issues or give rise to constitutional concerns.

For example, proposed AS 46.41.040(b) may raise potential due process issues with respect to implementation. That provision states that "the coastal districts, coastal district boundaries and approved coastal management plans that were in effect as of June 30, 2011 are in effect and are incorporated into the Alaska Coastal Management Program." This raises questions concerning the immediate application of these district plans to projects, given that the consistency review provisions will not be in place until adopted as regulations under AS 46.41.040(a)(2) and approved by the U.S. Department of Commerce under the Federal Coastal Zone Management Act as required in AS 46.41.020(a)(2). Similarly, the Division of Coastal Management will not be able to issue state responses on federal consistency determinations and certifications under AS 46.41.030(b) until the program is approved by the U.S. Department of Commerce.

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[29] 2009 Op. Alaska Att'y Gen. (July 2) at 13 (finding that where provisions of an initiative bill possibly implicated the prohibition on prescribing court rules, that conclusion was "not so clear that we can recommend that [the Lt. Governor] deny certification of [the] initiative application.").

AS 46.41.040(b) raises potential due process problems under article I, section 7 of the Alaska Constitution and delegation of legislative authority issues under article II, section 1 because of the ambiguity and lack of standards for application of the local district plans in this interim period. However, a court is likely to interpret these provisions to avoid these constitutional infirmities[30] by applying these local district plan requirements to project reviews only after the scope of such projects and the consistency review procedures are defined in the regulations required by AS 46.41.040(a)(2) and those regulations are submitted and approved by the U.S. Department of Commerce as called for by proposed AS 46.41.020(a)(2).

Another potential problem involves pre-emption issues under the Alaska Constitution and the supremacy clause of the federal constitution with respect to the application of certain local district standards. Many of these potential pre-emption issues will not arise or become clear until the statewide and district coastal standards are adopted under AS 46.41.040(a)(1) and (2). Depending on how AS 46.41.060(b)(2), (c) and AS 46.41.180 are interpreted and implemented, and on what factual basis, these pre-emption and conflict of law issues may not arise. The same is true for any argument that differing coastal district enforceable policies may invoke equal protection concerns under article I, section 1 of the Alaska Constitution.

At this point, these provisions should be construed in favor of constitutionality.[31] You have the authority to deny certification if you determine that the measure violates any of the liberally construed restrictions on initiatives—the constitutional and statutory provisions regulating initiatives.[32] As discussed above, we do not believe such violations exist. With respect to other constitutional challenges "grounded in general contentions that the provisions of an initiative are unconstitutional," you may deny certification only

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30 Where it is reasonable to do so, the Alaska Supreme Court "will construe statutes to avoid constitutional problems." *See, e.g., Whitesides v. State, Dep't of Public Safety, Div. of Motor Vehicles*, 20 P.3d 1130, 1139 (Alaska 2001) (citing *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 785 (Alaska 1999)).

31 *See, e.g., Whitesides*, 20 P.3d at 1139.

32 *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004).

if "controlling authority leaves no room for argument about its unconstitutionality."[33] We find no such authority. In sum, we cannot say that these provisions are clearly unconstitutional on their face, or that the people should be denied access to the initiative process on that basis.

Finally, we should note that a court may sever impermissible portions of a proposed initiative bill during a pre-election review.[34]

B. FORM OF THE APPLICATION

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
>
> (1) proposed bill;
>
> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
>
> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

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33 *Id.* (internal citations and quotations omitted).

34 Specifically, severance is appropriate where "(1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety." *McAlpine*, 762 P.2d at 94.

The application meets the first and third requirements, as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, we understand that the Division of Elections has determined that the application contains the signatures and addresses of not fewer than 100 qualified voters.

C. NUMBER OF QUALIFIED SPONSORS

As noted above, we understand that the Division of Elections has determined that the application contains the signatures and addresses of not fewer than 100 qualified voters.

III. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared a ballot-ready petition summary and title for your consideration. It is our practice to provide you with a summary and title to assist you in compliance with AS 15.45.090(2) and AS 15.45.180. Under AS 15.45.180, the title of an initiative is limited to 25 words and the body of the summary is limited to the number of sections in the proposed law multiplied by 50. "Section" in AS 15.45.180 is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter."

Technically this initiative bill has only one "section," but this single section creates an entire new chapter of the Alaska Statues consisting of 18 new statutory provisions governing a complex new program. All of these provisions are distinguishable in purpose, if not subject matter. If the bill were treated as a single section, the summary would be limited to 50 words. Alaska Statute 15.45.180 requires that the ballot proposition "give a true and impartial summary" of an initiative bill, and the Alaska Supreme Court has held that such a summary should provide "an accurate depiction of the scope and substance of the initiative."[35]

It is not possible to accomplish these mandates by summarizing this initiative bill in 50 or fewer words. So we think the proper approach is to treat these 18 provisions as separate sections for purposes of summary preparation. Therefore the maximum number of words for the summary may not exceed 900. We have used 703 words in the summary and seven words in the title of the following proposed summary, which we submit for your review:

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35 *Pebble L.P. v. Parnell*, 215 P.3d 1064, 1084 (Alaska 2009).

Establishment of an Alaska Coastal Management Program

This bill would create the Alaska Coastal Management Program in the Department of Commerce, Community, and Economic Development ("the Department"). The program would develop new state and local standards to review projects in coastal areas of the State. These standards would be in addition to existing state and federal permitting requirements. Both state and federally permitted projects would be reviewed under the program. The program would go into effect upon federal approval of these new state and local standards by the U.S. Department of Commerce under the federal Coastal Zone Management Act.

The bill creates a Coastal Policy Board. The board would have 13 members appointed by the governor. Nine would be members of the public from coastal areas. 4 would be state commissioners. The board would coordinate agencies for coastal and ocean planning. The board would work with agencies to develop and implement the program. The board would also review, approve, and evaluate coastal district management plans ("district plans"). The board would direct the Department to apply for funding. The board would review and approve regulations. Board members could receive per diem and travel expenses.

The bill sets out 9 coastal districts. Each district would adopt a district plan. District plans would need board approval. To be approved, the district plan must comply with the bill's provisions and regulations approved by the board. Each district plan would set boundaries for the coastal area subject to the district plan. District plans would define the land and water uses subject to the district plan's requirements. District plans would also set special management areas and enforceable policies. The bill sets standards for district enforceable policies. The bill defines when an enforceable policy is pre-empted by existing state or federal law.

The bill would restore coastal districts, boundaries, and district plans that were in effect on June 30, 2011 under the prior coastal management program. Coastal districts would have to review their prior district plans and submit any needed changes for board approval. Coastal districts with zoning or land use authority would use those powers to apply their district plans. Otherwise, state agencies would put the district plan into effect. Local and state agencies would regulate uses to conform to the district plans. The superior court could enforce board or department orders.

The bill would also create the Division of Ocean and Coastal Management in the Department. This division would issue state consistency determinations and respond to

federal consistency determinations and certifications. It would adopt board-approved regulations. It would also give planning and management information to coastal districts. The division would create a financial aid program to help coastal districts create and effect their district plans.

The bill sets goals for the program. These goals include (1) management goals for coastal uses and resources; (2) the coordination of coastal planning among government and citizens; (3) public and government participation in the program; and (4) require state agencies to comply with the program.

The bill requires that regulations be adopted. The regulations would be approved by the board and then issued by the division. They would set state coastal standards, district plan requirements, and consistency review procedures.

The bill would allow regional education attendance areas ("REAAs") in the unorganized borough to be used as Coastal Resource Service Areas ("CRSAs"). CRSAs would act through a board and function like coastal districts. The Department could combine or divide REAAs into CRSAs under set conditions. A coastal city could also be included in a CRSA under set conditions. CRSAs could also be created by voters or by a voter-approved city or village council decision. Service areas would elect boards with seven members. The State would run and fund CRSA board elections. Under some circumstances, board members could be appointed. Board members could be recalled. They could receive per diem and travel expenses. If voters fail to create a needed service area, the Department could create a district plan for the area to submit to the legislature. Under set conditions, the Department could complete a district plan for a CRSA. The bill creates a development, approval and implementation process for district plans in service areas.

The bill sets out rules of construction and defines 16 terms.

Should this initiative become law?

This summary has a Flesch test score of 52.8 and thus approximates the target readability score of 60 set out in AS 15.80.005. We have tried to use simple words to summarize the complex subject matter of this initiative to ensure that the summary meets the statutory readability standards set forth in AS 15.80.005.

IV. CONCLUSION

For the foregoing reasons, we find that the proposed bill and application are in the proper form and that the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative application and notify the initiative committee of your decision. You may then begin to prepare petitions in accordance with AS 15.45.090.

Please contact me if we can be of further assistance in this matter.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By:
Elizabeth M. Bakalar
Assistant Attorney General

3/28/12 PRESENTATION: FASD AND THE JUSTICE SYSTEM

<TARGET><BILL></BILL><SUBJECT>3-28-12 PRESENTATION FASD AND THE JUSTICE SYSTEM</SUBJECT><COMM>HJUD27</COMM></TARGET>

HJUD presentation 3/28?

Mélanie Lesh

From: Melanie Lesh
Sent: Monday, March 19, 2012 5:13 PM
To: carljgatto@gmail.com
Cc: Melanie Lesh
Subject: RE: FASD Panel before House Judiciary on March 28

Carl,
The following email contains the essence of a House Judiciary Committee Overview request for next Wednesday (which correlate with the presence of this FASD Partnership folks being here in Juneau), March 28th.
FYI. Rep. Keller is said to be cross-sponsoring SB 151 Sen. Kevin Meyer's bill related to FASD.
Mel

BILL: SB 151
SHORT TITLE: FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR
BILL VERSION:
CURRENT STATUS: (S) JUD
STATUS DATE: 03/06/12
SPONSOR(s): SENATOR(S) MEYER, Hoffman, Dyson, Menard, Paskvan, Egan, Davis, Ellis, McGuire

TITLE: "An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

01/17/12 1225 (S)	PREFILE RELEASED 1/13/12
01/17/12 1225 (S)	READ THE FIRST TIME - REFERRALS
01/17/12 1225 (S)	HSS, JUD
01/20/12 1261 (S)	COSPONSOR(S): HOFFMAN, DYSON, MENARD, PASKVAN, EGAN, DAVIS, ELLIS, MCGUIRE
03/05/12 Text (S)	HSS AT 1:30 PM BUTROVICH 205
03/05/12 Text (S)	Moved CSSB 151(HSS) Out of Committee
03/05/12 Text (S)	MINUTE(HSS)
03/06/12 1754 (S)	HSS RPT CS 4DP NEW TITLE
03/06/12 1754 (S)	DP: DAVIS, DYSON, MEYER, EGAN
03/06/12 1754 (S)	FN1: INDETERMINATE(LAW)
03/06/12 1754 (S)	FN2: ZERO(CRT)
03/06/12 1754 (S)	FN3: ZERO(ADM)
03/06/12 1754 (S)	FN4: ZERO(COR)
03/06/12 1754 (S)	REFERRED TO JUDICIARY
03/12/12 Text (S)	JUD AT 12:30 PM BELTZ 105 (TSBldg)
03/12/12 Text (S)	Heard & Held

From: Tibbett, Teri (HSS) [mailto:teri.tibbett@alaska.gov]
Sent: Thursday, March 15, 2012 10:53 PM
To: Melanie Lesh
Cc: Burkhart, Kate (HSS)
Subject: FASD Panel before House Judiciary on March 28

Hi Melanie,

I'm writing to follow-up on the idea of a 15-minute panel before the House Judiciary Commimttee on the topic of FASD and the Justice System.

The panelists will be in Juneau for an FASD Justice Summit, hosted by the Alaska FASD Partnership, on March 28.

They include: Superior Court Judge Mike Jeffery, Barrow; Dee Dee Raymond, Mental Health Release Program/DOC; Trish Smith, Prevention Director/Volunteers of America-Anchorage, Stephanie Johnson, Mental Health/Nome Youth Facility; and Jeri Museth, Wellness Director, Central Council Tlingit & Haida Indian Tribes of Alaska/Juneau.

They would be prepared to give a short presentation on the prevalence of fetal alcohol spectrum disorders in Alaska's criminal justice system and solutions being implemented, followed by an opportunity to answer questions by the committee.

Before presenting to the committee, the panelists (as part of the FASD Justice Summit) will have met with the Juneau Mental Health Court, Juneau Public Defender's Agency, and Juneau Office of Public Advocacy, the statewide director of the Division of Juvenile Justice, and Barrow Superior Court Judge Michael Jeffery, who has been addressing FASD issues in his court for many years.

As a bit of background, our boards (see signature below) coordinate the Alaska FASD Partnership, the sponsoring entity for the FASD Justice Summit.The goal of the summit is to strategize and put into place efforts to address fetal alcohol spectrum disorders within the criminal justice system. The "FASD and the Legal System Workgroup" of the Partnership has been working for nearly two years on issues related to FASD and the justice system.

Thanks again for your willingness to consider this. If it works out great, if not, thanks for trying!

Teri

Teri Tibbett
Advocacy Coordinator
Alaska Mental Health Board
Advisory Board on Alcoholism and Drug Abuse
(907) 465-4765

HB
SB 151

Melanie Lesh

From: Tibbett, Teri (HSS) <teri.tibbett@alaska.gov>
Sent: Thursday, March 15, 2012 10:53 PM
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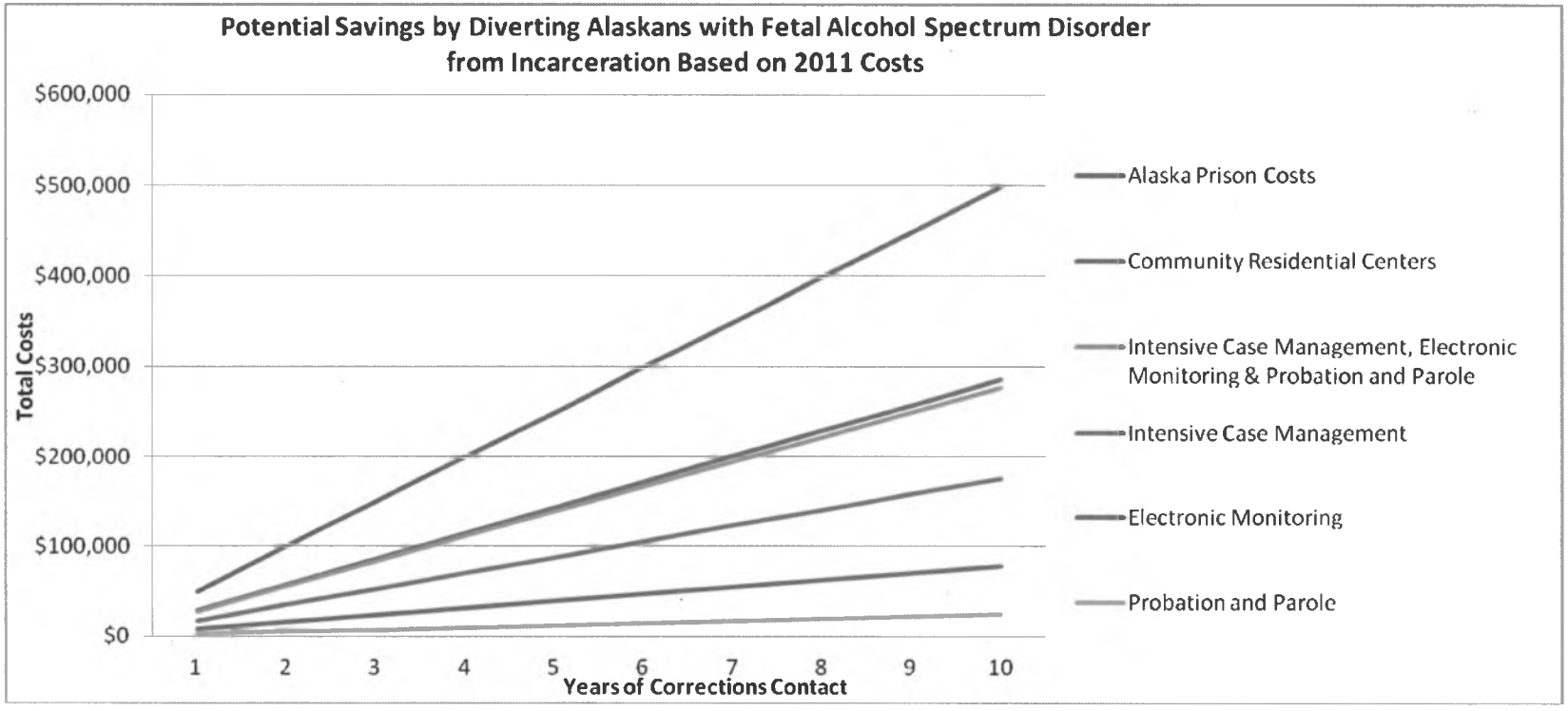
Teri

Teri Tibbett
Advocacy Coordinator
Alaska Mental Health Board
Advisory Board on Alcoholism and Drug Abuse
(907) 465-4765



	Alaska Prison Costs	Community Residential Centers	Intensive Case Management, Electronic Monitoring & Probation and Parole	Intensive Case Management	Electronic Monitoring	Probation and Parole
Daily Costs	$136.44	$78.34	$76.01	$48.00	$21.25	$6.76
Yearly Costs	$49,800.60	$28,594.10	$27,743.65	$17,520.00	$7,756.25	$2,467.40

Source of Corrections Costs: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf
Intensive Case Management costs based on a per person rate of $48/day (highest estimate).
Prepared by: Advisory Board on Alcoholism and Drug Abuse/Alaska Mental Health Board - 3.30.12

Alaska FASD Partnership

Over 75 organizations and individuals supporting:

Advocacy ▪ Diagnosis ▪ Case Management ▪ Prevention ▪ Substance Abuse Treatment for Pregnant Women ▪ Parent Navigation ▪ Training for Parents ▪ Public Awareness ▪ Alternatives to Incarceration ▪ Court Interpreters ▪ Peer Support ▪ Training for Judges, Public Defenders, and Prosecutors ▪ Training for Educators and Medical Professionals ▪ Traditional Healing ▪ Supported Housing and Employment ▪ Family Support

March 30, 2012

House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative,

It is with great pleasure that the Alaska FASD Partnership supports HB 367 to include FASD as a mitigating factor in sentencing.

The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management, including electronic monitoring and probation/parole, is about $76 per day ($48 for intensive case management, $21 for electronic monitoring, $7 for probation/parole) – for a savings of $21,900 per person, per year.[1]

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*" the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD and other brain-based disabilities can live successfully in the community as contributing citizens, *and* provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does HB 367 further

[1] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf . *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm ▪ email: akfasdpartnership@alaska.gov

the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

Additionally, the state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism, and a safer general public.

Thank you for the time and effort you have put into supporting this important effort.

Sincerely,

Monica Charles Leinberger

Monica Charles-Leinberger, Chair
Alaska FASD Partnership

Partnership members include: *Abused Women's Aid in Crisis, Advisory Board on Alcoholism and Drug Abuse, Alaska Behavioral Health Association, Alaska Center for Children & Adults, Alaska Children's Services, Alaska Mental Health Board, Alaska Mental Health Trust Authority, Alaska Peer Support Consortium, Alaska Youth & Family Network, Aleutian Pribilof Islands Association, All-Alaska Pediatric Partnership, Anchorage Coordinated Resources Project, Anchorage School District (Anchorage), Anchorage Tlingit & Haida Indian Tribes of Alaska, Arctic FASD Regional Training Center, Assets Inc., Association for the Education of Young Children-SEAK , Big Brothers Big Sisters of Alaska, Boys & Girls Home of Alaska, Camp Fire USA Alaska Council, Central Council of the Tlingit & Haida Indian Tribes of Alaska, Christian Health Associates, Copper Basin Neurodevelopmental Center, Deltana Community Services Partnership, Dena A Coy/Southcentral Foundation, Diocese of Juneau, Fairbanks Community Behavioral Health Center, Family Centered Services of Alaska, Frontier Community Services, Gastineau Human Services, Governor's Council on Disabilities and Special Education, Hoonah Indian Association, Hope Community Resources, Independent Living Center, Kenai Peninsula FASD Program, Ketchikan Indian Community, Kinetictions, Kobuk Valley Consulting, Kodiak Area Native Association, Juneau Family Health and Birth Center, Juneau FASD Diagnostic Clinic, Juneau Partnerships for Families and Children, Lower Kuskokwim School District, Lynn Canal Counseling Services, Nenana City School District, Ninilchik Traditional Council, Nome Youth Facility, Nondalton Tribe, Regional Wellness Forum, Set Free Alaska, Inc. (Wasilla), Southcentral Foundation FAS Diagnostic Team, Southeast Regional Health Consortium, Southeast Regional Resource Center, Southern Kenai Peninsula Communities Project, Sprout Family Services, Stone Soup Group, Tongass Substance Screening, UAA Department of Health Sciences, UAA Center for Human Development, Volunteers of America-Alaska ...and many individuals.*

Alaska FASD Partnership

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 • (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm
Email: akfasdpartnership@alaska.gov

SB 151/HB 367 - Inclusion of FASD as a Mitigating Factor

The Need for SB 151/HB 367

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) are disproportionately represented within Alaska's criminal justice system. The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

SB 151/HB 367 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission: "The legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder."[1]

A draft resolution being proposed by the Commission on Youth At Risk of the American Bar Association for consideration at this year's annual ABA meeting states: "... the American Bar Association urges lawyers and judges, as well as bar associations and law school clinical programs, to support training that includes law school law enforcement, and legal/judicial education curricula on enhanced awareness of the child and adult disability of Fetal Alcohol Spectrum Disorders (FASD) and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and that they work with medical, mental health, and FASD disability experts to promote: ... (d) applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

Overview of the changes proposed in SB 151/HB 367

SB 151/HB 367 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "defendant committed [an] offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct."

SB 151/HB 367 would, for the purposes of the subsection on mitigating factors, define fetal alcohol spectrum disorder as any "a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy."

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[1] Alaska Criminal Justice Assessment Commission (2000). *Final Report.* Retrieved October 12, 2010 from www.hss.aic.state.ak.us/reports/CJAC Final 2004.pdf, at p.71.

The legislation *DOES NOT*:

1) *require* a judge to use the mitigating factor;
2) *automatically* adjust a presumptive sentence; the defendant would have to prove by *clear and convincing evidence* 1) that he or she has a fetal alcohol spectrum disorder and 2) that the condition "significantly affected the defendant's conduct" before the judicial officer can consider the possibility of adjusting the presumptive sentence; or
3) the goal is not a "get out of jail free" card, but an attempt to be "smarter" within the justice system to better direct people who have impaired brain function to services both within and after release from the criminal justice system.

What are mitigating factors?

The Legislature has decided in the presumptive sentencing law that judges should give jail time within certain ranges in all felonies (with the exception of "class C felonies" where the minimum presumptive term is 0 years). The amount of the presumptive term depends on the severity of the crime and whether or not a defendant has prior felonies. There are 34 statutory aggravating factors that could result in a sentence above the presumptive range, if proved by clear and convincing evidence. A judge must sentence a person to at least the minimum presumptive term unless a "mitigating factor" is shown by clear and convincing evidence. There are 19 statutory mitigating factors. With the current mental disease or defect mitigating factor, the defendant must *also* show by clear and convincing evidence that the condition "significantly affected the defendant's conduct." The proposed fetal alcohol spectrum disorder mitigating factor also requires proof by clear and convincing evidence that the condition "significantly affected the defendant's conduct" before a judge could consider it. If the required showing has been made for any mitigating factor, it is legally possible for the judge to sentence below the minimum term (but if the minimum term is more than 4 years, the lower limit is half the minimum presumptive term).

There are special rules when there is a factor in a case that does not fit within the statutory list but which is so important in a case that it would be manifestly unjust to sentence a person without considering the factor. If the sentencing judge finds that such a "non statutory mitigating factor" exists, then the judge must refer the case to a three judge sentencing panel. If at least two judges on the panel agree, the panel can sentence with the same lower limits applicable to a statutory mitigating factor. If the panel does not agree, the case is referred back to the original judge to impose at least the minimum presumptive term. The "three judge panel" method is very cumbersome, time consuming and expensive. SB 151/HB 367 is a "statutory mitigating factor" and would not require any referral to a three judge sentencing panel.

What are Fetal Alcohol Spectrum Disorders?

FASD is not a medical diagnosis, but an umbrella term for the range of diagnoses associated with damage caused by maternal alcohol consumption during pregnancy. These medical diagnoses can include Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (PFAS), Alcohol-Related Birth Defects (ARBD), and Alcohol-Related Neurodevelopmental Disorder (ARND). Note that the term, Fetal Alcohol Effects (FAE), is no longer commonly used, having been replaced by the PFAS, ARBD and ARND diagnoses.

Each diagnosis has its own symptoms and attributes, but common among all the diagnoses is permanent, life-long brain damage – often affecting decision-making, judgment and impulse control.

FASD is a brain-based disorder, similar to autism, traumatic and acquired brain injury, and other cognitive impairments.

FASDs appear in individuals differently. Some alcohol-exposed individuals may exhibit impulsivity, hyperactivity and risky behaviors. Some have difficulties with memory, while others have very good memories. Some have low IQs, while others have normal IQs.

Experts report that the different presentations are influenced by many variables, including when the mother drank, how much she drank, the genetic makeup (or genotype) of the baby, and the genotype of the mother.

Primary behavior characteristics of people with impaired brain function include: impulsiveness, memory difficulties, anger and frustration, difficulty pairing actions to consequences. Secondary behaviors that develop in reaction to or as a result of the primary disability, include substance abuse and mental health problems, anger and aggression, homelessness, involvement with the criminal justice system, and more.

Neurologist Dr. Susan Hunter-Joerns, a member of the Juneau FASD Diagnostic Team, wrote that structural brain damage "often significantly impair[s] cognitive behavior, common sense, the ability to understand right from wrong, cause-and-effect, consider consequences, ability to recognize social norm ... even though defendants may verbally seem able to talk about the issues. Making long term goals, planning appropriate actions, delaying gratification, and understanding the legal system, are often significant problems."

Who in Alaska is qualified to give a diagnosis of FAS/FASD?

Though some physicians may be qualified to diagnose all the disorders on the FASD spectrum, the preferred method of diagnosis, according to Susan Astley, Professor of Epidemiology and Pediatrics at the University of Washington and director of the Washington State FASD Diagnostic and Prevention Network, is by an interdisciplinary diagnostic team using current, rigorous FASD diagnostic guidelines. This preferred method is also advocated for nationally by the Centers for Disease Control and Prevention.

Each diagnosis on the spectrum requires evaluation and testing related to the Central Nervous System (CNS) to detect damage that cannot be measured alone by physical attributes. Interdisciplinary diagnostic teams using the 4-Digit Diagnostic Code include evaluations by a medical professional, psychologist, occupational therapist, and speech-language pathologist. These evaluations can detect the nuances of the disability.

How many diagnostic teams and/or physicians are available to give FASD diagnoses in Alaska?

Currently, through the Division of Behavioral Health FASD Diagnostic Team Provider Agreement, Alaska has eight active FASD diagnostic teams – in Bethel, Fairbanks, Mat-Su, Kenai, Juneau, Sitka, and two in Anchorage (Southcentral Foundation and ASSETS). Alaska also has a trained diagnostic team at Alaska Psychiatric Institute (API) for children who enter the service system through that door. In the past there were teams in Dillingham and Kodiak — both locations that are interested in reviving their teams at some point, but do not have the resources to do it at this time. Alaska also has had team in Nome, Copper Center, and Ketchikan. The majority of FASD diagnoses in Alaska are determined by the diagnostic teams overseen by DHSS.

How many people are diagnosed with FAS/FASD in Alaska annually?

In 2011, Alaska's FASD diagnostic teams diagnosed 179 individuals. The average per year number is around 153 per year, according to the Alaska Department of Health & Social Services.

What is Alaska's diagnostic standard based on?

In 1999, the DHSS Office of FAS, in conjunction with the statewide FASD Steering Committee, agreed to use the 4-Digit Diagnostic Code as the standard diagnostic system for Alaska's developing Diagnostic Team Network. The 4-Digit Diagnostic Code was developed at the University of Washington's FASD Diagnostic and Prevention Network by Drs. Susan Astley and Sterling Clarren. The 4-Digit Diagnostic Code measures: 1) facial features, 2) growth deficiency, 3) central nervous system damage/dysfunction, and 4) prenatal alcohol exposure. The client's diagnosis is derived after a thorough evaluation by an interdisciplinary team of professionals, which generally includes a physician (or nurse practitioner), psychologist, occupational therapist, speech-language pathologist, social worker, and family advocate. For more information on the FASD 4-Digit Code, visit: http://depts.washington.edu/fasdpn/htmls/4-digit-code.htm.

The 4-Digit Diagnostic Code is considered the "gold standard" for FASD diagnosis and provides a reliable, evidence-based diagnostic process that gives detailed information about the individual client and how best to help that person work with their disability to reach their full potential. All team members are required to complete the University of Washington FASD 4-Digit Diagnostic Code Training Course.

The economic benefits of SB 151/HB 367

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management, including electronic monitoring and probation/parole, is about $76 per day ($48 for intensive case management, $21 for electronic monitoring, $7 for probation/ parole) – for a savings of $21,900 per person, per year.[2]

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD, T/ABI and other brain-based disabilities can live successfully in the community as contributing citizens, *and* provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does SB 151/HB 367 further the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

FASD in other jurisdictions

Judges nationwide are experiencing repeat offenders diagnosed with these disorders who, as a direct result of their disabilities, are effectively unable to understand the charges against them, or comply with the conditions of their sentence. There is a growing body of research affirming that FASDs are

[2] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf . *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

brain disorders effectively impairing "judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

Kate Burkhart, attorney and executive director of the Alaska Advisory Board on Alcoholism and Drug abuse, wrote that the language in SB 151/HB 367 "is commensurate with the federal sentencing guidelines and other western state laws that provide for such a mitigating factor. While none of the western states surveyed expressly include FASD in their definitions of mental defect, Utah includes a broad definition that would include FASD. The other states and federal guidelines would permit but do not mandate consideration of FASDs in sentencing unless they impair comprehension or ability to form intent."

Burkhart noted that Utah defines "mental illness" as "a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of an injury, or residual effect of a physical or mental disease that includes, but is not limited to, mental retardation" which is further defined to mean "significant sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior."

Idaho permits consideration of mental condition creating an "inability to appreciate the wrongfulness" of conduct or to conform to legal requirements at sentencing."

Washington permits the courts to consider "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

Nationally, advocates within the American Bar Association are proposing a resolution urging lawyers, judges, bar associations and law school clinical programs to promote "applying FASD as a factor in the mitigation of juvenile and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism." The resolution also asks, "that state and federal laws and policies reflect the serious effects of prenatal alcohol exposure by a) including persons diagnosed with FASD, or suffering from the affects of prenatal alcohol exposure, within the statutory definition of developmental disabilities ... and b) enhancing identification and diagnosis of ... persons with FASD." Their intent is that this resolution would be approved by the ABA House of Delegates at the annual meeting in Chicago in August 2012.

Internationally, Alaska is among the forerunners in awareness, diagnosis, and prevention of fetal alcohol spectrum disorders, both nationally and internationally. However, Canada and parts of Australia are leading the world in establishing laws and practices that address FASD as a brain-based disability with specific interventions and solutions.

The Canadian Bar Association passed a resolution in 2010 acknowledging that FASDs involve a range of neurological and behavioral challenges that can include "impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control."

The resolution also acknowledged that "the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others" and " these normative assumptions and sentencing principals such as specific and general deterrence, are not valid for those with FASDs.

Following are other highlights addressed in the CBA's resolution:

- sentencing options available to courts are often ineffective in changing the behavior of those with FASD and those with FASD are frequently repeat offenders

- some courts have ruled that absolutely no rehabilitative or deterrent purpose is served by incarceration of those with FASD;
- laws, programs or activities could ameliorate the disadvantages experienced by those with FASD whose behavior is judged on a standard that they are incapable of meeting because of their disability;
- the Canadian bar is resolved to urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

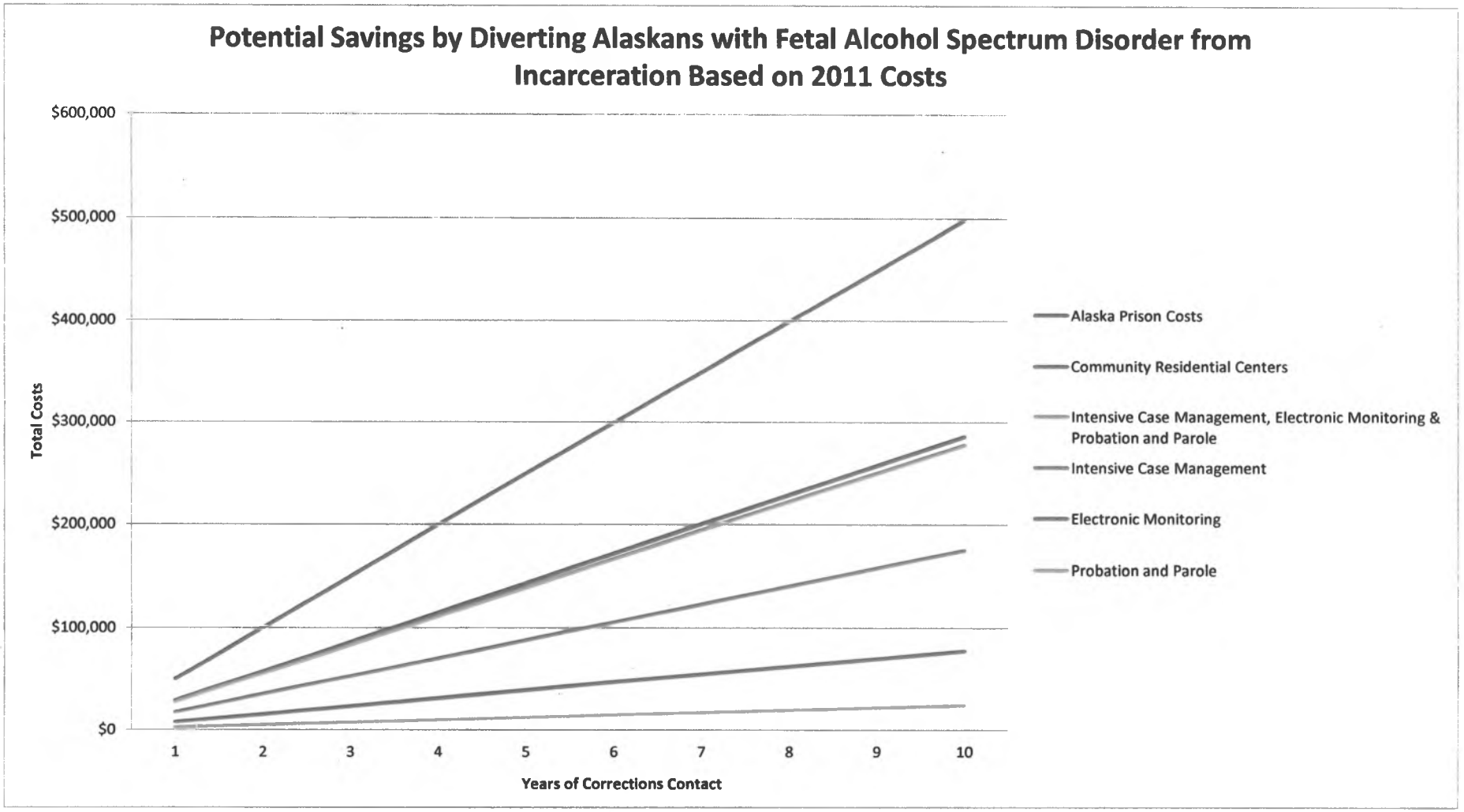
In Heather Douglas' article, *The sentencing response to defendants with fetal alcohol spectrum disorder* (2010) published by Thomas Reuters in Australia, the author notes that "as a result of deficits in executive function resulting in memory difficulties, inability to plan and failure to recognize the consequences of actions, many of those with FASD are likely to fail to pay fines and to breach probation orders ... Suspended sentences will not be useful in a context where cause and effect is not understood. In prison, highly suggestible FASD sufferers are likely to be victimized. While FASD clients cannot be cured of all their symptoms, techniques and approaches have been identified that can be employed by professionals to help the person reach his or her potential."

Conclusion

The state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism and a safer general public.

Chasnoff, M.D., an international expert on FASD, wrote in an article "Is Fetal Alcohol Spectrum Disorders a Mitigating Factor in Criminal Litigation and Sentencing?" in *Psychology Today* (2011), "We are in an ethical conundrum. Children, youth and young adults with FASD are more likely than not to end up before the court on criminal or civil charges, but the legal system has not come close to resolving how their cases should be treated. Most individuals with FASD have normal IQs, and most can relate a story as to how they ended up before the judge. Most can even state they understand the charges against them. But the truth is that neurocognitive damage that inhibits executive functioning, decision-making, and emotional and behavioral regulation has tremendous bearing on the capacity of these individuals to understand the ramifications of their actions. These people look normal, they speak normally, but they often have only a superficial understanding of the charges against them."

As noted by Canadian Judge Barry Stuart in R. v. Sam (1993), FASD takes away someone's "... ability to act within the norms expected by society." It is "manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a 'normal' offender cannot serve the same ends when imposed on an offender with FASD," he said. "Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD," Judge Stuart concluded.



Source of Corrections Costs: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf.
Intensive Case Management costs based on a per person rate of $48/day (highest estimate)

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What are Fetal Alcohol Spectrum Disorders (FASD)?

Fetal Alcohol Spectrum Disorders (FASDs) are a range of birth defects caused by maternal consumption of alcohol during pregnancy. FASDs can include:

- Fetal Alcohol Syndrome (FAS)
- Partial Fetal Alcohol Syndrome (PFAS)
- Alcohol-Related Neurodevelopmental Disorder (ARND)
- Alcohol-Related Birth Defects (ARBD) and Fetal Alcohol Effect (FAE)
- Static encephalopathy (alcohol exposed)
- Neurobehavioral Disorder (alcohol exposed)

The term FASD is not in itself a clinical diagnosis, but describes the full range of disabilities that may result from prenatal alcohol exposure. Currently, the only expression of prenatal alcohol exposure that is defined by the International Statistical Classification of Diseases and Related Health Problems is FAS, assigned ICD-9 and ICD-10 diagnoses.

FASD-related disabilities result when alcohol crosses the placental barrier and causes the developing brain cells and structures in the fetus to be underdeveloped or malformed, causing permanent brain damage. Primary disabilities can include poor memory, attention deficits, impulsive behavior, and poor cause-and-effect reasoning. Secondary disabilities, or by-products of the primary disabilities, can include cognitive and behavioral problems, poor self-esteem, addiction disorders, homelessness and unemployability.

National prevalence rates for Fetal Alcohol Syndrome (FAS) range from 0.2 to 1.5 per 1,000 live births; prevalence rates for FASD were reported to occur approximately three times as often (Centers for Disease Control, 2004).

According to a 2007 report in the *Journal of Psychological Practice*, "FASD is of serious concern to behavioral health practitioners due to high prevalence rates, soaring economic costs, and lifelong implications of the disorder ... It is critical that practitioners working with children and families are aware of FASD and are prepared to screen for the disorder."

The Range of FASDs

Fetal Alcohol Syndrome (FAS) is a congenital medical condition which can include growth deficiency and body deformation, abnormal facial features, central nervous system damage, especially to the brain, and prenatal exposure to alcohol.

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Partial Fetal Alcohol Syndrome (PFAS) is a diagnostic classification for patients who present with most, but not all, of the growth deficiency and/or facial features of FAS, central nervous system damage (structural, neurological and/or functional impairment), and prenatal exposure to alcohol.

Alcohol Related Neurodevelopmental Disorders (ARND)* is a diagnostic classification, coined by the Institute of Medicine in 1996, for patients who present with central nervous system damage (structural, neurological, and/or functional impairment).

Static encephalopathy (alcohol exposed)* The term *encephalopathy* refers to any significant abnormal condition of the structure or function of brain tissues. The term *static* means that the abnormality in the brain is unchanging – neither progressing nor regressing. This diagnostic classification is for patients who present with central nervous damage and prenatal alcohol exposure.

Neurobehavioral Disorder (alcohol exposed)* This is a diagnostic outcome classification for patients who present with central nervous system dysfunction (mild functional impairment with no evidence of structural or neurological abnormalities) and prenatal alcohol exposure.

* ***Note:*** Outcomes such as ARND, Static Encephalopathy (alcohol exposed), and Neurobehavioral Disorder (alcohol exposed) are more prevalent than FAS or partial FAS.

Source: What Are FASD, FAS, Partial FAS and ARND? Fetal Alcohol Syndrome Diagnostic & Prevention Network, University of Washington, Seattle. http://depts.washington.edu/fasdpn/htmls/fasd-fas.htm

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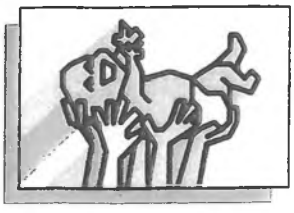

Alaska FASD Talking Points

- FASDs are a range of disabilities caused when a developing fetus is exposed to alcohol.
- The term FASD is not in itself a clinical diagnosis, but describes the full range of disabilities that may result from prenatal alcohol exposure, including Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (PFAS), Alcohol-Related Neurodevelopmental Disorder (ARND), Static encephalopathy (alcohol exposed) and Neurobehavioral Disorder (alcohol exposed).
- One of every four Alaskans dependent on or abusing alcohol is a woman, and one of every 25 women whose babies are born alive said she drank while pregnant, according to the Center for Behavioral Health Research and Services (UAA).
- This lifelong disability can include learning disabilities, problems with memory, heart and kidney problems, impulsiveness, poor judgment, mental retardation and severe emotional disturbance (SED).
- Alaska has the highest per capita rate of FASD in the United States.
- FASD is the most common known cause of mental retardation in the United States.
- FASDs are a leading cause of preventable and permanent birth defects in the United States.
- A person with an FASD without support is at high risk of developing secondary disabilities – such as alcoholism, drug abuse, depression, mental illness, and/or criminal behaviors.
- With early diagnosis, knowledge, and support – families, schools and communities can become better equipped to support a person with FASD and minimize or prevent the development of secondary disabilities.
- With the right supports, individuals with FASD can live productive and fulfilled lives.

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FASD in Alaska's Correctional Institutions

Fetal Alcohol Spectrum Disorders (FASDs) are a range of birth defects caused by maternal consumption of alcohol during pregnancy. These defects can arise when alcohol crosses the placental barrier and causes the developing brain cells and structures in the fetus to be underdeveloped or malformed, resulting in permanent brain damage. Primary disabilities include poor memory, attention deficits, impulsive behavior, and poor cause-and-effect reasoning. Secondary disabilities, or by-products of the primary disabilities, can include alcoholism, drug abuse, depression, mental illness, and/or criminal behaviors. Impulsive behavior and poor cause-and-effect reasoning are commonly at the root of criminal behaviors.

A 2006 evaluation by the University of Alaska Anchorage (UAA) Behavioral Health & Research Services, conducted surveys distributed to personnel at each of Alaska's correctional institutions:

- Estimated percentage of the inmates on current caseload who may have FAS = 27%
- Percentage of Corrections staff who have referred an inmate for FAS screening or diagnosis = 25%
- Percentage of Corrections staff who say they have the appropriate skills and knowledge to deal with alcohol abuse among the inmates or offenders on their caseload = 56%
- Percentage of Corrections staff who say they have the appropriate skills and knowledge to deal with offenders or inmates who have FASD = 55%
- Percentage of Corrections staff who say they have the support of their admini-stration to deal with inmates or offenders on their caseload who have FAS = 56%
- Percentage of Corrections staff who say the current social service programs within the correctional system are appropriate for inmates or offenders on their caseload who have FAS = 30%
- Percentage of Corrections staff who say the current educational service programs within the correctional system were appropriate for the inmates or offenders on their caseload who have FAS = 35%
- Corrections respondents had an average of 9-10 year experience working in corrections in Alaska.

Source: *FAS Knowledge, Attitudes, Beliefs and Behavior (KABB): 2006 Survey of Alaskan Professionals.* Behavioral Health Research and Services, FAS Evaluation, University of Alaska Anchorage. http://bhrs.uaa.alaska.edu/pdf/reports/FAS/FAS_KABB_FINAL_Report.pdf

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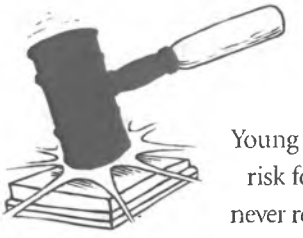
Fetal Alcohol Spectrum Disorders And Juvenile Justice: How Professionals Can Make a Difference



[T]here is hope. We can change how lawyers, clients, police, judges, probation officers, prison guards, and family members work with FAS clients.[1]

—David Boulding, attorney for clients with fetal alcohol spectrum disorders

Young people who are affected by fetal alcohol spectrum disorders (FASD) are at increased risk for involvement with the juvenile justice system.[2,3] Most youth who have an FASD have never received a diagnosis or services, and they reach the system after a long fall through the cracks.

How is FASD Linked to Problems With the Juvenile Justice System?

Youth with an FASD were born with brain damage that can make it difficult for them to stay out of trouble with the law. They do not know how to deal with police, attorneys, judges, social workers, psychiatrists, corrections and probation officers, and others they may encounter.

Professionals who work with the court system can reach out to young people who may have an FASD to ensure that they receive needed help. Education and training can help professionals identify young people who may have an FASD. This can help them get fair treatment and appropriate services.

What Is FASD?

"FASD" is an umbrella term describing the range of effects that can occur in an individual whose mother drank alcohol during pregnancy. These effects may include physical, mental, behavioral, and/or learning disabilities with possible lifelong implications.

The term FASD is not used as a clinical diagnosis. It refers to conditions such as fetal alcohol syndrome (FAS), alcohol-related neurodevelopmental disorder (ARND), and alcohol-related birth defects (ARBD). FASD occurs in about 10 per 1,000 live births, or about 40,000 babies per year in the United States.[4]

What Are the Challenges for Youth With an FASD?

FASD's effects on the brain can result in cognitive or behavioral deficits. These deficits may include mental retardation, learning disabilities, hyperactivity, attention deficits, and poor social skills. These and other problems associated with FASD may increase the chance that a person will break the law.

Individuals with an FASD typically are impulsive and have trouble foreseeing the consequences of their actions. They may have a poor sense of personal boundaries. Many are very susceptible to peer pressure and can be easily led. Their judgment is often poor.[2]

FASD also presents challenges throughout the judicial process, from questioning through arrest, hearings, sentencing, and detention. Many youth who have an FASD have poor communication skills, while others may "talk" much better than they can function. They may become confused under pressure. They often cannot understand their rights and may confess or otherwise implicate themselves and others, even if they are not guilty. Youth who have an FASD may believe that if they confess, they will be allowed to go home. They also want people to like them and may provide a false confession in an effort to please the police.

Youth who have an FASD typically have memory problems, which can contribute to forgotten court dates or meetings with probation officers, judges, and attorneys. Their risk for victimization in detention is high, as they may fall prey to other inmates.

It can be difficult for persons with an FASD to learn from their mistakes. Because the judicial process can be lengthy, they may not draw a connection between their actions and the later consequences. Once released from detention, youth who have an FASD may commit similar offenses and cycle through the system again and again.

How Can the System Help Youth With an FASD?

Youth should be screened for FASD at all entry points into the juvenile justice system. Those who work in the system, especially attorneys and social workers, should look for a history of behavior that suggests an FASD. They also should ask questions about prenatal exposure to alcohol. When they suspect that an FASD is present, they should request a complete

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evaluation by clinicians qualified to diagnose an FASD. The evaluation should include assessments of possible co-occurring psychiatric disorders and adaptive behavior.[5]

Attorneys should be aware of FASD and use their knowledge to advocate effectively for their clients, particularly in proceedings related to:

- Competency—Youth with an FASD may be unable to understand the charges against them and participate in their own defense.
- Diminished capacity—Young people with an FASD may find it difficult to distinguish right from wrong, form intent to commit an offense, and understand consequences.
- Decisions to decline/remand/waive—Youth with an FASD are likely to be safer in a juvenile facility than in an adult prison due to potential victimization.
- Sentencing—In some cases, attorneys may be successful in presenting FASD as a mitigating or exculpatory factor. They also should explore alternative sentencing options.
- Treatment—Court-ordered treatment is sometimes the only way for youth with an FASD to receive appropriate interventions.

Information from evaluations, medical records, family history, and school and employment records should be included in presentencing investigations. The outcome may influence whether or not the youth will be detained, where, for how long, and what support he or she will receive. Appropriate services are essential, including medication or substance abuse treatment (if necessary), vocational training, life skills training, mentoring, and advocacy.

Detention of youth with an FASD may be unproductive. It can increase the risk of recidivism because they may copy the deviant behavior of other juveniles. For probation or aftercare, a highly supervised, structured living arrangement is critical for success. People with an FASD often have difficulty managing their money or tending to household chores. Attorneys should ensure that clients who were receiving developmental disabilities support do not lose their benefits while they are in the system.[6,7]

Throughout the judicial process, communication with young people who have an FASD should be concrete, simple, and repetitive. Youth with an FASD have trouble following multistep instructions and understanding figures of speech. Using frequent reminders, visual cues, and open-ended questions can help them follow rules and understand what is happening.

FASD is not an excuse for breaking the law. However, all youth, including those with an FASD, deserve to be treated fairly by the juvenile justice system. Increased awareness and action at all levels of the system can offer a lifeline to young people with an FASD. In addition, the potential benefits to society, through decreased crime and costs, are tremendous.

Additional Resources

SAMHSA FASD Center for Excellence. 2005. **What You Need To Know: Understanding Fetal Alcohol Spectrum Disorders: Getting a Diagnosis**. Rockville, MD: fasdcenter.samhsa.gov

Minnesota Organization on Fetal Alcohol Syndrome. **Tools for Success: Working With Youth With Fetal Alcohol Syndrome and Effects in the Juvenile Justice System Resource Guide**. www.mofas.org

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Fetal Alcohol Spectrum Disorders and the Criminal Justice System

There was a part of me that was angry, but I also knew that the police department and the justice system were uninformed about how vulnerable and easily swayed people [with an FASD] are.

—Mother whose son with an FASD was wrongly convicted of a crime

WHAT YOU NEED TO KNOW

Fetal Alcohol Spectrum Disorders

FASD is an umbrella term describing the range of effects that can occur in an individual prenatally exposed to alcohol. These effects may include physical, mental, behavioral, and/or learning disabilities with possible lifelong implications. FASD is not a clinical diagnosis. It refers to conditions such as fetal alcohol syndrome (FAS), alcohol-related neurodevelopmental disorder (ARND), and alcohol-related birth defects (ARBD).

Reasons People With an FASD Get in Trouble With the Law

Studies show that people with an FASD have specific types of brain damage that may cause them to get involved in criminal activity. These individuals show:

- Lack of impulse control and trouble thinking of future consequences of current behavior
- Difficulty planning, connecting cause and effect, empathizing, taking responsibility, delaying gratification, or making good judgments
- Tendency toward explosive episodes
- Vulnerability to peer pressure (e.g., may commit a crime to please their friends).

Persons with an FASD may break the law without intending to do so. For example, they may touch people when it is unwanted and think they are just being friendly. They may take things that do not belong to them because they like them.

People can take advantage of individuals with an FASD. They may talk them into committing crimes. Females with an FASD may be involved with destructive men for food, shelter, attention, or drugs.[3] These relationships put them at risk for arrest.

Number of People in the Criminal Justice System With an FASD

It is difficult to know how many people in the criminal justice system have an FASD. Data are limited, and populations vary by State. In addition, few systems screen for FASD or conduct a full diagnostic assessment. Researchers at the University of Washington estimate that 35 percent of individuals with an FASD have been in jail or prison at some point. They also estimate that more than half the people with an FASD have been in trouble with the law.[1]

The number of people with an FASD in the criminal justice system is assumed to be high. In the United States, approximately 3 million people are in jail or prison. Based on estimates of FASD in the general population, as many as 28,036 inmates could have an FASD.[2]

Issues Related to FASD in the Criminal Justice System

Laws vary by State and case law is binding only in the State or circuit where the case was decided. Only Supreme Court cases are binding nationally. However, several general issues can arise for attorneys and judges dealing with persons with an FASD:

- **Competency to stand trial**, which is the ability to understand the charges, participate in a trial, and assist in one's own defense. Persons with an FASD may not understand the charges against them. They may find criminal proceedings confusing. They may have problems with time management and come to court late or not at all. Several cases address competency and FASD.[4–6]
- Validity of expert testimony regarding diagnosis. Questions arise about the types of exams that are sufficient to determine a diagnosis of an FASD. For example, what if maternal alcohol use during pregnancy is unknown?[7,8]
- **Diminished capacity.** Capacity refers to the ability to understand right and wrong and to understand the

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likely outcome at the time of the act. Some crimes require evidence of intent for the person to be found guilty. Defense lawyers may argue that persons with an FASD cannot form the intent to commit crimes because they cannot foresee the likely outcome.[9]

- **Effect of FASD on sentencing.** Lawyers have appealed the death penalty by arguing that FASD was not introduced as evidence to support a lesser sentence.[10–12]
- **Ability to testify.** Persons with an FASD are highly suggestible and may not be able to give accurate testimony. They are prone to making false confessions.[13]
- **Recidivism.** Offenses do not appear to get worse, such as from auto theft to robbery. However, persons with an FASD tend to repeat crimes of opportunity, such as shoplifting. Their thought process seems to be, "I want. I take."[14]

Ways the Criminal Justice System Can Address the Needs of Persons With an FASD

Because of their disabilities, persons with an FASD may repeat the same mistakes many times. Thus, support to improve funtioning might be more appropriate than rehabilitation. This approach focuses on education, job training, and family support, rather than punishment. Medication may also help. In some cases, adults with an FASD who had multiple jail stints for petty, impulsive acts avoided jail when given appropriate medical treatment.[3]

Understanding how persons with an FASD respond to certain situations can help. Due to sensory issues, they can become overwhelmed by bright lights, causing them to panic and run from the police or resist arrest. Because they are eager to please, many unknowingly waive their rights by signing forms that they do not understand. In addition, they may consent to being searched or take responsibility for the crimes of others to win favor.

Sentencing is also an issue. Some persons with an FASD respond well to the intense structure and rules of prison. Others are vulnerable to attack, exploitation, and manipulation by other inmates. Some do not understand prison rules and break them. Because corrections officers may not understand FASD, they may punish inmates with an FASD for failing to follow directions. It is critical to offer training on FASD to all corrections staff so they can learn strategies to respond to inmates with an FASD.

Once on probation, persons with an FASD may have trouble meeting probation requirements. They can have problems managing time, recalling appointments, and making plans. Therefore, they may need a greater level of supervision. A relative or support person may need to be assigned to follow up on probation requirements. Highly structured probation that includes supervised living, life skills education, and drug and alcohol treatment can be very effective.[15] In fact, supervision can help prevent crime. Many clients with an FASD can remain crime free with intense supervision.[14]

Other effective alternatives to prison include halfway houses, group home treatment centers, or electronic monitoring at home. In such cases, emphasis must be placed on creating a well-structured environment with predictable rules and consequences. In these settings, persons with an FASD can continue to participate in the community but their behavior will be more closely monitored.[16]

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01/06

Fetal Alcohol Spectrum Disorder and the Criminal Justice System

FASD: Fetal Alcohol Spectrum Disorder

FASD is an umbrella term covering a range of birth defects and brain damage resulting from prenatal exposure to alcohol. The term FASD is not used as a clinical diagnosis, but encompasses diagnoses such as Fetal Alcohol Syndrome (FAS) and related disorders. FAS is diagnosed when a child shows retarded growth, a specific pattern of minor facial anomalies and neurological damage. Children who do not show all the features of FAS may receive a diagnosis of partial FAS, Fetal Alcohol Effects, Alcohol-Related Neurodevelopmental Disorder, or Alcohol-Related Birth Defects. All persons with a FASD have lifelong cognitive, social and behavioral disabilities.

Trouble with the law

FASD often goes unrecognized, or is misdiagnosed as ADHD or another disorder. The behavior is sometimes blamed on environment or poor upbringing, while the true underlying cause may be brain damage due to prenatal exposure to alcohol. Youth and adults with FASD get intro trouble due to their cognitive disabilities:

- Poor grasp of right and wrong.
- No feeling of guilt.
- Lack of impulse control.
- Poor understanding of cause and effect.
- Do not learn from experience.
- Vulnerability to peer pressure.
- Social immaturity: think and act much younger than chronological age.

How many persons with FASD are in the criminal justice system?

It is not known how many people in the criminal justice system have a FASD. A report of the US Centers for Disease Control estimates that 60% of people with an FASD over the age of 12 have been in trouble with the law, and that 35% have been incarcerated.[1] A Canadian study found that 23% of young offenders remanded to a forensic psychiatric inpatient assessment unit had a FASD.[2]

Problems in dealing with the police

Youth and adults with FASD may panic during encounters with the police, or alternatively, may be very friendly and, in an effort to please, admit to crimes they did not commit. Questioning may confuse them due to their intellectual disabilities:

- Poor short- and long-term memory.
- Difficulty with concept of time (past, present, future, how long).
- Poorly developed concept of property ("It was just lying there, so it didn't belong to anybody.")
- Difficulty separating fact and fiction.

" The person with FASD can be misunderstood in court, victimized in jails, and mismanaged in the transition back to the community, unless those working with the individual are aware of FASD and its implications." *Fast & Conry (2004)*

Helping offenders with FASD

Police, attorneys and judges should be aware of the limitations that accompany FASD. Offenders should be screened for FASD. Detention may be unproductive, resulting in copying deviant behavior. Lifelong structure and supervision is the best way to avoid recidivism.

Resources

FAS: Implications for Correctional Service, Canada
http://www.csc-cc.gc.ca/text/rsrch/reports/r71/er71.pdf

FASD Legal Issues Resource Center--U. of Wash. Information and cases in the US justice system
http://depts.washington.edu/fadu/legalissues/

FASD and the Justice System--Canada Information and cases in the Canadian justice system
http://fasdjustice.on.ca/

Factsheet FASD and the Criminal Justice System
http://fascenter.samhsa.gov/documents/WYNK_Criminal_Justice5.pdf

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3. Fast, D.K. & Conry, J. The challenge of fetal alcohol syndrome in the criminal legal system. Addict. Biol. 9, 161-166 (2004).

National Organization on Fetal Alcohol Syndrome

Helping children & families by fighting the leading known cause of mental retardation & birth defects

FASD: What the Justice System Should Know

Alcohol abuse and pregnancy are common among women in the criminal justice system.

- An estimated 70 to 85 percent of inmates need substance abuse treatment.
- Approximately one in four women is either pregnant or postpartum when she enters prison.

The Justice System can help to prevent Fetal Alcohol Spectrum Disorders (FASD) among the incarcerated population by offering educational workshops on FASD and addiction counseling for women inmates.

Behavioral impairments due to FASD make affected individuals more likely to get in trouble with the law

- Sixty-one percent of adolescents and 58% of adults with FASD have been in legal trouble.
- Thirty-five percent of those with FASD over the age of 12 had been incarcerated at some point in their lives.

Many individuals with FASD will never socially mature beyond the level of 6 year-old child.

Other factors that may place persons with FASD at risk for involvement with the criminal justice system include:

- Difficulties in impulse control;
- Intellectual deficits;
- Poor judgment skills; and
- A history of abuse and/or neglect.

Problems individuals with FASD may encounter when dealing with police include:

- Being persuaded by the police (even inadvertently) to admit to crimes which they did not commit;
- Taking responsibility for crimes committed by others in order to win the favor of more sophisticated companions or to please the police;
- Consenting to searches of themselves or their possessions in circumstances in which non-disabled sophisticated individuals would not;
- Panicking during encounters with the police, running away or resisting arrest;
- Saying that they understand their legal rights when in fact they do not; and
- Making potentially incriminating statements about how serious any misconduct may have been.

The Justice System can help FASD-affected individuals by:

- Educating judges, lawyers and parole officers about the characteristics and behaviors of persons with FASD;
- Establishing screening, analysis, and treatment procedures for those with FASD who enter the juvenile justice or adult criminal justice system;
- Establishing/utilizing alternative sentencing programs for persons with FASD who have committed non-violent offenses; and
- Offering referral information for the children of incarcerated women who may have been prenatally exposed to alcohol.

900 17th Street ▪ Suite 910 ▪ Washington, DC 20006 ▪ Phone: 202-785-4585 ▪ 1-800-66-NOFAS ▪ Fax: 202-466-6456 ▪ E-mail: information@nofas.org

Alaska FASD Partnership

A Coalition of 75 individuals and organizations supporting:

Advocacy ▪ Diagnosis ▪ Case Management ▪ Prevention ▪ Substance Abuse Treatment for Pregnant Women ▪ Parent Navigation ▪ Training for Parents ▪ Public Awareness ▪ Alternatives to Incarceration ▪ Court Interpreters ▪ Peer Support ▪ Training for Judges, Public Defenders, and Prosecutors ▪ Training for Educators and Medical Professionals ▪ Traditional Healing ▪ Supported Housing and Employment ▪ Family Support

Monica Charles Leinberger, FASD and Behavior Specialist from Lower Kuskokwim School District in Bethel, presents during a noontime Legislative Health Caucus at the Capitol in Juneau in February, 2011. Also pictured are Senator Donny Olson (left) who chaired the caucus, and Jeanne Gerhardt-Cyrus (right), a parent advocate from Kiana. Partnership members presented on the topic of FASD and the Education System.

Alaska FASD Partnership: a productive first year

The Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership is now one year old. The coalition has expanded to 75 individuals and organizations statewide.

FASDs are a range of brain-based disabilities caused from drinking alcohol during pregnancy. The mission of the Partnership is to address prevention and interventions for people affected by FASD.

Since May 2010, Partnership members have advocated in work-groups, visited with policy-makers, and held public meetings and events promoting awareness of FASD statewide.

During the legislative session, Partnership members visited Juneau and wrote their legislators about FASD. They advocated for substance abuse treatment for pregnant women and access to services for people diagnosed with FASD. They promoted early childhood screening and peer support services in rural areas.

Following are some of the Partnership's activities in 2010-11:

In 2010

- Membership increased to over 75 organizations and individuals by the end of 2010;
- Successfully advocated for funding in the state operating budget that supported case management for individuals diagnosed with FASD in Kenai, Juneau, Bethel and Sitka, and substance abuse treatment for pregnant women.

***First Year** – continued on page 2*

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm ▪ email: akfasdpartnership@alaska.gov

***First Year** –continued from page 1*

- Co-sponsored with Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse, through the boards' *Family Voice* project, advocacy training for five families who presented on FASD before the House and Senate Health and Social Services Committees. Families also met with individual legislators and presented on a panel discussion at the FASD Southeast Alaska Regional Conference about their experiences related to FASD;
- Successfully advocated for SCR 12, proclaiming Sept. 9, 2010 as FASD Awareness Day, sponsored by Senator Kevin Meyer (R-Anchorage);
- Collaborated with Alaska CHARR in promoting "free non-alcoholic beverages for pregnant women" in restaurants on International FASD Awareness Day;
- Co-sponsored, with Alaska CHARR (Cabaret Hotel, Restaurant and Retailers), an appreciation luncheon at the Capitol for legislators who have worked on behalf of individuals and families affected by FASD;
- Hosted a summit of the Alaska FASD Partnership steering committee to determine short and long-term recommendations.

In 2011

- Met with all 60 legislators on topics related to FASD; each legislator received an information packet that outlined facts and figures, funding recommendations for FY12, and other issues related to FASD;
- Co-sponsored with Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse, through the boards' *Family Voice* project, three families to present before the Senate Education Committee on "FASD and the Education System," and for a lunchtime Legislative Health Caucus. Participants received advocacy training and met with legislators individually to discuss issues related to FASD;
- Successfully advocated for substance abuse treatment for at-risk parents, rural peer support services, and the Alaska Complex Behaviors Collaborative, in the state operating budget;
- Successfully advocated for SCR 7, proclaiming Sept. 9, 2011 as FASD Awareness Day, sponsored by Senator Kevin Meyer (R-Anchorage);
- The steering committee continues to meet monthly; workgroups are addressing recommendations from the December 2010 Summit.

For additional information on the Alaska FASD Partnership, or how to become a member (no dues or minimum requirements) visit the new website at www.hss.state.ak.us/abada/fasd.htm. ❖

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Legislators learn about Fetal Alcohol Spectrum Disorders

During the 2011 legislative session, members of the Alaska FASD Partnership came to Juneau and advocated for issues related to fetal alcohol spectrum disorders.

In early February, Partnership members presented before the Senate Education Committee, chaired by Sen. Kevin Meyer, on the topic of FASD and the Education System. Other legislators on the committee include Sen. Gary Stevens, Sen. Bettye Davis, Sen. Joe Thomas, and Sen. Hollis French.

The group also presented at a noontime Legislative Health Caucus, sponsored by Rep. Sharon Cissna and Sen. Donny Olson, and chaired by Sen. Olson.

The panels included Cindy Anderson, director of Special Education for Anchorage School District; Monica Charles Leinberger, FASD and Behavioral Specialist for Lower Kuskokwim School District; Deb Evensen, FASD Education Consultant; Jeanne Gerhardt-Cyrus, parent navigator and parent of children with fetal alcohol spectrum disorders, and Ivory Gerhardt-Cyrus, teen with FASD; Mary, Trevor and Angela Andrews, family affected by FASD; and Mindy Cason, UAA student and adult with an FASD.

Panel discussions covered many issues facing students, teachers, administrators and families affected by FASD. Following are some of the highlights of their presentations, with recommendations:

- ✓ Policy-makers and administrators need to know what FASD is and understand the importance of addressing issues related to FASD; including:
- ✓ Expand FASD training for teachers and staff, including what is FASD and how to effectively work with students who have an FASD;
- ✓ Expand models for serving students, teachers and families used at Lower Kuskokwim School District and Anchorage School District who incorporate an FASD/Behavior Specialist in their schools;
- ✓ Expand special education services to students with FASD (and suspected FASD), with or without a diagnosis, based on behavior and functionality;
- ✓ Facilitate a paradigm shift for teachers, staff and families in how to work with students who have FASD, including seeing behavior as the result of a brain-based disability, understanding that students *can't* perform certain behaviors, not *won't*, develop patience with individual student processing time; work on changing the environment, to accommodate the student's disability.

During a visit to Juneau in 2011, members of the Alaska FASD Partnership presented in a panel before the Senate Education Committee (above) and again at a Legislative Health Caucus (below) on the topic of "FASD and the Education System." Panel members pose at the Capitol (center).

Members also visited legislators individually in their offices to discuss one-on-one many issues related to FASD and funding priorities supported by the Partnership.

Several budget items passed the legislature in 2011 that will benefit people and providers who work with people impacted by FASD (see pages 10-15 for state budget overview).

By the end of session, all sixty legislators had been visited and handed an FASD information packet that included background information on FASD and what kinds of efforts are needed to address FASD issues in Alaska. ❖

Proclaiming September 9, 2011 as FASD Awareness Day

***WHEREAS** fetal alcohol spectrum disorders are a leading cause of preventable and permanent birth defects and mental retardation in the United States; and*

***WHEREAS** the birth defects associated with fetal alcohol spectrum disorders include brain damage, facial deformities, and deficits in growth, learning, memory, and internal organ development; and*

***WHEREAS** fetal alcohol spectrum disorders result from ingestion of alcohol by a woman during pregnancy; and*

***WHEREAS** Alaska has the highest known incidence of fetal alcohol spectrum disorders in the United States; and*

***WHEREAS** fetal alcohol spectrum disorders affect all racial and socioeconomic groups; and*

***WHEREAS**, in addition to the personal emotional costs, fetal alcohol spectrum disorders cost taxpayers millions of dollars over an affected individual's lifetime;*

***BE IT RESOLVED** that the Alaska State Legislature proclaims September 9, 2011, as Fetal Alcohol Spectrum Disorders Awareness Day; and be it*

***FURTHER RESOLVED** that the people of the state observe Fetal Alcohol Spectrum Disorders Awareness Day with appropriate efforts to promote awareness of the effects of prenatal exposure to alcohol and of the fact that there is no known safe level of alcohol consumption during pregnancy, to increase identification of children with fetal alcohol spectrum disorders, and to improve the lives of those affected by fetal alcohol spectrum disorders.*

-- SCR 12 Sponsored by Senator Kevin Meyer, signed into law on 4/28/11

New bill, SB 127, would put FASD Awareness Day permanently in state statute

At the end of the 2011 legislative session, Senator Kevin Meyer introduced a bill that would permanently recognize September 9 as FASD Awareness Day in state statute.

SB 127, *"An Act establishing September 9 each year as Fetal Alcohol Spectrum Disorders Awareness Day"* will likely begin having hearings in the 2012 legislature.

Alaska has the highest known incidence of FASD in the United States – a condition caused by prenatal exposure to alcohol – which can result in permanent brain damage, birth defects, learning disabilities, behavioral problems and the loss of individual potential.

While FASD affects all racial and socio-economic groups, it is a 100% preventable condition.

FASD Awareness Day is observed internationally on September 9th – serving as a reminder that during the nine months of pregnancy a woman should abstain from alcohol.

SB 127 would observe FASD Awareness Day by promoting the awareness of the effects of prenatal exposure to alcohol.

Following is the language of the bill:

Sec. 44.12.074. Fetal Alcohol Spectrum Disorders Awareness Day

"Fetal Alcohol Spectrum Disorders Awareness Day is established on September 9 of each year to promote awareness of the fact that there is no known safe level of alcohol consumption during pregnancy, to promote awareness of the effects of prenatal exposure to alcohol, to increase identification of children with fetal alcohol spectrum disorders, and to improve the lives of those affected by fetal alcohol spectrum disorders.

"SCR 7 would proclaim September 9, 2011 as Fetal Alcohol Spectrum Disorders Awareness Day (FASD)."

For additional information, contact: Senator.Kevin.Meyer@legis.state.ak.us

Briefly

FAScinating Families Camp will expand to three new communities

Volunteers of America (VOA) in Anchorage was recently awarded a grant to expand their *FAScinating Families Camp* to three new locations: Fairbanks, Sitka and Homer. The three-day weekend camp provides a supportive, educational, and fun environment for children and families impacted by fetal alcohol spectrum disorders (FASD). VOA has been coordinating the camps in the Anchorage/Mat-Su area since 2000. Members of Anchorage Council on FASD helped develop the Anchorage camp.

VOA will partner with Anchorage's Stone Soup Group to share expertise and resources for the new and existing camps. Expanding the camps to rural areas was one of the priorities of the Partnership's Family/Peer Support workgroup, which worked with Trish Smith at VOA early on to help identify potential new sites and offer support.

The selected communities were chosen in part because they have a FASD diagnostic team coordinator or a parent navigator willing to assist in camp preparation – which will include locating a campsite, gathering volunteer support, advertising, and identifying eligible families.

The camps feature the 16-hour *FASD into Action* parent/care provider training model developed by Diane Malbin, MSW, an internationally recognized authority on FASD. The hands-on training is designed to help care providers better understand and work with young people affected by prenatal alcohol exposure.

Families and staff participate in Native dancing at FAScinating Families Camp in February 2011, near Anchorage.

Families are able to practice what they learn with the support and guidance of trained professionals.

Besides offering training and respite, the camps feature lots of fun activities, like arts and crafts, cultural and outdoor activities. Families get to know each other, share stories, watch their children play and have fun, and learn new strategies for success. For many families, the *FAScinating Families Camp* is the only resource they have for learning about FASD and meeting with others who share similar experiences.

"Trying differently, rather than harder" is a central theme at the camps, and the environment is supportive and helpful, as well as fun.

VOA is hoping to expand the camps to other camp-ready communities in the future.

The Governor's disabilities council invites comment on FASD issues

The Governor's Council on Disabilities and Special Education (GCDSE) is currently working on its Five-Year Plan. There are several parts that address issues related to FASD. If you're interested in reading about it and/or commenting, go to: www.hss.state.ak.us/gcdse and look for the 5-year plan. Deadline for comment is July 15.

Some sections to note, are: 1) Page 13, see description of underserved and unserved people affected by FASD; 2) Page 13, Goal 3, see the section related to housing and supporting "living in accessible, affordable and safe homes in the community;" and 3) Page 20, Goal 4, related to access to health care services, "work with relevant state agencies and other key stakeholders to prevent FASD and better serve those affected by prenatal alcohol exposure."

FASD training opportunities for parents and professionals in Alaska

Alaskans have several options for FASD training: *FASD 101* and *FASD 201* through the state Division of Behavioral Health (DBH) and affiliated trainers, and *FASD Into ACTION*, through Stone Soup Group in Anchorage.

FASD 101 focuses on the physiology of prenatal drinking and the disabilities that can result from prenatal exposure to alcohol. *FASD 201* offers helpful strategies for working with individuals with FASD, including successful

***Briefly** – continued on page 6*

Briefly *– continued from page 5*

approaches in the home, classroom, employment settings, and society.

Genevieve Casey, FASD Program Coordinator with DBH, wrote: "Through this training we can begin to change the paradigm related to this disability (brain damage vs. behavior problem) and it can begin the process of systems change within our existing service delivery systems —education, developmental disabilities, juvenile justice, child protection, health care, public assistance, vocational rehabilitation, substance abuse treatment, mental health and corrections to name a few ... Most importantly, we need to ensure that these service systems remain strong and continue to grow."

FASD into ACTION: Becoming a More Effective Caregiver was developed for parents and professionals working with people affected by FASD by Diane Malbin of Fetal Alcohol Syndrome Consultation, Education and Training Services, Inc., (FASCETS) in Oregon.

The course provides parents and professionals information about FASD and neurobehavioral disorders. Malbin reports that with an increased understanding of FASD as a brain-based disorder, parents and caregivers can adjust the environment to decrease the occurrence of secondary behaviors (e.g., frustration, aggression, depression, irritability, anger, isolation, tantrums, etc.).

Participants have reported reduced stress and improved parenting ability after taking the course. Similar results were found in a study by Hume et al. (2009) which reported an increase in parent/caregiver confidence and understanding of the needs and strengths of people with FASD.

Substance abuse treatment for pregnant women expands in Kenai and Juneau

In 2010, stakeholders statewide successfully advocated for increased funding that would expand substance abuse treatment for pregnant women in Alaska. The Division of Behavioral Health (DBH) has recently awarded grants to two programs, Serenity House at Central Peninsula Hospital and Rainforest Recovery Center at Bartlett Regional Hospital. Another program is expected to be awarded soon.

Serenity House offers a wide variety of clinical programs assisting clients with their individual needs, including substance abuse treatment and mental health care, motivation interventions, FASD education, Dialectical Behavior Therapy, trauma-informed care, couples therapy, and Strengthening Families Program. Contact them at: www.cpgh.org.

Rainforest Recovery Center's outpatient addiction treatment program for women focuses on pregnant women, women with children, and women of child-bearing age, and offers family and individual counseling, group therapy, case management, child care assistance and transportation. Contact them at www.bartletthospital.org/patientServices/rainforest.htm.

Funding for FASD case management

In 2010, stakeholders successfully advocated for funding to help people diagnosed with FASD get better access to support services in four communities: Juneau, Bethel, Kenai, Sitka. The diagnostic clinics in these communities determined the best way to get clients to services is to offer case management, since most families upon getting a diagnosis are unaware or unprepared to handle what comes next. A case manager helps families identify what services are needed, fill out necessary paperwork, make it to appointments, etc.

The Division of Behavioral Health (DBH) has finalized provider agreements and funding should be available in July.

Lower Kuskokwim and Anchorage School Districts lead the way on FASD

The Alaska FASD Partnership applauds the work of LKSD and ASD in serving students, teachers, and families impacted by FASD. Both districts have initiated efforts to deal with FASD in their schools. The establishment of a district-wide FASD specialist position at LKSD and putting a behavior specialist in each school at ASD shows foresight and leadership. As other school districts increase their awareness and follow this trend, they will be looking to LKSD and ASD for guidance.

FASD and Sexuality Workshop

Advocates in Juneau hosted a one-day workshop in February that addressed FASD and sexuality, including how people with FASD understand and express sexuality, what strategies are effective for directing and encouraging healthy expressions of sexuality and preventing inappropriate behavior, healing for victims and perpetrators, and how communities and care systems can better respond to FASD challenges.

Break-out sessions focused on parents and caregivers, justice system workers and care providers. Presenters included Jeremy Baumbach, Deb Evensen, Morgan Fawcett, Ric Iannolino, Judge Mike Jeffery, Kay Kelly and Sherri Wes. ❖

Participate in FASD Awareness Day on September 9

A table tent offers pregnant women a free, non-alcohol beverage on Sept. 9, 2011, and informs restaurant customers about the effects of drinking alcohol during

Free non-alcoholic drinks in restaurants for pregnant women

For the past eight years, the Alaska Women's Recovery Project has promoted a "free non-alcoholic drinks for women" in Anchorage restaurants. The Alaska FASD Partnership his helped expand the effort throughout the state.

This campaign invites local restaurants to offer a free non-alcoholic beverage to pregnant women on FASD Awareness Day, September 9, 2011. The event promotes awareness about alcohol-free pregnancies and educates patrons about the potential effects of drinking during pregnancy. Table tents at participating restaurants present an overview of what FASD is, what causes it, and how to prevent it. The tents also give contact info for local and national FASD agencies and invites pregnant women to enjoy a free non-alcoholic beverage provided by the restaurant.

In 2010, three other communities joined the effort: Juneau, Nome and Sitka. In 2011, the Partnership is coordinating with CHARR (Alaska Cabaret, Hotel, Restaurant and Retailers Association) in promoting the effort statewide.

If you would like to host your own restaurant promotion, here are some hints, or contact the Partnership for templates:

Event Preparation:

1. Assign a master coordinator to keep track of who is doing what.
2. Recruit volunteers to go to restaurants and solicit participation in the promotion. Consider church groups, youth groups, VISTA, AmeriCorp volunteers, etc.
3. Maintain a master list of volunteers and their assigned restaurants.
4. Print and prepare posters, restaurant invitation letter, table tents, and sample thank you notes.
5. Hang community posters around town week before the event (optional).

Volunteer Responsibilities:

1. Volunteers choose or are assigned a restaurant.
2. Volunteers agree to approach the restaurant manager or owner to solicit participation in the promotion. Each restaurant is given a participation request letter, sample table tent, and poster. Set a deadline to confirm with restaurant and report to master coordinator.
3. Upon commitment from the restaurant, volunteer counts how many tables will need table tents and agrees to return on September 9 to place the tents on the tables. At this same time, volunteer hangs a poster in a prominent place at the restaurant (such as front door, bulletin board, near cash register, bathrooms, etc.) at the direction of the manager/owner to pre-advertise the event.
4. Volunteers report to master coordinator with a total number of table tents needed and coordinate for time to pick up table tents.
5. On September 9, each volunteer picks up table tents and returns to assigned restaurant to place them on the tables and hangs poster in prominent place.
6. Volunteers return the following day to pick up table tents and take down poster(s).
7. Volunteers give a thank you note to the restaurant.

For guidelines and posters/table tent templates contact Teri at (907) 465-4765, or email at: akfasdpartnership@alaska.gov. ❖

Partnership workgroups address top issues statewide

At a summit in December 2010, the steering committee of the AK FASD Partnership met in Anchorage to finalize short-term and long-term goals for the following year. The recommendations came after a month of teleconferenced workgroups, who met and identified issues related to FASD that are most pressing to Alaskans. To join a workgroup, contact akfasdpartnership@alaska.gov.

Diagnosis

- Develop use of telemedicine in expanding diagnosis, support and services
- Promote use of screening tools/EPSDT (Early Periodic Screening, Diagnosis & Treatment) statewide
- Promote FASD training for primary care and behavioral health providers

Family/Peer Support

- Expand FASD Family Camps to rural areas
- Expand FASD training for primary care and behavioral health providers
- Coordinate efforts with the Alaska Peer Support Consortium (AKPSC), Alaska Mental Health Trust Authority and Dept. of Health & Social Services to develop peer specialist network and training programs

Prevention and Treatment for Pregnant Women

- Support FASD messages on pregnancy tests
- Vary "Do Not Drink When You Are Pregnant" signs in public places
- Expand substance abuse screening for females of child bearing age
- Expand Parent-Child Assistance Programs (PCAP) in Alaska
- Coordinate efforts with the Dept. of Health & Social Services

FASD and the Education System

- Educate district, board and school personnel about FASD, TBI, and other neurobehavioral disabilities and their relationship to behavior, e.g. presenting at conferences, in-services, hands-on in classrooms, etc.
- Promote statewide the LKSD/ASD models of employing an FASD/Behavior Specialist offering effective interventions for students, teachers and families impacted by FASD
- Expand training for para-educators, teachers and special education teachers, small village clergy, tribal staff and elders about successful interventions, e.g. positive behavior support (PBS), the importance of structure, alternative tools for discipline, etc.
- Coordinate efforts with the Dept. of Education and Early Development

FASD and the Legal System

- Address mitigating factors for people with FASD and other neurobehavioral disabilities (e.g. Traumatic Brain Injury (TBI), Bipolar Disorder, etc.)
- Expand use of mental health courts as alternatives to incarceration for people with FASD, and other neurobehavioral disorders.
- Expand screening and services in corrections and juvenile justice for people with neurobehavioral disabilities.
- Coordinate efforts with the Depts. of Corrections and Law, Public Defenders Agency, Courts, Disability Justice Workgroup of the Alaska Mental Health Trust Authority, and the Criminal Justice Working Group (CJWK).

Services for Adults with FASD

- Expand transition services (housing, treatment, medication management, employment, education, case management)
- Develop service system for adults with neurobehavioral disabilities
- Expand diagnosis for adults
- Coordinate efforts with Depts. of Health & Social Services and Corrections.

Professional Development

- Distribute resources for professionals
- Training for professionals, including medical personnel, educators, small village clergy, tribal staff, legal system personnel, public safety personnel, mental health/substance abuse treatment providers, and alcohol beverage servers
- Coordinate efforts with Dept. of Labor & Workforce Development, the Disability Justice Workgroup of the Alaska Mental Health Trust Authority, and Criminal Justice Working Group (CJWG)

Public Relations (Ad Hoc)

- Identify/contact conferences for exhibit space, keynote and break-out sessions
- Create/distribute exhibit kits for use at conferences
- Create/distribute packets for mushers and other potential sponsors ❖

Strategies for Success

Mindy Cason (far right), and other panelists, discuss personal experiences at Collaborative Conversations, sponsored by the Arctic FASD Regional Training Center, in May 2010.

Mindy Cason is a recent UAA graduate. She experienced prenatal alcohol exposure and was 20 before she discovered many of her difficulties were related to having an FASD. Her early school years were difficult because learning disabilities and a lack of interventions limited her ability to develop normal social and academic skills. After realizing the cause of her difficulties, she began to let go of the blame and shame, and with others' help, started developing strategies that have helped her succeed. Mindy wrote this article for people who experience an FASD and for people affected by FASD.

By Mindy Cason

When thinking about success, to me, it means preventing certain responses that come with shame, guilt, or embarrassment. When looking at coping mechanisms, any of the three of these emotions can hinder success. Learning how to reframe my ability to learn is critical to deter these feelings.

When looking closely at education and social life, there are a few coping skills that I have developed, and since awareness is the best tool to find these for any individual, here are my discoveries:

- Focusing for long amounts of time is not a strength. There are things to be expected, distractions. Redirecting and asking many questions are inevitable.
- Keeping and carrying a bag with the essential items I frequently use to escape uncomfortable situations: ipod, pen, pencils, snacks, a book, journal, tactile hand toys, magazines, and pictures of people I care about. These provide comforts and familiarity in an unfamiliar environment, or situations such as social or educational setting, and relieve anxiety or stress.
- Prepare for distractions: make the items I distract myself with available, collect them before I sit to study. This may include making food before studying and having it available the entire time I have to focus my attention. Also, having the bag of essentials available as well. I will become distracted at some point so I provide myself with an expected distraction. This way I can move from one thing to another easily and redirect to the task at hand without feeling guilt for being off task. After being distracted for a while I find a closing point and redirect to the task I am accomplishing.
- Asking questions – all and any questions. This can mean asking the same one many times even minutes after the answer has been given. I process verbal directions atypically. I may think I understand, only to discover I am off base from the intended outcome. I find it encouraging and reassuring to know that if there are doubts about the outcome, I can ask for clarification or to be walked through the information until I own it.
- Learning that taking breaks and knowing that it's alright to isolate at times, and understanding that I have social differences, was difficult. However, I now understand my perspective is uniquely mine; no one perceives things the same as myself. I need time alone with my comfort tools to find a calm place and be ready to re-enter the setting in a healthy way.
- Positive regard is very important. My difficulty with learning, the inability to stay focused, and my not understanding sequential information creates frustration for those working with me. The times I realize I have frustrated someone unintentionally causes me to shut down due to guilt and embarrasssment. Having a person who is patient and has positive regard makes a significant difference. ❖

FY12 state budget supports people with disabilities, including those impacted by FASD

DEFINITIONS:
DHSS = Department of Health & Social Services
DBH = Division of Behavioral Health
DJJ = Division of Juvenile Justice
OCS = Office of Children's Services
SDS = Division of Senior and Disability Services
DPH = Division of Public Health
DOC = Department of Corrections
DEED = Department of Education and Early Development
LAW = Department of Law
ADMIN = Department of Administration
Courts = Alaska Court System
Trust = Alaska Mental Health Trust Authority
AHFC = Alaska Housing Finance Corporation
RPTC = Residential Psychiatric Treatment Center
SED = Severe Emotional Disturbance
FASD = Fetal Alcohol Spectrum Disorders

YOUTH and PREVENTION

Early Intervention/Infant Learning Program Positive Parenting Training *$80,000 to Infant Learning Program Grants, OCS/DHSS.* Funding will support three demonstration sites in fully implementing the "Teacher Pyramid" model, an evidence-based research model for supporting social competence and preventing challenging behavior in young children. The parent training modules serve both biological and foster families who are in need of intervention supports, but whose provider agencies have not yet adopted these strategies *(funded by Alaska Mental Health Trust Funds).*

Clinician to work with Head Start & day care centers for early childhood screening services *$100,000 to Infant Learning Program Grants, OCS/DHS* Funding will establish an early childhood mental health learning network and provide grants for agencies to engage in early childhood screening and intervention services – serving youth at risk of experiencing SED. Coordinator will provide consultation, technical assistance, and professional development to mental health clinicians, family support workers, child care workers, Head Start staff, early intervention, and infant learning specialists *(funded by Alaska Mental Health Trust Funds).*

Expansion of school-based services capacity
$300,000 to Services for Seriously Emotionally Disturbed Youth, DBH/DHSS. Grants will provide funding for educational tracking of youth returning from RPTCs to ensure their educational success upon return; and pilots positive behavioral supports in four school districts: Ketchikan, Juneau, Sitka and Dillingham *(funded by Alaska Mental Health Trust funds and state GF funds).*

Crisis bed stabilization statewide
$150,000 to Services for Seriously Emotionally Disturbed Youth, DBH/DHSS. This program maintains services in Anchorage and begins to expand services beyond Anchorage for youth in crisis. It provides grants to assist both youth in OCS custody and youth with family, and is expected to save Medicaid funds by reducing acute hospitalizations and referrals to RPTCs *(funded by state general funds).*

Services for transition-aged youth
$250,000 to Services for Seriously Emotionally Disturbed Youth, DBH/DHSS. Funding will support community-based capacity for transition-aged youth to move into adulthood with age-appropriate services, including productive work and educational activities. The goal for this increment is to target youth with few or no family supports who are at risk of moving into adult systems, such as corrections, emergency mental health or substance abuse services *(funded by Alaska Mental Health Trust funds).*

Training and Technical Assistance for Bring the Kids Home programs *$330,000 to Behavioral Health Administration, DBH/DHSS.* Funding will support technical assistance, training, and ongoing mentoring to improve delivery of integrated, family-driven, recovery-oriented services. Focus is on business practices and clinical performance improvement projects – such as developing wraparound facilitation, implementing evidence-based or best practices, developing FASD waiver services, and/or expanding in-home and family therapy service models *(funded by Alaska Mental Health Trust funds).*

Child Psychiatrist at API
$50,000 to Alaska Psychiatric Institute (API), DBH/DHSS. Funds will pay for a child psychiatrist at API to provide doctor-to-doctor consultation to other RPTCs on issues of case planning and treatment recommendations. The psychiatrist will provide a second opinion for state staff working to divert children from RPTC care and consults with primary care physicians on children at risk of moving into acute or residential care *(funded by state general funds).*

Alaska Family Violence Prevention Project (AFVPP)
$200,000 to Chronic Disease Prevention and Health Promotion, DPH/DHSS. Funding will support training, personnel, curricula and tools, printing and dissemination of resource materials for providers statewide. AFVPP is a nationally recognized best practices program for violence prevention that uses a community-based, multidisciplinary team approach to address dating violence and substance use among youth *(funded by state general funds).*

Pre-K Program Funding
$1.7 million to Early Learning Coordination, TLS/DEED; and $300,000 for intervention districts Lower Yukon and Yupiit School Districts. Funds will help continue pilot preschool programs statewide as part of the Alaska Pre-Kindergarten Project, which provides voluntary, comprehensive, half-day preschool pro-grams in rural and urban settings. These programs build on existing community resources and supports the creation of local model programs. Early childhood programs help identify and serve students with special needs throughout their school years. This increment maintains the program that began as a pilot project in previous years *(funded by state general funds)*.

See "Training and Technical Assistance for Bring the Kids Home Programs" under TRAINING/WORKFORCE
See "Foster parent & parent recruitment training & support" under TRAINING/WORKFORCE
See "Rural/tribal system development" under RURAL SERVICES
See "Training and Technical Assistance for Bring The Kids Home Programs" under YOUTH/PREVENTION
See "Community Behavioral Health Centers Outpatient & Emergency Residential Services & Training" under TRAINING/WORKFORCE

TREATMENT/RESOURCES

Alaska Complex Behaviors Collaborative: Start Hub
$325,000 to Services to Seriously Mentally Ill, DBH/DHSS. This funding will be used to begin implementation of the Alaska Complex Behaviors Collaborative Hub, where individuals who experience developmental disability, mental illness, addiction, fetal alcohol spectrum disorders, and/or other behavioral disorders can receive stabilization, triage, assessment, referral to diagnostic services and/or short and long-term community-based support services. Funding will support project start-up costs, brief stabilization services, intensive intermediate services, and development of the Hub, or point-of-entry, component *(funded by state general funds)*.

Substance Abuse Treatment and Recovery Services for At-Risk Parents *$225,000 to Family Preservation in OCS/DHSS.* Funding will provide clinical substance abuse treatment and recovery services for parents who have a substantiated report of harm, where substance abuse is a contributing factor to continued risk of harm for their children. It will be delivered through the Family Preservation program offered by the Office of Children's Services, to ensure that treatment services are available to the parent before a child must be removed from the home *(funded by state general funds)*.

Treatment funding for therapeutic court participants
$500,000 to Therapeutic Courts/COURTS. Funding will support timely access to substance abuse and mental health treatment for therapeutic court participants in an effort to address the underlying issues related to contact with the criminal justice system. Timely access to substance abuse and mental health treatment services is a critical component to the operations of these courts, the success of its participants, and to reduced recidivism *(funded by Alaska Mental Health Trust funds and state general funds)*.

Pre-development for sleep-off alternatives in Nome
$100,000 to Behavioral Health Grants, DBH/DHSS. Funds will be used to support pre-development and planning activities for alternatives to incarcerating persons requiring protective custody in Nome. Activities may include substance abuse assessment, assessment of the service capacity of existing programs and facilities within the community, and developing an implementation plan for identified treatment services *(funded by Alaska Mental Health Trust funds)*.

IMPACT model of treating depression
$75,000 to Alaska Psychiatric Institute, DBH/DHSS. Funding will support the "Improving Mood Promoting Access to Collaborative Treatment" (IMPACT) model of treating depression in the primary care setting. Administered by a psychiatrist and depression care manager, this model emphasizes patient education, positive lifestyle changes, and antidepressant medication when appropriate. Funding will also support telehealth equipment for three demonstration projects in urban and rural Alaska *(funded by Alaska Mental Health Trust funds)*.

Family Wellness Warriors Initiative (Year Two)
$200,000 to DHSS. Family Wellness Warriors Initiative seeks to address domestic violence, abuse, and neglect in Alaska Native communities. The project will equip organizations and individuals to effectively address the emotional, spiritual, mental and physical effects of domestic violence, abuse, and neglect *(funded by state general funds)*.

Traumatic/Acquired Brain injury Program
$300,000 to Senior and Disabilities Services Administration, SDS/DHSS. Funding will support continuation of the Acquired/Traumatic Brain Injury (A/TBI) Program, a mini-grant program currently serving about 60 Alaskans with A/TBI. Funding will support planning, coordinating and developing TBI-specific services in Alaska – including access to neuropsychological exams, assistive technology, memory devises, treatment, and more. Additionally, it will support the development of the Traumatic/ Acquired Brain Injury Longitudinal Registry. People with A/TBI are at risk for mental health, substance abuse, homelessness, incarceration and suicide. Access to appropriate services is critical to ensuring hope for recovery *(funded by state general funds)*.

Acquired/Traumatic Brain Injury Program Research Analyst & Registry Support *$136,000 to Senior and Disability Services Administration, SDS/DHSS*. This funding will support staffing,

planning infrastructure and development expertise for the ATBI Program. These funds will also support planning and successful demonstration of best practice activities that provide treatment and support for individuals and families impacted by brain injury *(funded by Alaska Mental Health Trust funds)*.

See "Alaska Family Violence Prevention Project (AFVPP)" under YOUTH/PREVENTION

PEER SUPPORT

Rural Peer Support Services
$225,000 *to Behavioral Health Grants, DBH/DHSS.* Funding will expand availability of peer support services for people with mental health and/or substance use disorders in rural areas. Peer-operated services include drop-in centers, clubhouses, crisis services, support groups, supported employment and housing assistance, case management, outreach, and more. "Peers" have experienced mental and/or physical difficulties and support other people experiencing the same difficulties *(funded by state general funds)*.

Peer Navigator Program
$200,000 to Services for Seriously Emotionally Disturbed Youth, DBH/DHSS. Funds will maintain peer navigator services, including hiring parents and youth experiencing SED to assist peers in navigating the service delivery system. Grantees are required to report outcomes, including number of parents involved, results of the interaction, and effectiveness of services *(funded by Alaska Mental HealthTrust funds and state general funds)*.

RURAL SERVICES

Tribal/rural system development
$100,000 to Behavioral Health Administration, DBH/DHSS. Funding will assist in establishing SED children's services in rural areas, including developing and improving funding mechanisms and strategies specific to tribal systems. Projects may include developing Medicaid clinical, billing and supervision capacity, technical assistance to link programmatic and finance sections into an effective service delivery/billing revenue generation, implementing telemedicine, Skype or other distance delivery technology, grant writing, and/or blending funding streams *(funded by Alaska Mental Health Trust funds)*.

Rural specialist
$110,900 to Probation Services, DJJ/DHSS. Funding will support a specialist to assist rural communities (treatment providers and local natural supports) in developing prevention and/or early intervention activities and making training recommendations that ultimately serve youth returning to their rural home communities from DJJ facilities *(funded by Alaska Mental Health Trust funds)*.

Rural long term care development
$140,000 to Senior and Disabilities Services Administration, SDS/DHSS. Funding continues a project that provides technical assistance to rural communities and helps address long-term care needs and resources to meet those needs. It includes outreach, education, and intensive community-based work to meet the needs of people with Alzheimer's and related dementias, fetal alcohol spectrum disorders, and other cognitive impairments *(funded by Alaska Mental Health Trust funds)*.

See "Rural peer support services" under PEER SUPPORT
See "Alaska Complex Behavior Collaborative" under TREATMENT/RESOURCES
See "Family Wellness Warriors Initiative (Year Two)" under TREATMENT/RESOURCES

DISABILITY JUSTICE

Social services specialist position in Bethel
$138,800 to Public Defenders Agency, LAS/ADMIN. Funding will support a social services specialist in the Public Defender Agency to assist attorneys with "in-house" clinical expertise on the disorders experienced by Trust beneficiaries and available community treatment. Duties may include forensic psychosocial interviews, home visits, needs assessments, and assistance in developing expert opinion and negotiating ongoing legal issues *(funded by Alaska Mental Health Trust funds)*.

Mental Health clinical positions in Corrections
$164,000 to Behavioral Health Care, IHC/DOC. Funding will support a mental health clinician in the Dept. of Corrections to manage the high needs of offenders in the newly expanded Men's Mental Health Unit at the Anchorage Correctional Complex. Duties will include assessment and programming, monitoring for safety, and developing appropriate release plans *(funded by Alaska Mental Health Trust funds)*.

Implement APIC discharge planning model in Corrections
$210,000 to Behavioral Health Care, IHC/DOC. Funding will support "Assess, Plan, Identify, and Coordinate" (APIC) model of connecting Trust beneficiary offenders re-entering the community to appropriate community behavioral health services. APIC has shown to reduce recidivism by engaging both Corrections and the community treatment provider in developing transition plans for the soon-to-be-released offenders *(funded by Alaska Mental Health Trust funds)*.

Criminal justice technician in Corrections
$56,000 to Behavioral Health Care, IHC/DOC. Funding will support a technician to track and provide reports on program outcome measures, clinical contacts, unit census changes, mental health Title 47s, access to programming, treatment failures, suicide data, assault and injury data, release data and a variety of other patient and programming needs, for offenders in the Dept. of Corrections *(funded by Alaska Mental Health Trust funds)*.

Increase mental health clinical capacity in DJJ
$200,000 to McLaughlin Youth Center, DJJ/DHSS. Funding will maintain adequate mental health clinical staff capacity to provide appropriate mental health treatment and transition planning to youth in DJJ facilities statewide *(funded by Alaska Mental Health Trust funds and state general funds).*

Management & clinical oversight of therapeutic court probation staff *$142,700 to Therapeutic Courts/COURTS.* Funding will provide focused daily and clinical supervision of the therapeutic court probation staff to ensure for adequate mentoring, program planning, budget management, monitoring, and public safety. Therapeutic courts serve people with mental illness, substance abuse and other cognitive impairments *(funded by state general funds).*

Fairbanks Juvenile Therapeutic Court
$245,900 to Therapeutic Courts/COURTS. This project continues funding for a therapeutic court alternative for youth with mental illness, substance abuse disorders, or other cognitive impairments involved in the juvenile justice system in Fairbanks. The project engages youth in treatment to avoid future treatment services and costs associated with the adult correctional and judicial systems. Funding also supports tracking and reporting outcomes *(funded by Alaska Mental Health Trust funds).*

Mental Health Court expansion in targeted communities *$204,400 to Therapeutic Courts/COURTS.* Funding supports a therapeutic court alternative for people with mental illness, substance abuse disorders, or other cognitive impairments in identifying the underlying reasons for an individual's contact with the criminal justice system. Funds will also support development of court-ordered treatment plans designed to decrease the risk of future contact with the criminal justice system. Funding also supports tracking and reporting data related number of individuals served and their outcomes, how funding is utilized and associated cost savings *(funded by Alaska Mental Health Trust funds).*

ASAP therapeutic case management and monitoring treatment in Barrow *$139,900 to Therapeutic Courts/COURTS.* Funding maintains a position with the Barrow Alaska Safety Action Program (ASAP) which provides a therapeutic court alternative for people with mental illness, substance abuse disorders, and other cognitive disabilities. Responsibilities include identifying available treatment options and making treatment recommendations, monitoring adherence to court-ordered recommendations, and mechanisms that address the underlying disorder contributing to the individual's contact with the justice system *(funded by Alaska Mental Health Trust funds).*

Probation Officer for Anchorage Wellness Court
$79,900 to Alcohol Safety Action Program, DBH/DHSS. Funding supports a probation officer at the Anchorage Municipal Wellness Court. Responsibilities include substance abuse screening, case management, education and treatment recommendations, monitoring of DWI and other alcohol/drug related misdemeanor cases. ASAP operates as a neutral link between the justice and the health care delivery systems, including enforcement, prosecution, judicial, probation, corrections, rehabilitation, licensing, traffic records, and public information/education *(funded by state general funds).*

See "Bridge Home Program" under SUPPORTED HOUSING
See "Discharge Incentive Grants" under SUPPORTED HOUSING
See "Treatment funding for therapeutic court participants" under TREATMENT
See "Training for Judicial Conference participants" under TRAINING/WORKFORCE
See "Deliver training for defense attorneys" under TRAINING/WORKFORCE
See "Training for Therapeutic Court clinical staff" under TRAINING/WORKFORCE
See "Probation staff instruction on therapeutic models of community supervision" under TRAINING/WORKFORCE
See "Pre-development for sleep-off alternatives in Nome" under PLANNING/RESOURCES
See "Rural specialist in DJJ" under RURAL SERVICES

SUPPORTED HOUSING

Office of Integrated Housing
$225,000 to Behavioral Health Administration, DBH/DHSS. Funding supports an ongoing project offering technical assistance in developing supported housing options for people with mental illness, substance abuse disorders, cognitive impairments and other disabilities *(funded by Alaska Mental Health Trust funds).*

Discharge Incentive Grants
$400,000 to Services to Seriously Mentally Ill, DBH/DHSS. Funding supports beneficiaries in DOC settings who require extended supervision and support services to prevent repeat incarceration and public health concern. These funds will be administered by DBH as Assisted Living Home Vouchers or support service resources. Resources will help increase skill level and capacity for assisted living providers *(funded by Alaska Mental Health Trust funds and state general funds).*

Bridge Home Program
$750,000 to Services to Seriously Mentally Ill, DBH/DHSS. Funding supports the Bridge Home Program, which offers rent

subsidies paired with intensive in-home support services for individuals 'cycling' through emergency and institutional settings, including DOC facilities, API, hospital emergency services, and other high-cost social service and health programs *(funded by Alaska Mental Health Trust funds)*.

Capital projects

AHFC Homeless Assistance Program ($10.05 million in AHFC receipts); and
AHFC Beneficiary and Special Needs Housing ($1.750 million).

See "Assisted living home training and targeted capacity for development" under TRAINING/WORKFORCE

PLANNING and RESOURCES

Comprehensive Integrated Mental Health Plan
$120,000 to Health Planning and Systems Development, DPS/DHSS. Funding supports continued development of the Comprehensive Integrated Mental Health Program Plan (Comprehensive Plan), a legislatively-mandated planning process used to guide the behavioral health system, to be carried out by DHSS, The Trust and four advisory boards *(funded by Alaska Mental Health Trust funds)*.

Behavioral health follow-up survey
$100,000 to Behavioral Health Grants, DBH/DHSS. Funding will be used to conduct a behavioral health survey of client recovery levels at one year after treatment. This survey has important policy implications for improving mental health and substance abuse treatment and could also help to document important cost savings from good treatment. If survey information is found to be helpful, it is the intent to repeat this survey every four- to five-years *(funded by Alaska Mental Health Trust funds)*.

Family Voice for parents and youth
$25,000 to Alaska Mental Health Board, DBH/DHSS. Funding brings youth experiencing SED to the Bring the Kids Home (BTKH) quarterly meetings and other advocacy/policy settings, with the goal of providing policymakers with first-hand knowledge of issues affecting youth and families affected by SED, including FASD *(funded by Alaska Mental Health Trust funds)*.

TRAINING and WORKFORCE

Assisted living home training and targeted capacity for development *$100,000 to Behavioral Health Grants, DBH/DHSS*. Funding continues assisted living home training and targeted capacity development to improve the quality of training available for assisted living home providers serving individuals with severe mental illness and high-needs individuals in correctional facilities. Both programs address homelessness and daily functioning for very impaired individuals *(funded by Alaska Mental Health Trust funds)*.

Mini grants for people with disabilities
$227,500 to Community Developmental Disabilities Grants, SDS/DHSS. Mini-grants provide Trust beneficiaries with a broad range of equipment and services that are essential to directly improving quality of life and increasing independent functioning, including therapeutic devices, access to medical, vision and dental, special health care, and other supplies or services that might remove or reduce barriers to an individual's ability to function in the community *(funded by Alaska Mental Health Trust funds)*.

Microenterprise capital
$125,000 to Governor's Council on Disabilities and Special Education, SDS/DHSS. Funding provides beneficiaries access to startup funding, small business technical assistance and support, alternative and innovative resources and other options promoting beneficiary self-employment and economic independence *(funded by Alaska Mental Health funds)*.

Community Behavioral Health Centers outpatient/ emergency residential services & training
$780,000 to Services for Seriously Emotionally Disturbed Youth, DBH/DHSS. Funding expands grant opportunities to Community Behavioral Health Centers (CBHC) to enhance outpatient services with innovative programs and training for children experiencing SED, Fetal Alcohol Syndrome (FAS), and other cognitive impairments. A separate component will evaluate the cost effectiveness of these outpatient services *(funded by Alaska Mental Health Trust funds and state general funds)*.

Training and technical assistance for Bring the Kids Home programs *$330,000 to Behavioral Health Administration, DBH/DHSS*. Funding will support technical assistance, training and on-going mentoring to improve delivery of integrated, family-driven, recovery-oriented services. Focus is on business practices and clinical performance improvement projects, such as wrap-around facilitation, evidence-based or best practices, FASD waiver services, and/or in-home/family therapy service models *(funded by Alaska Mental Health Trust funds)*.

Foster parent & parent recruitment training & support
$276,000 to Family Preservation, OCS/DHSS. Funding will provide 1) resources to recruit and screen potential foster parents, 2) provide training and technical assistance for parents and foster parents. Therapeutic Foster Homes are recognized in Bring the Kids Home (BTKH) planning as an economical and effective alternative to more costly residential care for youth experiencing SED. Biological parents will be included in relevant trainings as available *(funded by Alaska Mental Health Trust funds and GF funds)*.

Probation staff instruction on therapeutic models of community supervision *$80,000 to Therapeutic Courts/COURTS*. Funding supports training for ASAP probation staff in evidence-based practices that will serve to improve

long-term client outcomes and reduce criminal recidivism among people with mental illness, substance abuse disorders and other cognitive impairments *(funded by state general funds)*.

Training for Judicial Conference participants
$15,000 to Therapeutic Courts/COURTS. Funding will support training on topics related to mental health disorders, substance abuse and other cognitive impairments, including autism, bipolar disorder, and fetal alcohol spectrum disorders, etc.. Training offers jurisprudence principles and practices to participants of the Judicial Conference, which includes representatives from Dept. of Law, Public Defender Agency, Office of Public Advocacy. Focus will be on root causes for a beneficiary's contact with the criminal justice system, recommendations for appropriate interventions, and alternatives in sentencing and conditions of bail/ probation *(funded by Alaska Mental Health Trust funds)*.

Training for prosecutors
$15,000 to Third Judicial District-Anchorage, Criminal Division/LAW. This project provides foundational knowledge to prosecutors within the Dept. of Law on mental illness, substance abuse, and other cognitive impairments, to include available treatment and an overview of the state's community behavioral health system. Training better equips prosecutors to 1) better understand and provide for the needs of offenders with disabilities, 2) consider underlying causes for an offender's contact with the criminal justice system, and 3) setting appropriate conditions of bail/ probation based on the individuals mental and/or cognitive capacity *(funded by Alaska Mental Health Trust funds)*.

Training for defense attorneys
$15,000 to Office of Public Advocacy, LAS/ADMIN. Funding will provide training for defense attorneys in understanding mental illness and other impairments, and how to better handle legal cases involving persons with disabilities, including education in treatment options and available resources *(funded by Alaska Mental Health Trust funds)*.

Training for therapeutic court clinical staff
$15,000 to Therapeutic Courts/COURTS. Funding will send Therapeutic Court teams (judges, attorneys, clinical case coordinators) to a national conference sponsored by SAMHSA and the GAINS Center focusing on the connection between mental health and criminal justice systems, including evidence-based practices as solutions *(funded by Alaska Mental Health Trust funds)*.

See "Early Intervention/Infant Learning Program Positive Parenting Training" under YOUTH/PREVENTION

UNIVERSITY OF ALASKA

Anchorage Campus

Increase provider capacity to better serve cognitively impaired offenders - *$80,000 (Alaska Mental Health Trust funds).*
Specialized skills and training on serving cognitively impaired offenders - *$55,000 (Alaska Mental Health Trust funds).*
Training and technical assistance for providers - *$210,000 (Alaska Mental Health Trust funds).*
Children's mental health (interdisciplinary education) and certification - *$64,000 (Alaska Mental Health Trust funds).*

Fairbanks Campus

Alaska Rural Behavioral Health Training Academy - *$172,500 (Alaska Mental Health Trust funds).*
Human Services - *$50,000 (Alaska Mental Health Trust funds).* ❖

Follow the State Budget from home...

To follow budget and policy issues as they pass through the legislative process, go to the Governor's website at www.omb.alaska.gov and the Alaska State Legislature website at www.legis.state.ak.us/basis .

*To join a statewide **Action Network** sponsored by the Alaska Mental Health Trust Authority, go to: www.capwiz.com/mhtrust/home/*

Organizations that participate in state budget issues related to vulnerable Alaskans:

- *Advisory Board on Alcoholism and Drug Abuse*
- *Alaska Brain Injury Network*
- *Alaska Commission on Aging*
- *Alaska Addiction Professionals Association*
- *Alaska Behavioral Health Association*
- *Alaska Mental Health Board*
- *Governor's Council on Disabilities and Special Education*
- *Statewide Suicide Prevention Council*

ADVOCACY TIPS

- *Write a letter-to-the-editor about FASD, or coordinate a letter writing campaign.*
- *Make a telephone call to a public official's office or coordinate a telephone campaign.*
- *Write a letter to a public official or coordinate a letter-writing campaign.*
- *Organize people to join the Alaska Advocacy Network at www.capwiz.com/mhtrust/home/.*
- *Host a reception in your home or place of work.*
- *Make five new contacts and spread the word about an issue.*
- *Set up a table at a public event, party, or reception and raise awareness about FASD.*
- *Visit a legislator in your hometown and talk about how FASD affects you or people you know.*
- *Write an opinion piece for your local newspaper or find someone else to do it.*
- *Go on a radio talk show and discuss FASD, or find someone else to do it.*
- *Write a personal story and send it to a policy-maker.*
- *Join the Alaska FASD Partnership and stay informed about FASD issues. Participate in the Partnership's workgroup teleconferences.*
- *Tell your friends or co-workers about FASD.*
- *Attend an advocacy training workshop or FASD 101/201 training.*
- *Tell your personal story at a public meeting (Assembly, City Council, Rotary, Chamber, School Board, state legislature).*
- *Coordinate a local advocacy effort in your community – involve the media, host receptions, write letters, coordinate volunteers, visit policymakers, etc.*

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Alaska FASD Partnership Steering Committee

Message from the Chair

Waqaa to the readers from the Alaska FASD Partnership. This partnership is a group of individuals and organizations coming together to address Fetal Alcohol Spectrum Disorders (FASD) and the concerns associated with FASD – health and social issues, as well as, providing education and awareness. We are professionals, parents, educators, voters, community leaders, health care providers, and more.

Alaska is an incredible state with diversity in our cultures, languages, and communities. Every year, our state attracts many tourists to witness firsthand the beauty of Alaska – in our lands and our people. Yet, behind this beauty, Alaska leads the way with the highest number of individuals born with FASD, the highest rates of alcohol abuse and domestic violence. The common factor is alcohol. FASD does not discriminate by culture, education, or economic status. It can happen anywhere alcohol is available.

Our policymakers are working to address the needs for each district: safe school buildings, road improvements, health care, safe water, law enforcement ... to name a few. Although Alaska leads the way with identification of FASD through our diagnostic teams, we can do more to help decrease the incidence of FASDs through education and awareness. If everyone reading this newsletter pledges to learn more about FASD – its causes and the issues surrounding alcohol use – our state has the potential to live more healthy, safe, and happier lives. Join our cause – sign up to become a member of the AK FASD Partnership!

Quyana for your time. If you have any questions, concerns, or would like to join the Partnership, please contact us.

Monica Charles Leinberger

The criminal justice system was never designed to accommodate the reality of people affected by Fetal Alcohol Spectrum Disorder. With efforts under way to address this issue, it is becoming apparent that the focus belongs on keeping them out of the system to begin with. And that is proving to be a far greater challenge.

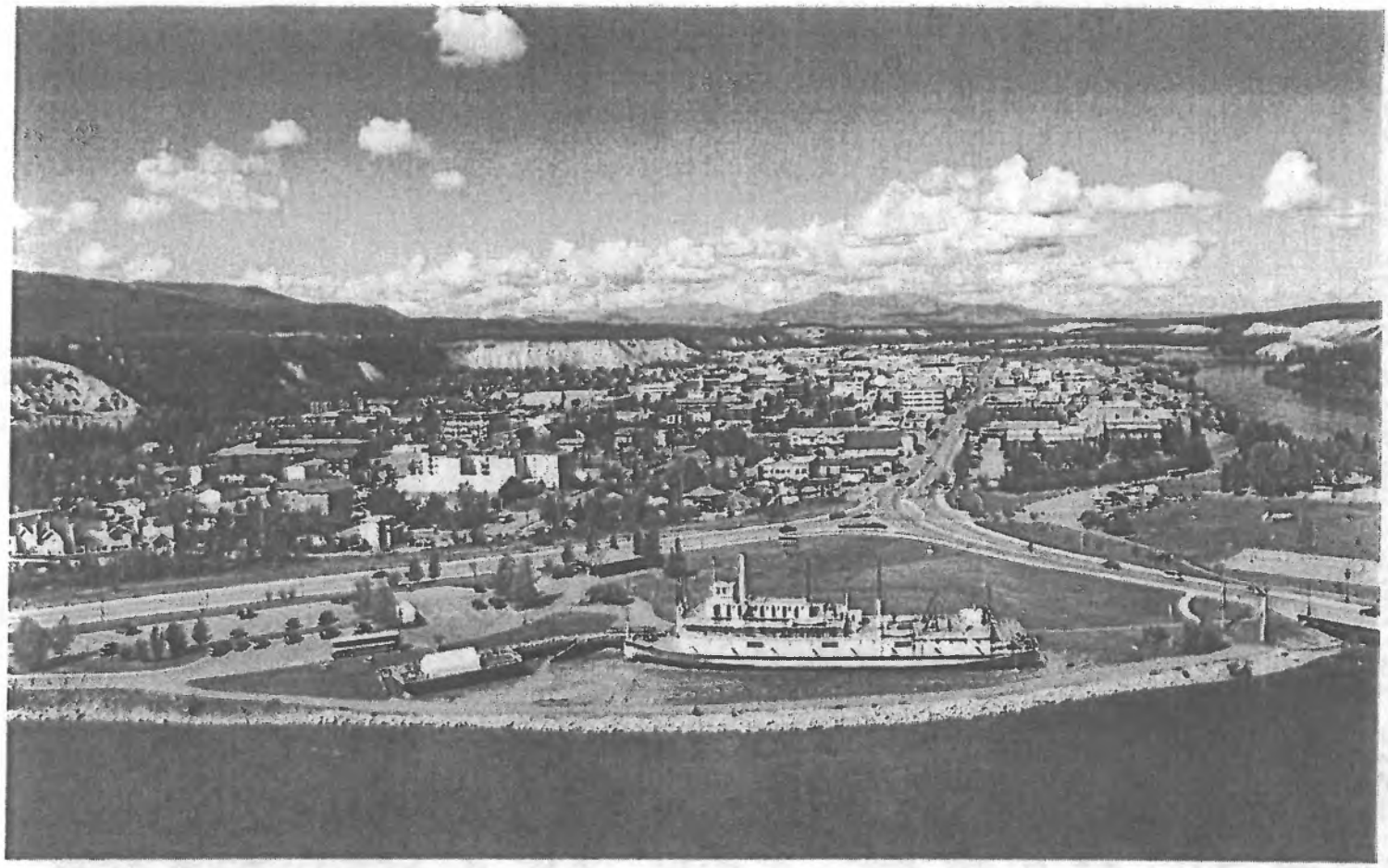
A DIFFERENT KIND OF JUSTICE

By Beverley Spencer

Lesley Carberry puts her arm affectionately around the smiling young man in the sunny kitchen of her home in Whitehorse. She introduces a guest and asks whether he knows why she's come to visit. "Do you remember what we're going to talk about?" she asks. "Hurt brain," he replies.

Frank, 33, has Fetal Alcohol Spectrum Disorder (FASD). So does his brother Carl, 36. They were adopted 26 years ago by Carberry and her husband Ray Marnoch, who have also acted as caregivers to two other young men with FASD. "Hurt brain" is how Frank has come to understand the permanent brain damage he suffered because his mother drank during pregnancy.

FASD is an umbrella term referring to a complex range of brain injuries resulting from prenatal exposure to alcohol. It is one of the leading causes of mental retardation, developmental and cognitive disabilities in Canada. It is estimated to affect 0.9 per 1,000 people in the general population with higher rates in areas with widespread alcohol abuse and poverty, but this is based on an extrapolation of U.S. data. The actual prevalence is not known since diagnostic capacity is limited and there is no systematic screening for FASD. Most of the legal cases where FASD has been a factor involve native people, but FASD affects anyone whose mother abused alcohol during pregnancy.



Every case is different. Symptoms include poor memory, impulsiveness, an inability to fully appreciate the consequences of one's actions and being easily influenced by others. It is a permanent condition that can affect the ability to function independently in life and it puts many on a collision course with the criminal justice system. It is also costly for both individuals and society: individuals with FASD in Canada who are alive today will cost taxpayers about $600-billion, according to FASworld Canada, a non-profit organization that aims to build awareness for the disorder.

"FASD is not just a northern issue nor is it only a first nations issue," Yukon Justice Minister Marian Horne wrote to her provincial counterparts in 2010. "It is an issue that affects every community... and every facet of the justice system we are responsible to uphold."

FASD means that Carberry and her husband still financially support their adult children and guide them through the ups and downs of everyday life. Carl, who lives in Edmonton with his partner and two daughters, cannot keep a regular full-time job. The only people who will hire him, Carberry says, are people on the fringes who think he is an easy target. "And he is," she says. He has been in and out of jail and has battled addiction. Frank, who lives at home, works at a major retailer through a supported employment program and dreams of becoming a full-time employee. He has a job coach and a girlfriend and generally enjoys a happy life, his mother says, but he will always need a support worker. She worries about what will happen to her sons and grandchildren when she and her husband are no longer there.

There is greater recognition of FASD now than there was 26 years ago, but not the permanent life-long support her sons will need.

"I'm not comforted that when I die and my husband dies there will be anybody to take care of our children," she says. "I'm not comforted that if they were to get into trouble because they're not getting the supports that were provided for them [by us] that anybody would understand any better about what's going on."

The wrong assumptions

The criminal justice system is based on a set of assumptions that collide with the reality of FASD, namely that people act in a voluntary manner that is determined by free will, University of Toronto law professor Kent Roach and Andrea Bailey, a law clerk at the Territorial and Supreme Courts of Yukon, write in a paper on the issue. It assumes that "they can make informed and voluntary choices both with respect to the exercise of their rights and the decision to commit crimes."

In law, accused persons are presumed to be fit to stand trial and not to suffer from a mental disorder that would exempt them from criminal responsibility. There are exceptions for those with extreme cognitive impairments that deprive them of the ability to understand the proceedings or to appreciate the consequences or wrongfulness of their actions. There is also an assumption that mental disorders can be treated so that the accused will either be fit to stand trial or no longer present a substantial danger to the public and be safe to release. As Roach and Bailey point out, this runs counter to the reality of the permanent brain damage caused by FASD.

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The law of sentencing is also influenced by assumptions about free will. The purposes of sentencing — specific and general deterrence, denunciation, incapacitation, rehabilitation and the promotion of a sense of responsibility — all assume that offenders are capable of "making choices, understanding the consequences of their actions and learning from their mistakes," write the authors.

"In short, Canadian criminal law is premised on assumptions about free will and individual responsibility, and temporary and treatable departures from that norm," they add. "These assumptions unfortunately do not fit well with what is known about FASD."

The Yukon has been a leader in addressing the reality of FASD in the criminal justice system. Judges Heino Lilles and Barry Stuart of the Yukon Territorial Court (both now retired), are considered pioneers in recognizing that crimes committed by offenders with FASD must be understood in the context of the cognitive brain damage they suffered and the system needs to change.

In 2002, Chief Judge Barry Stuart issued a clarion call for action in the case of Marcel Jacob, a 21-year-old who had committed a vicious sexual assault. The judge sentenced him to eight years in the penitentiary, but warned there will be more cases like his unless families, communities and professionals learn to work together to address the root causes of crime.

Jacob was neglected for most of his childhood and physically and sexually abused; his history was full of symptoms suggesting FASD and he was diagnosed with psychopathic tendencies and multiple personality disorders, the judge observed. How could those well-documented problems not have been addressed? he asked.

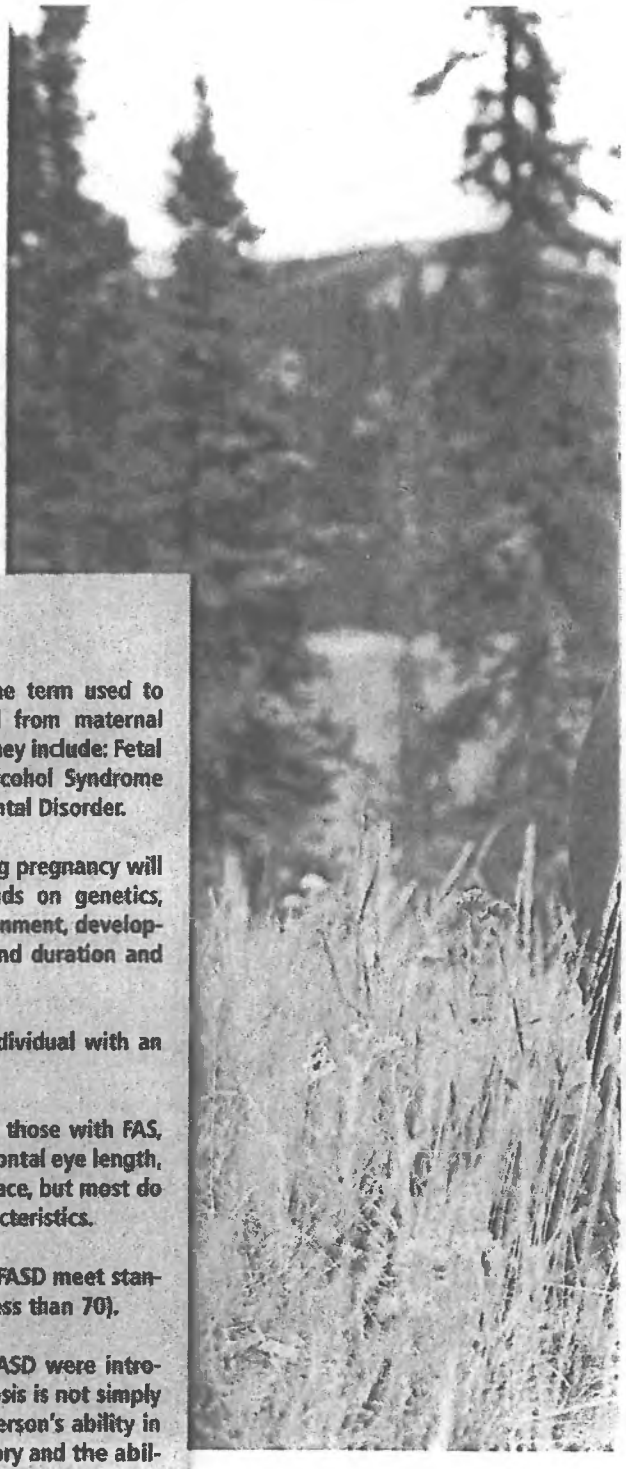
"The villain in this piece, as in so many other cases, is no one person, no one agency or department, but rather the system," he wrote. "The fragmented, truncated system that has no integrated vision or holistic approach is the villain."

"We cannot stop the next Marcel Jacob with good intentions, nor with small changes. . . . I believe there will always be a need for what the justice system currently offers, but it can no longer be the only . . . approach to the underlying causes of crime, the conditions that generate so many 'next cases' like Marcel Jacob."

In 2007, a Community Wellness Court was established in Whitehorse in a partnership between the Yukon Territorial Court, Yukon Department of Justice and the Yukon First Nations. It offers a therapeutic alternative for offenders with substance abuse problems, FASD or other cognitive impairments and/or other diagnosable mental health problems related to the commission of their offences. In 2008, the Yukon hosted the first-ever national conference on FASD and the law, which brought together experts and professionals to share information about cross-country FASD initiatives, including youth justice projects in Vancouver and Winnipeg and efforts by Correctional Service of Canada to identify the prevalence of FASD in the prison population.

Since then, the Yukon has developed a justice training curriculum on FASD, undertaken a prevalence study in the Yukon corrections population with Justice Canada and is developing greater collaboration between government departments.

In 2010, the CBA passed a resolution, put forward by its



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What is FASD?

- **Fetal Alcohol Spectrum Disorder is the term used to describe the medical diagnoses caused from maternal alcohol consumption during pregnancy. They include: Fetal Alcohol Syndrome (FAS); partial Fetal Alcohol Syndrome (pFAS); Alcohol-Related Neurodevelopmental Disorder.**
- **Not everyone who drinks alcohol during pregnancy will have a child with FASD: it also depends on genetics, maternal characteristics, nutrition, environment, development timing, reactions to other drugs and duration and extent of alcohol exposure.**
- **FASD manifests differently in every individual with an alcohol-related diagnosis.**
- **Some individuals with FASD, especially those with FAS, have facial anomalies, such as short horizontal eye length, a thin flat upper lip and a flattened midface, but most do not have any visible facial or other characteristics.**
- **Approximately half of individuals with FASD meet standard criteria for mental retardation (IQ less than 70).**
- **National guidelines for diagnosis of FASD were introduced in 2005. The challenge with diagnosis is not simply to identify brain injury, but to assess a person's ability in the exercise of judgment, planning, memory and the ability to cope independently with day to day life.**

Source: The Path to Justice: Access to Justice for Individuals with FASD, Yukon Government; Consensus Statement on FASD — Across the Lifespan, Institute of Health Economics, Government of Alberta.

"I would get a phone call and [my client] would always be embarrassed and upset to be calling me. "He'd say: 'Oh, I screwed up again' which I don't think is necessarily the case. I think I felt like everybody else was screwing up."

— Fia Jampolsky —

Cabott & Cabott, and member of the CBA FASD Advisory Committee, Whitehorse

Yukon branch, urging the federal government to avoid criminalization of people with FASD and allocate resources to develop solutions. CBA past-president Rod Snow recalls asking a meeting in Whitehorse in 2006 whether the branch should take on the issue of FASD in the criminal justice system. A judge sitting across the table responded immediately. "Of course you should. If you are not doing that, what good are you doing? I have a file this thick on the topic," he said, holding his hand about a foot above the table.

Fia Jampolsky, a former Legal Aid lawyer who now works for Cabott & Cabott in Whitehorse and serves on the CBA FASD Advisory Committee, remembers a client who couldn't spend more than three weeks out of the system. A "lost soul" who had been bounced around group homes

"We have to ask ourselves in each case, 'Do we have what this person needs to be able to help them?' and the sad reality is sometimes we don't."

— Chief Judge Karen Ruddy —
Yukon Territorial Court, Whitehorse

after his caregiver died, the 19-year-old was always in trouble for spontaneous crimes of opportunity: grabbing jackets off the wall or stealing penny jars from hotels. Sometimes the offences would escalate to break and enters or assault.

"I would get a phone call and he would always be embarrassed and upset to be calling me," she recalled in an interview. "He'd say: 'Oh, I screwed up again' which I don't think is necessarily the case. I think I felt like everybody else was screwing up."

For Jampolsky, he epitomized the conundrum of FASD in the criminal justice system. "I don't think his behavior is necessarily criminal," she says. "I think he's a victim more often than he's an offender and he lacks the services and resources that may have been able to stabilize him." He was diagnosed with Alcohol Related Neurodevelopmental Disorder (ARND), a form of FASD, but displays no physical symptoms of the disorder. "I think it is hard for people to see him as anything less than willfully disregarding the law," Jampolsky said. He wasn't in the wellness court program because he missed too many meetings and could not follow conditions.

Nils Clarke, executive director of Yukon Legal Services Society, estimates that FASD is a factor for between 30 and 40 per cent of his clients. "These are not people that are criminal masterminds committing sinister offences of forethought and premeditation," he observed in an interview.

Jampolsky tried to work within the system to find a solution that could break the cycle for her client. She asked the court for time to get assessments for a suspected cognitive disorder, a measure not normally available to adults under the *Criminal Code*. The court nonetheless agreed to the request, but by the time the assessment was ready, her client "would have spent so much time in jail that I would end up doing a sentencing with him and he would get time served," she said.

Efforts to get Jampolsky's client into adult services also failed. "They would say, 'This is voluntary so he has to be able to come in and make his meetings and tell us the path that he wants.' Well that's precisely the problem with an individual with FASD."

What would have made a difference, she believes, is a multi-sectoral approach to the young man's problems. "Everybody knew about him," Jampolsky points out. "He was a product of the foster care system so he has a file a foot thick. I know there are privacy interests, but I think more sharing of information and resources with a real focus on preventing him from coming into the system would have been the most important approach."

The last she heard, he was back in the system and a former legal-aid colleague was handling his bail review.

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"My role is to ensure that citizens have access to justice. In the Yukon, it's clear we could do better for those with FASD."

— Dennis Cooley —
Yukon Deputy Minister of Justice

A rough start in life

Lesley Carberry's son Carl was a handsome young boy who displayed none of the outward manifestations of FASD. That turned out to be part of the problem.

Unlike his younger brother, he didn't have the physical facial features — the thin upper lip, short eye slits and slightly recessed jaw — associated with Fetal Alcohol Syndrome. Frank, on the other hand, was a "funny-looking kid," Carberry told the Yukon FASD conference in 2008. "And thank goodness he was because that diagnosis afforded him a protection and services not available to his older brother, who didn't look funny and therefore didn't come to the attention of any medical professionals at the time."

Carl was handsome, bright, charming, "very verbal, very adept" and a people-pleaser. Teachers viewed him as capable and competent. But something was very wrong. "He was in trouble really from the day we met him," Carberry says. "His inability to accept consequences for actions, his inability to predict consequences for actions — looking back, it's all there."

She and her husband knew very little about the early history of their adopted children. In fact, Carl and Frank both had endured an abusive childhood in a Dene Nation community in the Northwest Territories. Carl had suffered a traumatic brain injury as a baby when his father smashed his skull against the wall. He spent over a year recovering in a medical foster home before being returned to his parents. His mother later took the two boys and moved to Whitehorse. The two brothers were apprehended and placed in foster care after they were discovered stealing food from a grocery store. Carl was 6 and Frank was 2.

They spent the next four years in a foster home where Carl was physically and sexually abused by his foster father and foster brother. Eventually, Carl and Frank were put up for adoption, their pictures appearing in an ad in the local newspaper. "Ray and I looked at them, and I said: 'I think this is it,'" Carberry remembers.

After a rigorous home study, the boys, ages 10 and 6, came to live with them. Frank had the benefit of supportive teachers and social workers who understood his diagnosis, but Carl struggled.

His teachers expected him to be able to perform at school and would make excuses for him when he couldn't. "There was no diagnosed disability," Carberry says. "He's charming, he's first nations; they wanted him to succeed. So they let him off with a whole lot of stuff." He had trouble understanding consequences and his parents' efforts to make him learn from his mistakes were futile.

Attempts to express love and support and talk things through were interpreted as judgment and created confusion and misunderstanding, Carberry says. Tough love and behavior modification didn't work. The family sought professional help, but the situation was blamed on a variety of factors, including adoption breakdown, overprotective and unrealistic parents and an incorrigible son. "Systems and professionals continued to look for reasons, to focus on something that could be 'fixed' — either our son or us," Carberry told the FASD conference. Carl started drifting from the family and took up with a community that was more accepting than his home: kids who were abusing drugs and stealing cars. It led to his first encounter with the criminal justice system.

He was 13.

No ordinary court

It's Monday afternoon in Whitehorse's Community Wellness Court and the first accused stands before Chief Judge Karen Ruddy.

OFFICIAL NOTICE/AVIS OFFICIEL

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Darren Vallentgoed of Schulich Law School in Halifax, has won the 2011 CBA National Military Law Section (NMLS) Law School, Sword & Scale Essay Prize. Mr. Vallentgoed's essay deals with the extraterritorial applicability of the Charter after the Omar Khadr decisions and Amnesty International v. The Canadian Forces.

The prize is presented annually for the best scholarly essay in military law or justice, public policy or public affairs related to Canadian military law affairs. The *Sword & Scale* Essay Competition prize consists of a monetary prize of $250 as well as paid registration for the NMLS annual PD conference in Ottawa held on June 14, 2011. The winning essay will be published in NMLS' electronic newsletter, the *Sword & Scale*.

Full details can be found on the CBA's website, at *http://www.cba.org/CBA/sections_military/main/*.

Darren Vallentgoed, de la Faculté de droit Schulich à Halifax, est le lauréat du Prix Salut militaire pour le Concours de dissertation des facultés de droit 2011 de la Section nationale du droit militaire (SNDM) de l'ABC. Sa dissertation traite de l'application extraterritoriale de la Charte à la suite des décisions portant sur Omar Khadr et de l'affaire *Amnistie Internationale c. les Forces canadiennes*.

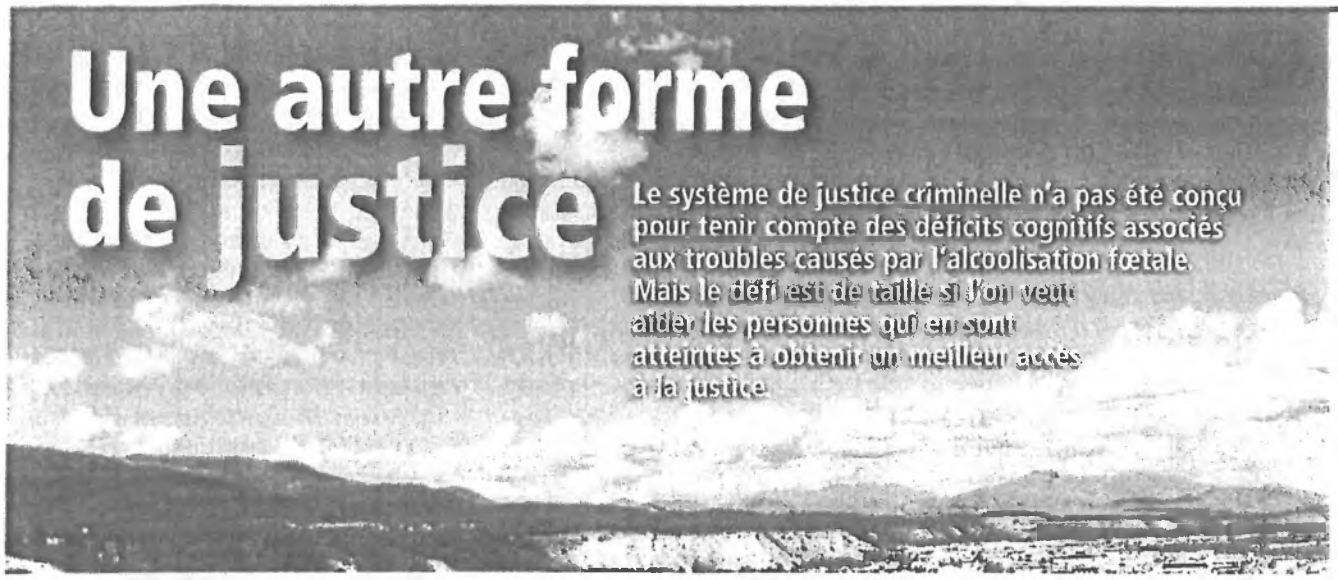
Le Prix est présenté, à tous les ans, à l'étudiant ou l'étudiante en droit qui rédige la meilleure dissertation sur un thème de droit militaire ou de justice militaire, de politiques publiques ou d'affaires publiques se rapportant au droit militaire canadien.

Le gagnant reçoit un prix en espèces de 250 $, ainsi qu'une inscription gratuite à la conférence annuelle de développement professionnel de la SNDM, qui a eu lieu à Ottawa le 14 juin 2011. La dissertation de M. Vallentgoed sera publiée dans *Salut militaire*, le bulletin électronique de la Section.

Vous trouverez tout renseignement complémentaire sur le site de l'ABC: *http://www.cba.org/ABC/sections_military_f/main/*.

Une autre forme de justice

Le système de justice criminelle n'a pas été conçu pour tenir compte des déficits cognitifs associés aux troubles causés par l'alcoolisation fœtale. Mais le défi est de taille si l'on veut aider les personnes qui en sont atteintes à obtenir un meilleur accès à la justice.



Lesley Carberry place son bras autour des épaules d'un jeune homme souriant, dans la cuisine ensoleillée de Whitehorse. Elle lui présente votre correspondante et lui demande s'il sait pourquoi il est venu. « Cerveau blessé », répond-il.

Frank, 33 ans, souffre de l'Ensemble des troubles causés par l'alcoolisation fœtale (ETCAF). Son frère Carl, 36 ans, également. Ils ont été adoptés il y a 26 ans par Leslie Carberry et son mari, Ray Marnoch. « Cerveau blessé » est la manière dont Frank exprime le dommage permanent qu'a subi son cerveau parce que sa mère buvait durant sa grossesse.

L'ETCAF est un terme général utilisé pour décrire un ensemble complexe de blessures cérébrales résultant de l'exposition prénatale à l'alcool. C'est l'une des premières causes de retards mentaux, de troubles cognitifs et de développement au Canada. Près d'une personne sur 1000 en serait atteinte, beaucoup plus dans les régions où la consommation d'alcool et la pauvreté sont plus répandues. Mais l'ampleur du phénomène demeure peu connue, vu l'absence d'évaluation systématique de l'ETCAF.

Chaque cas est différent et il dépend de la consommation de la mère. Les symptômes incluent la mauvaise mémoire, l'impulsivité, une incapacité à juger des conséquences de ses actes et le fait d'être facilement influencé par les autres. C'est une condition permanente qui en place plusieurs sur la voie de la délinquance.

L'ETCAF signifie que Lesley Carberry et son mari soutiennent toujours financièrement leurs enfants adultes et les guident à travers les hauts et les bas de leur vie quotidienne. Carl, qui vit à Edmonton avec sa conjointe et ses deux filles, n'est pas capable de conserver un emploi stable. Frank, qui habite à la maison, travaille dans un grand magasin dans le cadre d'un programme de soutien aux employés. Il rêve d'y travailler à temps plein.

« Je m'inquiète du fait que quand je mourrai et que mon mari mourra, il n'y aura personne pour s'occuper de nos enfants, dit Mme Carberry. Je m'inquiète du fait que s'ils se mettent dans le trouble parce qu'ils n'ont plus le même soutien, personne ne comprendra ce qui se passe. »

De mauvaises présomptions

Le système de justice criminelle est bâti autour d'une série de présomptions qui sont en contradiction avec la réalité de l'ETCAF. Le système assume que les gens « peuvent faire des choix informés et volontaires au moment d'exercer leurs droits ou de prendre la décision de commettre des crimes », ont récemment écrit le professeur Kent Roach et la juriste du Yukon, Andrea Bailey, dans un article sur la pertinence de l'ETCAF en droit criminel canadien.

Les principes de détermination de la peine sont aussi influencés par des présomptions de libre arbitre. La dissuasion, la dénonciation, la

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"How are you feeling?" the judge asks with a kind smile. "I'm feeling anxious," the woman replies in a quiet voice. She had missed a recent court appointment, but the judge notes it is her first slip, suggests a change in scheduling and gently reminds her about the importance of showing up.

This sets the tone for the rest of the afternoon. Every sign of progress earns a "Good job!" from the judge. "It's been a long road, but it will be nice to get to the end of it," she tells a young dark-haired man wearing an Evil Knieval T-shirt and a black hoodie. People who have failed to follow through on commitments are quietly but firmly set straight. "Mr. Blanchard, we've missed you," Judge Ruddy tells a man who has missed the last two court appearances. "If you don't show up, we can't help you. You need to think long and hard about whether you want to be in this process. If no, we'll go to sentencing on June 13."

Clearly, this is no ordinary court.

Therapeutic courts have gained popularity over the past 20 years as part of a move to restorative justice and a focus on rehabilitation and reconciliation. They have been established in Canada, the United States and Britain in response to the stress placed on the system by increasing numbers of offenders and the recognition that the traditional approach addresses the symptoms but not the cause of their legal problems, according to a paper on the Yukon wellness court prepared by the Four Worlds Centre for Development Learning in Alberta.

They are based on the assumption that an integrated program of intense supervision, treatment, therapeutic support, and skills development will produce better results for the offender (who must be willing to take responsibility for his or her behavior), the victims and the community. But finding resources to make it work, especially for structured supervision, can be a challenge.

One of the most important roles of the Yukon wellness court is getting a proper diagnosis for offenders with suspected FASD. Once the individual is found to be a suitable candidate for the program, the judge can order a formal FASD assessment. It costs $3,000 to $6,000; separate funding is available under the program since FASD assessments are not routinely covered by provincial or territorial health plans.

"Once you've got that assessment, it's not limited to this process," Judge Ruddy said. "Where people's expectations of

réhabilitation et la promotion d'un sens de la responsabilité assument toutes que les délinquants sont capables de faire des choix, de comprendre les conséquences de leurs actions et d'apprendre de leurs erreurs.

« Ces présomptions ne cadrent pas avec ce que l'on sait de l'ETCAF », ont conclu les deux auteurs.

Un tribunal pas comme les autres

Le Yukon est un leader quand vient le temps de faire face à la réalité de l'ETCAF dans le système de justice criminelle. En 2007, Whitehorse a créé un Tribunal communautaire du mieux-être, en partenariat avec la Cour territoriale du Yukon, le ministère de la Justice et les Premières nations du territoire. Cette cour offre une alternative thérapeutique pour les délinquants avec des problèmes de consommation, aux prises avec l'ETCAF ou d'autres formes de troubles mentaux.

Dans une petite juridiction comme celle-ci, les juges, les avocats et d'autres employés de la cour ont rapidement noté que les mêmes personnes revenaient toujours devant les tribunaux pour faire face aux mêmes accusations et au non-respect de conditions.

Fia Jampolsky, une ancienne avocate de l'aide juridique qui travaille maintenant chez Cabot & Cabot, à Whitehorse, se souvient d'un client qui ne pouvait passer plus de trois semaines à l'écart du système judiciaire. Le jeune homme de 19 ans était toujours dans le trouble pour des crimes spontanés : voler des manteaux sur des murs, voler des pots de monnaie dans des hôtels... Parfois, les infractions escaladaient jusqu'à l'entrée par effraction ou les voies de fait.

« Je recevais un coup de téléphone et il était toujours gêné et frustré de devoir m'appeler », se souvient Me Jampolsky.

Pour elle, ce jeune homme incarnait la tragédie de l'ETCAF dans le système de justice criminelle. « Je ne pense pas que son comportement soit nécessairement criminel, dit-elle. Je crois qu'il est une victime plus souvent qu'il est coupable, en ce qu'il manque de services et de ressources qui pourraient l'aider à se stabiliser. »

Il a été diagnostiqué avec des Troubles neurologiques du développement liés à l'alcool (TNDLA), une forme d'ETCAF, mais il n'affiche aucun symptôme. « C'est difficile pour les autres de le voir autrement que comme une personne qui ne respecte pas la loi », note Me Jampolsky. Il n'était plus devant le tribunal du bien-être parce qu'il avait manqué trop de rencontres et ne pouvait respecter ses conditions.

Les tribunaux thérapeutiques comme celui du Yukon ont gagné en popularité au cours des 20 dernières années. Ils sont basés sur l'hypothèse qu'un programme intégré d'intense supervision, de soutien thérapeutique et de développement des habilités donnera des meilleurs résultats pour le délinquant, les victimes et la communauté.

L'un des rôles les plus importants du tribunal du mieux-être du Yukon est d'obtenir un diagnostic pour les gens en apparence atteints de l'ETCAF. Ce diagnostic aide par la suite à établir un plan de mieux-être aux délinquants, qui inclut une évaluation de leurs habilités.

Mais pour faire de véritables progrès, les individus ont besoin d'un environnement de vie stable, sobre et supervisé. Et c'est peut-être là le plus grand défi, note la juge en chef du tribunal, Karen Ruddy. Malgré l'existence de certaines familles comme celle de Lesley Carberry ou de centres comme la maison de transition de 20 lits opérée par l'Armée du salut à Whitehorse, « la réalité est que nous n'avons pas toujours » ce dont ils ont besoin, reconnaît la juge.

Signes de progrès

L'ABC travaille avec le ministère fédéral de la Justice pour trouver des solutions au problème de l'ETCAF dans le système de justice criminelle. En 2010, l'Association a adopté une résolution exhortant Ottawa d'éviter de criminaliser les gens aux prises avec l'ETCAF et d'allouer des ressources pour développer des solutions. Puis, en mars dernier, un comité qui travaille sur le sujet a entre autres recommandé d'amender le Code criminel pour permettre aux tribunaux d'ordonner une évaluation des adultes susceptibles d'être touchés. Les changements proposés permettraient aussi au juge de ne pas tenir compte de certaines obligations du code, comme des peines minimales, dans certaines circonstances.

Quand les ministres de la Justice du pays se sont entretenus de la question de l'ETCAF en octobre 2010, ils ont donné leur appui aux efforts de sensibilisation de l'ABC et ont indiqué leur volonté de continuer à échanger avec l'ABC sur le sujet.

Lesley Carberry est encouragée par tous ces efforts, mais l'expérience lui a appris que ces changements doivent être accompagnés par des plans de soutien communautaire pour faire une différence à long terme. « Pour moi, ce qui est prometteur, c'est de voir plusieurs communautés qui luttent avec ce problème de supporter tant de délinquants aux prises avec l'ETCAF. Et ils prennent vraiment les choses en main et tentent de savoir quoi faire. »

Quand on lui demande ce qui l'a soutenu pendant toutes ces années passées à élever deux enfants avec l'ETCAF, elle répond immédiatement : « Mes enfants. Mes enfants sont les personnes les plus fortes que je n'aie jamais rencontrées. Ils se relèvent chaque fois et se remettent à marcher. Je ne suis pas certaine que je pourrais faire la même chose. »

« Mes enfants sont mes héros. » N

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them need to be modified that assessment is there and can still be used for other purposes."

The assessment helps the court develop a wellness plan for each individual. The diagnosis is accompanied by an assessment of individual skills and abilities and recommendations on how to deal with them in the justice system. "The nature of the disorder differs from person to person," Judge Ruddy points out. "It helps you clearly understand what you can expect from a particular individual in terms of what they can do and what they can't do."

The nature of FASD means their behavior is not going to improve over time. The goal is to create an environment and structure that allows them to function in a way that keeps them from coming into conflict with the law, Judge Ruddy says. "For a lot of [FASD clients], success is keeping them from offending substantively over the period of time that they're with the court."

Life skills programs such as Challenge, which also offers vocational training and employment opportunities, provide some of that structure. But to make real progress, the individual needs a sober, stable, supervised living environment. And that's been the biggest struggle, Judge Ruddy admits. "There have actually been people that we have had to turn away because we can't find that for them."

Sometimes family can help. The Adult Resource Centre (ARC), a 20-bed halfway house for adult men operated by the Salvation Army in Whitehorse, is another option. For individuals who can function at a higher level and don't need 24-hour supervision, a semi-independent living situation can work. "We have to ask ourselves in each case, 'Do we have what this person needs to be able to help them?' and the sad reality is sometimes we don't," she says.

Dennis Cooley, the Yukon deputy minister of justice, says the biggest challenge is finding funding and co-ordinating services to ensure clients with FASD get what they need. "My role is to ensure that citizens have access to justice," he said in an interview. "In the Yukon, it's clear we could do better for those with FASD."

What would be ideal, Judge Ruddy says, is a comprehensive housing project that provides programs and a supervised living environment. Longer-term programs to transition offenders back into the community are also needed.

"Having something that assumes responsibility for meeting

"These are not people that are criminal masterminds committing sinister offences of forethought and premeditation."

— Nils Clarke —

Executive director, Yukon Legal Services Society, Whitehorse

those needs outside of the justice system would be wonderful. But it's going to take time for us to get to that stage. It's an evolution."

Lucky to be alive

Carl was in and out of the criminal justice system from age 13 until he was over 30. As a youth, he was involved in stealing cars. He withdrew from his parents; a series of psychiatrists framed his problems as attachment disorder and adoption breakdown. A cognitive disorder was never considered.

"We were at a loss," Carberry remembers. "It took us a long time to understand that someone could be as bright as Carl and still be affected by pre-natal exposure."

At age 15, he left home in a stolen vehicle. Later, he wound up in jail in Edmonton after being caught in a high-speed police chase in another stolen car. Back on the street with a group of other young troubled kids, he got involved in drugs and alcohol. "I don't know all the details of what happened there," she says. "I know enough to know that he's really fortunate to still be alive."

But Carberry and her husband never lost contact with Carl and eventually rebuilt the relationship. She has a theory about why he left. "He knew he had to go because he felt he was going to take us down," his mother says. "I think he was right. I don't think we were going to survive with him here."

Carl was finally diagnosed with FASD in his early thirties. He understands that his life will be permanently affected by what has happened to his brain. But after the birth of his two daughters, he gave up criminal activity (he has not been in trouble with the law for the past six years) and stopped using drugs and alcohol. He wants his daughters to have a better dad than he did.

Carl is a good father who loves his children, Carberry says, but he can't manage without support from his family. "The key is to keep him in that strong husband/father role without overwhelming him," she says. "I don't have many fears that he's going to slide back as long as we keep a support network around and as long as the money can last."

Recently when she asked Carl what might have made a positive difference for him, he had two observations. First, when he was caught misbehaving, as a child, he felt it was like a little game: there weren't enough consequences so he didn't understand the path he was on. Second, he said, "People just need to be kind."

As for what the criminal justice system could have done differently, he says his natural father should have been charged with abusing him. "His father has never had any consequences

CATHIE ARCHBOULD

for anything he's ever done to this kid," Carberry says. "So Carl grew up knowing that you could do those things to somebody and it didn't matter."

Signs of progress

FASD is a multifaceted issue with no easy solutions. There are no national surveillance or prevention strategies and research activities are fragmented and underfunded. Multiple sectors, including health, social services, education, the courts and corrections, are involved which means approaches to services for individuals with FASD and their families can be haphazard.

The criminal justice system has proved to be a blessing and a curse for offenders with FASD. Some would never have received a diagnosis or any kind of therapeutic intervention if they hadn't committed a crime. On the other hand, the system itself creates unique challenges for them. Their inability to connect behavior to consequences makes the process confusing and stressful; their impulsive behavior makes it a challenge to comply with routine conditions and probation orders, and they struggle in the aggressive and uncertain prison environment and are more likely to be victimized by other inmates, according to a 2008 report submitted to the Yukon Department of Justice by the Canadian Research Institute for Law and the Family.

When federal, provincial and territorial (FPT) ministers responsible for justice and public safety met in October, 2010, there was strong support to continue to make FASD and the justice system a priority item, and to engage the CBA in dialogue about FASD as an access to justice issue.

In March, 2011 the CBA FASD Advisory Committee and the Federal Provincial Territorial FASD Steering Committee recommended measures to improve access to justice for individuals with FASD. They include education of justice professionals, resources for community alternatives such as supportive housing and alternative measures and diversion programs that hold individuals accountable "consistent with their degree of responsibility" [see sidebar below.]

The committee also wants the *Criminal Code* amended to address the unique challenges that FASD presents. For example, it recommends taking a page from the *Youth Criminal Justice Act* to allow courts to order assessments of adults suspected of having FASD. (Currently, courts cannot order assessments for suspected cognitive disorders in adults unless the accused is considered unfit to stand trial or not criminally responsible by reason of a mental disorder. These provisions do not apply or are considered inappropriate for individuals with FASD.) The committee also recommends giving the judiciary discretion when sentencing individuals with FASD and removing barriers including mandatory minimum sentences.

Nils Clarke favours dual track sentencing provisions for FASD and any other cognitive disorder where diminished capacity is recognized. "I would like the judges to have the tools to have that parallel-track sentencing regime," he said. "There should be national consensus and it shouldn't be that controversial. We should move forward and strike while the iron is hot."

Lesley Carberry is encouraged by the efforts she sees to deal with the issue in the criminal justice system, but experience has taught her that changes must be accompanied by corresponding community support plans to make a difference over the long haul. "What's promising for me is just to see different communities struggling with how to support so many of these high-volume offenders with FASD. They're really stepping up and saying, 'We need to know how to do this,'" she says, "It's very, very tough stuff they're trying to do."

When asked what has sustained her through the years of raising two children with FASD, she answers immediately: "My kids. My kids are the strongest people I have ever met. They just get up and keep going. I'm not sure I could do that.

"My kids are my heroes." N

Beverley Spencer is editor-in-chief of *National*.

A call to action

The CBA FASD Advisory Committee and members of the Federal Provincial Territorial FASD Steering Committee have suggested the following measures to improve access to justice for people with FASD:

- **Allocate resources for community alternatives, including supportive housing and social services, to avoid the unnecessary criminalization of individuals with FASD;**
- **Develop alternative measures/ diversion programs in the criminal justice system that hold individuals with FASD accountable consistent with their degree of responsibility;**
- **Educate justice system professionals, including police, judges and lawyers, about FASD;**
- **Add sections of the *Youth Criminal Justice Act* that offer special protections to youth to the *Criminal Code* to accommodate the unique challenges presented by individuals with FASD. That would include:**
  - **a. Allowing courts to order assessments of adults that are believed to be affected by FASD at any stage in the proceedings and as early as possible;**
  - **b. Ensuring that counsel are present in encounters with the criminal justice system;**
  - **c. Using case conferencing at an early stage to get collaboration among key players in deciding an appropriate response.**
- **Encourage all government ministries to collaborate to share information and co-ordinate and integrate services;**
- **Recognize that FASD is a life-long disability distinguishable from a mental illness that requires appropriate legal and social accommodations;**
- **Allow all sentencing options to be available to judges to allow them to devise just and appropriate dispositions for people affected by FASD;**
- **Limit unnecessary conditions, including bail conditions and terms of probation, to avoid the unnecessary accumulation of administration of justice breaches;**
- **Review standardized checklists and risk assessments tools used by courts and corrections to ensure their validity for people affected by FASD.**

Superior Court Judge Michael I. Jeffery
Second Judicial District
Post Office Box 270
Barrow, Alaska 99723
(907) 852-4800

Suggestions for more user-friendly court hearings

Barrow has about 4,500 people. It's the farthest north community in the United States. The Barrow court serves an area about half the size of California, with a population of about 10,000 people. We do a lot of telephonic hearings. Most of the population is Inupiaq Eskimo, but there are a large number of other racial and cultural groups, too. These suggestions are offered in a spirit of humility, knowing that there are many different kinds of courts, different types of cases and different amounts of time available for each case. These thoughts are personal to me based on over 29 years as a judge in this community: they are not an official position of the Alaska Court System.

- Realize that a person who appears to understand everything, and even says they understand, **may not**. There may be language problems and cultural misunderstandings about the justice system. There may be mental conditions like Fetal Alcohol Spectrum Disorder in which (for example) a young adult in his or her 20's actually has the ability to understand of an elementary school student. Some "red flags" that I consider in being especially careful to accommodate the person:
  - ✓ Diagnosis of FAS/FAE/FASD or other mental challenge.
  - ✓ A very traditional type of person who may just not understand the Western justice system.
  - ✓ Judge's personal knowledge or indication in file that the person had an alcoholic mother and/or a very disrupted childhood.
  - ✓ A follower in criminal activity but is the person getting caught.
  - ✓ Keeps getting into trouble multiple times, especially in similar type of cases.

- ✓ In special education or left school early.
- ✓ Others say the person is impulsive—does not think before doing actions.
- ✓ Back in court for multiple, relatively minor, probation violations.

- Slow down and check in with a person during an explanation of rights or similar hearing to make sure that the person knows what is going on. Pauses are probably necessary between different major points just to make sure the concepts sink in. When questions are being asked, pauses may be necessary for the person to respond in a manner that is comfortable and that will allow sharing of information that the person wants to say. Offer a chance to consult again with the attorney after the explanation.
- Consider using visual aids, such as writing on large sheets of paper or on a wipe on/wipe off board. Logistics in the courtroom may make this difficult.
- A rural court like Barrow involves frequent use of telephonic hearings. Using the telephone is extremely convenient and cost-effective for everyone. But such hearings present special issues. If silences are necessary during telephonic hearings, explain what is going on so that the frustration level for the person(s) on the phone can be reduced. Sometimes, it's impossible to do a telephonic hearing with certain people involved in the justice system. The lack of personal contact may reduce their ability to understand. It may be possible simply to combine two hearings done in person at a future date instead of having one telephonic (like a change of plea) and the other (like a felony sentencing) in person. We have arranged for a preparation of a presentence report and then conducted a combined change of plea and sentencing with a remand to jail immediately following the hearing.
- Be sensitive to your own cultural biases. Someone may not look at you directly. It may be the person is ignoring you. But, in that person's culture, it may be a sign of respect.

Some shy juveniles dealing with justice system personnel in this part of Alaska may raise their eyebrows to indicate "yes". Though not saying anything, they are responding to the question. Saying "he let me do something" might mean the other person allowed it to happen or it might mean that the other person forced it to happen.

- Do not assume that the attorneys involved have had the time to explain what is needed to their clients in a way that the client can understand. There may have been a lack of time or a lack of understanding of a client's mental conditions (such as FASD). I believe that it's the judge's responsibility to make sure the persons involved in the hearing understand what happened.
- Where possible, use plain English in what is said and what is written. Written forms should have places for a defendant or juvenile to initial so that the person focuses on each portion of the form. Concrete language is best. Having "white space" and easy to read type is helpful, even if it uses more paper! We need to avoid having the whole experience being a "blur" of words.
- When appropriate, check in with the lawyer's client about their personal schedule when setting a court hearing. The convenience of the judge and attorneys may not coincide with other factors like making sure that a child's hearing occurs after the school day.
- Once structure has been provided to a juvenile by a conduct agreement and treatment, the juvenile may do much better. Busy professionals may suggest that the interventions are no long needed. Be very cautious about removing the structure, since that portion of the environment of the juvenile may be the source of the success being experienced.
- **Bottom line: the goal of timely judicial decision making ("moving cases") must not displace having respect for all the participants' need to understand what is happening.**

GENERAL CONDITIONS OF PROBATION

I KNOW THAT I MAY BE SENT TO JAIL IF I DON'T OBEY ALL THESE RULES
I AM PUTTING MY INITIALS TO SHOW THAT I UNDERSTAND

1. I will follow all the direct court orders in this sentencing order by the deadlines stated in this order.
My initials: [_____]

2. I will contact my probation officer the next work day after my sentencing (if no jail time) or the next work day after I get out of jail. **My initials:** [_____]

3. I will ask my probation officer before moving to a new place, leaving my approved region of residence or before getting a new job. **My initials:** [_____]

4. I will try to find a job, if I can. When I don't have a job, I will give my probation officer proof of my job search efforts or other activities if asked to do so by my probation officer.
My initials: [_____]

5. I will visit my probation officer before the tenth of each month, or as otherwise directed. If my probation officer says it is okay, I can call or fax a report instead.
My initials: [_____]

6. I will not carry firearms or any hidden weapon.
My initials: [_____]

7. I will let my probation officer know about any friends or family on felony supervision or have a felony conviction. I will not associate with other felons without first getting permission from my probation officer. Brief incidental contact is okay.
My initials: [_____]

8. No matter where I am, I will stay sober. I cannot drink any alcohol, including "homebrew".
My initials: [_____]

9. I will stay out of trouble and follow the laws.
My initials: [_____]

10. I will tell my probation officer if I buy or sell a car, truck, snow machine, or ATV.
My initials: [_____]

11. I will follow any special rules given by my probation officer or the judge, in order to enforce these general and special conditions of probation.
My initials: [_____]

SPECIAL CONDITIONS OF PROBATION FOR XXXXXX

I KNOW THAT I MAY BE SENT TO JAIL IF I DON'T OBEY ALL THESE RULES
I AM PUTTING MY INITIALS TO SHOW THAT I UNDERSTAND

1. I will stay sober. I will not drink, order, make or possess alcoholic beverages, including homebrew. I will only live in a residence where there is no alcohol (including homebrew) present.
My initials: [_____]

2. I will be "drug-free." I will not use or possess any illegal drugs, including marijuana. I will only live in a residence where there are no illegal drugs (including marijuana) present.
My initials: [_____]

3. I will promptly give samples of my breath (including a "PBT") or urine at the direction of my probation officer to test for use of alcohol or illegal drugs. I will promptly give enough of a sample so that the test(s) can be done.
My initials: [_____]

4. I will not knowingly enter or remain at a place where alcohol is the main thing being sold. This rule includes bars, liquor stores, and bootlegger's houses.
My initials: [_____]

5. My Probation Officer can search me without a warrant or the Probation Officer can tell a police officer to do the search

without a warrant. The search can include my body, my personal property, my living space, my vehicle, or any vehicle that I control. This search is for alcohol, including homebrew; illegal drugs, including marijuana, and items used for taking drugs ("drug paraphernalia").
My initials: [_____]

6. Within thirty (30) days after my probation begins, I will contact an alcohol/substance treatment program approved by the Department of Corrections and arrange to have an assessment for alcohol/substance abuse treatment. I will take the first available assessment for treatment. If treatment is recommended, I will enter, actively participate and successfully complete the treatment, which may include residential treatment of up to **thirty (30) days**.
My initials: [_____]

7. As arranged by my Probation Officer, I will get an evaluation for alternatives to violence/anger management from a program approved by the Department of Corrections. I will follow any treatment recommendations in the evaluation. I will not stop treatment without approval of my Probation Officer.
My initials: [_____]

8. I will sign the permission slips ("releases") so that the Department of Corrections can monitor my participation and attendance at any of the evaluations and treatment programs and receive copies of evaluations, progress reports and discharge summaries.
My initials: [_____]

9. I will submit to taking of a swab from inside my cheek and the taking of fingerprints for the DNA Identification System when my Probation Officer asks me to.
My initials: [_____]

10. I will have no contact with the victim in this case, XXXXX without permission from my supervising probation officer. In addition, I will not use the services of any employee of City Cab in Barrow, Alaska.

My initials: [_____]

11. I will have no contact with co-defendants XXXXXX & XXXXXX without permission from my probation officer. But incidental contact is okay.
My initials: [_____]

12. If restitution is ordered, I will make payments on a schedule approved by my probation officer. I will provide income and expense records to help set up a reasonable payment plan.
My initials: [_____]

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA

SECOND JUDICIAL DISTRICT AT BARROW

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
_____,)
)
Defendant.)
DOB: _____ DOV: _____)

BAIL ORDER

Date Judge's Initials

This order is valid until _____ _____

_____ _____

_____ _____

Case No. 2BA-_____-_____ CR

ATTORNEY:

[ ] I will get a private attorney. My initials: [ ]

[ ] I want an attorney and the court agrees I cannot afford one:

[ ] My attorney is the Public Defender. P.O. Box 429, Barrow, AK 99723. Phone: 852.2520 or 1.800.478.2521. My initials: [ ]

[ ] My attorney is the Office of Public Advocacy
100 Cushman Street, Suite 100,Fairbanks, AK 99701.
Phone: 907. My initials: [ ]

[ ] My attorney is _____
Address: _____
Phone: _____ My initials: [ ]

[ ] I do not want to have an attorney. I know I can ask for an attorney later. My initials: [ ]

COURT DATES:

[ ] My next court date is _____ at _____ for
[ ] pretrial conference [ ] omnibus hearing [ ] _____
My initials: [ ]

[ ] Another court date is _____ at _____ for
[ ] calendar call [ ] _____ My initials: [ ]

[ ] Another court date is _____ at _____ for
[ ] jury trial [ ] _____ My initials: [ ]

[ ] I can call in for all my hearings except my jury trial. I have to be in Barrow for my jury trial. Phone: 907.852.4800 or the "866 line."
My initials: [ ]

BAIL PROMISES: FOLLOW THESE RULES AND BE SUCCESSFUL ON BAIL!

I promise the Judge/Magistrate that I will follow the rules that the judge/magistrate has checked.

[__] I will stay away from alcohol completely. [0.00 BrAC] [NO alcohol] My initials: [_____]

[__] I will be "clean" of illegal drugs and stay away from them. [NO illegal drugs] My initials: [_____]

[__] I will only be in places that have no alcohol and no illegal drugs. My initials: [_____]

[__] I will take a "PBT" when an officer asks me to. I know the officer has to have a good reason for asking. My initials: [_____]

[__] I will go to the police station with my photo id EVERY DAY and take a "PBT." In Barrow, I will go between 11:00 a.m. and 1:00 p.m. In a village, I will go during the times set by the village police officer. My initials: [_____]

[__] While in town, I will ONLY be a passenger in a car, truck, snow machine or four-wheeler. My initials: [_____]

[__] I will stay away from: _____
_____.
[Including NO calls, texting, sending letters or email, Facebook posts, My Space or other messages, either].
My initials: [_____]

[__] I will always be at least 100 feet away from this place:
_____.
My initials: [_____]

[__] I can go to this place ONCE with an officer to get my personal things.
My initials: [_____]

[__] I will be with _____ who is my "third party custodian"
[__] all the time [__] _____. My initials: [_____]

[__] I will let the police search my living space, my clothes, or my car/truck for
[__] alcohol [__] illegal drugs [__] weapons. They don't need a warrant.
My initials: [_____]

[__] I will be inside or right beside a house [__] from _____p.m. to _____ a.m. OR
[__] at times set for me by my probation officer. My initials: [_____]

[__] I will stay in touch with my attorney. My initials: [_____]

[__] If I change where I live, I will tell my attorney or the court within a day.
My initials: [_____]

[__] I will get a written OK from the Court before I leave
[__] Alaska and [__] Barrow [__] _____ My initials: [_____]

[__] **I will stay out of trouble and follow all the laws.** My initials: [_____]

[__] _____
_____ My initials: [_____]

**** YOU MAY BE ARRESTED WITHOUT A WARRANT IF YOU VIOLATE ANY OF THE BAIL PROMISES****

RELEASE OR BAIL BOND:

[__] **"Own recognizance."** I do not have to give any money to be released, But if I do not show up for court or follow the rules, I could be arrested and put in jail. My initials: [_____]

[__] **Unsecured appearance bond.** I don't have to give any money right now. But the state could get the money from me later if I don't follow the rules. The bond is an "appearance bond" for $ _____. This bond is to make sure I come to court for all my hearings.

My initials:[_____]

[___] **Other bonds.** I have to get everything arranged before I can get out of jail. Any money I give can be lost to the State if I do not follow the promises I have made.

[___] The bond is a **cash "performance bond"** for $ _____. Cash in that amount has to be given to the jail or court before I can get out of jail. This bond is to make sure I follow all the promises except the one about coming to court. My initials: [_____]

[___] The bond is an **"appearance bond"** for $ _____. Either cash in [___] full amount or [___] 10% of the amount, or a bond from a bonding company has to be given before I can get out of jail. This bond is to make sure I come to court for all my hearings.

My initials: [_____]

[___] **Not bailable.** The judge/magistrate has decided I have to stay in jail right now. I can ask for a bail review later on. My initials: [_____]

AGREEMENT BY DEFENDANT

I PROMISE to follow the rules the judge/magistrate checked. I know I can get in trouble if I don't. I could be put in jail and the State could take my bail money. The police could charge me with new crimes like "Violation of Conditions of Release," "Failure to Appear," and "Unlawful Contact." I give permission for the Clerk of Court to accept for me any paperwork needed for the state government to get the bail money if I cannot be found.

_____ Today's date: _____

My name (sign your name)

_____

My address for mail

Phone numbers: Cell_____ Home_____ Work_____

PROMISE BY THIRD PARTY CUSTODIAN

I accept the duty of making sure the defendant follows the promises made in this court form. I will make sure the defendant comes to court or jail as ordered by the Judge/Magistrate. I understand that I can be charged with a misdemeanor crime that has ☐ **up to one year in jail and up to a $10,000 fine or** ☐ **up to 90 days in jail and up to a $2,000 fine if I do not call the police right away if the defendant does not follow the bail promises in this case.**

Custodian's Signature	Date of Birth	Home Phone
Residence Address City State		Work Phone

COURT ORDER

Based on the above information, the Court makes the following order:

1. **The defendant must obey all promises checked in this court form.**
2. **Arrest without a warrant is allowed for violation of any of the bail conditions.**
3. **If an attorney is "checked" above, that attorney is appointed to represent the defendant.**
4. **The defendant shall be released, after any required bail has been posted or other court order such as a court-approved third party custodian has been satisfied.**
5. **The defendant may be transported to any appropriate jail if the defendant has not posted any required bail within 48 hours.**

Date **Judge/Magistrate**

I certify that copies distributed to: ☐ Defendant ☐ Barrow jail ☐ Village of _____ Police (fax)
☐ DA ☐ PD ☐ Defense Attorney _____ ☐ Adult Probation ☐ _____
☐ _____ on _____, _____, Clerk.

THE SUPERIOR COURT FOR THE STATE OF ALASKA
SECOND JUDICIAL DISTRICT AT BARROW

In the Matter of:)
)
)
AKA)
)
A minor under 18 years of age.)
)
Date of Birth: _____) ☐ CONDUCT AGREEMENT

CASE NO. 2BA- - - DL ☐ CONDITIONS OF PROBATION

I WILL PUT MY INITIALS IN THE [_____] TO SHOW I UNDERSTAND AND AGREE WITH EACH RULE.

1. I won't drink alcohol. [_____]

2. I won't use illegal drugs like marijuana. [_____]

3. I will take a "PBT" or "UA" test when the police or the probation officer asks me to. [_____]

4. I won't buy or carry any weapons, unless I'm out hunting with an approved adult. [_____]

5. The police or my probation officer can search my clothes, things I am carrying, my living space or a vehicle I'm in for alcohol, drugs, or weapons. [_____]

6. I will come to my court hearings when I'm supposed to. [_____]

7. I will follow the rules of my parents or guardians or the probation officer. [_____]

8. I will go to school when it is open and follow their rules. [_____]

9. I will stay where I am living or be with my parent or guardian or other approved adult between 10:00 p.m. and 7:00 a.m. every night. [_____]

10. I will stay out of trouble and follow the law. [_____]

Special Rules. These rules are part of this case. _____, Judge

11. will talk to the counselors about what kind of treatment I may need to help me stop using alcohol or illegal drugs. [_____]

12. I will do the treatment the counselors say to do. Treatment might be in Barrow with Inupiat Teens Taking Control or off the North Slope. [_____]

13. I will sign papers so the probation officer knows about the assessment and treatment. [_____]

14. I will also follow these rules:

_____

_____. [_____]

I understand all these rules and I will follow them.

_____ Witness: _____
My signature Probation Officer

Promise of parents or guardians:

We also understand these rules. We will make sure the minor follows them, and we will call the police if the minor does not do so. We understand that if the minor does not follow them, the minor could be arrested and put in a locked place for juveniles. We agree to bring the minor to the court hearings.

_____ _____
Parent/Guardian/Custodian Parent/Guardian/Custodian

COURT ORDER

Based on these promises, IT IS HEREBY ORDERED that the minor follow these rules. The minor can be released from any detention.

Recommended on _____ Effective Date: _____
(date)

_____ _____
Superior Court Master Superior Court Judge
Michael I. Jeffery
Type or print name

I certify that on _____
a copy of this document was sent to:

☐ DJJ ☐ Minor ☐ Attorney ☐ Parent/Guardian

☐ DA ☐ GAL ☐ Placement Facility ☐ Other: _____

Clerk: _____

PROBATION CONDITION

JUSTICE AND EQUALITY FOR ALL

Keep your eyes on the dream

Abstain

Go to court

Appointment

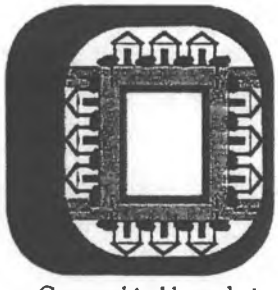
Break in tools

Report ISSP

Counselling

Curfew

DNA testing



Geographical boundaries

Employment & training

Keep the peace

Release to

School

Reside

Auto related

Report PO

No contact

No weapons

ID required

JAIL ALTERNATIVE SERVICES

State of Alaska Department of Corrections

Purpose

- The Alaska Mental Health Trust Authority, Alaska Mental Health Board and Alaska Department of Corrections identified "decriminalization of the mentally ill" as a priority. In 1998, Anchorage based Jail Alternative Services (JAS), was funded by the Trust as a pilot project. In 2005, JAS became a core program in State budget. Jail Alternative Services links mentally ill misdemeanants with treatment programs in the Anchorage community.
- Initial identification in jail -- with sufficient time to stabilize acute symptoms or make treatment arrangements prior to sentencing -- could help stop the "revolving door."
- Court ordered conditions to comply with mental health treatment could enhance the individual's motivation and prospect for continued treatment and stability.

Eligibility

- Pre-sentenced **misdemeanants** in DOC custody
- Psychotic disorder or Major mental illness
- New arrests **in** or **out of custody**
- **Agreement by** the **offender to participate**
- Final **approval by** DOC **project staff**
- Up to 30 clients can be served on each caseload

Admission Process

- DOC Mental Health Clinicians collaborate with the two JAS Coordinators to identify pretrial mentally ill misdemeanants in Anchorage correctional facilities, assess current mental status and suitability for release, make recommendations for treatment, identify risk factors and determine the likelihood of compliance with community-based treatment recommendations.
- JAS Coordinators assist the Defense to determine whether the individual is willing and able to participate in the program.
- Recommendations for post-release treatment are presented to the Defense for use in determining sentencing and court-ordered conditions of probation.
- The Defendant must agree to follow the recommendations of the JAS program and agree to be sentenced in the Anchorage Coordinated Resources Project (Mental Health Court).

Monitoring

- The JAS Coordinator maintains regular contact with treatment providers and program participants for the purpose of monitoring stability and treatment compliance.
- Clients remain on the Active Caseload for at least 12-24 months, with the length of time dependent on criminal and psychiatric history. Clients who experience relapse or make only minimal progress may remain on the Active Caseload for the duration of the court order.
- If the client fails to comply with court ordered conditions, then the JAS Coordinator facilitates filing affidavits of non-compliance and petitions to revoke probation.
- If the JAS participant decides not to follow treatment and probation conditions, then he/she may decide to opt out and return to sentencing in regular District Court.

For additional information or referrals contact

Doug Lindsay, M.S., JAS Coordinator
Phone: 269-7357 Fax: 269-0013
Email: Douglas.Lindsay@alaska.gov

Tamra Matlock, M.S., LPC, JAS Coordinator
Phone: 269- 7374 Fax: 269-0013
Email: tamra.matlock@alaska.gov

Colleen Patrick-Riley, MSW, LCSW
Director DOC Mental Health Release Programs
Phone: 269-7317 Fax: 269-0013
Email: Colleen.Patrick-Riley@alaska.gov

Kate Sumey, MA, Anchorage CRP Project Manager
Phone: 264-0886 Fax: 264-0872
Email: ksumey@courts.state.ak.us

Institutional Discharge Project Plus (IDP+)
State of Alaska Department of Corrections

Purpose

- The Alaska Department of Corrections has identified "decriminalization of the mentally ill" as a priority.
- DOC IDP+ Clinicians work to link mentally ill felons who will be released on felony probation or parole to treatment programs in Anchorage. The IDP+ Coordinator s work closely with probation officers and community treatment providers to provide an effective case plan.
- Initial identification in jail – with referral to IDP+ to be made within 6-12 months of release date. Although shorter referral dates may be considered, longer notice helps to insure establishing effective treatment plans, intake with a community provider, and referral to appropriate housing resources. IDP+ is also able to initiate expedited prerelease Social Security applications for individuals who qualify.
- Close monitoring of court ordered conditions to comply with mental health treatment can enhance the individual's motivation and prospect for continued treatment and stability, and promote public safety.
- IDP+ is a mandatory DOC program for all individuals with a DOC diagnosed psychotic disorder that will be released on felony probation or parole in Anchorage.

Eligibility

- Must be released on **felony** probation or parole
- Major mental illness with a history of **psychosis**
- Final **approval by** DOC **project** staff
- 75-80+ clients are served on the active caseload.

Admission Process

- Mental Health Clinicians in DOC correctional facilities collaborate with the IDP+ Coordinators to identify felons with a psychotic disorder who will release on probation or parole in Anchorage, make recommendations for treatment, identify risk factors and determine the likelihood of compliance with community-based treatment recommendations.
- The institutional clinician advises the IDP+ Coordinator of possible referrals and completes the DOC Mental Health Release Program IDP+ referral packet.
- If accepted, the IDP+ Coordinator will meet with the referred individual to create a set of treatment recommendations and determine the appropriate agency to refer to for services.
- Recommendations for post-release treatment are presented to the individual, who is advised he/she is required to comply with treatment recommendations as part of probation or parole. IDP+ works to increase the prospect of a successful transition and to ensure public safety.

Monitoring

- The IDP+ Coordinator maintains regular contact with treatment providers and program participants for the purpose of monitoring stability and treatment compliance, or to alter treatment plans as necessary.
- If the client fails to comply with court ordered conditions, the IDP+ Coordinator works with the Probation Officer to use positive reinforcement, impose sanctions or revoke probation or parole. The person may be remanded for a short or long period depending on what will be needed to enhance compliance with treatment and probation conditions in the community.

For additional information or referrals contact:

Pauline (Polly) Slisz, LMSW, MHC II, IDP+ Coordinator
Phone: 269-7381 / cell 748-8907 Fax: 279-0013
Email: Pauline.Slisz@alaska.gov

Derek Sandlin, LPC, MHC II, IDP+ Coordinator
Phone: 269-7320 Fax: 269-0013
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Colleen Patrick-Riley, LCSW, MHC III
Director of Mental Health Release Programs
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Attorney/Clinician Handout October 2011

What is APIC and what does an APIC Mental Health Clinician do?

Due to the deinstitutionalization of America, the nation's correctional system has become the largest residential provider for individuals with severe mental illness, developmental delays or mental retardation (DDMR). APIC is a national best practice model that was implemented statewide through procedures that were developed by the APIC Steering Committee; a multi-state, federal and community agency committee. The goal of APIC is to reduce recidivism for severally mentally ill inmates with co-occurring disorders and increase public safety through transitional planning that can start 90 days before release and continue for at least 60 days post release from jail. The APIC Steering Committee chose to implement the APIC model through the awarding of contracts with funds from the AMHTA to community providers. The APIC funds pay for non-Medicaid billable services, to include services inside of the jail, services prior to benefits, and services that are needed for success. Initially, the community mental health providers had planned on providing all the transitional planning and services; however, it quickly became apparent that a bridge between the all the systems (DOC, the Court, OPA, SSA e.g.) was essential. The APIC population encompasses a broader diagnostic range than the other mental health release programs and it is statewide. The IDP+ clinician and DOC institutional clinicians rely on the assistance of APIC for release planning. The APIC staff work on planned releases and the "crisis" of the day for inmates that are suddenly released from jail . The APIC Mental Health Clinician also manages the APIC contracts and works closely with the DOC Director of Mental Health Release programs to develop interagency partnerships, problem solve and advocate for the most challenging and difficult to house or serve individuals, and assists in maintaining multi-agency systems (social security, guardianships, court e.g.). APIC was originally implemented to work with the severely mentally ill population; however, it quickly became apparent that the DDMR population had been significantly underserved. Because of the mental health challenges both of these populations face, they are more likely to re-offend and can be very dangerous if left untreated. For example, a sex-offender with DDMR issues will need housing, wrap-around treatment and services, and benefit applications. At present, APIC provides transitional services to some of the DDMR population, simply because no one else does. Within this fiscal year, APIC has provided intensive transitional services to 26 high risk inmates that did not qualify for APIC or a DOC mental health release program. Since the inception of APIC in 2007, APIC has grown from 60 to 143 APIC individuals and is currently beyond maximum capacity.

What is IDP+ and what does an IDP+ Mental Health Clinician do?

IDP+ is a DOC Mental Health Release Program for felons released on felony probation or parole who are diagnosed with a psychotic disorder. While APIC provider crisis and transitional services, IDP+ provides ongoing supervision. Given the intensive level of services and monitoring needed and the lack of housing options statewide, most of these individuals with a psychotic disorder and significant functional impairments and are released in Anchorage. The current Anchorage IDP+ caseload is 77-81, up from a caseload of 30 when DOC took over management of IDP+ in 2002. Outside-of-Anchorage, an additional 15 felons are on probation or parole with a psychotic disorder that meet formal IDP+ diagnostic criteria. All these out-of-Anchorage IDP+ probationers are supervised by Probation Officers only. No DOC mental health clinician is assigned or able to provide ongoing oversight or assistance with out-of-Anchorage cases. Initial limited consultation for these individuals is provided by the APIC clinician, with occasional telephone calls and 1 time per year face to face contact. This is in stark contrast to felons with a psychotic disorder who are on IDP+ in Anchorage, who are intensively supervised by both the DOC IDP+ mental health clinician and designated Anchorage mental health Probation Officers, in tandem with Anchorage based community mental health providers.

At the present time, the IDP+ caseload is too high to broaden the diagnostic range to include individuals with FASD, TBI or other DDMR cognitive impairments. The DDMR population can be very intensive due to the combination of the behavior and cognitive challenges this population faces and the very limited to non-existent services and housing options. In FY10, it is estimated that DOC institutional mental health staff completed consults on 188 unique inmates who were identified as having a history of a Traumatic Brain Injury and 93 unique inmates who were considered to have Fetal Alcohol Spectrum Disorder. At the present time it is estimated that there are approximately 25 probationers in Juneau, Fairbanks and Palmer, plus, 45 probationers that are supervised by the Anchorage Probation Officers who have DDMR related diagnosis and corresponding severe functional impairments, for a total of 70 individuals statewide that have a non-psychotic disorder or a DDMR related challenge.

TALKING POINTS

- The Alaska Department of Corrections (DOC) is the largest institutional provider of mental health services in the State of Alaska. Since the deinstitutionalization of American, nationwide correctional centers have become the largest residential provider for individuals with severe mental health and DDMR challenges.

- 42% of DOC's inmate population are considered Alaska Mental Health Trust beneficiaries with a mental illness or mental disorder (Hornby Zeller, 2006). There are over 2,327 unique individuals within the correctional system that were seen by DOC mental health staff in 2010.

- 95+ felony offenders, who have been diagnosed with a psychotic disorder, are on the current IDP+ caseload (80+ for Anchorage and 15 for out-of-Anchorage). The IDP+ caseload has more than doubled since 2002 (caseload of 30) and there is only 1 mental health clinician assigned to the Anchorage caseload.

- IDP+ probationers are intensively supervised by the IDP+ Mental Health Clinician and Anchorage Mental Health Probation Officers, in tandem with Anchorage based community mental health providers.

- Outside of Anchorage, there are 15 felony offenders who have been diagnosed with a psychotic disorder that are on IDP+. All these out-of-Anchorage IDP+ probationers are supervised by Probation Officers only. No DOC mental health clinician is assigned or able to provide ongoing oversight or assistance with out-of-Anchorage cases.

- The DDMR population, to include individuals with FASD, TBI and other cognitive impairments, face challenges that significantly increase their risk for re-offending and recidivism.

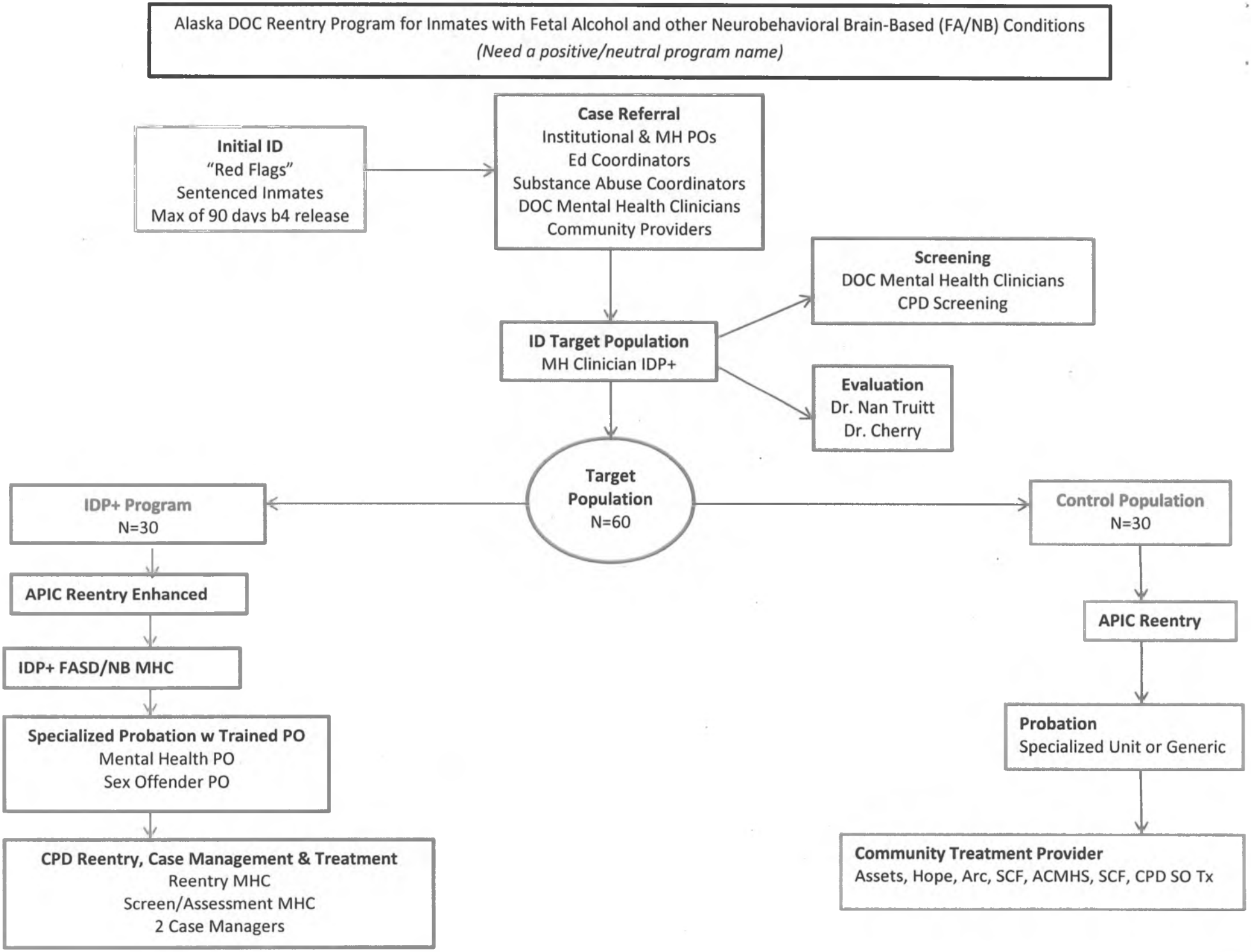
- Individuals with DDMR challenges, such as FASD, TBI, mental retardation or other cognitive impairments are significantly underserved by the APIC program and not supervised at all by the IDP+ program.

- 70 felony offenders that include individuals with non-psychotic disorder or DDMR challenges are currently on statewide Mental Health Probation Officer's caseloads that need IDP+ supervision.

- APIC has proven to be very successful in bringing the community together to integrate services and systems to provide transitional services for severely mentally ill inmates. APIC participant have a much higher chance of success in the community and a reduced chance of recidivism.

- IDP+ had no new felony charges for violent offenses for years when the caseload numbers were within recommended limits. Now that the caseload has more than doubled, the rates of legal (jail) and clinical (API) recidivism has increased.

- The IDP+ and APIC Mental Health Release programs have been presented in numerous statewide conferences and in the National GAINS conference in 2008 and 2010, respectively. Both programs are considered to be very effective at reducing recidivism, increasing public safety and increasing offender's chances of success in the community.


Alaska DOC Reentry Program for Inmates with Fetal Alcohol and other Neurobehavioral Brain-Based (FA/NB) Conditions
(Need a positive/neutral program name)
Initial ID
"Red Flags"
Sentenced Inmates
Max of 90 days b4 release
Case Referral
Institutional & MH POs
Ed Coordinators
Substance Abuse Coordinators
DOC Mental Health Clinicians
Community Providers
Screening
DOC Mental Health Clinicians
CPD Screening
ID Target Population
MH Clinician IDP+
Evaluation
Dr. Nan Truitt
Dr. Cherry
Target Population
N=60
IDP+ Program
N=30
APIC Reentry Enhanced
IDP+ FASD/NB MHC
Specialized Probation w Trained PO
Mental Health PO
Sex Offender PO
CPD Reentry, Case Management & Treatment
Reentry MHC
Screen/Assessment MHC
2 Case Managers
Control Population
N=30
APIC Reentry
Probation
Specialized Unit or Generic
Community Treatment Provider
Assets, Hope, Arc, SCF, ACMHS, SCF, CPD SO Tx

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An Arctic judge's journey with FASD

BY HON. MICHAEL I. JEFFERY

An Arctic judge's journey with FASD

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A trial court judge knowledgeable about Fetal Alcohol Spectrum Disorders struggles with adapting the operations of his court to the needs of FASD-affected individuals in the Alaskan Arctic. His background in learning about FASD through cases and training a the methods he has brought to the Barrow Superior Court to atte to make the justice system more understandable and fair to perso affected by FASD are described. His frustration at not being able evaluate the degree of impairment from FASD experienced by the affected persons in the courtroom and the appropriate accommodations needed for each person are also described.

KEY WORDS: *FASD, Arctic, justice system.*

Barrow, Alaska,[1] is the northernmost community in the United States. It is the hub community of the North Slope Borough,[2] an expanse of about 89,000 square miles of Arctic tundra, ponds, critical habitat for wildlife, and the home of the resilient Inupiaq Eskimo people and other ethnic groups.

AUTHORS' NOTE: *The comments in this article are personal and do not represent the Alaska Court System. For additional information about this article contact: The Honorable Michael Jeffery, e-mail: mjeffery@courts.state.ak.us.*

[1] Estimated 2003 population of 4,286, including 59.3% Inupiaq Eskimo persons. (North Slope Borough Department of Planning & Community Services 2003, BRW-3, BRW-5).

[2] Estimated 2003 population of 7,307, including 74.21% Inupiat Eskimo persons. (North Slope Borough Department of Planning & Community Services 2003, NSB-3, NSB-6).

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The wind blows for hundreds of miles across the Arctic plain. The small amount of air pollution in Barrow is carried by the winds from Russia and China. The sun shines nonstop in the summer, but it does not rise in the winter for about 8 weeks.

A group of Inupiaq Eskimo people ("the Inupiat") settled in Barrow in ancient times because of the food resources, including caribou, ducks, seals, and the bowhead whale. In the late 1800's the bowhead whale attracted the intrepid Yankee whaling crews for whale oil and baleen. The whalers not only drastically reduced the population of bowhead whales; they also brought alcoholic beverages with them. The Inupiat were introduced to a substance that is still part of daily life, used by many natives and nonnatives alike.

In precontact times, the Inupiat had traditional laws administered by consensus of the whaling captains and elders (Case, 1984). In the late 19th century, the traditional law was supplemented by the U.S. Revenue Cutter Bear whose captain dispensed Western justice during annual visits, until Charles Brower, a nonnative former whaler who had married into the community, became territorial magistrate. From Alaska statehood on January 3, 1959 to the early 1980s, Barrow was served by dedicated local magistrates, without formal legal training, supplemented by Superior Court judges who would visit on occasion.

After a year of work as a legal services attorney in Boston, a near-fatal car crash, and almost 5 years in India, I moved to Barrow in mid-January 1977 to open an office for the Alaska Legal Services Corporation. I traveled to all seven North Slope villages as part of this work. In 1982, I was appointed the North Slope's first resident superior court judge and have continued this service since. Alaska has a statewide court system. The Barrow Court has been staffed since 1982 by a superior court judge and magistrate, with the support of the hard-working court staff. The magistrates serving since 1984 have all had law degrees. The court serves an area of about 80,000 square miles,[3] including Barrow, six of the seven Arctic villages, and the Prudhoe Bay oil complex.

My journey with FASD begins

The ancient Greek philosophers Plato and Aristotle recognized the problems caused to children by mothers drinking during pregnancy, but in 1968, French researchers first described the existence of common issues associated with children thus born (Lemoine, Horousseau, Borteyru, & Menuet, 1968). In 1973, researchers in Seattle, Washington identified a set of characteristics occurring in children with mothers who drank alcohol during pregnancy. They called these characteristics Fetal Alcohol Syndrome (FAS) (Warren, 1997).

Since 2004, the term Fetal Alcohol Spectrum Disorders (FASD) has been used to describe a variety of conditions that can occur when a child has been exposed to alcohol while in the mother's womb (CDC, 2009).[4] Fetal Alcohol Syndrome is the most easily diagnosed and studied of the FASD conditions because of distinctive physical features, but the number of individuals affected by all of FASD conditions is 9-10 times the number affected by FAS (Briacombe et al. 2009).

I was completely unaware of all this information during my years in Barrow with Legal Services and during my early years on the bench. I don't remember when I first heard about "Fetal Alcohol Syndrome or Fetal Alcohol Effects" (the former terms used for FASD), but Clayton's[5] case in 1990 was a crash course for me.

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[3] This area is about the same size as Minnesota (79,610 sq. mi., 206,189 sq. km.) (Bockenhauer & Cunha, 2004).

[4] "Fetal Alcohol Spectrum Disorders" is not itself a diagnosis. The term includes the following diagnoses: Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (PFAS) (most of the features of FAS), static encephalopathy (alcohol exposed) (an unchanging brain condition with central nervous system damage and prenatal alcohol exposure), and neurobehavioral disorder (alcohol exposed) (central nervous system impairment without structural or neurological abnormalities). The last two categories have also been described as "Alcohol-Related Neurodevelopmental disorders" (ARND) (Fetal Alcohol Syndrome Diagnostic and Prevention Network, n.d.).

[5] The names of all persons involved in cases have been changed.

/ton Clayton had appeared before me as a juvenile delinquent. Shortly after his 18th birthday, he received an adult felony conviction for taking money from the cash register of a local restaurant. He was back in front of me in 1990 for his second felony, sexual assault in the second degree, for the sexual touching of a teacher in a remote classroom. His energetic defense attorney on the second felony discovered that the sober couple that raised Clayton had adopted him—his birth mother had been afflicted with severe alcoholism. The defense attorney was able to get her client diagnosed by a mental health professional who was familiar with FAS/FAE, and the conclusion was "fetal alcohol effects." The diagnosis recognized the damage to his brain even though he did not have the short stature and facial features of Fetal Alcohol Syndrome.

Under the sentencing laws in effect in 1990, Clayton was facing a maximum sentence of 10 years and a "presumptive term" of 4-6 years on the new charge.[6] In Alaska, the only way for a defense attorney to obtain an adjustment of a presumptive term is to convince the sentencing judge by clear and convincing evidence that it would be manifestly unjust to sentence the person according to the presumptive term (Alaska Statute 12.55.165(b)).

The defense attorney contended that it would be manifestly unjust to sentence Clayton without considering his fetal alcohol effects condition. Her solution was that there should be less than the required four years of jail time, followed by supervision of the Department of Corrections in a far less restrictive setting. I agreed with her arguments and followed the presumptive sentencing statute's requirements by referring the case to a three-judge sentencing panel of other superior court judges. If at least two members of the panel agreed after a sentencing hearing in front of them that the panel should accept the case, they would be able to sentence Clayton without being bound by the presumptive term. If they did not accept it, they would refer the case back to me, the sentencing judge, to impose the presumptive term (Alaska Statute 12.55.165)(b)).

They did not accept the case, finding that the fetal alcohol effects issue was a mental health consideration not included in the Legislature's existing mental health mitigating factor, and that judges should not add new mental health considerations when the Legislature had already spoken. They stated that the Department of Corrections would have discretion to release the inmate to a halfway house during the jail time, and they referred the case back to me.

Since our spring judicial conference was being held in Fairbanks, Alaska, at the appropriate time for the resentencing hearing, the parties agreed that I would do the hearing there. Fairbanks is the location of the nearest long-term jail to Barrow and is located about 500 miles south. As it happened, just before the Fairbanks conference my long plane flights to and from a meeting on the East Coast provided the opportunity to read a book that opened my eyes to the challenges facing families and children affected by fetal alcohol exposure. The book was Michael Dorris' *The Broken Cord* (Dorris, 1990), a memoir about raising a child afflicted with mysterious difficulties that proved to be FAS.

As required by statute, I sentenced Clayton to the four-year presumptive term with a recommendation for classification to a halfway house. But as I looked at him, I suddenly was deeply affected by the thought of so many defendants like him that would really not understand or benefit from the longer jail sentence. I got emotional and left the bench abruptly at the end of the hearing. The defendant appealed the three-judge panel decision but the Alaska Court of Appeals affirmed (*W. R. L. v. State*, 1992).

[6] The current Alaska sentencing scheme for sexual felonies has drastically increased the jail time for these crimes. Now a person with one prior nonsexual felony convicted of sexual assault in the second degree is subject to a maximum of 99 years and a presumptive range of 10-25 years (Alaska Statute 12.55.125(i)(3)(B)).

There is some good news: The Department of Corrections followed my recommendation and did release Clayton to a halfway house during the jail term. He is now living in the Anchorage area and he has a guardian/conservator to help manage his affairs. Court records show only one misdemeanor case for Clayton since his 1990 felony case.

After my encounter with Clayton, I was appointed to the Alaska Criminal Justice Assessment Commission, which had been established to allow representatives of all three branches of government and other citizens to review the criminal justice system "and to collectively develop recommendations to alleviate the problem" of prison overcrowding (Alaska Criminal Justice Assessment Commission, 2000). I advocated for inclusion of "organic brain disorder" as a mitigating factor in felony presumptive sentences. Although the Commission adopted the proposal,[7] this statutory amendment has not been passed by the Legislature.

My understanding increased during a 1996 Barrow conference on FAS/FAE sponsored by the North Slope Borough Health Department. The organizers arranged for many inspiring speakers including Ann Streissguth, Ph.D., from Seattle, Washington, (one of the leading researchers on FASD) and Jan Lutke from Vancouver, British Columbia (who is raising and effectively advocating for her adoptive children with FASD), as well as experts from Alaska. As I attended the sessions and continued my work at the court that week, I began to realize that the lifelong effects of exposure of a fetus to alcohol in the mother's womb affected the justice system in countless ways. I also realized that it would be impossible to know for certain in a particular hearing who was affected and who was not, and how deeply prenatal alcohol exposure affects any given person. The frustration this understanding left with me remains with me daily.

[7] Proposal 19: "The legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder" (Alaska Criminal Justice Assessment Commission, 2000, p. 71).

Characteristics of FASD that are recognized as presenting difficulties for the justice system

It is not surprising that the justice system in Barrow is struggling to adapt to FASD. That the challenges faced by persons affected by FASD impact the justice system has been recognized in other jurisdictions as well. A recent example is the September, 2008, conference in Whitehorse, Yukon Territory on The Path to Justice—Access to Justice for Individuals with Fetal Alcohol Spectrum Disorder. The conference attracted 130 delegates from across Canada and the United States, and the summary conference report discusses characteristics of FASD that present severe problems for adaptation by the Canadian justice system to these conditions.

Dr. Sterling Clarren, a physician involved with FASD issues for over thirty years and now CEO and Scientific Director of the Canada Northwest FASD Research Network in Vancouver, British Columbia, described persons with FASD who have been diagnosed early in life as having "mysterious maladaptation:"

> First, they don't do well in school and social experiences; by the time they get to [be] adults they are often alienated or have exhausted their care givers, so they are out on their own, and these combined lead to social isolation, poor job performance, poverty, mental health problems, homelessness, victimization, and criminogenesis (Fraser, 2008, September, p. 6). He recognized that "there are often no apparent physical characteristics that predict FASD. Individuals with FASD may appear 'normal' and often have good verbal communication skills. Without specific knowledge of the common behavioral characteristics associated with FASD, it is difficult to 'flag' or identify someone that may have this disability" (Fraser, 2008, p. 8).

The 2008 conference identified additional reasons that the justice system has difficulty adapting to persons with FASD:

> Furthermore, behaviors associated with individuals with FASD are also common among offenders that do not have FASD. For example, offenders with and without FASD are often considered to be impulsive, thrill-seeking, and lacking in judgment. Individuals from both groups who are involved with the criminal justice system may

have substance abuse and mental health problems, along with limited employment and education histories. Also, co-occurring problems such as anti-social personality disorder, conduct disorder, or attention deficit disorder may be masking an underlying condition of FASD.

Justice professionals, whether they are police, defense counsel, Crown [prosecutors], judges, victim services workers, or corrections officers, only spend limited time with a client. The short period of time spent with each client often results in the professional not knowing much about the client, including if they have a disability. It often takes more time than professionals have to clearly communicate with individuals with FASD to ensure that they fully understand what is being said to them. Also, some behavioral characteristics associated with FASD are sometimes seen by justice professionals as behavior that suggests disobedience, noncompliance, or aggressiveness. If justice professionals are not aware how FASD may impact an individual, they may not want to get to know their client or work with them any more than the basic minimum to "get by" (Fraser, 2008, p. 8).

The conference report summarized the challenges facing efforts to encourage justice system adaptation to the needs of persons affected by FASD. An important issue is the "lack of awareness of FASD among justice system professionals." Additional challenges are: "(1) that FASD is an 'invisible disability"; (2) the short time-frame that individuals spend with criminal justice professionals; and (3) that it is difficult to order or conduct an FASD diagnostic assessment" (Fraser, 2008, p. 8).

Recent documentation of the prevalence and costs to society of FASD

Facial features typical of FAS make it easier to document than the other far more prevalent but hidden FASD conditions. Therefore, even in publications discussing the general issues presented by FASD, the available statistical data is often limited to studies of the prevalence of FAS. The Alaska Department of Health and Social Services has found that among states tracking FAS rates, Alaska has the highest prevalence in the nation (Alaska Department of Health and Social Services, 2010). Corrections officers in Alaska estimate that 27% of the inmate population has FAS (Behavioral Health Research and Services, 2006). The federal Centers for Disease Control (CDC) reports that the FAS prevalence in the general population of the United States is 0.2-1.5 per 1,000 births; in the American Indian/Alaska Native population it is 3-5 per 1,000 births; in the population of the children in foster care it is 15 per 1,000 births; and in the population of children in a (Canadian) juvenile justice treatment facility it is 200 per 1,000 births (Briacombe et al, 2009, p. 11).

The CDC also reports studies showing that the estimated prevalence of all FASD conditions in the general population of the United States is 9-10 per 1,000 live births (Briacombe, et. al, 2009, p. 11). The Alaska Department of Health and Social Services states that about 180 babies born each year in Alaska have "suspected FASD." (Alaska Department of Health and Social Services, 2010). In 2008, there were 11,438 births (Alaska Bureau of Vital Statistics, 2010) yielding an estimated prevalence of FASD in Alaska of approximately 16 per 1,000 live births. The prevalence of births of children affected by FASD on the North Slope or other rural areas of Alaska is not documented.

A study by the Fetal Alcohol and Drug Unit at the University of Washington of 661 clients diagnosed at their clinic with FAS from 1973 to 1995 showed that "[s]ixty percent of the adolescents and adults and even 14% of the children had trouble with the law." (Streissguth, 1997). This over-representation of persons affected by FASD in the justice system, justifies substantial efforts to accommodate the cognitive disabilities presented by fetal alcohol exposure.

The incredibly high costs to society from this situation are illuminated by the federal Centers for Disease Control recognition of a 2004 study, which found that "[i]n 2002, the estimated [average] lifetime cost for one individual with FAS

was $2 million" (Briacombe et al., 2009, p. 12,). The CDC admits that the costs to society from all FASD conditions are "unknown" (Briacombe, et al., 2009).

Accommodations used in the Barrow court for persons who may be affected by FASD

The following ideas are offered as a work in progress. The justice system in Barrow is always interested in approaches relevant to our situation and I have found that each conference I attend presents new ideas and a deeper understanding of how to best adapt to the realities presented by FASD. These are some techniques that seem to work for us in our rural court environment:

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Instead of completing the hearing quickly by assuming that there has been effective communication with counsel before the hearing, I take the time to completely explain to local participants what is going on. It is sometimes necessary to take a break in the hearing to allow an individual affected by FASD to process what he or she has heard before yet more information is discussed.

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I try to avoid legal jargon as much as possible. I often use a more informal tone, since a person affected by FASD may really be relating to the whole experience like a middle school (or far younger) student, instead of the high school student or adult that the person appears to be.

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In addition to sensitivity to the possibility of FASD, I need to respect cultural influences that can affect many court participants. For example, more traditional persons in many Alaska Native cultures do not look directly at an authority figure, as a sign of respect. Shy youth on the North Slope will sometimes not respond to a question except by raising their eyebrows, meaning, "yes." Local people on the North Slope often require a longer time to formulate an answer to a question even if they understand perfectly what was said, as within this culture a thoughtful answer is valued above a quick answer.

Adapt commonly used forms to have 1) concrete language, 2) more white space, and 3) opportunities for a defendant to put initials by each condition

For example, my criminal forms do not simply state "OR Release." Alaskan practitioners know that this statement means a person is released without posting any bail, but one should not assume a defendant, especially one affected by FASD, understands this. The current version of my four-page form appointing counsel, setting dates and bail conditions, says:

> ☐ OWN RECOGNIZANCE. I can get out on my "own recognizance." This means: I don't have to give any money right now. I promise to come back to court or jail. I also promise to follow all the promises in this form. The police could arrest me if I do not come back to court or follow all the promises.
> My initials: [_____]

Using more white space, 14-point type, and the requirement to initial each rule are efforts to make sure that the whole process is not simply a "blur" of words. Both the Court and the defendant must focus on each point.

Use the same system for conduct agreement/ conditions of probation forms in a juvenile delinquency case

These cases are less formal than the adult criminal cases and Alaska's Division of Juvenile Justice emphasizes the value of "restorative justice." The Division has been supportive in our implementation of a shortened version using concrete language of its Conduct Agreement/Conditions of Probation form. For example, the current form used at Barrow includes the following rules:

> 1. I won't drink alcohol. [_____]
>
> 2. I won't use illegal drugs like marijuana. [_____]
>
> 3. I will take a "PBT" or "UA" test when the police or the probation officer asks me to. [_____]

Be receptive to "third party custody" arrangements (including, when available, electronic monitoring) in criminal cases rather than using higher bail, when such arrangements will provide adequate structure for a defendant. Such arrangements will reduce overcrowding in the jails, are more humane and constructive for defendants affected by FASD, and reduce costs to society.

When sentencing laws provide enough flexibility, reduce the amount of jail time (or the level of care for a juvenile delinquent) and increase the amount of supervision time. The attorneys involved in a case can often reach this result through plea bargains that reduce the severity of a charge, enhancing judicial discretion in fashioning a meaningful sentence or juvenile disposition. A person affected by FASD could adapt well to the structure of a jail or juvenile institution, but the person is also more likely to learn negative behaviors from others in the same environment. Another reason supporting the use of sentencing alternatives for persons affected by FASD is that jail beds and placements at juvenile institutional facilities provide more structure than needed at greatly increased cost to society (Wartnik, 2007).

When FASD is suspected, include a recommendation in a sentencing judgment or juvenile disposition order that can assist professionals working with the individual. The recommendation for adult defendants could read something like: "This defendant may have a FASD condition. The Court THEREFORE RECOMMENDS that anyone working with the defendant use concrete language, with the realization that basic concepts will need to be repeated frequently."

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- *For defendants who might qualify for community custody and who have issues of alcohol/substance abuse and limited employment skills:* Classification to a halfway house for alcohol/substance abuse counseling and employment training.

- *For defendants likely to remain in jail and have alcohol/substance abuse issues*: Defendant should participate in any alcohol/substance abuse counseling provided to the defendant by the Department of Corrections, which may include a residential therapeutic community within the jail.

- *For defendants with more severe cognitive impairments:* Prior to release from jail, the Department of Corrections should explore long-term structured living arrangements that might be available for this defendant upon completion of the jail term.

Keep bringing up the issue of FASD, especially in child welfare and juvenile delinquency cases

If a FASD condition is suspected, encourage the social worker or juvenile probation officer to obtain a FASD diagnosis. The greater resources available in these cases and the greater amount of time that a youth is in custody, as compared to adult defendants, make it more likely that an evaluation might be arranged. The earlier the evaluation can occur, the more useful in the life of the person: Having an evaluation prior to the age of 6 is the second most beneficial "protective factor" for patients 12 years and older (Streissguth, Barr, Kogan, & Bookstein, 1997). Efforts to bring up the subject of FASD are also necessary in other types of cases when a participant is suspected of having the condition (Malbin, 2004).

Schedule periodic review hearings in certain cases

More frequent interaction with an authority figure like a judge is a great way to enhance structure for juveniles and adults involved in the justice system. Therefore, we have monthly or quarterly review hearings in some cases. The hearings are an opportunity to make sure a treatment program is working, to celebrate successes, and (once again) to warn of consequences of not following the rules.

Acknowledge and support, on record, initiatives by other professionals to assist FASD-affected clients

For example, one officer in Barrow had a number of probationers who were obviously affected by FASD who were not doing well. Rather than immediately filing petitions to revoke probation, the officer started the "Breakfast Club." Each of these defendants had to come into the office at 8:00 a.m. to plan his or her activities for that day. The next day they would come in and report on the previous day's activities and plan the current day. The officer found that after about three

weeks of this additional structure in their lives, they would get the message on complying with probation or show that they were not able to do so.

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Caring social workers or juvenile probation officers may have gone through the steps necessary to qualify a young adult affected by FASD for federal Social Security disability payments. In Alaska, youth in custody may build up a significant trust fund from dividends received from the state and/or native corporations. Such trust funds become available in a lump sum on the 18th birthday. Most youths need guidance in managing these government or private funds, and appointment of a conservator provides great benefits for such youth. If the mental problems are severe enough to prevent normal decisions about living arrangements and medical care decisions, the court may also need to appoint a guardian.

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Another adaptation I have made is to attempt to identify suspected FASD cases even though an actual FASD diagnosis is rare in my court. I keep in mind (and put on record) that I cannot "diagnose from the bench." Yet there are indicators that I use to tell me if a person is probably affected by FASD:

1. Comes from an alcoholic family.
2. Frequent contact with the justice system—especially with similar kinds of cases; back in court repeatedly for bail or probation violations.
3. Impulsive behavior is demonstrated in current situation and/or prior record.
4. Often a "follower" in criminal incidents, but is the one who is getting caught.
5. History of problems with school, including having an IEP or dropping out early.
6. Has a lot of mental health diagnoses (FASD may be the most basic one that has been missed).
7. Short stature.
8. Facial appearance—however, for adults this factor is not very useful.

9. Multiple foster home placements (in the unusual case in which such information is available to me).
10. History of inappropriate sexual behavior (when such information is available to me).

Encourage the individual to learn more about FASD and attempt to reduce feelings of guilt and blame of the birth mother

Bringing up the issue of FASD at a court hearing can sometimes lead to some very sensitive moments, especially when parents are in court to support a person with a possible FASD. Here is the approach I use for both adolescents and adults:

It looks like you might have a challenge in your life called FASD. It's not your fault; it just happens that your brain may work a little differently because your mother may have been drinking while you were inside her. You might want to learn about it and mention it to people working with you so that they can do a better job in helping you understand things. Remember that your mom could have been drinking before she even knew that she had you inside her.

(Based on suggestions from Olson, 2009; Kelly; 2010).

Special programs at the Barrow Court

Barrow Misdemeanor Resources Project

The Alaska Mental Health Trust Authority (Alaska Statutes 47.30.11-47.30.61) uses the income from the one million acres of Alaska's land Congress granted to the Territory of Alaska "to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska" (*Weiss v. State*, 1997).[8] The beneficiaries of the Trust are persons with various mental health conditions, including developmental disabilities (Alaska Statute 47.30.056(c)(2), (d), (e), (f), & (g)). The Trust programs may also include "prevention or early intervention services for individuals at risk of becoming Trust beneficiaries. The Trust considers prevention of these conditions, where possible, as part of its mandate" (Alaska Mental Health Lands Trust, 2010).

[8] The lands were granted in the U.S. Congress' Alaska Mental Health Enabling Act (1956).

The Trust has been aware that there are a significant number of persons involved in the justice system in Alaska who have FASD or other mental health challenges that result in excessive jail time. In fact, "approximately 42% of individuals incarcerated in the Alaska Department of Corrections qualify as Trust beneficiaries" (Alaska Mental Health Trust Authority, 2010). The Trust approached the Barrow Court as a site to try initiatives to specifically deal with this issue in a rural setting. The Trust's first approach at Barrow was to encourage formation of a therapeutic court program. It paid for a consultant who (after consultations with the judicial officers, social workers, juvenile probation officers, prosecutor, defense attorney, police and others) prepared manuals for both professionals and defendants. Despite these substantial efforts, this attempt did not work in our small community: We have only one prosecuting attorney, one resident defense attorney, one superior court judge and one magistrate. Considerations of both time and personnel made it impossible to have the type of specialized "team" and "premeetings" before each court hearing that therapeutic courts require. The extremely low number of clients demonstrated that the complexity of the program did not appeal to North Slope defendants.

With considerable input from the justice community in Barrow, the Trust's efforts have now evolved into the Barrow Misdemeanor Resources Project (BMRP). An adult misdemeanor probation officer/case manager (administered through the statewide Alcohol Safety Action Program [ASAP]) staffs this program. The case manager's duties are broader than other probation officers administrated by ASAP. Since well over 90% of the crime on the North Slope is alcohol-related, and since we also have a relatively high percentage of domestic violence assaults, misdemeanor (and felony) probation conditions routinely include treatment requirements. The case manager attends misdemeanor arraignments and sentencings as well as other court hearings. Most referrals to the case manager state that the defendant is to meet with BMRP soon after the hearing (or completion of jail time) "for assistance in complying with probation conditions." The case manager meets with the defendant in the BMRP office across from the courtroom. The case manager interviews the person to gain information for a mental health screening tool she has developed based on models used in other programs, reviews the probation conditions, and then assists the defendant in contacting local treatment programs for assessment.

The assistance from BMRP may end after the interview if the defendant does not appear to have mental challenges. However, if the initial interview reveals mental health concerns, including suspected FASD, the case manager undertakes a broader range of involvement. The defendant is assisted in contacting treatment programs, referrals may be made to other support services, and family counseling about guardianship/conservatorship may be given. The case manager schedules ongoing appointments with the defendant to monitor progress. The effort is to make the criminal justice process more understandable with extra attention and explanation, and to keep the defendant affected with FASD from needlessly facing petitions to revoke probation and more jail time by providing greater structure that helps maintain the defendant's ability to make appointments and comply with treatment recommendations (G. Hooper, personal communication, September 1, 2010). The adult probation officer has also requested assistance from the BMRP caseworker for felony probationers needing special assistance because of mental health concerns.

Compliance hearings

The flexibility of a therapeutic court program to conduct relevant hearings and have reasonable, swift sanctions for those with FASD make such programs a very desirable option,[9] but Barrow's small justice community does not have the available staff to support a full therapeutic court program. However, this reality does not prevent us from using therapeutic

[9] See, for example, the Community Resources Project/Mental Health Court in Anchorage, Alaska and the Community Wellness Court in Whitehorse, Yukon Territory, Canada.

court principles. For about 2 years, District Court Magistrate Karen R. Hegyi maintained a program of monthly compliance hearings, inviting the superior court judge to join her on the bench to hear from treatment providers and misdemeanor defendants whose probation conditions included treatment conditions. Unlike a traditional therapeutic court, however, there were no premeetings before the monthly compliance hearings. Treatment providers sent compliance forms in before hearings. These were reviewed by the magistrate and cases were ranked. Defendants doing well were first. As each name was called, the defendant would come up and treatment provider(s) would give a summary of progress in treatment. Completion of a program resulted in a standing ovation, good progress met with applause, spotty compliance was met with silence and the prosecuting attorney would inform persons not making adequate progress that a petition to revoke probation would be filed. (If the defendant shows compliance, the prosecutor would withdraw the petition).

The value of ongoing contact between the judicial authority figure and the defendant is one of the basic techniques of the nationwide therapeutic court movement, especially for defendants with mental challenges such as FASD (Hora, Schma, & Rosenthal, 1999). Barrow's compliance hearing program is currently in vacation mode because of workload considerations from the clerk's office and the concern of a treatment program's former administrator that the monthly reporting could harm the program's treatment relationship with the client. We anticipate addressing these issues and rejuvenating this program within the next few months.

The journey continues: Some recent cases involving persons affected by FASD

Tom *Tom has never been evaluated for Fetal Alcohol Spectrum Disorder despite his lengthy juvenile justice history, a series of misdemeanor convictions, and his felony weapons charge involving a dangerous standoff with police officers.* Tom is now 24 years old, but he started using alcohol and marijuana when he was 12. Raised in a North Slope village, he was placed in another village in foster care from age 11 to 14. Several males in his extended family had committed suicide. Police investigations found at least probable cause that he was involved with a great deal of dysfunctional behavior as a juvenile: at age 8, deliberately setting a fire; at 10, breaking windows; at 14, stealing items from the counseling center in Barrow, assaulting another youth, stealing a bike and trying to steal a four-wheeler; at ages 15 to 16, being identified as someone who took snow machines and arranged for other youth to do so. All these incidents were dismissed or handled with counseling by the juvenile probation officer.

Tom was formally adjudicated a juvenile delinquent at 16 after he chased another youth while in possession of a baseball bat. He was referred to a residential alcohol/substance abuse treatment program in Southeast Alaska and did fairly well. But then, as a 19- to 20-year-old adult he was convicted three times of misdemeanor domestic violence assaults against his girlfriend. He reported to treatment providers that during this period of time he also had eight major snow machine accidents. He had periods of employment: 2 years as a stockman in an auto parts store, 4 months as a laborer, and 28 months as a tour guide.

At the age of 22 he received his first felony conviction for having an illegal weapon (a sawed-off shotgun) during an incident in which he possessed the illegal weapon and a rifle, was intoxicated and highly agitated, and engaged in a 3-hour standoff with police officers until he was allowed to talk with his ex-girlfriend. Based on the plea agreement, I sentenced him to 24 months with 18 months suspended and put him on probation for 3 years with probation conditions including no possession or consumption of alcohol and treatment requirements. By the time of the sentencing hearing he had served the jail time.

His probation officer allowed him to travel to Anchorage shortly after the sentencing. When he returned, the probation officer searched his baggage and found two bottles of whiskey, a probation violation. He told his probation officer that he knew he should not have brought in the alcohol, but he figured "his chances of getting searched were only about 5% so it was worth the risk." I added some community work service to his sentence. He is currently before the court for another petition to revoke probation for failing to complete the court-ordered domestic violence intervention program. The probation officer, prosecuting attorney, and defense attorney agreed to extend his probation for enough time to complete all treatment and to require him to travel to Fairbanks, Alaska to complete (and pay for) domestic violence intervention treatment, alcohol/substance abuse treatment, and a psychiatric evaluation. I recommended that the psychiatrist be someone familiar with FASD.

The fact that Tom was in foster care from ages 11 to 14, the dysfunction in his birth family, and his ongoing offenses as a juvenile strongly suggest a cognitive impairment such as Fetal Alcohol Spectrum Disorder, but he never had the benefit of this type of assessment. The child welfare and juvenile justice systems (and the Court) had ample opportunity to conduct such an evaluation but missed it. At last, as an adult, he is being referred for an appropriate mental health evaluation.

Jane *Jane's case demonstrates the limits of service delivery when a client turns 18 and insists on leaving an available structured placement.* Jane was involved in the child welfare system, and the FASD evaluation arranged by the social worker yielded a diagnosis of FASD "static encephalopathy-alcohol exposed." Her behaviors were quite difficult for care providers to deal with and she lived in institutional placements for extended periods of time. As she approached her 18th birthday, she was placed in a therapeutic foster home. The foster parents were working with her to finish her high school diploma. But she insisted that she leave the custody of the social workers as soon as she turned 18. When all persuasive efforts failed, the state moved to close the case at the 18th birthday. Custody remained open only long enough to have a conservatorship established for her.

Tragically, she was sexually assaulted while in Anchorage shortly after her release from custody. She returned to her birth mother in a North Slope village, but had problems in the village and became suicidal. She was immediately transferred to the Fairbanks Memorial Hospital for care. When the hospital released her, she was provided temporary housing, and she received transition to adulthood services in Fairbanks from a specialist at the Office of Children's Services. But she insisted on going to locations frequented by alcohol and drug abusers and spending time there. Only after she was again physically assaulted did she begin to realize that she needed more assistance than the conservatorship. A temporary guardian is now in place (pending the permanent guardianship hearing) with the ability to find adequate housing and require Jane to take advantage of the placement.

Mary *Mary is someone for whom the structure provided by a loving adoptive family has given her a reasonable chance to live a full life as an adult.* I had handled the termination of parental rights proceeding of Mary's birth parents some twenty years ago. One part of the evidence was videotaped testimony of a child psychologist about the many complicated problems Mary would face as she grew up because of her exposure to alcohol during her mother's pregnancy, and how the birth parents would be unable to cope with them because of their own instability. I granted the termination of parental rights. Mary was very blessed to have a Barrow couple file an adoption petition within a few months. I insisted that the couple watch the videotaped expert testimony before I would grant the adoption. The couple watched the video and proceeded; I granted the adoption. I have noticed that Mary has never been in the Barrow court[10] and has had appropriate employment. She

[10] She has had traffic tickets and a minor misdemeanor in South Central Alaska.

appears to be doing fine, with the structure that had been provided by the adoptive parents and her employment.

John *John had the benefit of a tentative FASD diagnosis while in the juvenile justice system. But his desire to live with his family in an Arctic village resulted in an environment that did not provide the structure he needed. His impulsive criminal behavior has landed him in jail, again.* John came before me in a juvenile delinquency case for burglarizing the store in his home village near Barrow. His dysfunctional family situation and the lack of other options on the North Slope that would meet his needs required placement outside the North Slope. One benefit of the placement was that the Division of Juvenile Justice was able to arrange for a mental health evaluation that concluded he had "Axis III: . . . Possible Fetal Alcohol Effect/Fetal Alcohol Syndrome." Just after his 18th birthday, he was back in front of me with an adult felony case for burglarizing the same village store. He had learned something from the previous burglary juvenile case: He wore gloves and turned off the store's electricity so that the surveillance camera did not work. But he was quickly turned in and the stolen items were recovered. When he was arrested, he was still wearing socks he'd stolen from the store.

The probation officer noted the diagnosis and recommended approval of an agreement for limited jail time and a suspended imposition of sentence that would give John the opportunity to have the felony taken off his record. She showed her understanding of FASD in her additional recommendation that if the defendant violated probation there should be a prompt response so that he will understand the connection between his actions and the consequences. I accepted the plea agreement and the defendant was out on probation immediately, since prior to sentencing he had already served the 60-day jail sentence required by the plea agreement.

Back in the village after the jail time, John wanted to get a job with a local construction company. The construction staff lived

in the village's small hotel. When he approached them about the job, they told him to apply online. He said he did not have computer and they let him use the computer in their area of the hotel. When he left, he was wearing some Carhartt overalls that he had seen inside the hotel, which had an iPhone in the pocket. The staff called the police. When the officer arrested John, he was still wearing the Carhartts, with the iPhone still in the pocket. Now he faced a petition to revoke probation with a possible maximum sentence of five years in the old case, as well as a new charge of burglary in the first degree with a maximum of 10 years and a "presumptive sentence" of 4-6 years. He faced an immediate sanction, because he remained in jail continuously since his arrest; however, the investigation and plea negotiations for the two cases lasted 5 months. I accepted the plea agreement resolving both cases, which mandated dismissal of the new case and a permanent felony conviction with a 2-year flat sentence for the probation revocation in the earlier case. I included a recommendation that because of the diagnosis of "probable FASD," corrections staff should use concrete language and repeat basic concepts. I also recommended that the defendant be transferred to a halfway house.

Joseph *This young adult was diagnosed with FASD as a youth and his behaviors prevented an adoptive placement. He was not able to cope with living in a community setting and his social workers placed him in a residential psychiatric facility for treatment that lasted about one year. He now has chosen to live in Anchorage and he has just started residing in an assisted living program that will be available for almost the next 3 years.* Joseph was one of several children in a highly dysfunctional family that generated a child welfare case resulting in termination of parental rights. He was 6 years old at the time. Both parents were severely alcoholic. When he was 11, Joseph was diagnosed with the FASD "static encephalopathy-alcohol exposed." His behaviors prevented a permanent adoptive placement. The social workers had to place him in a residential psychiatric program in the rural hub community of Bethel in Southwest Alaska, which had staff that understood his FASD

condition and worked well with their native clients. He completed the program in approximately 1 year.

As he approached his 18th birthday, professionals obtained the services of a court-appointed conservator for him. Joseph wanted to move to Anchorage and, with assistance from the transition to adult life specialist in the Office of Children's Services, he was accepted to an assisted living program where he can live with some structure until his 21st birthday. With the income he has coming in from Social Security and native corporation dividends, along with the structure of the assisted living program, he has an ideal situation for beginning his life as an adult. His case is now being transferred to Anchorage, but I had the gratification of seeing these arrangements put in place for him.

The journey continues: Ideas for the future at Barrow

In addition to continuing to implement adaptations in the court setting, it is important to consider additional projects to make our rural community more responsive to the needs of persons affected by a FASD.

ourage mation a local FASD gnostic team

Service providers in our community have identified the difficulty of finding opportunities for diagnosis of FASD as a stumbling block in providing support to individuals with obvious challenges in dealing with their life experiences (Ruiz, personal communication, September 9, 2010). Having the diagnosis when it is justified holds the promise of more effective treatment and adequate structure to avoid the justice system altogether.

Efforts are underway to form a FASD diagnostic team in Barrow. Dedicated professionals active in a FASD diagnostic team in Anchorage have offered to assist Barrow professionals in establishing a FASD diagnostic team for the North Slope. They have proposed a model of having quarterly 4-day trips (including weekend days) to Barrow to conduct evaluations as a team alongside local professionals. We could have a "FASD Clinic" just like the existing "Orthopedic Clinic," "Diabetes Clinic," and other specialty clinics provided at our local hospital facility with specialists from Alaska Native Medical Center in Anchorage. Having such a team would slowly reduce the tremendous backlog of undiagnosed individuals, including young children, teenagers and adults, resulting in more effective service delivery, greater understanding by the person and his or her caregivers about behavioral issues, and enhanced ability to access benefits. On a statewide basis, this model would encourage development of traveling FASD diagnostic teams to serve rural hub communities similar to Barrow.

Adopt innovations such as the "Probation Icon Project" for juvenile justice cases

The FASD Youth Justice Program in Winnipeg, Manitoba has developed sheets of peel-off icons symbolizing each juvenile probation condition. When the juvenile probation officer is explaining the conditions to a FASD-affected youth, the youth is encouraged to peel off the appropriate icon and place it by the corresponding probation condition. When the youth is done, the youth leaves with the copy of the conditions with the icons on it. The probation officers testing this approach feel that the level of comprehension is greatly increased (Robson, 2009). The Alaska Division of Juvenile Justice is receptive to adapting the use of peel-off icons to its Conduct Agreement/ Conditions of Probation (Murray, personal communication, October 28, 2010). The first step will be to develop icons that fit the Alaska Division of Juvenile Justice probation conditions.

Encourage development of programs to support birth mothers to care for a child with FASD, when at all possible, while preserving safety for the child

The value of such programs in providing meaningful support for birth mothers and their families has been confirmed by research (Olson, Oti, Gelo, & Beck, 2009). Programs in Washington such as Families Moving Forward and the Parent Child Assistance Program provide such a model. Dr. Sterling Clarren, a leading physician in the field of FAS for over 30 years, has predicted that such programs would reduce the incidence of FASD by half, since birth mothers given such support tend not to have additional FASD-affected children (Clarren, 2010). Barrow's Children and Youth Services program[11] is currently developing such an initiative using

[11] Jointly sponsored by the North Slope Borough, the Native Village of Barrow and the Alaska Office of Children's Services.

the Teaching-Family Model of providing a great deal of support within the family to eliminate or at least greatly reduce time that a child must be separated from the child's family (Dunbar, personal communication, October 22, 2008).

The Barrow Superior Court is in the process of becoming the first rural Alaska court to implement the Alaska Department of Corrections' Probationer Accountability with Certain Enforcement (PACE) program. Modeled on a successful program in Hawai'i, the program identifies certain felony probationers for special enforcement procedures in which even technical probation violations result in immediate petitions to revoke probation, warrants are served on an expedited basis, and a court hearing is held within 72 hours (Halpin, 2010). The hearing results in a very prompt but limited sanction. The sanction might be the immediate service of a few days in jail (Telkamp, personal communication, October 13, 2010). Such an effort will assist probationers affected by a FASD or similar cognitive impairments to realize that violating probation conditions has a consequence of jail time by having the limited consequence occur immediately after the violation.

Such placements would be more humane, suitable, and far less costly to the citizens than locking persons affected by FASD in jails or locked juvenile institutions. The Lakeland Centre for Fetal Alcohol Spectrum Disorders in Cold Lake, Alberta, Canada has issued a report describing a large number of Canadian programs that provide structured living for persons affected by FASD. One program of particular interest is the Whitecrow Village FASD Society in Nanaimo, British Columbia, Canada, which provides a wonderful model of a structured living and outreach program administered by and serving adults with FASD (Warner & Kissinger, 2010). Two programs that have lost their funding also demonstrated the feasibility of structured living specifically targeted for adults and adolescents affected by FASD: the Phoenix House program for adult offenders in a halfway house in Vancouver, British Columbia, and the Kids Kare and Education program in Washington State for adolescents in state custody.

Bread for the journey

As hopes for a North Slope justice system that is more caring and more appropriate for its citizens with fetal alcohol spectrum disorders and other mental health challenges become more real, it is useful to keep some basic realities in mind.

FASD is not a racial issue; it is a medical condition caused by maternal drinking during pregnancy that can happen anywhere on earth among persons of any race. Unfortunately, the medical community may misdiagnose or overlook the FASD condition and provide a psychiatric diagnosis that leads to ineffective and inappropriate treatment. Instead of realizing the FASD condition exists, the professional may give a diagnosis limited to conditions such as Attention-Deficit/Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, and/or Conduct Disorder only (Dubovsky, 2008). On the other hand, a person with a FASD may also have a number of other mental health conditions along with the FASD.[12] Effective intervention will only occur if the treatment providers pay attention to FASD and the other conditions as well.

Even if facial appearance changes over time, a person does not "outgrow" FASD. With a structured life, the person may adapt and become a productive citizen (Kleinfeld & Westcott, 1993). In court, an affected person may be quite verbal, give answers indicating that the person has "understood," and could, if asked, repeat back what was said. But an adult or teenager affected by FASD may have the understanding and behavior of

[12] "Attention-Deficit/Hyperactivity Disorder, Schizophrenia, Depression, Bipolar Disorder, Substance Abuse Disorder, Sensory Integration Disorder, Reactive Attachment Disorder, Separation Anxiety Disorder, Post Traumatic Stress Disorder, Traumatic Brain Injury, Medical disorders (e.g. seizure disorder, heart abnormalities.)" (Dubovsky, 2008).

a middle school student or younger. A person affected by a FASD may be able to follow a direction one day and be unable to do so the next, not due to recalcitrance, but simply because of the way the person's brain functions (Rathbun, 1993).

The challenges for persons affected by FASD are present across the justice system. A defendant may lack the intent required for certain crimes, yet be convicted of them. A defendant might be very suggestible during police questioning, leading to false confessions and wasted resources (and increased danger to the community) when the investigation is shut down too soon. Victims and other witnesses affected by FASD may have a great deal of difficulty in a trial when asked to describe what has happened (Conry & Fast, 2000). Probationers or parolees may have special difficulties in following the rules, leading to more court time and jail commitments for violations of bail, probation and/or parole. Parents in child welfare cases may have special difficulties in satisfactorily completing case plans.

Delivering adequate training about FASD to justice system professionals can be challenging, given work loads and shift work. The problems become more acute when dealing with the vast area of a jurisdiction like Alaska. Even when persons have been trained, the turnover in these positions fosters the need for ongoing training despite the costs involved.

Even if judicial officers and other justice system professionals understand FASD and its effect across a person's life span, the traditional justice system has many roadblocks for those wishing to adapt. Research on the effect of FASD shows that an affected person has difficulty relating consequences to previous actions (Conry & Fast, 2000), yet cases drag on for months because of workloads and efforts to protect rights, greatly diminishing the impact of any consequences imposed. The experience of families raising a child affected by FASD shows that it is most productive to have an affected person concentrate on a very limited number of goals (Jones & Cunningham, n.d.), yet bail orders and case plans may have a dozen rules and a document like the judgment for a felony probationary sentence in Alaska has 12 to 30 general and special probation conditions. Pressures to complete hearings promptly to move the docket and leave court clerks free to work on progressively more difficult data entry requirements make it difficult to slow down a hearing and provide the explanations needed by an affected person. The very real possibility that a person affected by FASD will be overwhelmed by too much information provided at one time justifies taking a short break in a hearing when possible to maximize the ability of the person to understand it.

A person affected with FASD almost always needs enhanced structure—the "external brain." But the available tools may be excessive in structure and expense—like a jail cell—or provide reasonable structure, but only for a relatively short period of time—like a halfway house, alcohol treatment program, or juvenile treatment program. Also, knowing how much structure is needed for a particular individual is difficult: Professionals (including judicial officers) can become chronically frustrated with the frequent situation that we do not know how intensely a particular individual is affected by FASD.

Conclusion, but not the end of the journey

Failure to adapt to the legitimate needs of persons with the "invisible disability" of FASD needlessly encourages the development of "secondary disabilities" (Streissguth, Barr, Kogan & Bookstein, 1996) that lead to excessive involvement of affected persons with the justice system, increased confinement, and tremendous time demands for all the professionals involved, including peace officers, probation officers, and social workers. Tribal courts face the same challenges as they resolve cases within their jurisdiction. Society as a whole bears a great burden of cost. By helping

affected persons avoid disproportionate entanglement with the criminal justice system, these costs would be reduced.

Accommodating persons with a cognitive disability like Fetal Alcohol Spectrum Disorder is both a human rights issue and a due process issue (Evensen, 2010). Despite the pressures on time and energy, courts must do their best to be understandable, and to be respectful of such persons appearing before them. Failure to do so implicates ethical requirements for both attorneys and judges to insure that persons involved in the justice system understand what is happening to them (Huguelet, 2010).

Fetal Alcohol Spectrum Disorder impacts the entire justice system in ways that are difficult for any one person to grasp. Those who realize this fact feel somewhat lonely and overwhelmed as the overall justice system adapts slowly to accommodating the human rights of cognitively impaired persons. But there are some rays of hope. The Canadian Bar Association's (CBA) 2010 resolution 10-02-A "Fetal Alcohol Spectrum Disorder in the Criminal Justice System" shows admirable understanding of the issues raised by FASD (Canadian Bar Association, 2010). The resolution recommends that the CBA:

1. support the initiative of Federal, Provincial and Territorial Ministers responsible for Justice with respect to access to justice for people with FASD and urge all levels of government to allocate additional resources for alternatives to the current practice of criminalizing individuals with FASD;

2. urge the federal, territorial and provincial governments to develop policies designed to assist and enhance the lives of those with FASD and to prevent persistent overrepresentation of FASD affected individuals in the criminal justice system; and

3. urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

Similar efforts in the justice community in Alaska and the rest of the United States would result in a more humane, effective justice system which would lead to a noticeable reduction in the needless human and financial costs of our current treatment of persons affected by a Fetal Alcohol Spectrum Disorder. As Canadian Judge Mary Ellen Turpel-Lafond stated at the September, 2008 Whitehorse conference on access to justice of persons affected by FASD, improving effective "access to justice" for individuals with FASD "is the desire in fact to understand and keep them out of the justice system and to ensure that the justice system is not used as a substitute for appropriate social services and supports for some of the most vulnerable citizens" (Fraser, 2008).

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Fetal Alcohol Spectrum Disorder - Management and Policy Perspectives OF FASD

by Edward Riley, Sterling Clarren, Joanne Weinberg, and Egon Jonsson

14

Understanding FASD: Disability and Social Supports for Adult Offenders

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Fetal Alcohol Spectrum Disorder (FASD) can affect people of all backgrounds, ethnicities, religious persuasions, and socioeconomic groups, and represents a significant factor in predicting involvement in the correctional system. The following discussion is focused on the issues facing the corrections system and offenders or former offenders with FASD, as well as issues facing society on the release of people with FASD back into the community. The strong correlation between the disability, unmet multifaceted needs and incarceration of people with FASD, along with the stigma and hard realities of incarceration, necessitate a thoughtful perspective to improve the chances of success for this population.

Adults with FASD experience a range of disabilities that contribute to the likelihood that they will enter the correctional system. These include the primary brain deficits of cognitive and behavioral problems, gullibility, inhibition and poor judgment; secondary disabilities, such as substance abuse and mental illness; and deficits in the social determinants of health, such as poverty and racism. However, the judicial and correctional systems are generally not prepared either to identify FASD, or to address the disabilities of FASD among the offender population. Screening and assessment for the spectrum in these systems is limited, and at present there is no system in place to screen for FASD in adult prisons in Canada (Chapman, 2008). Although there are overtures in some jurisdictions to address the latter deficit, the needs of adult offenders with FASD are currently not adequately met in the corrections system (Chapman, 2008; Miller, 2005; Boland, Chudley, and Grant, 2002). It is important that the correctional system recognizes and identifies affected individuals, because people with FASD are vulnerable and their disabilities contribute to their getting into trouble with the law (Moore and Green, 2004; Streissguth *et al.*, 2004). Moreover, research has indicated that identifying FASD at any age improves options for interventions and helps to reframe problematic behaviors (Malbin, 2004).

14.1
Fetal Alcohol Spectrum Disorder (FASD) is a Disability

The term "disability" has a variety of definitions. For the purposes of discussing the interrelationship between FASD, social services and incarceration, disability occurs when individuals have activity limitations that create barriers to their participation in society. In the International Classification of Functioning, Disability and Health (ICF), developed by the World Health Organization (WHO), three broad health domains are noted: body functions and structures; activities or the execution of actions; and participation, or life involvement (Cieza *et al.*, 2009). Using this international framework, it is appropriate to view FASD as a brain dysfunction that causes impairments (Olson *et al.* 2009) in all three main areas of functionality.

Fetal alcohol exposure (FAE) results in a continuum of impairments that cause affected people to be functionally disabled in a variety of ways. There are both primary disabilities and secondary disabilities associated with FASD. *Primary disabilities* are those that are directly caused by exposure to alcohol before birth, while *secondary disabilities* arise out of the interplay between primary disabilities, psychosocial factors, and environmental influences. Other factors that contribute to the barriers experienced by people with FASD are deficits in the social determinants of health.

Incarcerated people with FASD are an especially vulnerable subgroup of the affected population. Offenders may never have received a diagnosis, and they commonly have a pattern of repeated trouble with the law. People with extensive criminal histories are frequently considered high-risk offenders, and factors contributing to their criminality, including brain damage caused by FASD, may not be taken into account by the justice system. The incidence of primary and secondary disabilities caused by the prenatal exposure to alcohol is very high in offenders with FASD, and interventions to ameliorate adverse outcomes generally have not been employed (Fast and Conry, 2004). The interrelationship between the primary and secondary disabilities of FASD can lead to behavior that results in incarceration, and as a result affected people will require the same societal accommodation and supports that are available to people with other disabilities. Offenders with FASD are disabled. FASD can be viewed as a disability with societal challenges and needs for support similar to those of other chronic impairments that result from injury, such as spinal cord injuries.

14.1.1
Primary Disabilities Associated with FASD

The effects of prenatal alcohol exposure (PAE) include damage to brain structures that results in deficits in cognition, development, and behavior. PAE can also cause separate medical conditions, such as seizure disorders, skeletal problems, cardiovascular disease, dental problems, and reactions to medications (Paley and O'Connor, 2009). All of these conditions influence an individual's ability to function and participate fully in society.

In particular, the diminished cognitive function in FASD results in major deficits in an individual's ability to meet the demands of daily life. Poor short-term memory can result in information and instructions being quickly forgotten; and while long-term memory may be unaffected, information storage is often disorganized and therefore information becomes difficult to retrieve (Grant *et al.*, 2004). Effective executive function (EF), or the integration of basic cognitive processes, is often lacking in people with FASD. Deficiencies in EF affect multiple areas of functioning, including work and school performance, social interactions, parenting, daily living skills, and ability to plan, organize and learn from mistakes (Grant *et al.*, 2004; Connor *et al.*, 2000). The scores on intelligence tests of people with FASD may or may not be abnormal, but many people with FASD are not able to perform at the level predicted by their IQ scores (Malbin, 2004; Kodituwakku, 2009; Fast and Conry, 2009; Chudley *et al.*, 2007; Wass, Persutte, and Hobbins, 2001). These factors, combined with insufficient inhibition and poor cause-and-effect reasoning, can lead to life-long difficulties in adapting to social expectations and functioning socially (Rasmussen *et al.*, 2008).

14.1.2
Secondary Disabilities Associated with FASD

Secondary disabilities are conditions, behaviors or situations that develop after birth. Secondary disabilities associated with FASD include mental illness (depression, anxiety and psychoses), substance abuse, restlessness, trouble at school, homelessness, and unemployment (Paley and O'Connor, 2009; Chudley *et al.*, 2007). Secondary disabilities cause significant upheaval in people's lives. Trouble at school can lead to delinquency and then to trouble with the law, which can in turn cause difficulty in attaining and retaining employment and lead to further encounters with the legal system. According to Streissguth *et al.* (2004), adolescents and adults with FASD have a 60% risk of getting into trouble with the law. Incarceration can result in a loss of housing and possessions, and association with other criminals can lead to stigma and victimization.

These problems are also referred to as "neurobehavioral." Malbin (2004) states that the observable behavioral effects of FASD need to be recognized as the result of the physical changes in the brain and their impact on brain processing. Dysfunction in behavior includes poor judgment, poor impulse control, conduct problems, poor problem-solving skills, learning problems, fine motor skills deficits, hyperreactivity to stress, sexual promiscuity, resistance to change, difficulties in forming lasting relationships, gullibility, victimization, and an inability to understand or conform to social norms (Paley and O'Connor, 2009; Chudley *et al.*, 2007; Rasmussen *et al.*, 2008; Aragon *et al.*, 2008). Some of these behaviors develop over time as protective reactions to feelings of frustration (Malbin, 2004). Aragon *et al.* (2008), indicate a link between a lack of services due to undiagnosed FASD and the development of secondary disabilities in adolescence and adulthood. Other research suggests that the early evaluation and identification of exposed people is vital to anticipating the confounding occurrence of secondary

disabilities (Schonfeld, Mattson, and Riley, 2005). Among offenders with FASD, secondary disabilities are a key aspect of their involvement with the justice system.

14.1.3 The Social Determinants of Health and FASD

Housing, sanitation, nutritious food, health care, employment, access to services, justice and human rights are vital for everyone, and are known as the "social determinants of health." These are the economic and social conditions in which people are born, grow up, live and age, and the wider economic, social and political systems established to deal with illness (World Health Organization, 2008). Research indicates that social determinants of health have a greater influence on an individual than behavioral risk factors.

Social determinants of health influence both the incidence of FASD and the outcomes of people affected by it. There are a number of factors that lead to FAE. The mother's alcohol consumption during pregnancy is the direct cause; however, women do not live their lives in a vacuum. Trauma, poverty, inadequate nutrition and housing, gender inequity, racism, addiction, abusive relationships and other conditions affect their health, personal options and behavior. Children born with FASD in such environments face serious environmental and social adversities that place them at risk for adverse outcomes (Streissguth *et al.*, 2004; Rasmussen *et al.*, 2008). Adults with FASD have frequently grown up in unstable environments and have experienced difficulty in meeting their basic needs; many have been separated from biological parents and lived in multiple foster homes (Olson *et al.*, 2009). They often have experienced learning problems and unemployment, and may have ended up in jail (Streissguth *et al.*, 2004). Studies indicate that FASD-affected children have lower health-related quality of life than children who have survived cancers and other significant physical disabilities (Stade *et al.*, 2006). High-quality caregiving and a stable home environment are important factors in successful outcomes for people with FASD, yet positive and stable family environments are not typical for this population (Olson *et al.*, 2009). The negative outcomes associated with FASD are thus related to the very high rates of environmental risk factors and the inadequacy of family resources for affected children (Olson *et al.*, 2009). Offenders with FASD represent the output of an environment that is characteristically rated low on social determinants of health.

The principal health risks such as trauma, physical and sexual abuse, racism, poverty and housing instability are rarely addressed in FASD prevention (Reid, Greaves, and Poole, 2008). In order to improve the health of people with FASD and lower the prevalence of the spectrum, the contributing social influences on alcohol use need to be attended to (Gearing, McNeill, and Lozier, 2005). All of these factors are important to address, as they contribute to sustaining a disadvantaged life situation. When added to the secondary disabilities such as substance abuse, unemployment and incarceration, social and environmental risk factors are increased. Attending to the social determinants of health should help to reduce not only the occurrence of complex conditions but also the societal costs associated with FASD.

14.1.4 Human Rights and FASD

FASD is best considered within a broader disability context wherein participation in society is accommodated and functionality is managed through service provisions, much as would occur for someone with a progressive degenerative disorder. Canadian law, as detailed in the Charter of Rights and Freedoms, recognizes that individuals are equal under the law and entitled to equal protection and benefit, without discrimination based on age, race or ethnicity, religion, skin color, gender, mental or physical disability (Canada, Charter of Rights and Freedoms, 1982). The purpose of equality rights is to respect the dignity, worth and value of all Canadians, and to ensure that laws and government action are based on circumstances and needs, and not on negative stereotypes. One of the roles of government is to facilitate equal access to services and supports for citizens. The impairments caused by FASD necessitate that affected individuals receive the supports they need to participate equally in society.

14.1.5 Incarceration and FASD

The prevalence of FASD is difficult to assess. Current estimates of the percentage of the overall population that is affected range from 2% to 5% in North America and Western Europe, with the spectrum generally under-recognized (Malbin, 2004; Fast and Conry, 2004; May *et al.*, 2009). There is a higher incidence of FASD in certain regions and groups. Typically, rural, isolated and remote areas have a higher incidence, but the precise numbers are unknown (Bohjanen, Humphrey, and Ryan, 2009). Canadian FASD research suggests that rates are also higher in some Aboriginal communities (Boland *et al.*, 1998). In particular, the prevalence of FASD is significantly higher among incarcerated people in Canada, and an estimated 10-fold greater than among the general population (MacPherson and Chudley, 2007).

The problems that people with FASD have in adhering to social norms of behavior can result in their being considered socially deviant instead of disabled. Children with FASD are viewed as victims of the birth defects caused by alcohol exposure (Donohue, 2008). Adults with FASD in the correctional system are regarded in an entirely different way, as deviants who have violated social norms (Donohue, 2008). Research indicates that the disabilities caused by FASD become de-medicalized as the affected person develops into an adult (Donohue, 2008; Golden, 1999). The term "de-medicalization" refers to affected people coming to be regarded as in charge of their lives and perpetrating social wrongs through choosing to display challenging behaviors, rather than as people with physical and mental limitations caused by damage to the brain (Golden, 1999). This change in perspective results in adults with FASD being considered fully responsible and then being relegated to the criminal justice system (Donohue, 2008). However, the child with FASD inevitably matures into the adult with FASD, because the

14.2.1
Treatment Programs

The brain deficits in offenders with FASD, combined with the secondary disabilities associated with the spectrum, cause problems in functioning that make traditional prison treatment programs ineffective. It is an expensive use of scarce resources to have people enrolled in programs that cannot be effective. Moreover, a lack of response to programs by people with FASD can lead to their not being able to access prison programs because they have a history of not being helped by such programs (Fast and Conry, 2009; Chudley *et al.*, 2007; Boland *et al.*, 1998; Burd *et al.*, 2003). The literature calls for corrections to do a better job with offenders with FASD. One way to accomplish this goal is to effect a change in offenders' behavioral skills and social circumstances before they are released into the community. The research calls for programs in prisons to address affected people's abilities (Chapman, 2008; Debolt, 2009; Alberta Health Services, 2009; SAMHSA, 2007). In addition, the prison programs need to be client-centered in order to assess each individual's strengths and weaknesses and to develop appropriate skills training and treatment. In order to attend to the different needs and functional abilities of people with FASD, existing programs in the corrections system require restructuring. Notably, this can be accomplished through focusing on meaningful outcomes, such as building adaptive skills.

The rehabilitation of offenders is an evaluative and capability-building process (Ward and Marshall, 2007). Current research indicates that rehabilitation programs, and the release plans developed for individuals, need to include constructive conceptions of positive lives (Ward, 2002). It is important to assess individuals' life histories to better understand their psychological dispositions and vulnerabilities, as well as the internal and external factors that may prevent them from meeting their primary needs (Ward, 2002). The multiple and comprehensive requirements of people with FASD in the correctional system require interdisciplinary teams to deliver programs (Evans and Brewis, 2008; Egger, Binns, and Rossner, 2009). The research on PAE conducted in schools indicates that a structured environment which is heavily oriented around order and routine is beneficial for people with FASD; developing integrated programs in the corrections system could help to address these requirements for adults (Chapman, 2008; Bell, Trevethan, and Allegri, 2004).

14.2.2
Recidivism and Alternative Sentencing

Numerous studies have noted the high rates of recidivism among offenders with FASD (Boland, Chudley, and Grant, 2002; Malbin, 2004; Fast and Conry, 2004; Chudley *et al.*, 2007; Mitten, 2003). Recidivism among FASD-affected people occurs for many reasons. The brain structural deficits that cause difficulty with school and socializing continue to cause problems in the correctional system. People with FASD have difficulty adhering to parole conditions, which is a primary

reason for the recidivism problems for this group (Fast and Conry, 2004; Chudley *et al.*, 2007). Moreover, research indicates a link between a lack of community living skills and high rates of recidivism (Eggers *et al.*, 2006; Lindstedt *et al.*, 2004). For offenders with mental illnesses, a lack of community services after release can exacerbate their illnesses and contribute to recidivism (Sneed *et al.*, 2006).

Considering the primary and secondary disabilities of people with FASD, a strong argument can be made for addressing recidivism among offenders with FASD through purposeful sentencing, improving skills, and attending to other issues such as mental illness. Research into chronic offenders acknowledges that high-needs offenders, such as people with FASD, are more likely to return to prison (Government of Canada, 2007), and that receiving services to meet those needs may act to reduce recidivism. However, this research also suggests that the criminal law paradigm is a less than appropriate way to deal with disabled offenders (Government of Canada, 2007).

Incarceration is based on principles of deterrence and rehabilitation, along with denouncing unlawful conduct. Incarceration is designed to deter people from breaking laws, and rehabilitation is intended to return offenders to the community in a better state than before the crime. These principles assume that offenders have the capacity to understand the nature and consequences of unlawful behavior and to enact changes in their behavior and personal circumstances. The brain damage caused by FASD makes deterrence from future crimes and rehabilitation unlikely, if not impossible (Malbin, 2004). Alternatives to incarceration for people with FASD, such as diversions, conditional sentences and sentencing circles, need to be considered (Fast and Conry, 2004; Fast and Conry 2009; Roach and Bailey, 2009; Mitten, 2004). The literature calls for environmental accommodations for affected people within the correctional system, much as would be considered standard for persons with other disabilities (Malbin, 2004). Chudley *et al.* (2007) have recommended alternative sentences and parole conditions that consider the disability caused by FASD.

Currently, the justice system in Canada may consider FASD as either a mitigating or an aggravating factor in sentencing offenders. An analysis of Canadian case law indicates a lack of consistency in the approach to offenders with FASD (Roach and Bailey, 2009; Justice Canada, 2009). In certain cases, offenders were found unfit to stand trial, some were sentenced as youths to adult correctional facilities, while others were labeled as dangerous offenders (Roach and Bailey, 2009; Justice Canada, 2009). FASD may be considered or mentioned by the court, but the brain impairments are frequently not given substantial weight during sentencing (FASD Ontario Justice Committee, 2007).

For offenders with FASD, it is essential for the justice system to focus on achieving long-term positive outcomes. Alternatives to incarceration are recommended in the literature for offenders with FASD who are not a risk to the public (Fast and Conry, 2009; Mitten, 2003; Debolt, 2009; Roach and Bailey, 2009). Suggestions for incarceration alternatives include holistic community-based programs that address both substance-abuse problems and mental health issues (Mitten, 2003). According to the research, the most purposeful sentences for people with FASD

may be those that effect change in the person's life or social circumstances, rather than strictly aiming to change the person's behavior (Fast and Conry, 2009). Another factor to consider in the sentencing of FASD-affected offenders is their susceptibility to victimization while in custody (Chudley *et al.*, 2007; Jones, 2007). Incarceration is not appropriate for many affected people because of the brain deficits caused by PAE, which impair learning and reasoning and influence behavior. Inmates with mental illnesses may accumulate disciplinary sanctions during incarceration, and thereby reduce their opportunities for parole (Baillargeon *et al.*, 2009). In addition, the negative social networks extant in prison increase the probability of re-offending through post-release affiliations.

Reducing recidivism by offenders with FASD will require adjustments within the correctional system. Canadian government research acknowledges that incarceration is an inefficient and ineffective way of addressing recidivism in chronic offenders for whom prison is not a deterrent (Government of Canada, 2007). This research recommends that, for chronic offenders with cognitive impairments, investing resources in health and social systems may yield better results than repeated processing through the criminal justice system (Government of Canada, 2007). Chudley *et al.* (2007) have called for the allocation of appropriate resources within social services to improve the outcome and quality of life for affected people. Addressing the lack of fit between the abilities of people with FASD and release requirements will also reduce the costs of recidivism associated with FASD, and improve outcomes (Alberta, Government, 2007–2008; Every *et al.*, 2000; Canada Government, 2009; Canada, Government, 2007).

The criminal justice system is currently limited in its ability to impose the type of sentencing that would be beneficial to people with FASD. Court jurisdictions were not intended to recommend the community-based holistic supports and services that help people with FASD live effectively in the community (Roach and Bailey, 2009).

14.2.3 Release Planning

Statutory release from custody is governed by a federal law that allows offenders who are not considered dangerous to serve the last one-third of their sentence in the community on parole to the Correctional Service of Canada (CSC). Parole is granted to offenders to facilitate rehabilitation and ease transition into the community. The criteria for granting parole includes the risk to society, the prisoner's post-release plan, criminal record, behavior in prison, and information provided by psychiatrists/psychologists, police, victims, and family. The CSC is responsible for preparing offenders for consideration by the National Parole Board. Upon release, prior offenders are required to report to a parole supervisor and to adhere to a variety of conditions, including curfews, restrictions on travel, movement and behavior, as well as prohibitions on alcohol consumption and associating with certain individuals. Should the conditions of release be violated, the offender may be returned to custody (Correctional Service of Canada, 2008).

Before an offender is released from custody, the individual must agree to a cor rectional plan, which outlines the procedures to maintain a law-abiding lifestyl in the community. The plan details restrictions on movement and commitment to participate in employment and programs. Each plan is individualized to th person's needs and focuses on specific issues, such as job training and substanc abuse. Successfully re-engaging prior offenders in the community requires ade quate supervision and effective community programs (Correctional Service c Canada, 2008). The inherent limitations faced by people with FASD can result i significant barriers to reintegration into the community for this group.

Community reintegration programs for offenders with brain damage, includin those with FASD, are vital to success. However, the research identifies a gener need for community reintegration programs in the corrections systems (Egger *et al.*, 2006), and a lack of continuity and program consistency between correction sites and community settings. This can result in people with FASD "fallin through the cracks" in service provision if bridging and transitions between th two environments are not in place.

Prior to the release of an offender with FASD into the community, planning fc that eventuality is critical. Both pre-release and post-release plans for affecte individuals need to be developed (Eggers *et al.*, 2006; Sneed *et al.*, 2006). Any trea ment needs of individuals, such as for mental illness and substance abuse, nee to be started while the person is in custody and then continued in the communit upon release (Magaletta *et al.*, 2009). Establishing contacts with a team of servic providers in the community is therefore essential for affected people before releas (Eggers *et al.*, 2006). It is also important that probation and parole orders be inte preted to offenders with FASD. Otherwise, their learning disabilities may precluc adherence to the guidelines and increase their risk of re-offending (Fast an Conry, 2004). Research recommends that affected people receive comprehensiv but simply written and meaningful discharge planning before being released int the community (Debolt, 2009).

Housing for offenders with FASD upon release appears to be a key to succeedin in the community. Stable housing for adults with FASD upon release from inca ceration will also improve the delivery of necessary services. The correction system has an opportunity to maximize the chance of successful reintegration fc offenders with FASD by tailoring services and supports, programs, sentences an probation or parole orders to reflect the needs and functionality of the individua

14.2.4 Correctional System Needs

The challenges facing the corrections system in addressing the functional disabil ties caused by conditions such as FASD are increasingly being recognized by bot researchers and governments. The complexity is in altering the existing system i such a way as to enable the needs of FASD-affected offenders to be successfull met within the corrections context, and then extending these services into th community upon the person's release. The FASD literature calls for purposefi

sentencing that is focused on outcomes, and effecting changes in the behaviors and skills of this population while they are in custody.

A recent formal evaluation of federal Canadian correctional programs revealed that targeting the specific needs of offenders is both relevant and effective (Correctional Service of Canada, 2009). Offenders who participated in correctional service programs, such as for substance abuse, exhibited changes in behavior and were more likely to be granted a discretionary release than those who did not participate in programs (Correctional Service of Canada, 2009). Program participation was also associated with a reduction in re-admissions into the correctional system. However, the evaluation also revealed that the correctional system is significantly lacking in its ability to deliver programs to offenders with learning deficits, cognitive disabilities, and mental disorders. The report formally recommended developing a strategy to address the programming needs of such offenders (Correctional Service of Canada, 2009).

Studies indicate a need to develop a clear approach to FASD in the criminal justice system, and to develop clear practice guidelines (Cox, Clairmont, and Cox, 2008). FASD research calls for specific units to be established within the correctional system that are environmentally sensitive to the offenders' behavioral profile (Fast and Conry, 2009; Chudley *et al.*, 2007; Boland *et al.*, 1998; Bell, Trevethan, and Allegri, 2004; Burd *et al.*, 2003). Founding FASD units would enable the corrections system to address the cognitive and behavioral impairments of offenders with FASD. Training corrections personnel about FASD and its effects is also vital since, unless they have an awareness of the condition, such personnel are unlikely to recognize that potentially difficult behaviors are not deliberately chosen but are, rather, a result of brain impairment. Corrections system staff require both a knowledge of FASD impairments and the skills to interact effectively with offenders with FASD (Fast and Conry, 2009; Chudley *et al.*, 2007; Boland *et al.*, 1998; Bell, Trevethan, and Allegri, 2004; Burd *et al.*, 2003). In these ways, the neurobehaviors caused by the impairment can be addressed through modifying the social and physical environment experienced by affected people.

In addition to training for corrections personnel, programming is needed that targets meaningful and relevant roles for FASD-affected offenders after release. Corrections is an environment that can be viewed as both a barrier and a facilitator to participating in society. Because people do get released, it can play a vital role in preparing people to re-enter society (Canada, Criminal Code of Canada, RSC, 1985). Certain aspects of correction culture–structure, repetition, habit–are positive environmental supports that can enhance this pre-release preparation. Working with the FASD-affected population in prisons is an opportunity to connect with individuals who might otherwise "fall through the cracks" in the system.

14.3
Interventions and Social Supports for Adults with FASD after Release

Viewing FASD as a disability under the WHO International Classification of Functioning (ICF) framework allows us to see FASD as a condition that can benefit

from many of the same strategies and principles used in developing services for other disability groups, such as those with acquired brain injury or spinal cord injury. In the case of FASD, there is some research indicating that the disabilities (both primary and secondary) may not be in a stable state (Moore and Green, 2004; Paley and O'Connor, 2009; Kodituwakku, 2009; Rasmussen *et al.*, 2008; McGee *et al.*, 2008). (This point will be discussed later, because it has implications for the design of a community service network.) Drawing on the prevention model (Caplan and Grunebaum, 1967), secondary prevention (which is sometimes called "treatment") and tertiary prevention (which can be viewed as "rehabilitation") are the focus of the activities both within corrections system and in the community.

Appropriate interventions and accommodations are vital for people with FASD if they are to remain in the community after being released from the correctional system. One major issue here is to establish seamless and continuous support from the correctional system to the community. Providing continuity in services requires that the correctional system establishes methods and policies to interact with community partners who will help individuals function and access services in the outside world. The limited knowledge regarding adults with FASD, and the challenges that they face in the community, dictates that interventions be specifically tailored to their individual profiles, but still be within the principles of general social service offerings.

14.3.1
Client-Centered Lifelong Multisectoral Supports

A client-centered approach recognizes that the specific characteristics and circumstances of individuals must influence service need and service delivery. The clients are the best persons to describe their experiences of reality, and as a result it behooves service providers to spend the necessary time to learn about the client's life experiences (Law, 1998). An essential element of client-centered practice is facilitating clients in solving their problems (Law, 1998). In the client-centered approach, clients may be involved in making choices about their rehabilitation, rather than having pre-established external decisions imposed on them. The approach allows for flexibility in program delivery and recognizes the particular requirements of the individual.

A client-centered approach has multiple advantages in delivering interventions for people with FASD, because of the highly variable nature of the brain deficits associated with the disorder. The needs of individuals with FASD depend in part on the extent of brain damage by PAE and on the secondary disabilities. Interventions that focus on the individual will be most able to address specific requirements (Chudley *et al.*, 2007; O'Connor and Paley, 2009; Bertrand, 2009). The literature recommends the establishment of multidisciplinary teams to work with community partners to maximize the interventions for individuals, based on their needs and abilities (Grant *et al.*, 2004; Chudley *et al.*, 2007). By tailoring interventions to the needs of the individual, personally beneficial programs and treatments can be provided (Lindstedt *et al.*, 2004; O'Connor and Paley, 2009).

The disabilities caused by FASD do not self-correct over time, and the FASD research indicates that lifelong interventions are necessary for affected people (Paley and O'Connor, 2009; Grant *et al.*, 2004; Chudley *et al.*, 2007; O'Connor and Paley, 2009; Bertrand, 2009). As a result, people with FASD need multisectoral coordinated services that are accessible across their lifespan (Grant *et al.*, 2004). The involvement of multiple service providers in comprehensive interventions has a variety of benefits. Service providers generally follow different mandates to deliver services, which can result in a "silo" approach. Affected people can be lost to follow-up and monitoring if left alone to negotiate the support system. A comprehensive approach that offers coordinated care across multiple systems, including corrections, is important to maximize success for people with FASD (Paley and O'Connor, 2009). Furthermore, traumatic brain injury research reveals that rehabilitation involving an interdisciplinary team leads to improved function and independence (Evans and Brewis, 2008). Successful initiatives are multidisciplinary and multisectoral, and also involve partnerships with community agencies to provide services (Olson *et al.*, 2009; Brown, 2004).

There are multiple barriers to accessing community services for adults with FASD. Affected individuals may not realize they are in need of formal support, and therefore do not seek it out (Debolt, 2009). In addition, they may not possess sufficient cognitive faculties to negotiate separate application processes, and adhere to the variety of system requirements developed for people without brain damage. For offenders with FASD, other impediments include a lack of coordination between the correctional system and programs available in the community (Hartwell and Orr, 1999). The literature identifies a need for community programs for newly released offenders, in part due to the prevalence of waiting lists for entry into treatment programs in communities (Brown, 2004). Further, establishing connections between the services that people receive in the correctional system and in the community will assist in informing service providers about the specific needs and goals of individual offenders (Magaletta *et al.*, 2009).

14.3.2
Employment and Housing

For adults with FASD, an additional impediment to successful community establishment after release from prison is trouble finding employment and other forms of support (Brown, 2004). Other barriers include deficient work skills, gaps in employment records, difficulty accessing transportation to employment or community services, and the availability of health care, child care, and medication (Brown, 2004; Magaletta *et al.*, 2009; Fonfield-Ayinla, 2009).

The availability of stable housing for newly released offenders with FASD is also crucial to success in the community. Homelessness worsens secondary disabilities, such as mental illness and substance abuse, even in people without the brain deficits caused by FASD (Fonfield-Ayinla, 2009; Zlotnick, 2009; Shand, 2004). Moreover, offenders may be released into unfamiliar communities, and with few financial resources (Brown, 2004). It is well known that limited financial resources

have a negative influence on the ability to find and maintain a stable home. As a result, developing a comprehensive approach to intervention across multiple systems of care, including stable housing, is strongly advocated for people with FASD (Paley and O'Connor, 2009; Grant *et al.*, 2004; Chudley *et al.*, 2007; Bohjanen, Humphrey, and Ryan, 2009).

Secure and stable housing has multiple benefits for adults with FASD, and acts as a cornerstone to success in other programs. Housing can help people with FASD to protect against, cope with, and minimize secondary disabilities, such as mental illness (Burd *et al.*, 2003; Brinda, 2006). Stability in housing also assists them in adhering to treatment goals (Debolt, 2009), and reduces recidivism in offenders with mental illnesses (Lindstedt *et al.*, 2004; Case *et al.*, 2009). The difficulties of affected individuals in tracking finances, controlling impulses and following rules necessitates support to ensure stability in housing, such as access to a case worker who can assess the person's needs and ensure that they are met (Brinda, 2006).

The variable and particular effects of FASD on individuals require that programs cover a wide range of housing options appropriate to the range of abilities and functionality, including specialized support and more independent programs. For a newly released offender with FASD, housing within the community is preferred over placement in halfway houses, due to the negative influence of other criminals on affected individuals (Brinda, 2006). Following a client-centered model for providing housing to newly released offenders with FASD is beneficial. A comprehensive umbrella program to provide housing for people with FASD has been recommended in recent research. Such a program would have the capacity to maintain housing stability while accommodating the changing needs of individuals.

14.3.3
Training and Programs

Social and vocational skills training is important for people with FASD. Adults with FASD may have significant social and vocational skill deficits because the impairments caused by PAE do not improve over time, and may even intensify (Moore and Green, 2004; Paley and O'Connor, 2009; McGee *et al.*, 2008). Moreover, even if individuals have received social skills training during their incarceration, repetitive training is vital due to problems in short-term memory and information storage and retrieval (Grant *et al.*, 2004).

The deficits in social problem-solving skills in adults with FASD also require specific interventions. Social problem-solving is affected by impairments in working memory, initiating and planning tasks, and organization and monitoring behavior. Interventions aimed at providing appropriate training and adequate academic and social support can improve the individuals' skills (McGee *et al.*, 2008). Research into interventions in anger management and social skills programs for adults with FASD after release from prison suggests that the management of high-risk situations can be successful with appropriate interventions (Brinda, 2006).

Integrated treatment programs to address mental illness and substance abuse for people with FASD are important. The literature clearly indicates that the secondary disabilities of mental illness and substance abuse are common in people with FASD. Furthermore, mentally ill offenders are at risk of social isolation on release, which is known to worsen substance abuse-related problems (Hartwell and Orr, 1999). Considering that many offenders with FASD are affected by mental illness and addictions, linking treatment for these conditions will help to reduce feelings of isolation. Research into the experiences of mentally ill offenders strongly advocates for an integrated mental health and substance abuse treatment to improve outcomes (Magaletta *et al.*, 2009; Roskes and Feldman, 1999).

Treating mental illnesses or substance abuse in people with FASD requires certain accommodations. Treatment approaches that focus on changing behaviors that are symptoms of FASD disability are inappropriate and ineffective (Malbin, 2004). Research indicates that, like people who have received a traumatic brain injury, those with FASD can be more sensitive to the medications used to treat mental illnesses, and may react to such medications in unexpected ways (Paley and O'Connor, 2009; Fast and Conry, 2009; O'Connor and Paley, 2009). People with FASD may also be resistant to medications and psychosocial therapy (O'Connor and Paley, 2009; Hellemans *et al.*, 2008). These atypical reactions to typical interventions require that service providers monitor individuals closely in order to ensure that medications are prescribed and administered effectively, and that any negative side effects are minimized.

Interventions provided for people with FASD after release from corrections must be tailored to address the needs that are specific to people of their age and gender. Youth require access to education, vocational and life skills training, social skills training and to stable housing. Adaptations to the learning problems associated with FASD require environments of reduced stimulation, the use of visual schedules, repeated instructions, and positive behavioral support (Bohjanen, Humphrey, and Ryan, 2009). Women require access to birth control and child care, as well as certainty in release planning to aid in re-establishing relationships with their children (Pedlar *et al.*, 2008). It is also important to screen for alcohol use in women during pregnancy (SAMHSA, 2007). The social and life skills training for women and men with FASD should reflect particular life circumstances, gender roles, culture and behaviors, such as anger management and parenting skills.

14.3.4
External Executive Function Support

People with FASD require the assistance of designated people to act as transitional navigators or advocates, mentors, advocates, and trustees. The problems that affected people have in learning, reasoning, judgment and adaptive skills frequently result in their becoming lost in the system, without assistance. They may have a limited insight into their lack of abilities, and over-represent their capabilities to themselves and others (Chudley *et al.*, 2007). The FASD research recommends that an "external brain" in the form of formal caregivers and advocates be established to help affected individuals adapt, function, and meet their social needs (Chapman, 2008; Chudley *et al.*, 2007; Boulding, 2007; Kellerman, 2003). Access to stable and funded contacts for service providers helps to improve adherence to recommendations and retain participants in programs (Grant *et al.*, 2004; Debolt, 2009). Assistance in financial management is also necessary, and affected people should benefit from the establishment of trustees to manage their personal finances (Chudley *et al.*, 2007). The experience of disability can be minimized with integrated approaches to optimize the person's capacities, strengthen their access to available resources, and improve their interaction with the environment (Stucki and Celio, 2007).

Accommodating the disabilities caused by FASD requires whole system modifications to the person's social and political environment. The ability of affected people to function in society can be improved through coordinated multisectoral targeted interventions, and the establishment of an "external brain" composed of caretakers, advocates, and trustees. Alterations in the environment to support and enhance the functionality of the person disabled by FASD need to be made at the community level, through programs and services provided by governments and community agencies.

One essential aspect of providing interventions to adults with FASD is to follow individuals through the system. When multiple systems of care provide services, it is vital to establish a process to follow the individual across services, to communicate between providers, and to ensure that the individual does not fall through any gaps in the services. Research indicates that, without follow-up, individuals can become lost in the system (SAMHSA, 2007; Hartwell and Orr, 1999). Recent FASD-associated literature calls for a full continuum of services to be available to affected individuals across the lifespan (Malbin, 2004; Olson *et al.*, 2009; Paley and O'Connor, 2009; Fast and Conry, 2009; Chudley *et al.*, 2007). Developing official procedures to follow affected people from the correctional system through the services supplied by multiple providers is critical.

14.3.5
FASD Costs

The economic costs of FASD are important to consider when evaluating the benefits of multisectoral assisted support across the lifespan for adult offenders with FASD. The overall costs of FASD are difficult to assess, due to the variety of factors that influence individuals. Furthermore, researchers acknowledge that the estimates of costs are minimum values, due to the unavailability of many types of data on individuals (Fast and Conry, 2009; Thanh and Jonsson, 2009; Stade *et al.*, 2009). However, there are several basic categories of cost, including direct short-term and long-term costs of FASD to society, correctional system costs, and costs of homelessness.

Evaluations of the general costs of FASD for Canada and for Alberta indicate considerable expenditures at provincial and federal levels. In Canada, the cost of FASD from birth to 53 years of age is CA$5.3 billion (at 2007 price levels) (Stade *et al.*, 2009). (For updated figures on the cost of FASD, see Chapter 4.) Over half of these costs are attributed to education and healthcare for affected children. This estimate does not include the costs of incarceration, or the cost of lost productivity among adults. The costs in Alberta of FASD amount to about CA$400 million annually in long-term costs, and about CA$143 million annually in short-term costs such as healthcare, education and the justice system (based on 2009 price levels) (Thanh and Jonsson, 2009).

Although the correctional system costs are not exclusive to people with FASD, the corrections system includes many with FASD. The cost of the corrections program in Alberta is CA$106.31 per person per day (CA$38 696 per year), while the federal corrections cost is CA$260.10 per person per day (CA$94 676 per year) (Alberta, Government 2008–2009). Despite these significant expenditures, the figures do not include all of the costs of FASD to the legal system, as there are also costs associated with the crime itself, policing, and court appearances (Fast and Conry, 2009). Boland, Chudley, and Grant (2002) have advocated that the costs associated with adult offenders with FASD be reduced by identifying affected individuals, so that the system could accommodate their disabilities.

The costs of homelessness are also significant. For example, in 2008 there were approximately 11 000 homeless people in the province of Alberta, while the provincial government spends annually an estimated CA$ 100 000 per person to deliver programs and services to chronically homeless people, such as emergency medical services. The cost of shifting from managing homelessness to ending homelessness in Alberta would save an estimated CA$ 7 billion over a 10-year period (The Alberta Secretariat for Action on Homelessness, 2008). Clearly, the avoidance of homelessness in people with FASD would lead to a major reduction in associated costs.

The extent of costs to society from FASD is substantial, even without an accurate breakdown of all the costs associated with the spectrum. The figures indicate, unmistakably, that to assist affected individuals in avoiding the correctional system and homelessness would not only greatly help the person but also have significant and lasting economic benefits to society.

14.3.6
Developmental Disability Assistance

The FASD research recognizes that a significant impediment to improving the community participation of people with FASD is the narrow criterion for disability assistance, which includes developmental disabilities (DD) and financial assistance (Streissguth *et al.*, 2004; Grant *et al.*, 2004; Bertrand, 2009). Chudley *et al.* (2007) have identified the need for access to developmental disability assistance for adults with FASD. Moreover, DD services can help in secondary prevention efforts. Burd *et al.*, (2003) have identified the receipt of developmental disability

services as a protective factor for avoiding the secondary disabilities associated with FASD. The literature clearly indicates the lasting and meaningful solutions that could be developed through providing access to developmental disability assistance to people with FASD, thus improving the quality of their lives. These supports may be just enough to keep some of these adults out of justice systems.

Alberta has developed a vision and innovative approaches to FASD in its ten-year strategic plan. There are a number of important ongoing projects in the province, and recently programs have been funded to address the needs of adults with FASD, one of which is Corrections and Connections to the Community (3C). The program has three components: evaluation, transition, and follow-up. Evaluation occurs within the correctional site, while transition begins with programming and relationship-building prior to release, and then continues into the community. The project also has an assertive follow-up phase.

Existing funded programs should be an exceptional source of data to expand the current knowledge of FASD. The annual reports that they submit to funders illustrate the importance of reporting requirements that go beyond accountability, and actually provide important information.

The above strategies are all reasonable and currently in existence in many areas of the community. The challenge is access to support for those people who are not in the greater urban areas and, more specifically, those returning to remote geographical areas with limited health and social services.

14.4
Policy Considerations for Adults with FASD

1) Comprehensive diagnostic capacity. In order to access services and supports to assist people with FASD to be contributing members of society, it is necessary to have access to a diagnosis. Diagnostic services for people who may be affected by FASD are needed for children, youth, and adults in all jurisdictions. The usual diagnostic clinics should also seek to evaluate the functional performance of individuals.

2) Seamless and equitable services across the lifespan. The brain impairments caused by FASD are lifelong. Thus, services that transcend the traditional "silo" approach, are multisectoral and connect the separate social, health and corrections systems are vital if people with FASD are to have access. It is important for these services to be available, regardless of the affected person's chronological age.

3) Expand Persons with Developmental Disabilities (PDD) legislation to incorporate the functional disabilities of FASD. Legislation that governs developmental disabilities assistance needs to be expanded to include adults with FASD. The legislation which guides eligibility and available services to people with developmental disabilities varies by province. Currently, the

leading provinces in Canada for providing inclusive disability support are Manitoba, Ontario, Prince Edward Island, and Saskatchewan. Alberta, British Columbia, the Northwest Territories and Quebec continue to link access to developmental disability support to narrow eligibility criteria: people with an IQ two standard deviations below the norm.

4) Transitions from child to adult services be pre-planned and allow for wrapa-round services, including follow-up, housing, and supported employment.

5) Sustainably funded services based on functional needs.

6) Ongoing life skills and socialization assistance.

7) FASD prevention efforts to target the social determinants of health.

8) Alternative sentences for offenders with FASD whenever possible.

9) Pre-release and post-release plans for offenders with FASD.

10) Enhance correctional environment to reflect the needs and functionality of offenders with FASD.

11) Reduce reconnecting with justice and correctional systems through provision of training, programs, and ongoing assertive supports.

12) Create a safe and supporting community-based "virtual world." Such a world has destinations, activity programs and shelters in which staff and volunteers understand and can manage the neurobehavioral presentation and profile of individuals with FASD. This world is interconnected and linked to resources and case management options across disparate service sectors.

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Fetal Alcohol Spectrum Disorder as an Access to Justice Issue

Meeting with Canadian Bar Association and Federal Provincial Territorial Co-ordinating Committee of Senior Officials (Criminal Justice) Steering Committee on FASD

March 1, 2011 • 10:00am – 5:00pm

Vancouver

Participants

CBA FASD Advisory Committee: Dan MacRury (NS), Corey LaBerge (MB), Fia Jampolsky (YT), Jonathan Rudin (ON), Gaylene Schellenberg (CBA staff) Regrets: David Christie (YT), Rod Snow (CBA President)

FPT Steering Committee Members: Teresa Brown (MB), Marilou Reeve (DOJ Canada), Natasha Phillips (YT), Sherri Lee – (AG/ BC) Janice Laycock (NT), Samantha Hulme (BC).

Chair: Marilou Reeve, Department of Justice Canada

Background

At its 2010 Canadian Legal Conference, the Canadian Bar Association (CBA) passed a resolution concerning Fetal Alcohol Spectrum Disorder (FASD) in the criminal justice system (*Appendix A*). This resolution supported the current work on FASD by the Federal Provincial Territorial Ministers Responsible for Justice (FPT Ministers). It urged them to avoid ongoing criminalization of people with FASD, and to allocate additional resources to develop policies and solutions relating to FASD as an access to justice issue.

In October 2010, FPT Ministers directed officials to engage with the CBA on FASD as an access to justice issue. An Engagement Strategy was then approved by FPT Deputy Ministers in January 2011 (*Appendix B*). Deputies supported the Engagement Strategy approach and directed its FASD Steering Committee to implement the Engagement Strategy and report back at the June 2011 Deputies' meeting.

A meeting was convened on March 1, 2001 (Item # 6 of the Engagement Strategy) in conjunction with ***The 4th International Conference on FASD***, Vancouver, BC, March 2-5, 2011. Funding was provided by Justice Canada.

Meeting Overview

The CBA FASD Advisory Committee representatives and members of the FPT FASD Steering Committee discussed the complex issues related to access to justice for individuals with FASD in a comprehensive and constructive forum. Participants had extensive experience working on issues relating to FASD, including program and frontline work, as well as policy development and prosecution/defence of individuals with FASD. The group discussed promising practices and the good work that is currently taking place in relation to this issue in some areas.

Participants agreed that individuals with FASD should be assessed and dealt with outside of the criminal justice system whenever possible through health and social services systems with adequate supports.

Fetal Alcohol Spectrum Disorder as an Access to Justice Issue

If individuals with FASD become involved in the criminal justice system, alternative measures/ diversion programs should be considered. The realities of the disability of FASD must be balanced with the need for public safety. Social services and agencies outside the criminal justice system play a critical role in responding appropriately to individuals with FASD who become involved in the justice system.

Outcome

Participants at the March 1 meeting suggest that the following measures would improve access to justice for people with FASD:

1. **Allocate new resources (or re-allocate existing resources as appropriate) for effective programs that avoid the unnecessary criminalization of individuals with FASD (i.e. community alternatives including supportive housing, social services etc.).**

2. **Explore and develop alternative measures / diversion programs that deal effectively with individuals with FASD who come into conflict with the law, in a timely, effective manner that holds individuals accountable consistent with their degree of responsibility.**

3. **Educate justice system professionals, including RCMP, police services and probation officers, judges, Crown, defence, court workers, corrections, and victim service workers about FASD and the implications for service provision.**

   The possibility of FASD should be considered in deciding on an appropriate justice system response. For example, the Prosecution Policy directives should be changed to require that consideration.

4. **Amend the legislative framework within the *Criminal Code* to more effectively address the unique challenges that FASD presents to the criminal justice system.**

   The *Youth Criminal Justice Act (YCJA)* provides a legislative framework that could be applied to offenders with special needs such as those with FASD. Some of the sections offering special protections to youth under the *YCJA* that could be added to the *Criminal Code* to accommodate the unique challenges individuals with FASD present to the criminal justice system include:

   YCJA s.34 (ordering assessments) A similar provision would allow court ordered assessments of adults that the court believes might be affected by FASD.

   YCJA s.25 (right to counsel) Ensuring that counsel are present in encounters with the criminal justice system is critical for people with a diminished cognitive ability, as with FASD.

   YCJA s.19 (case conferencing) Case conferencing can be an effective tool to garner collaboration amongst key players, in deciding on an appropriate response in the individual circumstances at an early stage of the criminal justice system process.

5. **Address the problems of people affected by FASD through an interdisciplinary/multi-sectoral approach.**

Some jurisdictions effectively use collaborative or inter-ministerial approaches between government ministries to share information and coordinate and integrate services. All jurisdictions should consider implementing this approach when addressing the needs of individuals with FASD.

Participants also recommended that a case conferencing provision equivalent to section 19[1] of the *YCJA* should be added to the *Criminal Code* to recognize the diminished capacity of people affected by FASD and the need for an integrated, multi-sectoral approach to addressing the unique challenges.

6. **Create legislative authority to allow courts to obtain an accurate assessment of an individual's neurocognitive abilities.**

   Section 34 of the *YCJA* has been used effectively to order assessments for FASD. The same provision should be added to the *Criminal Code* for adults affected by FASD.

   Currently, the courts cannot order assessments for adult accused they believe may have a cognitive deficit unless the accused is considered "unfit to stand trial" or "not criminally responsible by reason of a mental disorder". Part XX.1 of the *Criminal Code,* dealing with mental disorder, is generally not applicable to, or appropriate for individuals with FASD.

   In order to more effectively ensure access to justice for individuals with FASD, courts should be able to order an assessment at any stage in the proceedings, and as early as possible in the judicial process to ensure that any diagnosis is properly considered throughout the individual's involvement with the justice system.

7. **Recognize that FASD is a life long disability distinguishable from a mental illness.**

   The distinction between permanent brain damage and a condition that may change with treatment is critical when considering the appropriate criminal justice system response, including in specialty courts and in sentencing dispositions.

   FASD must be considered the primary underlying issue and any mental illnesses then be considered in the context of FASD. FASD is not an illness, but a permanent disability that requires appropriate legal and social accommodations.

8. **Allow all sentencing options to be available to judges to allow them to devise just and appropriate dispositions for people affected by FASD.**

   It is important to remove barriers that constrain the exercise of judicial discretion, including mandatory minimum sentences.

   For example, a legislative safety valve (exemption clause) could be added to the *Criminal Code* that would allow judiciary to exercise discretion when sentencing individuals with FASD.

---

1 Section 19 of the *Youth Criminal Justice Act* provides that a conference can be convened by a youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker for the purpose of making a decision under the *Act* (subsection 19(1)).

9. **Minimize possibilities for people with FASD to accumulate unnecessary Administration of Justice Breaches.**

   All justice professionals should limit unnecessary conditions (bail conditions, terms of probation, sentencing conditions) to accommodate the cognitive ability of individuals with FASD and avoid the unnecessary accumulation of administration of justice breaches. This is a perfect example of the need for education and the types of policies and directives that can be established by justice agencies for working with individuals with FASD.

10. **Review standardized checklists and risk assessment tools used in the Court and Corrections systems to make decisions about individuals to ensure their validity & reliability for persons affected by FASD.**

FASD and the Legal System

"FASD is not an excuse, it is a reason".

Fetal Alcohol Spectrum Disorder (FASD) is a range of clinical conditions including Fetal Alcohol syndrome (FAS), Partial Fetal Alcohol syndrome (pFAS), Alcohol-related Neurodevelopmental Disorder (ARND) and Alcohol Related Birth Defects (ARBD). Many of these individuals go unrecognized as they appear "normal" with above average IQ's and are often defiant or disruptive. The spectrum of neurological damage with FASD causes many different cognitive and behavioral problems.

Currently our legal system is based on fundamental principals of freewill and choice. However, the whole issue of FASD challenges these precepts.

Whether or not we are able to overcome the issues of identification and diagnosis of FAS in the court system is not the context of this discussion. Diagnosis or not, we are still left struggling to understand the issue of FASD and its relationship to offending and the law. There are a number of issues we must begin to understand and address.

1. **Individuals with FASD have an increased susceptibility to involvement with the legal system.**

   FASD individuals are highly suggestible, often have a negative self-image and almost always get caught by the legal system because they can't plan ahead. These individuals have poor adaptive behavior, poor language ability, they acquiesce when they don't understand, confabulate because their memory is faulty, and fail to reason through issues. Julie Conry's study (Conry, 1999) reports that approx 25% of youth prison populations in British Columbia are FAS affected and 50% have other disabilities. This results in a high representation of disabled youth who are now labeled criminal. A Seattle study found 60% of FAS affected individuals were in conflict with the law (Conry, 1999)

2. **Courts are designed to deal with a model of intervention that assumes a person is responsible for their future behavior.**

   The court system is inappropriate and unworkable for FASD affected individuals. The model of the courts is based on the notion of freewill and choice and that the accused is responsible for their future behavior. Judges need to ask that people affected with FASD have a fixed point of responsibility who monitors the specific and concrete plans for day-to-day living. A fixed point of responsibility requires someone who knows how to advocate for access to those services in the community that will best facilitate the FASD individual's needs. FASD affected are often without family supports that could act as such for them. A model that has been successful in the deinstitutionalization of the handicapped is the individual program plans (I.P.P.'s). Should we not consider the concept of Individual Sentencing Plans (I.S.P.'s) where the emphasis is on the individual's plans and there is identification of a fixed point of responsibility to ensure that those needs are met?

3. **FASD affected individuals have little or no concept of cause and effect. We must ask**

whether or not their actions can then be deemed to be criminal.

An FASD affected individual is not able to link cause and effect which of course limits their ability to anticipate consequences. They are unable to integrate all of the information from cause and effect situations, leading to an inability to look at the "whole picture". These are serious cognitive impairments. We must ask ourselves if it is morally or ethically acceptable to punish handicapped individuals. More humane methods of dealing with FASD in the legal system can be utilized.

4. **FASD are victimized in the court system and the jail setting.**

   FASD display a number of characteristics, which have a negative effect in the court and in the prison system where there is a definite expectation of ability to comply with "appropriate behavior". They are often non-compliant, "stubborn", misinterpret cues, go to far, don't respond to adult approval, ignore verbal limit setting, have trouble adjusting in social situations, over or under react, may show flat affect or lack of eye contact, are spacey or lack initiative, have inappropriate responses to situations and have an apparent lack of remorse. Failure to engage in appropriate behavior leads to the desire to "teach the youth a good lesson", one which he will usually be unable to learn.

5. **We don't spend enough time early in their conflict with the law, trying to understand the underlying causes for why people come into the system.**

   Criminal lawyer's are taught to ask the question of guilt and innocence but these are not the right questions to ask FASD affected. We need to ask "why are you here", "What should happen to you now", "Why did this happen" and "what can we do to ensure that this doesn't happen again"? The vast majority of accused do not warrant incarceration. This could be reduced by 50% if we focused on these questions. (Canada places second in the Western World for number of incarcerated citizens)

6. **We can lower the risk of re-offending by establishing effective strategies for working with FASD individuals.**

   Incarceration is not the only form of punishment in our society. The increased use of the principles of restorative justice could assist in diverting these disabled individuals from the legal system and ensure appropriate community supports. There are no restrictions on the kinds of offenses that can be diverted so as long as the issues of public protection and the needs of the individual are addressed there is a potential here to decriminalize people with disabilities.

Viable Alternatives

Judges are asking for alternatives. They are becoming more aware of the need to deal with this disability in a more proactive way. An "aggressive, comprehensive, intervention and treatment program" is required. Information Management Systems that keep track of FASD affected people are required and Therapeutic Courts like those used in the Toronto Drug Courts should be developed.

Circle Courts are being explored in Saskatoon (Judge Turpel-LaFond, Saskatoon Provincial Courts, 2001). These team-based, mediation oriented, interagency courts create a "circle of care" support network that utilizes the inter-community expertise and family supports to create a solid support network for the FASD affected. The provision of appropriate legal services for FASD affected is not

specialized treatment. It is however differential treatment with the goal of ensuring an outcome of equality. All disabilities deserve to have an outcome of equality in our society.

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Updated: September 9, 2002

David Michael Boulding - Lawyer
Fetal Alcohol and the law

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A LAWYER'S BRIEF ON FETAL ALCOHOL SPECTRUM DISORDERS (FASD)

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Alcohol in the womb is a solvent and acts on the baby's developing brain like paint stripper acts on layers of old paint on furniture: it dissolves brain cells, bubbles them away. Thus, brain functions are missing.

1. FASD IS A PERMANENT BRAIN-BASED BIRTH DEFECT

- Jan Lutke advises: distinguish between non-compliance and non-competence. **There is a difference, and it is brain-based.**

2. FASD IS A MULTI-SECTOR PROBLEM

- It is a school, police, social, legal, medical, family, community, and national problem.
- It is a delusion to think one agency can solve this problem.

3. DO NOT RE-INVENT THE WHEEL

- Find the new research online. Start at these two websites: www.asantecentre.org and www.fasdconnections.ca
- Early assessments are critical. Seek informed help now.

4. GO PAST JUDGMENT AND UNDERSTAND THE REASONS WHY PREGNANT WOMEN DRINK ALCOHOL

- This is difficult and requires a heartfelt, clear-minded knowledge of family violence, the history of close relationships, poverty, lack of education, addiction, and an understanding of how people cope with daily difficulty.
- FASD is not restricted to poor marginalized Canadians. Rich stockbrokers have wives who binge-drink while pregnant. Young, educated professional women binge-drink almost as a rite of passage, often not knowing they are pregnant.

5. THERE IS GOOD NEWS: IT'S CALLED THE "EXTERNAL BRAIN"

- The "External Brain" as intended by Dr. Sterling Clarren means appropriate supervision 24/7. Design appropriate structures to create opportunities for the FASD person to be successful. All the available drugs and therapy, all the jail time, all the best intentions found in court orders, will not generate new brain cells. These offenders will be the same every time they come into the courtroom. They are not going to change. It is our responsibility to create success for persons with FASD. They need help from a walking, talking committee of knowledgeable helpers.
- The "External Brain", as a legal concept, is our duty of care. It is our duty to accommodate FASD persons because we are all to be equal before the law.
- Diane Malbin provides four practical suggestions:
    1. Match the brain before you to the task you set.
    2. Identify your assumptions.
    3. Adjust your expectations and stretch your definition of success.
    4. Change their environment.
- These suggestions are easy to say aloud but difficult to implement for four reasons:

- Each of us has a little voice inside that says: they should not get away with this unacceptable behaviour.
- Each of us shares a social sense that an individual could do better if the individual would just try harder.
- If we really knew how the brain worked, we would punish differently. We would design our "teaching and corrections industries" differently. Our knowledge of the human brain is in its infancy. There is much we do not know. Many of our brain-based assumptions in the criminal system are clearly wrong. The McNaughten Rules (1853) work for you and I, not FASD persons.
- Change is not easily accepted or even wanted, especially in rigid systems like the legal or educational systems.

Most importantly: caregivers and others charged with dealing with persons with FASD will experience near total exhaustion very quickly—this includes police, teachers, lawyers, social workers, and judges. Guard against dying inside yourself, the same way a long-distance runner guards against fading too soon. There are training tips and they involve physical, mental, emotional, and spiritual fitness—take care of yourself. Like the monotonous warnings on airlines, put on your air mask before helping others. You are useless if dead, or unable to do your appointed task.

RESOURCES:

- Fetal Alcohol Spectrum Disorder: Trying Differently Rather Than Harder, Diane Malbin.
- Fetal Alcohol Syndrome and the Criminal Justice System: Understanding the Offender with FAS (DVD and VHS), Dr. Julianne Conry. www.asantecentre.org
- The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities, Ann Streissguth and Jonathan Kanter (eds.)
- Fetal Alcohol Syndrome: A Guide for Families and Communities, Ann Streissguth
- Beautiful Smiles, Gentle Spirits. Fetal Alcohol Spectrum Disorder: A Misunderstood Problem, Margaret Michaud and Sacha Michaud (eds.)
- Web Resources by Dr. Kathy Sulik, Ph.D., University of North Carolina (Embryologist).

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AMERICAN BAR ASSOCIATION
COMMISSION ON YOUTH AT RISK

Resolution for August 2012 Meeting of the ABA House of Delegates (3/22/12 Third Draft)

RESOLVED, that the American Bar Association urges attorneys and judges, as well as state and local bar associations and law school clinical programs, to support training that enhances understanding of the child and adult disability of Fetal Alcohol Spectrum Disorders (FASD), its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and the importance of collaboration with medical, mental health, and disability experts to promote:

a) Skilled civil, juvenile, and criminal legal representation for persons with FASD;
b) Enhanced access to FASD experts for screening and assessing persons suspected of having this disability;
c) Appropriate responses to the over-abundance of FASD-affected persons in foster care, juvenile delinquency cases, adult criminal proceedings, and correctional facilities; and
d) Use of FASD knowledge in court for the mitigation of sentencing, as well as in the use of alternatives to incarceration and execution, including therapy and comprehensive services, to help rehabilitate individuals and reduce recidivism.

FURTHER RESOLVED, that the American Bar Association urges that state and federal laws, and policies at all levels of government, reflect the serious effects of prenatal alcohol exposure by:

a) Including FASD, alcohol-related neurological disorders, alcohol-related birth defects, and persons suffering from the effects of fetal alcohol abuse generally within the statutory definition of developmental disabilities and the listing of conditions that provide medical and other benefit coverage for screening, diagnosis, and treatment to help enhance the lives of those with these conditions;
b) Allocating comprehensive resources for the early identification, diagnosis, intervention, and treatment of persons with FASD;
c) Fully implementing provisions, including those in the federal Child Abuse Prevention and Treatment Act, for more effective screening and referral processes to help ensure that infants and toddlers affected by FASD are identified at the earliest possible age and provided assistance at the earliest opportunity;
d) Developing programs designed to enhance the lives of and protect persons living with FASD (and to support their families), including youth transitioning from foster care and juvenile justice systems, since these impairments make those with this condition especially vulnerable to physical and sexual assault; and
e) Increasing public awareness, especially for women of childbearing age and substance-abusing women generally, about FASD and the importance of preventing alcohol-related birth disorders.

Report

Introduction

Fetal Alcohol Spectrum Disorders (FASDs) are a group of conditions that can occur in individuals whose mother drank alcohol during pregnancy. This can result in severe physical and emotional symptoms. FASD is a serious problem in the United States that warrants greater attention. This past

FASD and the Brain

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Alcohol is a "teratogen" (substance that is toxic to the baby's developing brain). Damage can occur in various regions of the brain. The areas that might be affected depend on which areas are developing at the time the alcohol is consumed. Since the brain and the central nervous system are developing throughout the entire pregnancy, the baby's brain is always vulnerable to damage from alcohol exposure.

The regions of the brain that might be affected by prenatal alcohol exposure include:

Frontal Lobes – this area controls impulses and judgment. The most noteworthy damage to the brain probably occurs in the prefrontal cortex, which controls what are called the **Executive Functions.**

Corpus Callosum - passes information from the left brain (rules, logic) to the right brain (impulses, feelings) and vice versa; related to attention deficits, psychosocial function, and verbal learning.

Basal Ganglia – involved in cognitive function; affects spatial memory and behaviors like perseveration and the inability to switch modes, work toward goals, and predict behavioral outcomes, and the perception of time.

Hypothalamus - controls appetite, emotions, temperature, and pain sensation

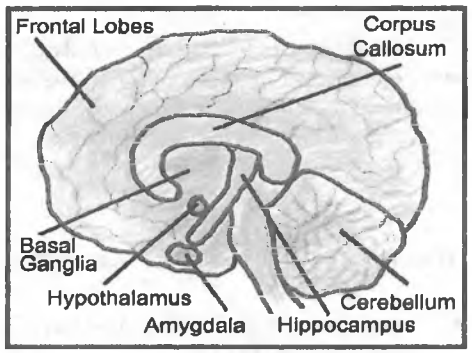
Amygdala – central part of emotional circuitry, senses danger, fear and anxiety; plays major role in recognizing faces and facial expressions, social behavior, aggression, and emotional memory; critical for stimulus-reinforcement association learning.

Hippocampus - plays a fundamental role in spatial and verbal memory retrieval; damage can cause chronic stress, anxiety, and depression; dysfunction is related to symptoms of schizophrenia.

Cerebellum – controls balance, coordination and movement; impacts learning and cognitive skills.

The hypothalamus, amygdala, and hippocampus are part of the **limbic system**, regulating emotions, social and sexual behavior, fight or flight" response, and empathy.

Fetal Alcohol Spectrum Disorders (FASD)



Executive Functions of the Prefrontal Cortex

Effects of alcohol exposure on behaviors related to executive functions of the prefrontal cortex:

- inhibitions: socially inappropriate behavior
- problem solving: inability to figure out solutions spontaneously
- sexual urges: inability to control sexual impulses, especially in social situations
- planning: inability to apply consequences from past actions
- time perception: difficulty with abstract concepts of time and money
- internal ordering: like files out of order, difficulty processing information
- working memory: storing and/or retrieving information
- self-monitoring: needs frequent cues, requires "policing" by others
- verbal self-regulation: needs to talk to self out loud, needs feedback
- motor control: fine motor skills more affected than gross motor
- regulation of emotion: moody "roller coaster" emotions, may withdraw or lash out
- motivation: apparent lack of remorse, need external motivators
- judgment – inability to make wise decisions

Alcohol Exposure by Trimester:

1. During the first trimester, as shown by the research of Drs. Clarren and Streissguth, alcohol interferes with the migration and organization of brain cells. [Journal of Pediatrics, 92(1):64-67]

2. Heavy drinking during the second trimester, particularly from the 10th to 20th week after conception, seems to cause more clinical features of FASD than at other times during pregnancy, according to a study in England. [Early-Human-Development; 1983 Jul Vol. 8(2) 99-111]

3. During the third trimester, according to Dr. Claire D. Coles, the hippocampus is greatly affected, which leads to problems with encoding visual and auditory information (reading and math). [Neurotoxicology And Teratology, 13:357-367, 1991]

Not all damage from alcohol exposure is seen on brain scans, as lesions might be too small to be detected, yet large enough to cause significant disabilities.

Children do not need to have full Fetal Alcohol Syndrome (FAS) to have significant difficulties due to prenatal exposure to alcohol. According to research done by Drs. Joanne L. Gusella and P.A. Fried, even light drinking (average one-quarter ounce of absolute alcohol daily) can have adverse affects on the child's verbal language and comprehension skills. [Neurobehavioral Toxicology and Teratology, Vol. 6:13-17, 1984] Drs. Mattson and Riley in San Diego have conducted research on the neurology of prenatal exposure to alcohol. Their studies show that children of mothers who drank but who do not have a diagnosis of FAS have many of the same neurological abnormalities as children who have been diagnosed with full FAS. [Neurotoxicology and Teratology, Vol. 16(3):283-289, 1994]

The brain is the organ most sensitive to prenatal alcohol damage. [Dr. Edward P. Riley lecture, September 25, 2002]

Damage to the brain from alcohol exposure can have an adverse affect on behavior. Alcohol exposure appears to damage some parts of the brain, while leaving other parts unaffected. Some children exposed to alcohol will have neurological problems in just a few brain areas. Other exposed children may have problems in several brain areas. The brain dysfunction is expressed in the form of inappropriate behaviors. Their behavior problems should be viewed with respect to neurological dysfunction. Although psychological factors such as abuse and neglect can exacerbate behavior problems in FASD, we are looking primarily at behavior that is organic in origin. To better understand FASD behavior issues, shift perspective from thinking the child "won't" to "can't." (Diane Malbin, MSW, Trying Differently Rather Than Harder,)

Sometimes the person's behavior is misinterpreted as willful misconduct (Debra Evensen, www.fasalaska.com), but for the most part, maintaining good behavior is outside of the child's control, especially in stressful or stimulating situations. Behavior problems in children with FASD are often blamed on poor parenting skills. While good parenting skills are required, even alcohol exposed children raised in stable, healthy homes can exhibit unruly behavior. The most difficult behaviors are seen in children who were prenatally exposed to alcohol and who also suffer from Reactive Attachment Disorder.

Most children with FASD have some attachment issues, may display inappropriate sexual behaviors, show poor judgment, have difficulty controlling their impulses, are emotionally immature, and need frequent reminders of rules. As a result, many will require the protection of close supervision for the rest of their lives.

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Fetal Alcohol Spectrum Disorders (FASD)

Alcohol causes more damage to the developing fetus than any other substance, including marijuana, heroin, and cocaine. (Institute of Medicine, 1996)

"Soft Signs"

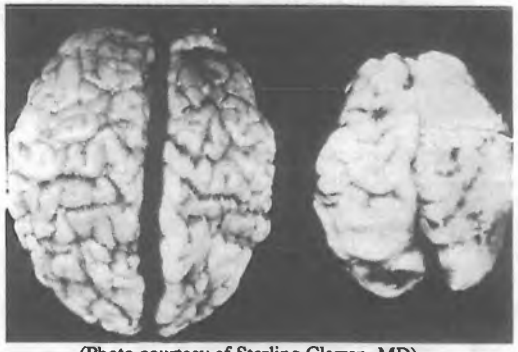
(Psychological signs of FASD brain damage)

- Immature social development: overly friendly to strangers
- Emotional lability:
- Poorly developed conscience:
- Lack of consistent impulse control:
- Inability to learn from consequences
- Good expressive language skills
- Talented in art, music or mechanics.
- Attention deficits: not always hyperactive, but easily distracted by external stimuli
- Short-term memory deficits
- Inappropriate social interactions
- Difficulty managing money:
- Poor concept of time
- Grandiose ideas and unrealistic life goals, distorted perceptions
- Poor judgment
- Vulnerability and naiveté

"The greatest obstacle our children with fetal alcohol disorders must overcome is chronic frustration from not being able to meet the unrealistic expectations of others." – Dr. Calvin Sumner, nationally recognized expert.

Fasstar Information Series Brochure 0408B1

FASD and the Brain



(Photo courtesy of Sterling Clarren, MD)

Brain of a baby with no alcohol exposure

Brain of baby with heavy alcohol exposure

How Prenatal Alcohol Exposure Affects Development of the Brain

By Teresa Kellerman

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Fetal Alcohol Syndrome: Support, Training, And Resources

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Alaska FASD Partnership

The Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership is a coalition of over 75 organizations and individuals committed to addressing issues related to FASD in Alaska.

The mission of the Partnership is to promote awareness, prevention, and effective life-long interventions for those affected by prenatal exposure to alcohol and their families.

The Partnership was formed in early 2010 after a groundswell of stakeholder effort and public comment to the Advisory Board on Alcoholism and Drug Abuse, and its partners, about the need for a more organized effort to address FASD in Alaska.

The Partnership is guided by a steering committee of individuals, organizations, and agencies – including people who experience FASD, family members, and professionals who work in the field. Additionally, the steering committee has members representing the Departments of Health & Social Services, Corrections, Education and Early Development, Labor and Workforce Development, and the Alaska Court System.

Seven workgroups of the Partnership are actively addressing a variety of issues related to FASD, including developing policy and funding recommendations, promoting public awareness, workforce development, collaborations, research, training, and more. They are:

- Diagnosis and Parent Navigation
- Family and Peer Support
- Prevention & Treatment for Pregnant Women
- FASD and the Education System
- FASD and the Legal System
- Services for Adults with FASD
- Professional Development

If you are interested in joining the Partnership or a workgroup, please visit our webpage or contact us via the information below.

Members of the Alaska FASD Partnership pose at the Alaska State Legislature in 2011 after a day of advocating for policies and funding related to FASD.

Message from the Chair

Waqaa from the Alaska FASD Partnership. We are a group of individuals and organizations coming together to address Fetal Alcohol Spectrum Disorders (FASD) and the concerns associated with FASD. We are individuals, parents, professionals, educators, community , healthcare providers, and voters.

Alaska is an incredible state with diversity in our cultures, languages, and communities. Every year, our state attracts many tourists to witness firsthand the beauty of Alaska – in our lands and our people. Yet, behind this beauty, Alaska leads the way with the highest number of individuals born with FASD, and the highest rates of alcohol abuse and domestic violence. The common factor is alcohol. FASD does not discriminate by culture, education, or economic status. It can happen anywhere alcohol is available.

Although Alaska leads the way with identification of FASD through our diagnostic teams, we can do more to help decrease the incidence of FASDs through education and awareness. If everyone reading this newsletter pledges to learn more about FASD – its causes and the issues surrounding alcohol use – our state has the potential to live more healthy, safe, and happier lives. Join our cause – sign up to become a member of the AK FASD Partnership!

Quyana for your time. If you have any questions, concerns, or would like to join the Partnership, please contact us.

Monica Charles Leinberger

Website:
www.hss.state.ak.us/abada/fasd.htm

Alaska FASD Partnership
431 N. Franklin Street Juneau, Alaska 99801
Phone: 907-465-8920 FAX: 907-465-4410

Email:
alaskafasdpartnership@alaska.gov

PARTNERSHIP MEMBERS

Abused Women's Aid in Crisis
Advisory Board on Alcoholism and Drug Abuse
Alaska Behavioral Health Association
Alaska Center for Children & Adults
Alaska Children's Services
Alaska Mental Health Board
Alaska Mental Health Trust Authority
Alaska Peer Support Consortium
All-Alaska Pediatric Partnership
Anchorage Coordinated Resources Project
Anchorage School District (Anchorage)
Arctic FASD Regional Training Center
Assets Inc.
Association for the Education of Young Children-SEAK
Big Brothers Big Sisters of Alaska
Boys & Girls Home of Alaska
Camp Fire USA Alaska Council
Central Council of the Tlingit & Haida Indian Tribes of Alaska
Christian Health Associates
Copper Basin Neurodevelopmental Center
Deltana Community Services Partnership
Dena A Coy/Southcentral Foundation
Diocese of Juneau
Fairbanks Community Behavioral Health Center
Family Centered Services of Alaska
Frontier Community Services
Gastineau Human Services
Governor's Council on Disabilities and Special Education
Hoonah Indian Association
Hope Community Resources
Independent Living Center
Kenai Peninsula FASD Program
Ketchikan Indian Community
Kinetictions
Kobuk Valley Consulting
Kodiak Area Native Association
Juneau Family Health and Birth Center
Juneau FASD Diagnostic Clinic
Juneau Partnerships for Families and Children
Lower Kuskokwim School District
Lynn Canal Counseling Services
Nenana City School District
Nome Youth Facility
Nondalton Tribe
Regional Wellness Forum
Set Free Alaska, Inc. (Wasilla)
Southcentral Foundation FAS Diagnostic Team
Southeast Regional Health Consortium
Southeast Regional Resource Center
Southern Kenai Peninsula Communities Project
Sprout Family Services
Stone Soup Group
Tongass Substance Screening
UAA Department of Health Sciences
UAA Center for Human Development
Volunteers of America-Alaska
...and many individuals

HOW TO BECOME A MEMBER

You are invited to join the Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership, a coalition of organizations and individuals committed to addressing issues related to fetal alcohol spectrum disorders in Alaska. There is no cost for membership and no minimum requirements.

Members will be informed of and invited to participate in the Partnership's efforts – including advocacy, budget and policy issues, public awareness, alternatives to incarceration, substance abuse treatment for pregnant women, supported housing, family support, diagnosis, case management, prevention, training for professionals and paraprofessionals, and other issues related to FASD. You may participate in or decline to participate in whatever efforts you choose.

Please fill out and **MAIL, SCAN** or **FAX to 907-465-4410.**

□ Organization □ Individual

Contact Person_____

Organization Name _____

Address_____

_____

Email_____

Phone contact(s) _____

What is your affiliation/interest in FASD?

What services do you provide related to FASD?

431 N. Franklin St. Juneau, Alaska 99801
Phone: 907-465-8920 FAX: 907-465-4410

Email: akfasdpartnership@alaska.gov
Website: www.hss.state.ak.us/abada/fasd.htm

Alaska FASD Partnership

Advocacy ▪ Family Support ▪ Diagnosis ▪ Case Management ▪ Prevention ▪ Life Skills ▪ Substance Abuse Treatment for Pregnant Women ▪ Parent Navigation ▪ Training for Parents ▪ Public Awareness & Education ▪ Supported Employment ▪ Supported Housing ▪ Case Workers ▪ Court Interpreters ▪ Alternatives to Incarceration ▪ Training for Attorneys & Judges ▪ Training for Educators ▪ Traditional Healing ▪ Training for Medical Professionals ▪ Life-Long Interventions

The mission of the Alaska FASD Partnership is to promote awareness, prevention, and effective life-long interventions for those affected by prenatal alcohol exposure and their families.

CONFIR-MATIONS 2011

<TARGET><BILL></BILL><SUBJECT>CONFIRMATIONS 2011</SUBJECT><COMM>HJUD27</COMM></TARGET>

Haase, Donald
Alaska Judicial Council

Donald J. Haase

Objective: Highly motivated, personable individual is seeking an opportunity to serve the State of Alaska and learn new skills.

Experience:

January 2000-present
CH2M-Hill / VECO ALASKA
Box 300MS777, Valdez AK 99686, (907)834-7359
Redline electrical, instrumentation, and mechanical drawings
Transfer redlines to AutoCAD drawings
Instrument/Electrical design team since July, 2001

September 1995 – January 2000
CHUGACH NORTH TECHNICAL SERVICES
Box 300MS792, Valdez AK 99686, (907)835-5847
Increasingly responsible positions in Corporate Affairs, Documentation, Drawing Update Program, the Maintenance Library, and As-builts

May 1997 - October 1999
LAUGH OUT LOUD PRODUCTIONS
Box 2903, Valdez AK 99686, (907)835-3505
Acted in and promoted play during tourist season

October 1994 - October 1996
C & D PRODUCTIONS
Box 3423, Valdez AK 99686, (907)835-3608
Wrote, produced and acted in a 4-part play for tourists
Hired, trained, and supervised 9 employee-actors and stage hands

May 1993 - September 1995
S & G ENTERPRISES
Box 2744, Valdez AK 99686, (907)835-3030
Carpentry, concrete work, and lawn maintenance

May 1991 - April 1993
J & F BUILDERS
8670 Eldora, Byron Center MI 49315, (616)878-9741
Carpentry, drywall, and apartment maintenance

SERVICE:
City of Valdez Planning and Zoning Commission, 2004 - present (Chair 2009-2011)
Copper Valley Electrical Association Board of Adjustments, 2005-2007
Copper Valley Electrical Association Scholarship Committee, 2006
Member of Valdez Trails Association, 1996-1997
Member of Valdez Snowmachine Club, 1996-1997
City of Valdez Mental Health Advisory Board Member, 1994-1997, Chair 1997

EDUCATION:
BS in Political Science at Grand Valley State University, 1992
Allendale MI 49401, (616)895-3327
3.59 GPA out of 4.0

print

Eclectic group vie for Alaska House Seat 12

by Amanda Bohman abohman@newsminer.com
08.18.10 - 11:52 pm

FAIRBANKS — A bush pilot, a dairy farmer and an instrument and electrical designer want the GOP nomination for House District 12 on Tuesday.

The district stretches down the Richardson Highway from Eielson Air Force Base to Valdez and includes a large chunk of the Matanuska-Susitna Borough to the west.

The Republican hopefuls are Eric Feige, 49, a U.S. Air Force veteran who graduated from West Point in 1983; Pete Fellman, 53, a father of seven who supplements farming as an aide to Rep. John Harris; and Don Haase, 40, a father of eight with an endorsement from Alaska Right to Life.

Harris, the Republican incumbent, said he decided not to seek re-election because he is making a new home outside the district in Anchorage.

The candidate drawing the most votes will face Valdez Mayor Bert Cottle, a Democrat, in the November general election.

Eric Feige

Feige came to Alaska in 1995 and launched a career as a bush pilot, eventually landing in Chickaloon, where he operates a bed and breakfast with his wife.

He is running for state House because he thinks the Legislature can do better.

"I'm pretty disappointed in what I've seen with the Legislature to date," Feige said. "Some poor decisions have been made that tend to rely too much on politics and not what's best for the state."

If elected, Feige would push for reform of taxes on oil production. He wants the state to boost support for agriculture with more product marketing overseas. Feige thinks the state ought to set a two-year spending plan. He supports an all-Alaska gas pipeline.

"Over the last several years, the Legislature has imposed so many new fees and taxes on businesses that many are finding it difficult to profit," Feige stated on his campaign website, www.ericfeige4akhouse12.org. "I will look to make the state of Alaska a more attractive to investment than it is now."

Pete Fellman

After a bout with homelessness, a stint in the U.S. Army and the loss of a farm in Washington, Fellman needed a fresh start. So he towed a U-Haul trailer to Alaska and stopped in Delta Junction.

That was 1988.

Now he's hoping to draw on his life experiences, including five years as a diesel mechanic and 11 years as a legislative assistant to help residents of House District 12. His campaign slogan is "put my experience to work for you."

"My first priority is to listen to and serve the people of District 12," he said in a position statement posted on his website, www.petefellmanworks.com. "Being a legislator is, above all, a job, and that job is to work for the people of the state. Everything else is secondary. A legislator doesn't work for big business, large corporations, lobbyists, special interest groups, the governor or any state employee."

He favors limiting state government to its constitutional responsibilities and he opposes abortion and gun control.

"A free nation is a well-armed nation," Fellman states. "Load them, tote them and show them."

Don Haase

After earning a political science degree at Grand Valley State University in Michigan, Haase came to Alaska 17 years ago looking for adventure.

"I wanted to experience the last frontier while still young enough to climb the mountains and hike the trails," he said.

For Haase, Valdez is home and he's served his community on the trails association, the mental health advisory committee and he's been involved with committees of the Copper Valley Electric Association. He works for CH2MHill.

"I am running to make sure there are jobs available for (my children) when they grow up so they do not feel the need to leave the state," Haase stated in an e-mail. "I guess it is kind of selfish, but I don't want to have to fly thousands of miles to visit my grandkids."

He serves on the conservative Eagle Forum Alaska's board of directors, supports the Alaska Family Council and describes abortion as execution on his campaign website, www.haaseforhouse.com.

"I am proud to say that I remain married to the mother of my children," he stated on the website. "This also speaks to trustworthiness, for how can you trust me to keep my word to you once I've broken the most sacred vow I ever made, to honor and cherish my bride until death?"

Haase said the government should focus on what it does best — road construction, public safety and education — and leave economic development to the private sector, which he said can more nimbly respond to market demands.

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Haase, Don

CANDIDATE DETAILS

Affiliation Republican
Name Don Haase
Address Valdez, Alaska , United States
Email haasedj@gmail.com
Website [Link]
Born April 12, 1970
Died Still Living (40 years)
Contributor eddy 9_99
Last Modifed Sewer Aug 28, 2010 12:10am

2010-08-01

Tags Very Conservative - Anti Embryonic Stem Cell Research - Anti-Gay Marriage - Pro Alaska/Offshore Oil Drilling - Pro School Vouchers - Pro- gun - Pro-Bush Tax Cuts - Pro-Capital Punishment - Pro-Life - Pro-Missile Defense - Pro-Social Security Privatization - Married - Christian -

Info

Importance? 0.00000 Average

FAMILY

INFORMATION LINKS

RACES

08/24/2010	AK State House 012- R Primary	Lost 33.36% (-0.29%)

ENDORSEMENTS

Measure 2 - Alaska Parental Involvement Act - Aug 24, 2010	YES Yes

JOB APPROVAL POLLS

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EVENTS

Start Date	End Date	Type	Title	Contributor

NEWS

Date	Category	Headline	Article	Contributor

DISCUSSION

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R:7837 Don (0.0000 points) " Wed. August 18, 2010 05:43:47 AM UTC0:00

My email is haasedj@gmail.com
My website is www.haaseforhouse.com
I was born 04/12/1970

Push-Button Publishing

Photo

View Full Size

User Stats

On Blogger Since	February 2006
Profile Views (approximate)	1928

Don Haase

Gender: Male

Location: Valdez : Alaska : United States

About Me

Don Haase is a 14-year resident of Valdez, AK where he resides with his wife, Heather, and their 5 children. Don works at The Valdez Marine Terminal and serves on the Alaska Republican Party Central Committee, the Valdez Planning & Zoning Commission, the board of Faith Harbor Fellowship, and the Valdez Friends of NRA Committee. Don has been a tireless voice for the right and for the unborn for many years. Don was recently appointed to serve on the Board of Eagle Forum Alaska.

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Eagle Forum Alaska

Team Members

Eagle Forum Alaska Don

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The Alaska Family Action

The AFA, an independent 501(c)(4) organization is the legislative, lobbying arm of the Alaska Family Council.

Our Values Have a Voice

In Juneau

- Advocate pro-family issues during legislative sessions
- Strategize with elected officials
- Testify in legislative committee meetings
- Produce issue briefs and policy papers

In Your Community

- Present pro-family perspective in the media
- Produce and distribute non-partisan Voter Guides and *Report Cards*
- Organize local networks called Family Forums for community impact
- Establish a statewide network of Pastors For Family Values
- Host nationally renowned speakers

What Now?

- Get more voter guides online at: www.alaskafamilyaction.org

Candidates

Peggy Wilson	P.O. Box 2211 Wrangell, AK 99929	874-3020	woodnpeg@gci.net
Stephen Samuelson	PO Box 2188,		
Urban Rahoi	1001 Lakeview Terrace, Fairbanks, AK 99701	465-6967	
Vivian Stiver	523 2nd Ave., Fairbanks, AK 99701	347-2102	
Steve Thompson	PO Box 70843, Fairbanks, AK 99707	374-4806	
Eric A. Feige	P.O. Box 1208 Chickaloon, AK 99674	351-2360	efeige@mtaonline.net
Don Haase	Box 3423, Valdez, AK 99686	835-3608	haasedj@gmail.com
Pete Fellman	HC 60 Box 4200, Delta Junction, AK 99737	895-4090	petefellman@hotmail.com
Carl Gatto	P.O. Box 2894 Palmer, AK 99645	232-3060	carljgatto@gmail.com
Don Benson	PO Box 4059, Palmer, AK 99645	745-4913	don@donbenson.us
Stephen Jacobson	P.O. Box 298497 Wasilla, AK 99629	715-2291	jacobsonak@mtaonline.net
Mark Neuman	13768 W. Maplewood, Wasilla, AK 99654	345-0800	
Dan Saddler	P.O. Box 771811 Eagle River, AK 99577	227-8484	dan@dansaddler.com
Dan Kendall	P.O. Box 770616 Eagle River, AK 99577	696-7066	kendall@alaska.net
Bill Cook	19328 A Monastery Dr. Eagle River, AK 99577	694-1010	akatty@gci.net
Jeannette Reddington	4460 Mars, Anchorage, AK 99507	947-0308	votereddington@gmail.com
Charisse Millett	2860 Beluga Bay Circle - Anchorage, AK 99507	227-7673	charisse@votemillett.com
Bob Lynn	4400 Trapline - Anchorage, AK 99516-1538	345-4447	boblynn@alaska.com
Steve Pratt	P.O. Box 112781 Anchorage, AK 99511	345-0032	voteforpratte@acsalaska.net
Cathy Giessel	12701 Ridgewood Rd. Anchorage, AK 99576	345-5470	cathy@giessel.org
Jennifer Johnston	11090 Hideaway Lake Dr, Anchorage, AK 99507	346-1087	jjohnston@gci.net
Mark W. Moronell	2440 E. Tudor Rd. #1111 Anchorage, AK 99507	242-5415	moronellforalaskasenate@gmail.com

Alaska Family Action | P.O. Box 231425, Anchorage AK, 99523
907-279-2825 | www.alaskafamilyaction.org

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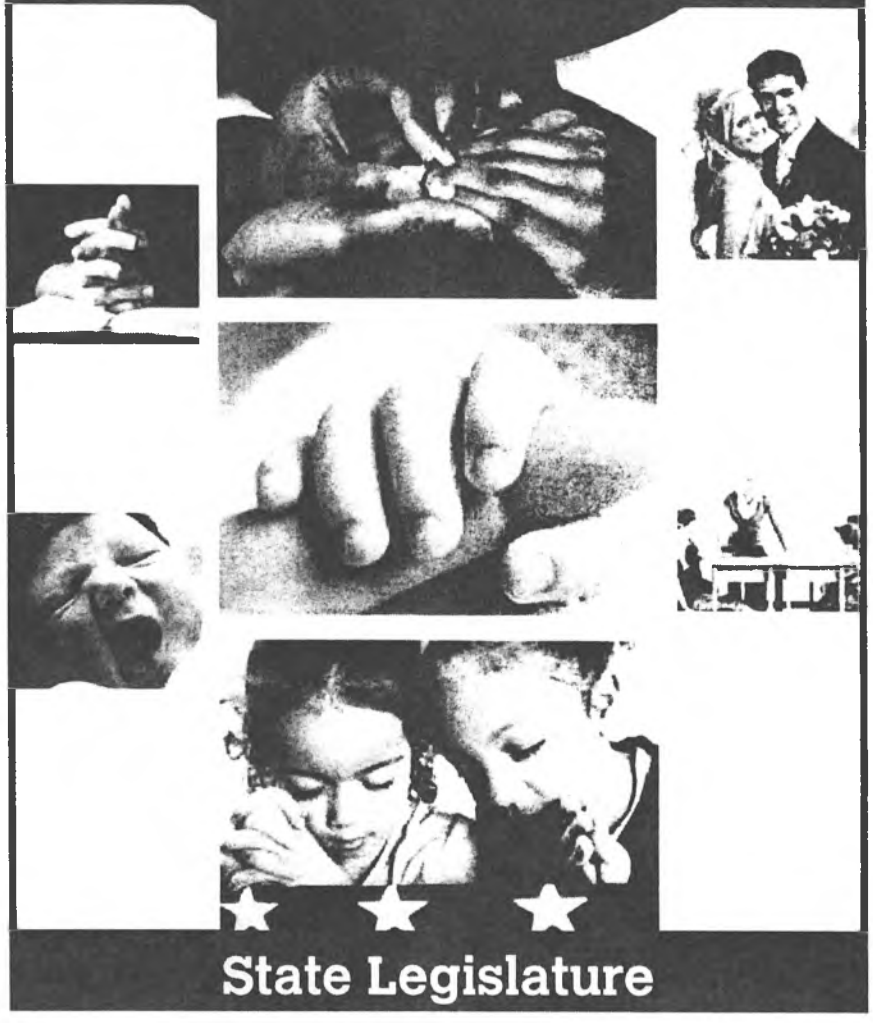
Values Voter Guide



State Legislature

The 2010 Alaska Voter Guide
provided courtesy of **Alaska Family Action** -
The legislative, lobbying arm of **Alaska Family Council**.

1) Denali KidCare – Abortion funding

Background

In June 2010, Governor Sean Parnell vetoed a $2.9 million appropriation to expand the Denali KidCare program. The Governor stated that he vetoed the additional money because Denali KidCare has used public funds to pay for abortions. The Dept. of Health and Human Services reports that Denali KidCare spent a total of $384,000 to pay for 664 abortions in 2009. This number equates to about 35 percent of the total number of 1,875 abortions reported to have occurred in Alaska during 2009.

Question

Do you support Governor Parnell's decision to veto additional funding for Denali KidCare due to the program's funding of abortions?

YES _____ NO _____ UNDECIDED _____

2) Policy concerning "medically necessary" abortions

Background

In 2001, the Alaska Supreme Court ruled that the Legislature could not refuse to pay for "medically necessary" abortions for poor women. In the same decision, however, the court said their opinion "does not concern State payment for elective abortions." Elective abortions are generally defined as abortions that are performed voluntarily at the request of the mother for reasons unrelated to concerns for maternal health. However, the state has no criteria, either in statute or regulation, for distinguishing between a "medically necessary" abortion and an "elective" abortion. The person who makes the judgment now for what is medically necessary is the doctor who stands to profit from receiving a state reimbursement for performing the procedure.

Question

Would you support legislation establishing objective and neutral medical criteria for determining what is a "medically necessary" abortion, and further stipulating that any application for a state-funded abortion must be reviewed by independent medical advisors with the Department of Health and Social Services before payment can be approved?

YES _____ NO _____ UNDECIDED _____

3) Abortion and the Alaska State Constitution

Background

In the 1997 *Valley Hospital* decision, the Alaska Supreme Court stated as follows: "...the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language." The court reached this conclusion despite the fact that (a) the word "abortion" is nowhere mentioned in the state constitution and, (b) nothing in the history of the Alaska Constitutional Convention (or any subsequent amendments adopted by the people) provides any evidence that the framers of the constitution intended to create a legal right to abortion.

This manufactured "right to abortion" in the state constitution has been interpreted by the state Supreme Court as being far more liberal in scope than the federal abortion policy set out in U.S. Supreme Court decisions such as *Roe vs. Wade* (1973) and *Planned Parenthood vs. Casey* (1992). As a consequence, Alaska courts have struck down many laws that are permissible under *Roe* and *Casey* – such as requirements for parental consent before a minor's abortion, and restricting public funding of abortion.

The Alaska Family Council supports a state constitutional amendment that would make it clear that nothing in the state constitution may be interpreted or construed to create any abortion-related rights beyond what is required under the U.S. constitution, as interpreted by the U.S. Supreme Court. Such an amendment would permit the Legislature, and also the people acting directly through the initiative process, to establish whatever abortion policy they deem appropriate for Alaska, provided it is consistent with the U.S. constitution.

Question

Would you support a constitutional amendment that would clarify that the state constitution does not provide a more liberal or expansive right to abortion than what is required under the U.S. constitution?

YES _____ NO _____ UNDECIDED _____

4) "Choose Life" specialty license plates

Background

About half the states in the U.S. allow their residents to select specialty plates for their motor vehicles that display the message, "Choose Life." In most of these states, proceeds from the sale of "Choose Life" license plates are donated to maternity homes, pregnancy care centers, and non-profit adoption agencies, which use the funds to assist needy women and their families with expenses associated with pregnancy, labor and delivery, and infant care.

Question

Would you support legislation that allows Alaska motorists to select "Choose Life" license plates, with the proceeds from plate sales going to non-profit groups that assist pregnant women?

YES _____ NO _____ UNDECIDED _____

5) Employment benefits for same-sex partners of public employees

Background

In 1998, Alaska voters overwhelmingly approved a state constitutional amendment defining marriage as a union of one man and one woman. In 2005, the Alaska Supreme Court declared that, despite the 1998 amendment, the same-sex "partners" of public employees were required to be treated the same as spouses of married employees in terms of eligibility for taxpayerfunded employment benefits (e.g., participation in retirement plans, health insurance, etc). In response, the Alaska Legislature passed a measure calling for an advisory vote in a special election on April 3, 2007. The question before voters was: *"Shall the legislature adopt a proposed amendment to the state constitution to be considered at the 2008 general election that would prohibit the state, or a municipality or other subdivision of the state, from providing employment benefits to the same-sex partners of public employees and to same-sex partners of public employee retirees?"*

A majority of voters, nearly 53 percent, indicated they wished to vote on the proposed constitutional amendment. Despite this fact, the proposed amendment has failed to garner the required 2/3 majority-vote in either the House or Senate before the question can be placed before voters.

Question

Do you support placing a constitutional amendment on the ballot that would let voters decide if taxpayer-funded employment benefits should be reserved for the spouses of married public employees, and not extended to the same-sex partners of public employees and retirees?

YES _____ NO _____ UNDECIDED _____

6) State civil rights law with respect to "sexual orientation" and "gender identity"

Background

In 2009 the Anchorage Assembly debated Ordinance 64, a controversial measure that would have banned individuals, businesses, schools, and city government from discriminating on the basis of a person's actual or perceived "gender identity" or "sexual orientation," in areas such as employment and housing. (The measure passed the Assembly on a vote of 7 to 4, but was later vetoed by Mayor Dan Sullivan).

The Alaska Family Council opposes such legislation because it inevitably leads to discrimination against those persons who, for reasons of conscience, cannot pretend to be morally indifferent to the homosexual lifestyle in the operations of their schools and businesses. For example, Christian schools would be required to hire homosexual teachers; a Christian bookstore owner could not refuse to hire a person who is a cross-dresser (based on prohibition of "gender identity" discrimination); a religious adoption agency would be required to place children with homosexual couples. Outside of Alaska, legislation similar to Ordinance 64 has been adopted by a number of states, and has predictably resulted in religious discrimination against Christians.

Question

If a bill is introduced in Juneau to add "gender identity" and/or "sexual orientation" to Alaska's civil rights statute, will you vote to **oppose** such legislation?

YES _____ NO _____ UNDECIDED _____

7) Gambling for profit in Alaska

Background

In 2009, a proposed constitutional amendment (HJR 3) was introduced that would generally prohibit all for-profit gaming or gambling in Alaska, unless it was authorized by an act of the Legislature, then ratified by a majority vote in the next statewide election, and approved by a majority of voters in the city, borough, or other area where the gambling may occur. The proposed amendment would not affect existing state law concerning non-profit gaming sponsored by boroughs, cities, and non-profit organizations.

Question

Would you support a constitutional amendment to require a vote of the people before any forprofit gambling is approved in Alaska?

YES _____ NO _____ UNDECIDED _____

8) Parental choice in education

Background

Across the U.S., there are 18 different private school choice programs at either the state or municipal level that provide parents increased options for educating their children at the K-12 level. States such as Arizona and Florida, and cities such as Milwaukee and the District of Columbia, use vouchers, tax credits, and/or "opportunity scholarships" to help promote school choice. Studies have shown that school choice programs increase graduation rates, improve educational performance, and provide a quality education for a lower cost on a per-pupil basis than public education. The programs also promote fairness for parents who are essentially "paying twice" for their child's education. Parents who currently send their children to nonpublic schools save the taxpayers' money because those children are not making demands on the public education system. Nevertheless, those same parents are still paying taxes to support the public schools that their children do not attend.

Question

Would you support legislation and/or a constitutional amendment to create some form of a private school choice program in Alaska at the K-12 level, whether through vouchers, tax credits, and/or opportunity scholarships?

YES _____ NO _____ UNDECIDED _____

9) Children's access to pornography

Background

The federal Children's Internet Protection Act, or CIPA, requires schools and libraries to place Internet filters on computers as a condition of receiving federal funds. However, statefunded libraries in Alaska that do not receive federal funds are currently not required to have Internet filters on their public computers. A bill was introduced in the Alaska Legislature in 2008 (HB 353) that would require all state-funded libraries to adhere to CIPA requirements and utilize filtering devices or software to prevent children from accessing obscene materials, as a condition of receiving state funds. Library staff would be permitted to turn off the filters when requested by patrons over the age of 18.

Question

Would you support legislation similar to HB 353 that would require libraries receiving state funds to install Internet filters on public computers?

YES _____ NO _____ UNDECIDED _____

10) Judicial selection process

Background

Alaska's constitution provides that the Governor shall appoint a qualified nominee to fill judicial vacancies in the state court system. However, the Governor's choices are extremely limited. he or she may choose only from a list of names that are submitted by the "Alaska Judicial Council," a seven-member body that is dominated by attorneys. In the past, the Alaska Judicial Council has refused to nominate many qualified applicants for court vacancies, thus artificially narrowing the Governor's options for appointing judges & justices.

Question

Would you support a state constitutional amendment that would allow the Governor the same leeway for appointing state judges as the U.S. President has for appointing federal judges, i.e., the Governor could nominate any candidate of his or her choosing for a judicial vacancy, and such nominee would have to be confirmed by the Alaska Senate?

YES _____ NO _____ UNDECIDED _____

State Legislature

Questions & Answers

From Alaska's 2010 Candidates

KEY: R Republican
Y Yes
N No
UN Undecided

		District	1. Support Gov. Parnell's Veto of Expanding Funding to Denali KidCare Because of Abortion	2. Support Policy Defining "Medically Necessary Abortions"	3. Support Constitutional Amendment Clarifying That AK Constitution Doesn't Have More Expansive Right To Abortion Than U.S. Constitution	4. Support Alaskans Right To Select "Choose Life" License Plates	5. Support Constitutional Amendment Limiting Marriage Benefits To Married Partners of Public Employees	6. Would You OPPOSE Adding "Gender Identity" and/or "Sexual Orientation" to Alaska's Civil Rights Statute	7. Support Constitutional Amendment Requiring Vote of People Before Gambling Can Be Expanded	8. Support School Choice Constitutional Amendment	9. Support Legislation Requiring Internet Filters On Public Library Computers	10. Support Constitutional Amendment Allowing Governor To Nominate Judicial Candidates Of His or Her Choosing With Senate Confirmation
House	R Peggy Wilson	2	Y	Y	Y	Y	Y	Y	Y	UN	Y	UN
	R Stephen Samuelson	2	Did Not Respond									
	R Urban Rahoi	10	Did Not Respond									
	R Vivian Stiver	10	Did Not Respond									
	R Steve Thompson	10	Did Not Respond									
	R Eric A. Feige	12	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Don Haase	12	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Pete Fellman	12	Did Not Respond									
	R Carl Gatto	13	Y	Y	Y	Y	UN	Y	Y	Y	Y	Y
	R Don Benson	13	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Stephen Jacobson	15	Y	Y	UN	Y	Y	Y	Y	Y	Y	Y
	R Mark Neuman	15	Did Not Respond									
	R Dan Saddler	18	Y	Y	Y	N	Y	Y	Y	Y	Y	Y
	R Dan Kendall	18	Y	Y	Y	Y	Y	Y	UN	Y	Y	Y
	R Bill Cook	18	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Jeannette Reddington	30	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Charisse Millett	30	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Bob Lynn	31	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Steve Pratt	31	N	UN	UN	Y	UN	Y	UN	Y	Y	UN
Senate	R Cathy Giessel	P	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	R Jennifer Johnston	P	Did Not Respond									
	R Mark W. Moronell	P	Y	Y	Y	N	Y	UN	Y	Y	Y	UN

Current Council Members

Chief Justice Walter L. Carpeneti
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 7/1/09 - 6/30/12

James H. Cannon (Attorney Member)
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 2/24/06 - 2/23/12

Kevin Fitzgerald (Attorney Member)
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 4/28/08 - 2/23/14

Julie Willoughby (Attorney Member)
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 4/27/10 - 2/23/16

William F. Clarke (Public Member)
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 10/16/08 - 3/1/13

Kathleen Tompkins-Miller (Public Member)
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 3/1/09 - 3/1/15

Christena Williams (Public Member)
Alaska Judicial Council
1029 W. 3rd Avenue, Ste 201
Anchorage, AK 99501
Effective Term 5/19/05 - 3/1/11

Judicial Council attorney and non-attorney members serve terms of six years. The Chief Justice serves a three year term.

About AJC

About Us
Roster of current Council members
Council photo
Council member duties
Council member position descriptions
Council bylaws
Constitutional provisions relating to the Council
Constitutional convention minutes
Law relating to public defender appointment
Past Council members

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Eagle Forum Alaska

TUESDAY, OCTOBER 31, 2006

Judicial Retention Information

- By Glen Biegel (posted by Don Haase)

Why judicial retention matters.

First, what is it? Judicial retention is a periodic opportunity for the public to judge our judges. They are voted on, or 'retained', in our regular elections in what has traditionally been an elective 'non-event.'

Judicial retention matters because the misinterpretation of even a single word in our Constitution leads to overturning supermajorities of legislators and Governors. Our judicial branch was designed to be the least powerful, not the most important. That is no longer the case. Liberalism in all of its forms is not often implemented by our elected legislators. It comes almost exclusively through the courts.

In extreme cases, our judge's rulings can abuse the will of the people by ignoring even a Constitutional Amendment such as the Marriage act that was passed in 1998. The Marriage Act was disregarded in a recent 5 to 0 decision that recognized 'same-sex domestic partnerships' as having the same characteristics as married people, and therefore were eligible for benefits. Read their reasoning:

The Supreme Court Ruling: ACLU vs State of Alaska and Municipality of Anchorage (S-10459)

"This case requires us to determine if it is reasonable

Contributors

Eagle Forum Alaska
Don
Don Haase

Previous Posts

Retention of Judges
Vote Buying?
UNION OFFICIALS ATTACK REPUBLICANS
The Consequence of Judicial Activism
Youth Leadership School
Judicial Retention
Social Security Benefits to Illegal Aliens
Preambles
EFA Legislative Alert, May 25, 2006
EFA Legislative Alert, May 16, 2006

Power Blogger

> to pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their coworkers who are married."
>
> Many same-sex couples are no doubt just as "truly closely related" and "closely connected" as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so.

There are no references to 'committed domestic relationships' or 'same-sex couples' in current Alaska law. They are constructs exclusively of the Alaska State Supreme court. This kind of judicial abuse directly contradicts the marriage amendment:

Section 1.25 - Marriage.

> To be valid or recognized in this State, a marriage may exist only between one man and one woman.

The courts may not grant the benefits of marriage by equating another relationship to marriage. That is specifically rejected in the amendment. Whether you call another relationship a 'same-sex couple' or a 'committed domestic relationship with same-sex partners,' our Constitution does not allow the courts to equate them to marriage.

The following is the list of judges who are up for retention. While none of the Supreme Court justices are up, that does not mean that the great disparity between public opinion and judicial action cannot be addressed.

Relevant Opinions:

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Eagle Forum Alaska

TUESDAY, OCTOBER 31, 2006

Retention of Judges (posted by Don Haase)

From the Eagle Forum Alaska Newsletter, October, 2006
-By Debbie Joslin

Alaska voters will be asked to vote on whether to retain judges on November 7.

Two judges of particular interest on the ballot this year are Peter Michalski and Sen Tan.

Judge Michalski is interesting. His wife Jo was listed as a co-sponsor of a fundraiser for Tony Knowles in September. Judge Michalski is probably best known for his 1996 court decision finding that homosexual partners are entitled to be "married". Alaskan voters apparently disagreed as we voted overwhelmingly to uphold traditional one man-one woman marriage.

Judge Sen Tan ruled in 2000 that the state must pay for convenience abortions for poor women. His rationale was that if the state was going to pay for prenatal care for these women, they must also fund abortions.

Alaska's courts are some of the most liberal in the country. Our Alaska Supreme Court overturned parental consent for abortion and the partial birth abortion ban. They are now considering forcing the legislature to fund education at whatever level the court says is appropriate. That is a move that has been successful in other states and I don't expect our courts to disappoint the liberals. After all, Alaska Courts are consistent if nothing else.

Contributors

Eagle Forum Alaska
Don Haase
Don

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posted by Don Haase @ 7:55 AM 0 comments

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Eagle Forum Alaska

FRIDAY, OCTOBER 20, 2006

The Consequence of Judicial Activism

(posted by Don Haase)

Dear God:

Why didn't you save the school children at. ..

Moses Lake, Washington 02/02/1996
Bethel, Alaska 2/19/97
Pearl, Mississippi 10/01/1997
West Paducah, Kentucky 12/01/1997
Stamp, Arkansas 12/15/1997
Jonesboro, Arkansas 03/24/1998
Edinboro, Pennsylvania 04/24/1998
Fayetteville, Tennessee 05/19/1998
Springfield, Oregon 05/21/1998
Richmond, Virginia 06/15/1998
Littleton, Colorado 04/20/1999
Taber, Alberta, Canada 05/28/1999
Conyers, Georgia 05/20/1999
Deming, New Mexico 11/19/1999
Fort Gibson, Oklahoma 12/06/1999
Mt. Morris Twp., Michigan 02/29/2000
Savannah, Georgia 03/10/2000
Lake Worth, Florida 05/26/2000
New Orleans, Louisiana 09/26/2000
Baltimore, Maryland 01/17/2001
Santee, California 03/05/2001
Williamsport, Pennsylvania 03/07/2001
El Cajon, California 03/22/2001
Gary, Indiana 03/30/2001
Caro, Michigan 11/12/2001
New York, New York 01/15/2002
New Orleans, Louisiana 04/14/2003

Contributors

Eagle Forum Alaska
Don Haase
Don

Previous Posts

Youth Leadership School
Judicial Retention
Social Security Benefits to Illegal Aliens
Preambles
EFA Legislative Alert, May 25, 2006
EFA Legislative Alert, May 16, 2006
EFA Legislative Alert, May 15, 2006
EFA Legislative Alert, May 11, 2006
An Open Letter to Washington Pastors
EFA Legislative Alert, May 5, 2006

Power Blogger

Red Lion, Pennsylvania 04/24/2003
Cold Spring, Minnesota 09/24/2003
Red Lake, Minnesota 03/21/2005
Jacksboro, Tennessee 11/08/2005
Essex, Vermont 08/24/2006
Bailey, Colorado 09/26/2006
Cazenovia, Wisconsin 09/29/2006
Nickel Mines, Pennsylvania 10/03/2006?

Sincerely,

Concerned Student

Reply:

Dear Concerned Student:

Sorry,

I am not allowed in schools!

Sincerely,

God

How did this get started?...

Perhaps when Madeline Murray O'Hare complained
She didn't want any prayer in our schools.

And the courts said, OK.

Then, someone said you better not

Read the Bible in school,
the Bible that says
"thou shalt not kill,
Thou shalt not steal,
And love your neighbors as yourself,"

And the courts said, OK...

Dr. Benjamin Spock said
We shouldn't spank our children
When they misbehaved
Because their little personalities
Would be warped and we might damage their self-esteem.

And we said,
An expert should know what he's talking about
So we won't spank them anymore..

Then someone said
Teachers and principals better not
Discipline our children when they misbehave.
And the school administrators said
No faculty member in this school
Better touch a student when they misbehave
Because we don't want any bad publicity,
And we surely don't want to be sued.

And we accepted their reasoning...

Then someone said,
let's let our daughters have abortions if they want,
And they won't even have to tell their parents.

And the courts said, that's a grand idea.

Then some wise school board member said,
Since boys will be boys
And they're going to do it anyway,
let's give our sons all the condoms they want,
So they can have all the fun they desire,
And we won't have to tell their parents they got them at school.

And the courts said, that's another great idea...

Then some of our top elected officials said
It doesn't matter what we do in private as long as we do our jobs.

And we said,
It doesn't matter what anybody, including the President,
Does in private as long as we have jobs and the economy is good....

And someone else took that appreciation a step further
And published pictures of nude children
And then stepped further still by
Making them available on the Internet.

And the courts said, everyone's entitled to free speech....

And the entertainment industry said,
let's make TV shows and movies that promote
Profanity, violence and illicit sex...
And let's record music that encourages
Rape, drugs, murder, suicide, and satanic themes...

And the courts said,

it's just entertainment
And it has no adverse effect
And nobody takes it seriously anyway,
So go right ahead.

Now we're asking ourselves
Why our children have no conscience,
Why they don't know right from wrong,
And why it doesn't bother them to
Kill strangers, classmates or even themselves.

Undoubtedly,
If we thought about it long and hard enough,
We could figure it out.
I'm sure it has a great deal to do with...

"WE REAP WHAT WE SOW"

posted by Don Haase @ 10:18 AM 0 comments

0 Comments:

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Superior Court - First Judicial District

Judge Larry Weeks
Juneau
09/03/90
Leniency
Court of Appeals Nos. A-8663/8664
Trial Court Nos. 1JU-02-1077 CR
1JU-02-1509 CR

O P I N I O N: [No. 1987 - June 17, 2005]

In this case, the sentencing judge did not specify during his remarks at sentencing whether the defendants sentences were concurrent or consecutive. We hold that, under former AS 12.55.025(e), when a sentencing judge does not specify whether a defendants sentences are concurrent or consecutive, the sentences must be deemed concurrent.

Judge Larry C. Zervos
Sitka
09/14/90
Sexual Assault of Children - Lenient
ALASKA MAN SENTENCED TO JAIL FOR MOLESTING TWO GIRLS
A deaf man in Juneau, Alaska was sentenced to eight years in prison after admitting to molesting two girls when they were children. Arley Dominguez, 48, "hugged his wife, smiled and waved his shackled hands at other family members" as he was led out of court last Friday, reported the Juneau Empire. Assistant Public Defender Eric Hedland said his client accepted guilt in the case ever since he was charged in November with eight felonies. "He was willing to take his lumps," said Hedland. Sitka Superior Court Judge Larry Zervos placed Dominguez on probation for 10 years after his release and ordered him to register as a sex-offender and participate in sex-offender treatment arranged by the Department of Corrections.

Superior Court - Second Judicial District

Judge Richard H. Erlich
Kotzebue
03/08/91

Judge Ben Esch
Nome
02/16/96
Bad Judgement - Sexual abuse of a minor
Judge reinstates civil suit against diocese
FAIRBANKS - A judge in Nome reversed himself and now will allow a civil case involving allegations of abuse by a priest to go forward. Superior Court Judge Ben Esch in February dismissed the suit against the Fairbanks Catholic Diocese and the Society of Jesus brought by a woman identified in court documents as Jane Doe 2.

Superior Court - Third Judicial District

Judge Joel Bolger
Kodiak
09/02/03

Judge Harold M. Brown
Kenai 04/08/96
Bad Judgment
Court of Appeals No. A-8809
Appellant,) Trial Court No. 3KN-03-478 CR
) [No. 5114 – September 13, 2006]

Superior Court Judge Harold M. Brown granted a motion to suppress McCurdy's statements, including evidence of McCurdy's conduct pointing out the location of the single packet of heroin. However, citing Smith v. State,5 Judge Brown concluded that the heroin would have been "inevitably discovered based solely on information known to the police[,] and [the heroin was] not subject to suppression."

Judge Charles T. Huguelet
Kenai
09/02/03

Judge Peter A. Michalski
Anchorage
01/31/85
Marriage
Judge Michalski is probably bestknown for his 1996 court decision finding that homosexual partners areentitled to be "married". Alaskan voters apparently disagreed as we votedoverwhelmingly to uphold traditional one man- one woman marriage. Judge Sen Tan ruled in 2000 that the state must pay for convenienceabortions for poor women. His rationale was that if the state was going topay for prenatal (well-baby) care for these women, they must also fund abortions.

Judge William F. Morse
Anchorage
02/27/02
Judicial Elitism
On July 28 Superior Court Judge William Morse determined that Superior Court Judge Michael Jeffery (Barrow) and District Court Judge Nancy Nolan (Anchorage) had timely filed their notices of intention to run for retention on the November 2004 ballot despite the undisputed fact that both judges submitted their declaration of candidacy forms to the Division of Elections over two weeks after the filing deadline, with the request that the Division accept them late. Under Alaska law the notice to file must be made by August 1st before the general election. In addition, the Alaska Supreme Court has held that the Division of Elections has no discretion to accept a late-filed declaration of candidacy, and that the Division must strictly construe the statute requiring this filing. However, in Jeffrey v. Glaiser and Nolan v. Glaiser the court said that the Division of Elections abused its discretion by refusing to put the names of judges on the ballot.

Even though the Division of Elections provides a declaration of candidacy form, Judge Morse determined that Judges Jeffrey and Nolan fulfilled the filing requirement when a Judicial Council employee sent an

email containing the addresses of the judges eligible for retention, without their knowledge, to a temporary employee at the Division of Elections whose job was to coordinate the ballot pamphlet sent to Alaska voters. This Elections employee then mailed the judges information about how to submit ballot pamphlet materials, along with a reminder that they were required to file their declarations of candidacy by August 1. The Judicial Council employee also later sent a reminder to the candidates, stating that if they failed to file a declaration of candidacy with the Division of Elections by August 1, their names would not appear on the ballot.

"The Division of Elections is charged with running a fair election, and this requires clear rules that the public understands," said Márquez. "The superior court decision recognizes that there are concrete deadlines for filing declarations of candidacy for any office, but establishes ambiguous standards for what constitutes a declaration by a judicial candidate. The burden that this decision places on the Division combined with the importance of the legal issue compels us to seek review by the Alaska Supreme Court."

Judge Eric Smith
Palmer
04/18/96

Judge John Suddock
Anchorage
11/14/02
Fathers Rights
Supreme Court No. S-11269
Superior Court No. 3AN-92-2426CI
[No. 5918 - July 1, 2005]

On May 13, 2003, James Ray filed a pro se superior court motion seeking a change of custody, support, and visitation, a combined affidavit and memorandum, and a proposed order. His motion asked the court to stop all child support for C.R. retroactive to the date of the

divorce and stated that C.R. was not his biological or adopted son. James alleged in his motion that he had not been given visitation rights as court- ordered and that he had been allowed to see C.R. only three times since the divorce. His supporting affidavit and memorandum alleged that C.R. was included in the divorce order because it had been determined that there was an existing father-son relationship. Jamess affidavit also stated that the father-son relationship was stopped when [C.R.s mother] left the state within a week of divorce and never allowed me visitation with [C.R.].

Judge Sen K. Tan
Anchorage
12/04/96
Abortion, public funding, parental consent
Planned Parenthood of Alaska et al. vs. State of Alaska. In 2003, Judge Sen Tan struck down a law that required young women under the age of 17 to obtain the consent of a parent or a judge before having an abortion. Tan ruled that the law violated teens' rights to equal protection under the state's constitution because it requires them to involve a parent only in their decision to have an abortion, not in other medical decisions such as carrying a pregnancy to term.

Judge Fred Torrisi
Dillingham
11/27/96
English Language

Judge Philip R. Volland
Anchorage
11/14/02
Judgement Ralph Inga convicted of sexual assault on incapacitated woman. Ralph Inga was tried for sexual assault in the second degree with an incapacitated person and was found guilty by a jury before Judge Michael L. Wolverton Anchorage 12/04/96 Leniency

Judge Volland did not admit the evidence that the

defendant had previously engaged in sexual abuse of the same person and did not even admit evidence that the defendant was on probation and was not supposed to have any contact with the victim.

Judge Michael L. Wolverton
Anchorage
12/04/96
Leniency
Downtown shooting, known gang member charged with first-degree assault and misconduct involving weapons. Wolverton approved a known gang-related third-party custodian over the state's objections. Police later could not reach the defendant, and surprise, the custodian was absent. He was later spotted and ran until he was tackled by an officer. He was carrying a stolen .40-caliber Glock.

In another case, Mark Elkins cut off another car in fit of road rage, causing that other vehicle to rollover, killing the driver and fracturing the skull of her son. Wolverton's sentenced Elkins to 12 weeks in jail after pleading no contest to leaving the scene of the accident.

Superior Court - Fourth Judicial District

Judge Leonard R. Devaney, III
Bethel
02/27/02

Judge Randy M. Olsen
Fairbanks
04/28/03

Judge Mark I. Wood
Fairbanks
08/30/02

District Court - First Judicial District

Judge Kevin G. Miller
Ketchikan

08/30/99

District Court - Third Judicial District

Judge Brian K. Clark
Anchorage
06/11/03

Judge William L. Estelle
Palmer
06/11/03

Judge Gregory Louis Heath
Palmer
10/11/03

Judge David S. Landry
Kenai
11/01/04

Judge John R. Lohff
Anchorage
03/08/91

Judge Gregory Motyka
Anchorage
07/26/91

Judge Sigurd E. Murphy
Anchorage
07/08/92

Judge Stephanie Rhoades
Anchorage
07/30/92
Leniency, See Wolverton

Judge Jack W. Smith
Anchorage
06/11/03

Judge John W. Wolfe
Palmer
11/01/04

District Court - Fourth Judicial District

Judge Winston S. Burbank
Fairbanks
04/28/03

Judge Jane F. Kauvar
Fairbanks
02/18/81
Drug Leniency
DAVID S. NOY,)
) Court of Appeals No. A-
8327
Trial Court No. 4FA-01-3003 CR 1897 August 29, 2003

The question presented in this case is whether AS 11.71.060(a) is constitutional to the extent that it prohibits possession of marijuana by adults in their homes for personal use.

On one level, the answer is straightforward. The Alaska Supreme Court ruled in Ravin that the right of privacy codified in article I, section 22 of our state constitution protects the right of adults to possess marijuana in their homes for personal use. When a statute conflicts with a provision of our state constitution, the statute must give way. Thus, a statute which purports to attach criminal penalties to constitutionally protected conduct is void.

posted by Don Haase @ 10:01 AM 0 comments

0 Comments:

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Granger, William
Board of Governors of the Alaska Bar

RESUME

WILLIAM. A. GRANGER

Anchorage Resident from 1964

Employment History:

Matanuska Valley Bank 1970 – 1972, 1974 - 1978
Various paying and receiving duties. Branch Manager, SBA Lender, Manager of Consumer Loan Department

Washington Trust Bank, Spokane Washington 1972 – 1974 Vault Teller

National Bank of Alaska 1978 – 1984
Vice President, Manager Commercial Special Credits (loan workout)

Alaska National Bank of The North (purchased by NBA) 1984 – 1987
Senior Vice President, Manager Special Credits (loan workout)

National Bank of Alaska (NBA)
1987 – 1992
Vice President, Manager Commercial Special Credits (loan workout)
Instructor American Institute of Banking, Anchorage Community College

1993 – 1999
Senior Vice President, Senior Credit Administration. Senior lending officer.
Lending Limit 45MM

Wells Fargo Bank Alaska (formally NBA)
1999 – 2001
Senior Vice President, Senior Regional Credit Officer

Wells Fargo Bank N.A.
2002 to present
Senior Vice President, Deputy Senior Regional Credit Officer
Manager, Credit Management Group, Supervising the following states with 28 officers in ten offices:
Alaska, Iowa, Nebraska, North and South Dakota, Indiana, Ohio, Illinois, Washington and Oregon.

Education:

Diamond High School, Anchorage Alaska 1972
Anchorage Community College, various banking Classes 1970 – 1982
Gonzaga University, Spokane Washington 1972 – 1974
Graduate of Pacific Coast Banking School, University of Washington 2000 – 2003
Graduate of Mendoza College of Business, University of Notre Dame, Catholic Charities Management 2008

Licenses:

Private Pilot License SEL/SES, Complex and HP
Alaska Real Estate Salesman (expired)
PADA Scuba Diver

Public Service

Alaska Bar Association Board of Governors, Vice President 2000-2009
Recipient of the Lay persons award for service to the Bar 2009
Anchorage Center for Families Board Member 1993-1999
Make-A-Wish Alaska President of Board 1998-2001
Catholic Social Services, Chairman of the Board of Trustees 2006-2009

Barlow, Nora
Violent Crimes Compensation Board

NORA G. BARLOW

EDUCATION:

1991	University of the Pacific, McGeorge School of Law with Distinction, Order of the Coif
1989	London Institute of International Business and Commercial Law "Fundamental Rights in Europe and the United States." Hon. Anthony Kennedy, Associate Justice, United States Supreme Court
1986	University of California, Berkeley, Bachelor of Arts, Environmental Science, Emphasis Biology

EMPLOYMENT:

2006-present	DeLisio Moran Geraghty & Zobel, P.C. Associate Attorney; General civil litigation practice with an emphasis in defense of employment law cases and workers' compensation claims.
2004-2006	Russell Wagg Cooper & Gabbert, P.C., Anchorage, AK Associate Attorney; Emphasis in workers' compensation defense.
2003-2004	Attorney General's Office, Anchorage, AK Assistant Attorney General, Office of Special Prosecutions and Appeals; Environmental Prosecutor.
2002-2003	District Attorney's Office, Anchorage, AK Assistant District Attorney; Felony Prosecution of Property Crimes and Sexual Assaults.
1999-2002	Office of the County Counsel, Contra Costa County, Martinez, CA Deputy County Counsel; Assigned to Juvenile Dependency and Conservatorship Unit.
1995-1999	Heller Ehrman White & McAuliffe, San Francisco, CA and Anchorage, AK Associate Attorney; Complex civil litigation practice.
1992-1995	Burr Pease & Kurtz, Anchorage, AK Associate Attorney; General civil litigation practice.
1991-1992	Law Clerk:"Hon. H. Russell Holland, Judge, United States District Court for the District of Alaska and Hon. James M. Fitzgerald, Senior Judge, United States District Court for the District of Alaska
Summer 1990	Pillsbury Madison & Sutro, San Francisco, CA Summer Associate

BAR ADMITTANCE:

Admitted in California 1992
Admitted in Alaska 1993

COMMUNITY ACTIVITIES:

Committee Member, Annual Jewish Cultural Gala
Volunteer, Bean's Café
Volunteer, Aquarian Charter School
Volunteer, Camp Gan Israel

Demboski, Amy
Commission on Judicial Conduct

Amy L. Demboski

INTRODUCTION
Initially, I acquired my dental skills in the military. After military service, I entered the private sector and have worked in almost every aspect of a dental practice. During the past 15 years I have grown as a person, an employee, and a leader. Through mutual respect, building those up around me, working hard, and leading by example; I have found we are truly limited by our own ambition. While working full time, I went to school full time, and in 5 years, achieved two college degrees. The secret to success: put one foot in front of the other, focus on the strengths of your co-workers, and be open to the wisdom and experience of others.

SUMMARY OF QUALIFICATIONS
- Marketing, Advertising, Human Resources, Payroll, Accounting, Collections
- Project Management: Development of new practices & expansion of existing practices
- Coordination of legal affairs: LLC incorporation, contract law, leasing
- Direct Patient Care: Certified Dental Assistant
- OSHA Compliance Director, Emergency Preparedness Facilitator, Training Coordinator

EMPLOYMENT
AUG 2005 to OCT 2010 - ADVANCED FAMILY DENTAL CARE
Project Management, Office Management, Human Resources, Payroll, Direct Patient Care
- Marketing, Advertising, Human Resources, Payroll, Accounting & Collections
- Project Management, Coordination of Legal Affairs, Contract Law & Leasing
- Managed & Coordinated all aspect of business
- Direct Patient Care: Expanded Duties Assistant
- OSHA Compliance Director, Emergency Preparedness Facilitator, Training Coordinator

JAN 2007 to MAY 2009 - ADVANCED FAMILY DENTISTRY
Project Manager, Human Resource Coordinator, Payroll, Direct Patient Care
- Facilitated Development & Management of all aspects of new business
- Marketing, Advertising, Human Resources, Payroll
- Training & Support of all new staff members

DEC 2000 TO AUG 2005 - LEE ELLENBURG, DDS
Dental Assistant
• Direct Patient Care: radiology, crown & bridge impressions, temporaries, impressions for all dental appliances, assist during all surgeries, ordering dental supplies

Education
BA Justice UAA 2006
BA History UAA 2007

Burns, John
State of Alaska Attorney General

John J. Burns

John J. Burns is Governor Parnell's appointee as Alaska's twenty-second Attorney General. Burns, age 51, is a life-long Alaskan, who grew up in Nome and Fairbanks, where his father was a marine mammal biologist with the Alaska Department of Fish and Game and his mother worked in the airlines industry. Burns graduated from West Valley High School in Fairbanks in 1976 and from the University of Alaska Fairbanks in 1982 with degrees in history and philosophy. In 1986, Burns received his JD degree from University of Puget Sound School of Law in Tacoma, Washington.

Burns spent the summer months of his high school, college, and law school years working as a fisheries technician for the Alaska Department of Fish and Game throughout Western Alaska and in Prince William Sound.

Burns was admitted to the Alaska Bar in 1986 and to the U.S. District Court of Alaska in 1987. He was a judicial extern for Justice Jay Rabinowitz of the Alaska Supreme Court and a law clerk for the Fairbanks Superior Court. Burns entered private practice with the law firm Birch Horton Bittner and Cherot in their Fairbanks office. In 1999, Burns and partner Cory Borgeson formed Borgeson and Burns, PC, providing a full range of legal services, including business law and litigation, public utility practice, property law, insurance defense, estate planning, and family law. Burns' practice focused primarily on business transactions and commercial litigation.

In addition to his legal practice, Burns commercial fished for a number of years in Bristol Bay and taught business law classes for 12 years as an adjunct professor at the University of Alaska Fairbanks. Burns was a member of the Fairbanks Chamber of Commerce, serving as its past president, and he has been active in many other community service organizations, including the Fairbanks Rotary Club, the University's Chancellor Advisory Committee, and Hospice of Alaska.

Attorney General Burns and his wife Christi have been married for twenty-four years. Together they have two daughters, Alissa, a senior at the University of Arizona, and Kate, a high school junior who is currently studying in Poland on a Rotary exchange fellowship.

Alaska State Legislature

House of Representatives

Office of the Chief Clerk

Official Business

State Capitol, Room 216
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

MEMORANDUM

Date: 2011

To: All Committees

From: Suzi Lowell
Chief Clerk

Subject: Confirmation Committee Report (Signature Page) for Governor's Appointments

The attached Confirmation Committee Report (signature page) should be used in conjunction with the Referral for Confirmation form for the Governor's appointments to boards and commissions requiring legislative confirmation. After a committee has reviewed the qualifications of the appointee(s), the Referral for Confirmation form(s) should be dated and attached to a signature page. Have members sign the signature page and return the confirmation packet to the Chief Clerk's office.

Please use a single signature page for multiple appointees if the names of all members signing the report are the same for each attached referral. This allows members to sign once for multiple appointments.

Attached are several signature pages for your use. We used colored paper to make them easier to identify. If you anticipate needing more forms or need assistance, please call Nancy McMullen at 465-6809.

Note: A separate report, including the signatures, will be used for department commissioners.

Attachments

Alaska State Legislature

Official Business

House of Representatives

Office of the Chief Clerk

Thomas B. Stewart Legislative
Office Building, Room 202
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

MEMORANDUM

Date: February 7, 2011

To: Representative Gatto, Chair
Judiciary Committee

From: Suzi Lowell, Chief Clerk

Subject: Governor's Appointee Contact Information

The Office of the Governor, Boards and Commissions Office, has provided contact information for appointees to the various boards and commissions requiring legislative confirmation and referred to your committee February 2, 2011. The information was redacted from the resumes and is strictly for the purpose of contacting appointees to schedule hearings. Please do not distribute this information or post it on BASIS or other web pages.

If there is a problem with any of the contact information or if more information is needed, please contact Selina Kokotovich in the Boards and Commissions Office at:

PHONE: 907.465.3934
FAX: 907.465.8110
selina.kokotovich@alaska.gov

Attachment

cc: Selina Kokotovich

JUDICIARY REFERRALS
2/2/11

Board	F Name	L Name	Address	City	State	Zip	Phone	Email
Bar Association Bd of Governors	Bill	Granger	13810 Jarvi Drive	Anchorage	AK	99515	907-345-1350	William.A.Granger@wellsfargo.com 265-2114
Judicial Conduct	Amy	Demboski	P.O. Box 672114	Chugiak	AK	99567	907-301-9179	amydemb@hotmail.com
Judicial Council	Don	Haase (Hayse)	P.O. Box 3423	Valdez	AK	99686	907-835-3608	n/a 834-7359 MSG 03/09/11 8AM
Violent Crimes Compensation Bd	Nora	Barlow	934 W 6th Avenue	Anchorage	AK	99501	907-279-9574	n/a MSG 03/09/11 8AM

CONFIR-
MATIONS
2012

<TARGET><BILL></BILL><SUBJECT>CONFIRMATIONS
2012</SUBJECT><COMM>HJUD27</COMM></TARGET>

CONFIRMATION COMMITTEE REPORT

Action date: 2/29/2012

The **Judiciary Committee** has reviewed the qualifications of the Governor's appointee(s) as shown on the attached Referral for Confirmation forms(s) and recommends that the name(s) be forwarded to a joint session for consideration:

This does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of confirmation.

Signature:	Printed Last Name
Wes. Keller	Keller
[illegible]	LYNN
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	Holmes
Chair: Steve M Thompson	Thompson

Please attach appointee Referral for Confirmation form(s) and return to the Chief Clerk's Office.

Alaska State Legislature

Official Business

House of Representatives

Office of the Chief Clerk

Thomas B. Stewart Legislative
Office Building, Room 202
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

REFERRAL FOR CONFIRMATION

Date Referred: February 3, 2012

Committee: **Judiciary Committee**

Commission on Judicial Conduct
Robert Sheldon – Anchorage
Appointed: 10/29/2010
Reappointed: 3/1/2012 Term Expires: 3/1/2016

Action Date: 2/29/12
(Same date as on the accompanying signature page)

Note: Attach to a signature page and return to the Chief Clerk's office.

Alaska State Legislature

Official Business

House of Representatives

Office of the Chief Clerk

Thomas B. Stewart Legislative
Office Building, Room 202
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

REFERRAL FOR CONFIRMATION

Date Referred: February 3, 2012

Committee: **Judiciary Committee**

Alaska Judicial Council
Kenneth Kreitzer – Juneau
Appointed: 7/28/2011 Term Expires: 3/1/2017

Action Date: 2/29/12
(Same date as on the accompanying signature page)

Note: Attach to a signature page and return to the Chief Clerk's office.

Alaska State Legislature

Official Business

House of Representatives

Office of the Chief Clerk

Thomas B. Stewart Legislative
Office Building, Room 202
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

REFERRAL FOR CONFIRMATION

Date Referred: February 3, 2012

Committee: **Judiciary Committee**

Violent Crimes Compensation Board
Dr. Regina Chennault – Anchorage
Appointed: 10/18/2005
Reappointed: 3/1/2006 Reappointed: 3/1/2009
Reappointed: 3/1/2012 Term Expires: 3/1/2015

Action Date: 2/29/12
(Same date as on the accompanying signature page)

Note: Attach to a signature page and return to the Chief Clerk's office.

CONFIRMATION COMMITTEE REPORT

Action date: 2-29-12

The Judiciary Committee has reviewed the qualifications of the following Governor's appointee and recommends that this name be forwarded to a joint session for consideration:

Attorney General
Michael Geraghty
Appointed: 2/1/2012

This does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of confirmation.

Signature:	Printed Last Name
	Bohlayn
	Gruenberg
	Pruitt
	Holmes
	Thompson
Chair:	Keller

Please return to the Chief Clerk's office.

CONFIRMATION COMMITTEE REPORT

Action date: 2/29/2012

In accordance with AS 24.60.130, the Judiciary Committee has reviewed the qualifications of the following Chief Justice's appointee and recommends that this name be forwarded to the House for ratification:

Select Committee on Legislative Ethics

Herman Walker, Jr. (reappointed)

This does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of ratification.

Signature:	Printed Last Name
	LYNN
	Gruenberg
	Keller
	Pruitt
	Holmes
Chair:	THOMPSON

Please return to the Chief Clerk's office.

CONFIRMATION COMMITTEE REPORT

Action date: 2/29/2012

In accordance with AS 24.60.130, the Judiciary Committee has reviewed the qualifications of the following Chief Justice's appointee and recommends that this name be forwarded to the House for ratification:

Select Committee on Legislative Ethics

Dennis Cook (reappointed)

This does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of ratification.

Signature:	Printed Last Name
	LYNN
	Gruenberg
	Keller
	Pruitt
	Holmes
Chair:	THOMPSON

Please return to the Chief Clerk's office.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

DATE: February 24, 2012

TO: Suzie Lowell, Chief Clerk
Alaska House of Representatives

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

RE: House Judiciary Committee Agenda

****

Wednesday, February 29, 2012 at 1:00 p.m. in Room 120

Confirmation Hearings:

Attorney General
- Michael Geraghty (appointed 2/1/12)

Select Committee on Legislative Ethics
- Dennis Cook reappointed (reappointed 1/19/12)
- Herman Walker, Jr. (reappointed 1/19/12)

Commission on Judicial Conduct
- Robert Sheldon (reappointed 3/1/12)

Alaska Judicial Council
- Kenneth Kreitzer (appointed 7/28/2011)

Violent Crimes Compensation Board
- Dr. Regina Chennault (reappointed 3/1/2012)

Bills Previously Heard

Alaska State Legislature

House of Representatives

Office of the Chief Clerk

Official Business

State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

MEMORANDUM

TO: Representative Gatto, Chair
Judiciary Committee

FROM: Suzi Lowell, Chief Clerk SL

DATE: February 3, 2012

SUBJECT: Governor's Appointment(s)

The Speaker referred the following Governor's appointment(s) to the Judiciary Committee:

Attorney General
Michael Geraghty
Appointed: 2/1/2012

Commission on Judicial Conduct
Robert Sheldon – Anchorage
Appointed: 10/29/2010
Reappointed: 3/1/2012 Term Expires: 3/1/2016

Alaska Judicial Council
Kenneth Kreitzer – Juneau 790-3136
Appointed: 7/28/2011 Term Expires: 3/1/2017

Violent Crimes Compensation Board
Dr. Regina Chennault – Anchorage
Appointed: 10/18/2005
Reappointed: 3/1/2006 Reappointed: 3/1/2009
Reappointed: 3/1/2012 Term Expires: 3/1/2015

The Referral for Confirmation page(s) and signature page(s) are attached for your use. The resume(s) and contact information will be sent electronically.

Attachments as noted

Alaska State Legislature

House of Representatives

Office of the Chief Clerk

Official Business

State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

MEMORANDUM

TO: All Committees

FROM: Suzi Lowell, Chief Clerk

DATE: 2012

SUBJECT: Confirmation Committee Report (Signature Page) for Governor's Appointments

The attached Confirmation Committee Report (signature page) should be used in conjunction with the Referral for Confirmation form for the Governor's appointments to boards and commissions requiring legislative confirmation. After a committee has reviewed the qualifications of the appointee(s), the Referral for Confirmation form(s) should be dated and attached to a signature page. Have members sign the signature page and return the confirmation packet to the Chief Clerk's office.

Please use a single signature page for multiple appointees if the names of all members signing the report are the same for each attached referral. This allows members to sign once for multiple appointments.

Attached are several signature pages for your use. We used colored paper to make them easier to identify. If you anticipate needing more forms or need assistance, please call Nancy McMullen at 465-6809.

Note: A separate report, including the signatures, will be used for department commissioners.

Attachments

Alaska State Legislature

Official Business

House of Representatives

Office of the Chief Clerk

State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

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MEMORANDUM

TO: Representative Gatto, Chair
Judiciary Committee

FROM: Suzi Lowell, Chief Clerk SL

DATE: January 25, 2012

SUBJECT: Select Committee on Legislative Ethics Appointments

The Speaker referred the following appointments made by Chief Justice Walter L. Carpeneti to the Judiciary Committee:

Select Committee on Legislative Ethics
Dennis Cook (reappointment)
Herman Walker, Jr. (reappointment)

The committee reports are attached for your use.

Attachments as noted

Communication
Judiciary
SCR Ltr 1 1/25
J3

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

P.O. Box 114100
Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

January 19, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, Alaska 99801-1182

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear President Stevens
and Speaker Chenault:

In my capacity as Chief Justice, and pursuant to AS 24.60.130(b)(3), I am re-appointing Dennis Cook to serve another term as a public member of the Select Committee on Legislative Ethics.

Mr. Cook is partner in a law firm in Fairbanks, Cook, Schuhmann & Groseclose, Inc. For purposes of determining compliance with AS 24.60.130(c), Mr. Cook is non-partisan.

Mr. Cook can be reached at (907) 457-6994. His mailing address is P.O. Box 70810, Fairbanks, Alaska, 99707-0810, and his e-mail address is skip@alaskalaw.com. Please let me know if I can provide you with any other information on this matter.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

cc: Dennis Cook
Joyce Anderson

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

P.O. Box 114100
Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

January 19, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, Alaska 99801-1182

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear President Stevens
and Speaker Chenault:

In my capacity as Chief Justice, and pursuant to AS 24.60.130(b)(3), I am re-appointing Herman Walker, Jr. to serve another term as a public member of the Select Committee on Legislative Ethics.

Mr. Walker is partner in a law firm in Anchorage, Limon & Walker, LLC. For purposes of determining compliance with AS 24.60.130(c), Mr. Walker is non-partisan.

Mr. Walker can be reached at (907) 279-2889. His mailing address is 606 E Street, Suite 203, Anchorage, Alaska 99501, and his e-mail address is hermanjr@limonwalker.com. Please let me know if I can provide you with any other information on this matter.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

cc: Herman Walker
Joyce Anderson

Dennis E. "Skip" Cook

P. O. Box 70810
Fairbanks, AK 99707-0810
(907) 452-1855
skip@alaskalaw.com

EDUCATION

- Admitted to practice law in the State of Alaska; 1970
- J.D., Willamette University College of law, Salem, OR; 1967-70
- M.A., Political Science, Northwestern University, Evanston, IL; 1962
- B.S., Economics, Politics & Engineering, Massachusetts Institute of Technology, Cambridge, MA; 1958-62

EMPLOYMENT

Partner/Shareholder, Cook Schuhmann & Groseclose, Inc., Fairbanks, AK; 1972-present
- Expertise in workers' compensation, commercial law and domestic law. Started as associate in 1970

Distribution Representative, Alaskan Adventures, Inc., Fairbanks, AK; 1969-70

Registered Representative, Horton, Geib & O'Rourk, Inc., Salem, OR; 1968-69

Clerk, Oregon State Police, Salem, OR; 1967-68

General Manager, Alaska 67 Centennial Exposition, Fairbanks, AK; 1965-67

Acting Director, Alaska Local Affairs Agency, State of Alaska, Juneau, AK- 1963-65

Election Supervisor, Alaska Division of Elections, Fairbanks, AK; 1963

PROFESSIONAL ASSOCIATIONS

- Tanana Valley Bar Association
- Alaska Bar Association
- American Bar Association

AWARDS & ACHIEVEMENTS

- Fairbanks Distinguished Citizen Award; December, 2003
- Vigil Honor, Order of the Arrow, Boy Scouts of America; 2003
- Outstanding Service Award, Alaska Bar Association Pro Bono Program; 1998
- Silver Beaver Award, Midnight Sun Council, Boy Scouts of America; 1997
- Blue Ribbon Volunteer Service Award – Tanana Valley State Fair Association; 1989
- Rotarian of the Year, Fairbanks Rotary Club; 1985
- Distinguished Service Award, Jaycees of Fairbanks; 1967
- Valedictorian, Fairbanks High School; 1958

CIVIC & COMMUNITY ACTIVITIES

- Member, Select Committee on Legislative Ethics, State of Alaska; *1998-present*
- Fairbanks Representative, MIT Educational Council; *1971-present*
- The Church of Jesus Christ of Latter-day Saints; V*arious positions held*
- Boy Scouts of America-Scoutmaster, *Council Board and Executive Committee Member; (President 1998-2000), Merit Badge Counselor*
- Rotary Club of Fairbanks; *1977-present*
- Rotary International District 5010; *District Governor; 2005-2006*
- Tanana Valley State Fair Association; *1970-1984*
- Interior Alaska Adoptive Parents, Western Association of Concerned Adoptive Parents; *Founding Member*

POFD Form

Completed

Submission Date: **01/10/2012**

Filer Information

First Name: **DENNIS**
Last Name: **COOK**
Address: **431 Birch Hill Road**
City, State Zip: **Fairbanks, Alaska 99712**
Contact Phone: **907-452-1855**
Alternate Phone: **907-457-6994**
Fax (Optional): **907-452-8154**
Email: **skipcook@mac.com**
Partner Type: **Spouse**
Spouse/Domestic Partner Name: **Olga B. Cook**
Dependent Children: **0**
Non-Dependent Children: **0**
Names of Non-Dependent Children living with filer: **0**

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Purpose of Filing

Report Dates: From **01/01/2011** Through **12/31/2011**
Filing As: **Office Holder**
Branch: **Legislative**
Position: **Member of Select Committee on Legislative Ethics**
Report Type: **Annual**

Income

Owner	Type	Detail	Description	Amount
Filer	Salaried	Cook Schuhmann & Groseclose, Inc. P.O.Box 70810 Fairbanks, Alaska 99707-0810 Part-time From: 01/01/2011 Through 12/31/2011 Time Worked: approximately 1/2 time	Staff Attorney	**$100,000 - $200,000**
Filer, Spouse	Dividend or Interest	Permanent Fund Dividends		**$1,000 - $2,000**
Filer	Other	Source: Cook Schuhmann & Groseclose Retirement Plan		**$50,000 - $100,000**
Filer	Other	Source: Social Security		**$20,000 - $50,000**
Spouse	Other	Source: Social Security		**$5,000 - $10,000**

Interests

Owner	Type	Detail	Description	Interest
Filer	Business	Business Name: Cook Schuhmann & Groseclose, Inc. P.O. Box 70810 Fairbanks, Alaska 99707-0810	Law Firm	Position / Type: Shareholder in C Corporation
Filer	Business	Business Name: Midnight Sun Council, Boy Scouts of America 1400 Gillam Way	Non-Profit Youth Organization	Position / Type: Board of Directors & Executive Committee

		Fairbanks, Alaska 99701		
Filer, Spouse	Real Property	431 Birch Hill Road Fairbanks, Alaska 99712	Ownership Interest: JRWROS -- Home	
Filer, Spouse	Real Property	9770 Salchaket Drive Harding Lake, Alaska 99705	Ownership Interest: JTWROS -- Recrdational Cabin	
Filer, Spouse	Real Property	1935 RJ Loop Fairbanks, Alaska 99709	Ownership Interest: Tenants in Common	
Filer	Beneficial	Managed By: Cook Schuhmann & Groseclose Pension & Profit Sharing	Americal Bar Association, P.O. Box 5142, Boston MA 02206-5142	Ownership: 100%
Filer	Beneficial	Managed By: Ridgeway & Conger, Inc.	Investment & IRA Accounts	Ownership: 100%
Spouse	Beneficial	Managed By: Wells Fargo Investment	IRA	Ownership: 100%
Filer, Spouse	Beneficial	Managed By: Wedbush Morgan Securities	Investment Account	Ownership: 100%
Filer	Beneficial	Managed By: First Midwest Securities, Inc.	Investment Account	Ownership: 100%

Loans and Debts

Owner	Type	Name
Filer, Spouse Address: Mt. McKinley Bank, 500 4th Avenue Fairbanks, Alaska 99701	Creditor Original Loan Amount: $407,000.00 Balance Amount: $393,975.59 Interest Rate: 5.0%	Dennis E. & Olga B. Cook
Filer, Spouse Address: Mt. McKinley Bank, 500 4th Avenue Fairbanks, Alaska 99701	Creditor Original Loan Amount: $228,510.00 Balance Amount: $213,531.57 Interest Rate: 6.125%	Dennis E. & Olga B. Cook

Leases

Owner	Type of Lease	Lease/Contract ID	Interest	Status	Description
No Leases / Nothing to Report					

Close Economic Associations

Person Disclosing Association	Associated Person	Description
No Associations / Nothing to Report		

Lobbyist Partner Employers

Name	Address	Compensation
No Lobbyist Partner Employers / Nothing to Report		

JAN 10 2012

HERMAN GENE WALKER, JR.

606 E Street, Suite 203
Anchorage Alaska 99501
(907) 279-2889
email: hermanjr@limonwalker.com

EDUCATION

- University of Wyoming Laramie, Wyoming. May 1992
  J.D. Degree

- Arizona State University Tempe, Arizona. May 1988
  B.S. Political Science Degree

LAW EXPERIENCE

• Limon & Walker, LLC. Attorney	Anchorage AK	2006 to Present
• Lynda Limon Law Offices Attorney	Anchorage AK	2000 to 2005
• Koval & Featherly Law Offices Attorney	Anchorage AK	1998 to 2000
• Public Defender Agency Attorney	Anchorage AK	1995 to1996
• Rex Lamont Butler & Associates Associate Attorney	Anchorage AK	1993 to 1995
• Law Office of Rex Lamont Butler Law Clerk	Anchorage AK	1993 to 1993
• Office of Public Advocacy Legal Intern	Anchorage AK	1992 to 1993
• Defender Association of Philadelphia Legal Intern	PA	1991
• Maricopa County Superior Court Pre-Trial Services Officer	Phoenix AZ	1989

MEMBERSHIPS AND AFFILIATIONS

Alaska Bar Association, United States District Court of Alaska, Anchorage Bar Association, American Bar Association, National Association of Criminal Defense Lawyers, Alaskan Association for Justice , National Board of American Association for Justice, Urban League, Sigma Pi Phi Fraternity,

POFD Registration

Completed

Submission Date: **01/19/2012**

Filer Information

First Name: **Herman**
Last Name: **Walker, Jr.**
Address: **606 E St. suite 203**
City, State Zip: **Anchorage, Alaska 99501**
Contact Phone: **907-279-2889**
Alternate Phone: **907-279-2890**
Fax (Optional): **907-258-4428**
Email: **hermanjr@llmonwalker.com**
Partner Type: **Spouse**
Spouse/Domestic Partner Name: **Lynda Limon**
Dependent Children: **2**
Non-Dependent Children: **0**
Names of Non-Dependent Children living with filer: **n/a**

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Purpose of Filing

Report Dates: From **01/01/2011** Through **12/31/2011**
Filing As: **Office Holder**
Branch: **Legislative**
Position: **Member of Select Committee on Legislative Ethics**
Report Type: **Annual**

Income

Owner	Type	Detail	Description	Amount
Filer	Salaried	Limon & Walker 606 E St. suite 203 Anchorage, Alaska 99501 Full-time From: 01/01/2011 Through 12/31/2011 Time Worked: 12	Law Firm	$50,000 - $100,000
Spouse	Salaried	Limon & Walker 606 E St. Suite 203, Anchorage, Alaska 99501 Full-time From: 01/01/2011 Through 12/31/2011 Time Worked: 12 months	Law firm	$50,000 - $100,000
Spouse	Rental	Tenant: Delia Martinez	Lisa Tellef	$5,000 - $10,000
Filer	Dividend or Interest	pfd		$1,000 - $2,000
Spouse	Dividend or Interest	pfd		$1,000 - $2,000
Child	Dividend or Interest	pfd		$1,000 - $2,000

Child	Dividend or Interest	pfd		$1,000 - $2,000

Interests

Owner	Type	Detail	Description	Interest
Filer, Spouse	Real Property	2351 Lusardi Pt. Circle, Anchorage, Alaska 99515	Ownership Interest: Home owner	
Spouse	Real Property	2440 E 5th Place Tempe, Arizona 85281	Ownership Interest: ownership	
Filer	Beneficial	Managed By: Herman G. Walker, Sr.	Various properties around the country. No properties in Alaska	Ownership: 20%
Filer	Beneficial	Managed By: State of Alaska	Pers	Ownership: 100%
Filer, Spouse	Beneficial	Managed By: A.T. Lloyd's Inc.	Fidelity Wealth central	Ownership: 100%

Loans and Debts

Owner	Type	Name
Filer, Spouse Address: n/a n/a, Alaska n/a	Lender Original Loan Amount: $0.00 Balance Amount: $0.00 Interest Rate: 0.0%	Wells Fargo
Filer, Spouse Address: n/a n/a, Alaska n/a	Lender Original Loan Amount: $0.00 Balance Amount: $0.00 Interest Rate: 0.0%	Bank of America

Leases

Owner	Type of Lease	Lease/Contract ID	Interest	Status	Description
No Leases / Nothing to Report					

Close Economic Associations

Person Disclosing Association	Associated Person	Description
No Associations / Nothing to Report		

Lobbyist Partner Employers

Name	Address	Compensation
No Lobbyist Partner Employers / Nothing to Report		

State of Alaska © 2012

JAN 19 2012

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001, Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: Medical/Other/Occupational Ther.
(For example, Board of Agriculture, public seat)

Please list any other State Boards or Commissions on which you currently or previously have served:

Name: Regina Christine Sutton Chennault, M.D.

Mailing Address: ____

Residence Address: Soldotna, Alaska 99669

City, State and Zip Code: ____

Home or Message Telephone: ____ Business Telephone: ____

Fax Number: ____ Cell Phone: ____

Email address: ____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election.

Are you a registered voter: YES ____ NO ____ Voter Registration Number (Optional): ____

Social Security Number (Optional, required if appointed for travel reimbursement etc.): ____

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES ____ NO ____ if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES ____ NO ____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES ____ NO ____

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria: M. D. Degree 1993

B. List both formal and informal education and training experiences: (Use additional paper if necessary).
General Surgery residency 5 years

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.
Vice Chairman, State of Alaska, Federal Committee on Trauma

D. Employment work history - paid, unpaid or voluntary: (Use additional paper of necessary).
Private practice surgeon Soldotna, Alaska

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will no be used to illegally discriminate against you.

DATE OF BIRTH: ____ SEX: ___ MALE ____

ETHNICITY:
Alaska Native ___ American Indian ___ Asian or Pacific Islander ___ Black Hispanic

MILITARY SERVICE (if applicable, give dates): ____ ____ ____

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): [signature] Date: 9-26-05

Please attach a current resume with your application.

Sheldon, Robert
Commission on Judicial Conduct

STATE OF ALASKA
OFFICE OF THE GOVERNOR
P.O. Box 110001 Juneau, AK 99811-0001
Phone: (907) 465-3500 Fax: (907) 465-3532

BOARDS AND COMMISSIONS APPLICATION FORM

INSTRUCTIONS

A separate application is required for each position for which you apply. Complete and specific answers will aid in rapid and accurate processing of your resume. Please type or print legibly in ink. Forward to the above address. Be sure your answers are true. A willfully false answer may result in your disqualification or removal from office if you are appointed.

Board or Commission and seat for which I am applying: Alaska Commission on Judicial Conduct Public Seat
(For example, Board of Agriculture, public seat)

Please list any other State Boards or Commissions on which you currently or previously have served:

Name: Robert O. Sheldon

Mailing Address: _____

Residence Address: _____

City, State and Zip Code: Anchorage AK 99502

Home or Message Telephone: _____ Business Telephone: _____

Fax Number: _____ Cell Phone: _____

Email address: _____

AS 39-05-100 requires that a person appointed to a state board or commission be a registered voter prior to the last general election:

Are you a registered voter. YES X NO _____ Voter Registration Number (Optional): _____

Social Security Number (Optional, required if appointed for travel reimbursement [redacted]

Have you ever been convicted of a misdemeanor within the past five years or a felony within the past ten years?

YES _____ NO X if "YES", explain the circumstances on a separate sheet of paper and attach it to this application. A conviction is not necessarily grounds for disqualification. The number of convictions, nature, recentness, and relationship to the board position applied for, will be evaluated and a determination will be made after a review of all relevant facts.

CONFLICTS OF INTEREST: Certain boards and commissions require full disclosure of personal financial data under AS 39.50.010. If required for the board or commission for which you are applying, are you willing to do so?
YES X NO _____

Could you or any member of your family be affected financially by decisions to be made by the board or commission for which you have applied? YES _____ NO X

If "YES", explain:

TRAINING AND EXPERIENCE: (If resume attached, it is not necessary to complete items A-D)

A. List any professional licenses, certifications, or registrations and dates obtained that may be used as qualifying criteria:

Please see attached resume

B. List both formal and informal education and training experiences: (Use additional paper if necessary).

Please see attached resume

C. List any community service, municipal government, and state positions held, and any awards received. Include both compensated and uncompensated positions (such as president of a service organization or a mayor). Include length of time serviced.

C. Service: Grace Alaska operating Entity Advisory Board 2007-now
C. Service: Bi-weekly mc, Childrens Service, Changepoint 2003-now
State: TATICC, Investment Section, 2006 & 2007

D. Employment work history – paid, unpaid or voluntary: (Use additional paper of necessary).

Please see Attached resume

The Office of the Governor and the State of Alaska have an Affirmative Action Equal Employment Opportunity Program. To assist in the program, you are asked to voluntarily answer the following questions to provide the information necessary for reporting purposes. Under State and Federal law, the information you provide will not be used to illegally discriminate against you.

DATE OF BIRTH: _ , _ _ SEX: FEMALE _____ MALE _____

ETHNICITY:
Alaska Native ___ American Indian ___ Asian or Pacific Islander ___ Black ___ Hispanic ___ White ___

MILITARY SERVICE (if applicable, give dates): _____

CERTIFICATION: I swear the information I have entered on this form is true to the best of my knowledge. I understand that if I deliberately conceal or enter false information on the form my application may be rejected, I may be removed from the list of eligible candidates, or I may be removed from the position. I agree that the Office of the Governor may contact present or former employees or other persons who know me to obtain an additional information about my skills and abilities. I understand that the information on this application is public information and may be released through a legal request for such information.

Signature (in ink): Robert D. Sheldon Date: 1-29-2008

Please attach a current resume with your application.

STATE OF ALASKA
OFFICE OF THE GOVERNOR

BOARDS AND COMMISSIONS

Name: Robert D. Sheldon Date: 1.29.2008

(Indicate top three boards/commissions of interest by number with #1 as your preference)

	Accounting Board
	Aerospace Development Corporation
	Aging Commission
	Agriculture & Conservation
	Alaska Juvenile Justice Advisory Committee
	Alaska Retirement Management Board
	Alaska Statehood Celebration Commission
	Alaska-Alberta Bilateral Council
	Alcohol/Drug Abuse
	Alcoholic Beverage Control
	Architects/Engineers/ Land Surveyors
	Arts Council
	Assessment Review Board
	Aviation Advisory Board
	Bald Eagle Preserve
	Bar Association
	Barbers & Hairdressers
	Bering Sea Fishery Advisory Board
	Big Game Commercial Services
	Boating Safety Council
	Broadcasting Commission
	Children's Trust Board
	Chiropractic Examiners
	Clemency Advisory Committee
	Commemorative Coin Commission
	Commercial Fisheries Entry
	Commercial Fishing/Agriculture Bank
	Community Service Commission
	Denali Access System Advisory Committee
	Dental Examiners
	Disabilities/Special Education
	Domestic Violence/Sexual Assault
	Education & Early Development
	Education Commission/States
	Emergency Medical Services
	Emergency Response Commission
	Employment of People with Disabilities
	Exxon Valdez Oil Spill Trustee
	Faith-Based & Community Initiatives Council
	Fire Standards Council
	Fisheries

	Fisherman's Fund Advisory & Appeals
	Forestry
	Game
	Health Council
	Historical Commission
	Historical Records Advisory
	Homeless Council
	Housing Finance Corporation
	Human Rights
	Humanities Forum
	Independent Living Council
	Industrial Development/Export Authority
	Interstate Oil & Gas Compact
1	Judicial Conduct
	Judicial Council
	Knik Arm Bridge
	Labor Relations Agency
	Libraries Advisory
	Local Boundary Commission
	Marine Pilots
	Marine Transportation Advisory Board
	Marital & Family Therapy
	Medical Board
	Mental Health Board
	Mental Health Trust Authority
	Midwives
	Minerals Commission
	Municipal Bond Bank
	Natural Gas Authority
	Natural Gas Pipeline Corporation
	Natural Resources Conservation Dev
	North Pacific Anadromous Fish
	North Pacific Fisheries Management Council
	North Pacific Research Board
	Nursing
	Occupational Safety
	Oil & Gas Conservation Commission
	Optometry
	Pacific Marine Fisheries Commission
	Pacific Salmon Commission-Commissioners
	Pacific Salmon Commission- Northern Panel

	Pacific Salmon Commission-Transboundary Panel
	Parole Board
	Permanent Fund
	Pharmacy Board
	Physical/Occupational Therapy
	Pioneer's Home Advisory
	Police Standards Council
	Postsecondary Education
	Professional Counselors
	Professional Teaching Practices
	Psychologist/ Psychological assoc.
	Public Offices Commission
	PWS Oil Spill Recovery Institute
	Railroad Corporation
	Real Estate Appraisers
	Real Estate Commission
	Regents
	Regulatory Commission (RCA)
	Royalty Oil & Gas Development
	Safety Advisory Council
	Seafood Marketing Institute
	Seismic Hazards Safety Commission
	Social Work Examiners
	Student Loan Corporation
	Subsistence Resource Commissions
	Suicide Prevention Council
	Telecommunications
	Uniform State Laws
	Veterans Advisory Council
	Veterinary Examiners
	Violent Crimes Compensation
	Water and Wastewater Works
	Western Interstate Comm/Higher Educ
	Wood-Tikchik State Park
	Worker's compensation
	Worker's Compensation Appeals Commission
	Workforce Investment Board
	Yukon River Panel

If appointed, a press release will be issued announcing your appointment pending the completion of the appointment process with the Governor's office. Please supply our office with the following information that will be included in the press release.

(Name): Robert D. Shelbo (Age): ___ of (Hometown): Anchorage
is (Job title/Place of employment): Principal / Arbor Capital Management, In
(Name) holds (Listing of earned degrees like bachelor's, master's,
ect.): BS Business Administration, BA Economics.
(Or list relevant experience to the position you are being appointed to)

Examples:

John A. Doe, 38 of Soldotna, is Director of T-Shirts & Co. Doe holds a bachelor's degree in business administration from X University and a master's degree in communications from X University.

John A. Doe, 38 of Palmer, is the owner and operator of Doe and Associates, Inc. Doe previously served as division manager at X, Inc. Doe is a certified personnel consultant.

Robert D. Sheldon

[redacted] Anchorage, Alaska 99502

HIGHLIGHTS:

- Extensive business development experience.
- In-depth financial and project management experience.
- Demonstrated ability to manage and direct multiple organizations.
- Experienced with creating, developing and implementing various investment conduits.

EXPERIENCE:

2000-**Present**	*MANAGING PARTNER* / Power Fund Management, LLC Co-founded management group that created and manages a private equity fund which invests in latter stage power related companies.
1996-**Present**	*CHAIRMAN & PRINCIPAL* / Arbor Capital Management, Inc., Anchorage, Alaska Co-founded Registered Investment Advisory firm which focuses on providing personalized portfolio management for institutions and high net worth individuals.
1995-2001	*DIRECTOR* / The Reeve Corporation, Anchorage, Alaska Investigated, reviewed and analyzed various subsidiaries and business practices at the behest of minority shareholders.
1994-1996	*PARTNER* / FirstAnco, Anchorage, Alaska. Supervise and directed investment activities within FNBA investment conduit.
1994-1996	*TRUST OFFICER & ADMINISTRATOR* / FNBA, Anchorage, Alaska Responsible for business development, general compliance and administration of several Trust Department units (Emplcyee Benefit Unit, Mortgage Backed Security Safekeeping Unit, Individual Retirement Account Unit, and paying agent duties for multiple fixed income security issues).
1993 & 1992	*MANAGEMENT TRAINEE II* (Summer) / FNBA, Anchorage, Alaska. Responsible for special projects as assigned by COO, SVP of Operations, and Director of Marketing. Training in bank operational and control areas.
1991 & 1992	*STATISTICS INSTRUCTOR* / Colorado State University, Fort Collins, Colorado Instructed Students in Linear Regression, Chi-Squared, and ANOVA.

EDUCATION & AFFILIATIONS:

- B.S., Business Administration (Finance), Colorado State University, 1993
- Minor B.A., Economics, Colorado State University, 1993
- Core Management Training, First National Bank Anchorage, 1994, 1995
- Member of Omicron Delta Epsilon, an international economics society
- Third Generation Alaskan

Ken Kreitzer

Kreitzer, Ken
Alaska Judicial Council

PERSPECTIVE:

My sincere desire is to help the Parnell/Treadwell Administration fulfill their vision for the state of Alaska. I have over 25 years of experience in resource conservation issues. I have been able to effectively work on both sides of management and labor. I would be honored to use my talent and experience hearing and adjudicating fisheries resources for the Commercial Fisheries (Limited) Entry Commission.

WORK EXPERIENCE:

*City Councilman *Citizens Advisory Commission on Federal Areas Member *Promoting conservation through volunteer service *Experience deck handing Southeast fisheries *Correctional Officer *Airport Safety Officer *Police Officer *Drilling Fluids Engineer *Professional Firefighter *Legislative Aide *City Treasurer *Emergency Medical Technician *PSEA Board Member, Corrections Chapter *PSEA Legislative Liaison *ACOA Legislative liaison

ISSUE EXPERIENCE:

Cold Bay City Councilman/Treasurer - helped write grants for community development plan with Southwest Alaska Municipal Conference (SWAMC) and for development of Cold Bay dock project, Work on City Recreation Committee to set policy for all city recreation programs, CACFA – Evaluate resource-related issues and provide a voice for Alaskans on federal/state resource issues, Fund raising for resource related groups like Ducks Unlimited, Educating, legislators on Corrections issues, Helped rewrite union bylaws, resolve grievances, and participated in negotiations of corrections contract

SUPERVISORY EXPERIENCE:

Acting airport manager, Supervise and train volunteer firefighters, Supervise inmates, Supervise Community Service offender, Supervise and implement FAA required security system, As EMT II, supervise lower level medics, Supervise drilling crews treating drilling fluids, DU Chairman, Salmon Derby Chairman Cold Bay, Supervised fiscal responsibilities of city clerk and clinic personnel

STRENGTHS:

BA Communications 1980 Wright State University, Numerous certifications and continuing ed documentation

REFERENCES ON REQUEST

Geraghty, Michael
State of Alaska Attorney General

MICHAEL C. GERAGHTY

mgeraghty@dmgz.com

PROFILE

Since he joined the firm in 1979, Mr. Geraghty's work has been devoted exclusively to litigation and trial practice before state and federal courts. He has assumed lead counsel responsibilities in all of his trials, which have included both civil and criminal law, as well as proceedings before the OSHA Review Board, the Alaska State Commission on Human Rights and the U.S. Land Commission. He has tried cases before juries in Fairbanks, Anchorage, Barrow, Kenai and Dillingham. Mr. Geraghty has been selected in The Best Lawyers in America in the specialties of Construction Law and Personal Injury Litigation since 2007 and he has also been recognized as a "Superlawyer" by Washington Law & Politics magazine since 2008. In 2005 he was appointed by the Governor to serve Alaska as a Uniform Law Commissioner to the National Conference of Commissioners on Uniform State Laws. In 2007 he was honored by his peers when he received the Board of Governors Professionalism Award "in recognition of exemplary conduct in his association with the public, his colleagues and the legal community." In 2011, he was elected to the Fellows of the American Bar Foundation "in recognition of outstanding dedication to the welfare of the community, the traditions of the profession and the advancement of the objectives of the American Bar Association."

PRACTICE DESCRIPTION

Born and raised in Alaska, Mr. Geraghty's practice has focused on industries and areas that reflect this state's growth and history, including natural resources, oil and gas and construction. He has been involved in numerous complex litigations, including class actions and anti-trust. Many, if not most, of these cases pose

unique challenges in terms of developing orderly plans for discovery, document production, depositions of witnesses and experts, and other related matters.

He has handled approximately 20 appeals to the Alaska Supreme Court in the areas of sovereign immunity, administrative law, insurance and bad faith, attorney-client privilege, OSHA regulations, personal injury, products liability and premises-landowner liability. His reported cases include:

- Harris v. Ahtna Government Services Corp., 193 P.3d 300 (Alaska 2008)
- Kirk v. Demientieff, 145 P.3d 512 (Alaska 2006)
- Halliburton Energy Services v. State of Alaska, Department of Labor Division of Labor Standards and Safety, Occupational Safety and Health Section, 2 P.3d 41 (Alaska 2000)
- McCubbins v. State of Alaska, Department of Natural Resources, Division of Parks and Recreation, 973 P.2d 588 (Alaska 1999)
- State of Alaska v. State Farm, 939 P.2d 788 (Alaska 1997)
- State of Alaska v. Sanders, 944 P.2d 453 (Alaska 1997)
- City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271 (Alaska 1994)
- Central Constr. Co. v. The Home Indem. Co., 794 P.2d 595 (Alaska 1990)
- Lake v. Constr. Mach., Inc., 787 P.2d 1027 (Alaska 1990)
- Myers v. Snow White Cleaners, 770 P.2d 750 (Alaska 1989)
- Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988)
- Wade Oilfield Serv. Co. v. Providence Washington Ins. Co., 759 P.2d 1302 (Alaska 1988)
- Cheeks v. Wismer & Becker, 742 P.2d 239 (Alaska 1987)
- Exxon Corp. v. Alvey, 690 P.2d 733 (Alaska 1984)
- Miller v. Northside Danzi Constr. Co., 629 P.2d 1389 (Alaska 1981)
- Black v. Universal Services, Inc., 627 P.2d 1073 (Alaska 1981)
- Ribar v. H & S Earthmovers, 618 P.2d 582 (Alaska 1980)
- Board of Educ. v. Ewig, 609 P.2d 10 (Alaska 1980)

Michael's approach is client-focused, solution-driven and premised on providing timely and superior service.

PROFESSIONAL AND COMMUNITY ACTIVITIES

- Uniform Law Commissioner, National Conference of Commissioners on Uniform State Laws
- American Bar Association Litigation Section and Construction Industry Forum
- Federation of Defense and Corporate Counsel (FDCC)
- Fellow, American Bar Foundation

EDUCATION

- University of Santa Clara, J.D., *Cum Laude*, 1978
- University of Hawaii, B.A., Political Science, 1974

BAR AND COURT ADMISSIONS

- Alaska Bar Association
- United States District Court for the District of Alaska
- United States Court of Appeals for the Ninth Circuit

Attorneys At Law
DMGZ
DeLisio Moran Geraghty & Zobel, P.C.

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Phone: 907.279.9574 • Fax: 907.276.4231 | Site Map

received
2/22/2012
BS

10140 Hillcrest Lane
Eagle River, Alaska 99577
(907) 727-2943
akwillis@gci.net

February 17, 2012

Senator Hollis French, Chair, Senate Judiciary Committee
Representative Carl Gatto, Chair, House Judiciary Committee

Sirs,

I would like to submit testimony regarding the appointment of Mr. Michael G. Geraghty as Attorney General. After contacting the Anchorage LIO who referred me to the offices of the President of the Senate and the Speaker of the House of Representatives I understand that the hearings on Mr. Geraghty's appointment have not been held. I also understand that both Legislative Judiciary Committees will be involved in this process.

This concerns Mr. Geraghty's performance as an independent counsel in regard to an ethics complaint I filed against the Governor. I am not contesting Mr. Geraghty's decision. What concerns me is the manner in which he executed his duties. Based on my experience, I very much doubt if Mr. Geraghty could effectively serve all Alaskans as Attorney General.

I understand that the facts concerning my complaint might want to be treated as confidential. Therefore I am asking for guidance regarding how to submit my testimony. Thank you.

Lynn C. Willis

Alaska State Legislature

Official Business

House of Representatives

Office of the Chief Clerk

Thomas B. Stewart Legislative
Office Building, Room 202
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

FYI
last yr.

MEMORANDUM

Date: February 2, 2011

To: Representative Gatto, Chair
Judiciary Committee

From: Suzi Lowell, Chief Clerk DL

Subject: Governor's Appointment(s)

The Speaker referred the following Governor's appointment(s) to the Judiciary Committee:

Attorney General
John Burns
Appointed: 11/30/2010

Board of Governors of the Alaska Bar
William Granger – Anchorage
Appointed: 3/1/2011 Term Expires: 3/1/2014

Commission on Judicial Conduct
Amy Demboski – Chugiak
Appointed: 3/1/2011 Term Expires: 3/1/2015

Alaska Judicial Council
Donald Haase – Valdez
Appointed: 3/1/2011 Term Expires: 3/1/2017

Violent Crimes Compensation Board
Nora Barlow – Anchorage
Appointed: 3/1/2010
Reappointed: 3/1/2011 Term Expires: 3/1/2014

The Confirmation Committee Report, Referral for Confirmation page(s), resume(s), and a signature page are attached for your use. In addition, copies of the resume(s) are also being sent electronically.

Attachments as noted

Alaska State Legislature

Select Committee on
Legislative Ethics

716 W. 4th, Suite 230
Anchorage AK 99501-2133
(907) 269-0150
FAX: 269-0152
Email: ethics_committee@legis.state.ak.us

Mailing Address:
P.O. Box 101468
Anchorage, AK.
99510 – 1468

TO: Senator Hollis French, Chair Senate Judiciary
Representative Carl Gatto, Chair House Judiciary

FROM: Joyce Anderson, Administrator

DATE: February 21, 2012

RE: Public Member Appointees to the Ethics Committee

Enclosed are the appointment letters, resumes, and financial disclosure statements for the two public member nominees for the Select Committee on Legislative Ethics:

Herman G. Walker, Jr
Dennis "Skip" Cook

Let me know if you need anything else or have questions.

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

P.O. Box 114100
Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

January 19, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, Alaska 99801-1182

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear President Stevens
and Speaker Chenault:

In my capacity as Chief Justice, and pursuant to AS 24.60.130(b)(3), I am re-appointing Herman Walker, Jr. to serve another term as a public member of the Select Committee on Legislative Ethics.

Mr. Walker is partner in a law firm in Anchorage, Limon & Walker, LLC. For purposes of determining compliance with AS 24.60.130(c), Mr. Walker is non-partisan.

Mr. Walker can be reached at (907) 279-2889. His mailing address is 606 E Street, Suite 203, Anchorage, Alaska 99501, and his e-mail address is hermanjr@limonwalker.com. Please let me know if I can provide you with any other information on this matter.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

cc: Herman Walker
Joyce Anderson

Chambers of
Walter L. Carpeneti
Chief Justice

Supreme Court
State of Alaska

P.O. Box 114100
Juneau, Alaska
99811-4100

(907) 463-4771
Fax (907) 463-3475

January 19, 2012

The Honorable Gary Stevens
Senate President
State Capitol, Room 111
Juneau, Alaska 99801-1182

The Honorable Mike Chenault
Speaker of the House
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear President Stevens
and Speaker Chenault:

In my capacity as Chief Justice, and pursuant to AS 24.60.130(b)(3), I am re-appointing Dennis Cook to serve another term as a public member of the Select Committee on Legislative Ethics.

Mr. Cook is partner in a law firm in Fairbanks, Cook, Schuhmann & Groseclose, Inc. For purposes of determining compliance with AS 24.60.130(c), Mr. Cook is non-partisan.

Mr. Cook can be reached at (907) 457-6994. His mailing address is P.O. Box 70810, Fairbanks, Alaska, 99707-0810, and his e-mail address is skip@alaskalaw.com. Please let me know if I can provide you with any other information on this matter.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

cc: Dennis Cook
Joyce Anderson

not yet.

STATE OF ALASKA
OFFICE OF VICTIMS' RIGHTS

January 27, 2012

The Honorable Carl Gatto, Representative
Chair, House Judiciary Committee
Alaska House of Representatives
Alaska State Legislature
State Capitol, Room 411
Juneau, Alaska 99801

Re: Alaska Office of Victims' Rights, Executive Director Appointment

Dear Representative Gatto:

My appointment term as the Victims' Advocate and Executive Director of the Alaska Office of Victims' Rights (OVR) ends in July 2012. It has been a great honor to serve the Alaska Legislature in this rewarding position for the past four and one-half years. I am grateful for the opportunity to serve Alaska residents with their rights as crime victims in the criminal justice system.

I sincerely hope that the Alaska Legislature will consider renewing my appointment term as allowed by Alaska Statue 24.65.040(a), Term of office.

Under Alaska Statute 24.65.040(a), the Victims' Advocate may be reappointed and serve for three terms. The term of office is five years. Since the establishment of the OVR, I have served the longest as the appointed Executive Director in the agency's history. I am the third appointed Executive Director of the OVR.

I have enclosed the last four annual reports to the Alaska Legislature detailing the work of the Alaska Office of Victims' Rights during my appointment term.

In June 2011, the National Crime Victim Law Institute recognized the Alaska Office of Victims' Rights for outstanding achievement. The Alaska Office of Victims' Rights received the 2011 Victims' Rights Partnership Award identifying the agency for its leadership in victims' rights, dedication to victims in Alaska, and collaborative efforts toward advancing crime victim rights (the announcement for this national award is attached).

1007 WEST 3RD AVENUE, SUITE 205 • ANCHORAGE, ALASKA 99501-1936
TELEPHONE: 1-907-272-2620 • FACSIMILE: 1-907-272-2640

Please inform me if I can provide any additional information regarding the Alaska Office of Victims' Rights. I stand ready to meet with any committee of the Alaska Legislature to discuss my continuing interest to serve Alaska and the Alaska Legislature as the Executive Director of the Alaska Office of Victims' Rights.

Respectfully submitted,

D. Victor Kester

D. Victor Kester
Executive Director

Enclosure

HB

1

<TARGET><BILL>HB 1</BILL><SUBJECT>HB
1</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

SESSION ADDRESS:
Alaska State Capitol
Juneau, Alaska 99801
Phone: (907) 465-3743
1-800-565-3743
Fax: (907) 465-2381

INTERIM ADDRESS:
600 E Railroad Avenue
Wasilla, AK 99654
Phone : 907-376-3725
Fax: (907) 376-4768

Representative Carl Gatto

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Rep. Carl Gatto

DATE: March 25, 2011

RE: Request for a hearing of CSHB 01 (HSS)

Enclosed is the committee packet for CSHB 01 (HSS), *Alaska Health Freedom Act.* I have included a sponsor statement, the original and current version of the bill, and other supplemental material.

I would appreciate a hearing before your House Judiciary Committee at your earliest convenience. I appreciate your time and look forward to your reply.

Please contact my staff member, Karen Sawyer at 465-5025, with any questions or comments regarding this request.

Thank you for your consideration.

Alaska State Legislature

SESSION ADDRESS:
Alaska State Capitol
Juneau Alaska 99801
Phone: 907-465-3743
1-800-565-3743
Fax: 907-465-2381

INTERIM ADDRESS:
600 E Railroad Avenue
Wasilla AK 99654
Phone: 907-376-3725
Fax: 907-376-4768

Representative Carl Gatto

CSHB 01 (HSS) Alaska Health Freedom Act

The *Alaska Health Freedom Act* codifies as state policy that every person in the state of Alaska is and shall continue to be free from government compulsion in the selection of health insurance options, and that such liberty is protected by the Constitutions of the United States and the State of Alaska. The bill removes the authority of any state official or employee from enforcing any penalty which violates the policy. **CSHB 1 (HSS)** affirms the right of all Alaskans to choose their own "mode of securing health care services."

We allege that the new federal law, *Patient Protection and Affordable Care Act (PPACA),* infringes upon the constitutional rights of U.S. individuals by mandating all citizens and legal residents have qualifying health care coverage or pay a tax penalty. By imposing such a mandate, the law exceeds the powers of the United States under the Constitution.

There are currently 44 state legislatures who have introduced legislation to limit, alter or oppose selected state or federal actions, including single-payer provisions and mandates that would require purchase of insurance. Please help Alaska join nine other states, Virginia, Idaho, Utah, Georgia, Louisiana, Arizona, Oklahoma, and Missouri, who enacted legislation in 2010 to establish the individual's right in their state to be free from government force to make their own choice about health care.

Contact: Karen Sawyer
465-5025
27-LS0006\M
Updated March 31, 2011

Representative.Carl.Gatto@legis.state.ak.us

Alaska State Legislature

SESSION ADDRESS:
Alaska State Capitol
Juneau Alaska 99801
Phone: 907-465-3743
1-800-565-3743
Fax: 907-465-2381

INTERIM ADDRESS:
600 E Railroad Avenue
Wasilla AK 99654
Phone: 907-376-3725
Fax: 907-376-4768

Representative Carl Gatto

Explanation of Changes from HB 01, version A To CSHB 01 (HSS) version M

There was a concern from the HSS Committee regarding the definition of penalty in HB01, version A. Under the Patient Protection and Affordable Care Act (PPACA), there is a mandate requiring all citizens and legal residents to have qualifying health care coverage or pay a tax penalty.

A scenario was presented that an individual decided to opt out of obtaining health care insurance coverage under the PPACA. He then received health care services and was issued a bill from the practitioner. Under HB01, *"...a person has the right to choose or decline any mode of obtaining health care services without penalty or threat of penalty."*

The concern was that this individual could say that the bill from the practitioner could be viewed as a "penalty" under the definition in HB 01, stating that a *"penalty means a fine, tax, surcharge, fee, or other monetary charge."* This individual could potentially not pay for the practitioner's bill because HB01 states a person declining health care insurance would not be penalized.

Therefore, a qualifying statement was added in CSHB 01 (HSS), Page 2, Line 9 stating ***"...however, liability for the cost of health care services is not a penalty".*** This additional definition to "penalty" will alleviate the concern of practitioners not being paid for health care services.

Karen Sawyer
March 16, 2011

Representative.Carl.Gatto@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **HB001**
() Publish Date:

Identifier (file name): HB001-DHSS-HCMS-02-24-11
Title: Policy for Securing Health Care Services
Sponsor: Rep. Bob Lynn, Rep. Carl Gatto
Requester: House HSS Committee

Dept. Affected: Health and Social Services
Appropriation: Medicaid Services
Allocation: Heath Care Medicaid Services
OMB Component Number: 2077

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

NA

Prepared by: Kim Poppe-Smart, Director — Phone 334-2520
Division: Health Care Services — Date/Time 2/24/11 12:00 AM
Approved by: Alison Elgee, Assistant Commissioner — Date 2/24/2011
DHSS Finance & Management Services

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB001
2011 LEGISLATIVE SESSION

Analysis:

The bill adds a new AS 44.99.130, which states that a person has the right to choose any mode of obtaining or declining health care without subject to penalty or threat of penalty. There is an exception for health programs that are required by the State, its political subdivisions, and State courts. The bill adds no responsibility to the Department of Health and Social Services and would not directly impact it.

Explanation of Page 1, Line 12: "(1) *does not apply to health care services provided or required by the state, a political subdivision of the state, or a court of the state; and may not impair a contract right that provides health care services.*"

This subsection does not apply to

- persons in custody of the Department of Correction or a local confinement facility or who have not completed all requirements imposed as the result of a sentence in a criminal conviction, including, but not limited to, any type of probation, parole, or post-release supervision.
- This section shall not be construed to expand, limit, or otherwise modify any of the following:
  (1) that a spouse is liable for the necessary expenses incurred by the other spouse, including expenses incurred by medical necessity, or any other duty a person owes to a spouse or dependent with respect to the provision of health care services or medical treatment.
  (2) Any law regarding which health care services or medical treatments are lawful within this State or who is authorized to provide health care services or medical treatments within this State.
  (3) Any law regarding the right or duty of a parent or guardian in the determination or provision of health care services or medical treatment for a minor.
  (4) Any law regarding the screening of newborns for metabolic or other hereditary and congenital disorders, examination and testing of a child for lead poisoning and health assessments for children entering Kindergarten in the public schools
  (5) Any law regarding health care services or medical treatments ordered under the Workers' Compensation Act.
  (6) Any law regarding health care services or medical treatment regarding involuntary commitments for mental illness or substance abuse.
  (7) The physical and mental examination of a party ordered by a judge, such as, blood or genetic testing to establish paternity
  (8) Any law requiring the provision of health insurance for employees as a condition of receiving State economic incentives.
  (9) Any law regarding the examination and testing of persons to determine possible exposure to nuclear, biological, or chemical agents caused by a terrorist incident

NFIB

The Voice of Small Business®

ALASKA

February 28, 2011

The Honorable Carl Gatto
Alaska State Representative
State Capitol Building
Juneau, Alaska 99801-1182

RE: House Bill 1

Dear Representative Gatto,

On behalf of the National Federation of Independent Business/Alaska, I wish to express our support for House Bill 1. The National Federation of Independent Business is the largest small-business advocacy group in the Alaska.

House Bill 1 establishes a state policy that an individual cannot be coerced to purchase a health insurance policy. This legislation at the state level will help block a government requirement to purchase health insurance. If enacted in Alaska, the legislation will block an individual mandate. NFIB believes that the government does not have constitutional authority to mandate an individual purchase health insurance.

As you may be aware, NFIB is the only trade association that is a party to the lawsuit filed in federal court in Florida. The district court found in favor of our suit. We expect the government will appeal the ruling. In the interim, we believe it is important that Alaska, that is also a party to the suit, set a state policy consistent with the position advocated in the lawsuit.

Sincerely yours,

Dennis L. DeWitt
Alaska State Director

cc: House Health Education & Social Services Committee

AARP Alaska
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February 28, 2011

The Honorable Wes Keller, Chair
House Health and Social Services Committee
Alaska Capitol, Room 432
Juneau, AK 99801-1182

RE: HB 1 (Gatto and Lynn)—Oppose

Dear Chair Keller:

On behalf of the members of AARP in Alaska, we encourage you and your colleagues on the House Health and Social Services Committee to oppose HB 1, authored by Representatives Carl Gatto and Bob Lynn and co-sponsored by Representative Peggy Wilson.

There is no doubt that there is significant disagreement about the impact of federal health care reform, in particular the individual mandate.

To date, three federal judges have found it constitutional and two have found aspects of the federal bill to be unconstitutional.

AARP advocates for the full implementation of the Affordable Care Act in every state. We believe the federal law should be implemented to best meet the needs of older Americans and their families.

If HB 1 is enacted, we believe Alaskans would face a series of unintended consequences:

- Who would pay for the health care costs of individuals who decide to opt out of coverage? Would our hospitals have to provide free care to those who choose not to obtain insurance or who have limited coverage or high deductibles? To make up for this fee care, hospitals would have to charge everyone else more, resulting in higher premiums for individuals, employers, state and local government and school districts, PERS and TRS.
- Because it would allow individuals to opt out of any health care coverage, HB 1 could, for example, preclude courts from ordering one party in a divorce proceeding to maintain health insurance for his spouse and children. This would leave many without coverage and some would undoubtedly seek coverage under Medicaid and Denali KidCare or rely on uncompensated hospital care.
- We understand that HB 1 would permit the sale of insurance by out-of-state and off-shore insurance companies not subject to state laws, regulation or courts. Consumers who have problems would not be able to seek the assistance of the Alaska Division of Insurance.

AARP believes there is great uncertainty of how the legislation would be carried out. The consequences of HB 1 are, we believe, not fully known or understood.

The language is vague and will be open to so many interpretations that it can only result in costly litigation for the state.

Our health care should not end up in litigation—that's nobody's idea of freedom of choice.

HB 1 could also impact the private sector too. It could result in insurance companies raising premiums, deductibles and co-pays—driving up already skyrocketing health care costs for individuals and businesses. Physicians and other providers, including our network of community health centers, hospitals and nursing homes, would find themselves serving even more uninsured patients.

HB 1 is a risky gamble. It is more than a political gesture to Washington, DC. HB 1 raises too many unanswered questions and unintended consequences. Why bet Alaska's health care on an unproven idea?

The federal health care reform implementation improves the state's ability to deliver health care for its citizens. Health care for our citizens is too important to become a turf war between the state and federal government.

AARP requests an "NAY" vote on HB 1.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Thank you for your consideration.

Sincerely,

Marie Darlin

Marie Darlin, Coordinator
AARP Capital City Task Force
415 Willoughby Avenue, Apt. 506
Juneau, AK 99801
586-3637 (voice)
463-3580 (fax)

CC: Vice-Chair Alan Dick
Representative Bob Herron
Representative Paul Seaton
Representative Sharon Cissna
Representative Bob Miller
Representative Charisse Millett
Representative Carl Gatto
Representative Bob Lynn

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March 31, 2011

The Honorable Carl Gatto, Chair
House Judiciary Committee
Alaska Capitol, Room 118
Juneau, AK 99801-1182

RE: HB 1 (Gatto and Lynn)—Oppose

Dear Chair Gatto:

On behalf of the members of AARP in Alaska, we encourage you and your colleagues on the House Judiciary Committee to oppose HB 1, authored by you and Representative Bob Lynn and co-sponsored by Representative Peggy Wilson.

There is no doubt that there is significant disagreement about the impact of federal health care reform, in particular the individual mandate.

To date, three federal judges have found it constitutional and two have found aspects of the federal bill to be unconstitutional.

AARP advocates for the full implementation of the Affordable Care Act in every state. We believe the federal law should be implemented to best meet the needs of older Americans and their families.

If HB 1 is enacted, we believe Alaskans would face a series of unintended consequences:

- Who would pay for the health care costs of individuals who decide to opt out of coverage? Would our hospitals have to provide free care to those who choose not to obtain insurance or who have limited coverage or high deductibles? To make up for this free care, hospitals would have to charge everyone else more, resulting in higher premiums for individuals, employers, state and local government and school districts, PERS and TRS.
- Because it would allow individuals to opt out of any health care coverage, HB 1 could, for example, preclude courts from ordering one party in a divorce proceeding to maintain health insurance for his spouse and children. This would leave many without coverage and some would undoubtedly seek coverage under Medicaid and Denali KidCare or rely on uncompensated hospital care.
- We understand that HB 1 would permit the sale of insurance by out-of-state and off-shore insurance companies not subject to state laws, regulation or courts. Consumers who have problems would not be able to seek the assistance of the Alaska Division of Insurance.

AARP believes there is great uncertainty of how the legislation would be carried out. The consequences of HB 1 are, we believe, not fully known or understood.

The language is vague and will be open to so many interpretations that it can only result in costly litigation for the state.

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HB 1 is a risky gamble. It is more than a political gesture to Washington, DC. HB 1 raises too many unanswered questions and unintended consequences. Why bet Alaska's health care on an unproven idea?

The federal health care reform implementation improves the state's ability to deliver health care for its citizens. Health care for our citizens is too important to become a turf war between the state and federal government.

AARP requests an "NAY" vote on HB 1.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Thank you for your consideration.

Sincerely,

Marie Darlin

Marie Darlin, Coordinator
AARP Capital City Task Force
415 Willoughby Avenue, Apt. 506
Juneau, AK 99801
586-3637 (voice)
463-3580 (fax)

CC: Vice-Chair Steve Thompson
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

Sarah Munson

From: Karen Sawyer
Sent: Friday, April 01, 2011 9:13 AM
To: Sarah Munson
Subject: FW: HB 179

Importance: High

From: Sally Clampitt [mailto:sclampitt.spca@alaska.net]
Sent: Friday, April 01, 2011 8:57 AM
To: Rep. Bob Lynn; Rep. Carl Gatto; Rep. Mike Chenault; Rep. David Guttenberg; Rep. Berta Gardner
Subject: HB 179
Importance: High

Dear Representatives Lynn, Gatto, Chenault, Guttenbert and Gardner:

The Alaska Society for the Prevention of Cruelty to Animals strongly supports any legislation that strengthens our state animal cruelty laws. We understand that HB 179 is before you now, and would provide that cruelty to five or more animals, as defined in more detail in the legislation, would constitute a class C felony. While we understand that there may be isolated instances where "back yard" individuals are charged with cruelty or neglect, to less than 5 animals, that is determined not to rise to the level of a felony, they should be treated as the exception to the rule, and not be the basis for a rule that allows cruelty to 4 animals, for example. If an individual commits egregious cruelty to 5 animals, s/he is guilty of a felony, but the same act(s) to 4 animals is not; and egregious pain and suffering to one animal is not. We do not believe that these standards are in the best interest of the animals.

We understand that Anchorage Animal Care and Control has made recommendations that would modify the proposed HB 179 so that this loophole does not occur. We sincerely hope that you will take their recommendations into serious consideration.

We are very grateful to all of you for your interest and hard work on behalf of animals, and hope that you will take HB 179 just one more notch to make it truly effective and meaningful for those creatures who depend entirely upon your decisions for their very lives.

Respectfully,

Sally Clampitt
Executive Director
Alaska SPCA
549 W. International Airport Rd. #B2
Anchorage, AK 99518
Office Tel: 907-562-2999
Cell: 907-350-0945
http://www.alaskaspca.org/

27-LS0006\B
Bailey
4/1/11

CS FOR HOUSE BILL NO. 1(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GATTO AND LYNN, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act stating a public policy that allows a person to accept or decline any offered mode of securing health care services."

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

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Alaska Health Freedom Act.

* **Sec. 2.** AS 44.99 is amended by adding a new section to article 2 to read:

Sec. 44.99.130. Declaration of policy for securing health care services. (a) It is the policy of the State of Alaska that a person has the right to accept or decline any offered mode of obtaining health care services without penalty or threat of penalty.

(b) The policy stated in (a) of this section

(1) does not apply to health care services provided or required by the state, a political subdivision of the state, or a court of the state; and

(2) may not impair a contract right that provides health care services.

(c) In this section,

(1) "health care services" means a service or treatment, or provision of a product, for the care of a physical or mental disease, illness, injury, defect, or condition, or to maintain or improve physical or mental health;

(2) "mode of obtaining" means directly purchasing health care services from a health care provider or purchasing insurance to cover the cost of health care services;

(3) "penalty" means a fine, tax, surcharge, fee, or other monetary charge; however, liability for the cost of health care services is not a penalty.

27-LS0006\B
Gatto
4/6/11

Conceptual Amendment

OFFERED IN THE HOUSE REP. GATTO

TO WORK DRAFT CS HB 01 (JUD)

Page 1, Line 4-6

Delete lines 4-6

Page 2, Line 6

Insert after health care provider (AS DEFINED IN SEC. 09.55.560)

"material" to a reasonable patient's decision concerning treatment. Under this view, expert testimony concerning the professional standard of disclosure is not a necessary element of the plaintiff's case because the scope of disclosure is measured from the standpoint of the patient. Korman v. Mallin, 858 P.2d 1145 (Alaska 1993).

Signed informed consent. — The requirements set forth in 7 AAC 12.120(e) are not inconsistent with this section. The regulations, simply impose a supplemental requirement that the patient's medical record contain a "signed informed consent" before a surgical procedure may begin. Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995).

In a medical malpractice suit, the court found no merit in the patient's contention that the implied consent form was invalid, because it was witnessed by a nurse instead of being signed in the doctor's presence. Neither this section nor its implementing regulation, 7 AAC 12.120, require that the treating physician personally read the consent form to the patient or witness the patient's signature. Harrold v. Artwohl, 132 P.3d 276 (Alaska 2006).

Discusssion of risks associated with procedure. — In a case involving informed consent, summary judgment was improperly granted in favor of several healthcare providers where no evidence was presented regarding whether the risks associated with a catheterization were discussed with a patient prior to the performance of the procedure. Parker v. Tomera, 89 P.3d 761 (Alaska 2004).

Failure to inform patient of reasonable alternative. — Where a patient underwent surgery to remove his appendix, the record suggested that he may not have been told that a CT scan could have ruled out the need for immediate surgery. The superior court erred by dismissing his malpractice suit upon summary judgment; a triable issue of fact was raised concerning informed consent under this section. Harrold v. Artwohl, 132 P.3d 276 (Alaska 2006).

Informing patient of HIV/AIDS status of hospital roommate. — Assignment of a room and a roommate to patient does not qualify as a "treatment or procedure," requiring informed consent. Gallant v. United States, 392 F. Supp. 2d 1077 (D. Alaska Oct. 5, 2005).

Validity of regulation. — The trial court in an evidentiary hearing did not adequately investigate the application of 7 AAC 12.120(e) which requires a signed informed consent before a surgical procedure because there was an insufficient factual basis from which to conclude that the regulation either was or was not obscure and whether or not it could be fairly interpreted to set the standard of care. Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995).

Hospital's duty to obtain consent. — This section did not impose a duty on a hospital to obtain a patient's consent before her physicians proposed and ordered blood transfusions. Ward v. Lutheran Hosps. & Homes Soc'y of Am., Inc., 963 P.2d 1031 (Alaska 1998).

Jury instructions held proper. — In a medical malpractice case, a court properly instructed the jury that the doctor had a duty to disclose information that would be material to a reasonable patient; "material information" was defined as information which the surgeon knew or should have known would be regarded as significant by a reasonable person in the patient's position. Marsingill v. O'Malley, 128 P.3d 151 (Alaska 2006).

Cited in Marsingill v. O'Malley, 58 P.3d 495 (Alaska 2002).

Collateral references. — Modern status of views as to general measure of physician's duty to inform patient of risks of proposed treatment. 88 ALR3d 1008.

Duty of medical practitioner to warn patient of subsequently discovered danger from treatment previously given. 12 ALR4th 11.

Liability for failure of physician to inform patient of alternative modes of diagnosis or treatment. 38 ALR4th 900.

Medical practitioner's liability for treatment given child without parents' consent. 67 ALR4th 511.

Malpractice: physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases. 89 ALR4th 799.

Sec. 09.55.560. Definitions. In AS 09.55.530 — 09.55.560,

(1) "board" means an arbitration board established under AS 09.55.535;

(2) "health care provider" means an acupuncturist licensed under AS 08.06; an audiologist or speech-language pathologist licensed under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45; an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist or occupational therapist licensed under AS 08.84; a physician or physician assistant licensed under AS 08.64; a podiatrist; a psychologist and a psychological associate licensed under AS 08.86; a hospital as defined in AS 47.32.900, including a governmentally owned or operated hospital; an employee of a health care provider acting within the course and scope of employment; an ambulatory surgical facility and other organizations whose primary purpose is the delivery of health care, including a health maintenance organization, individual practice association, integrated delivery system, preferred provider organization or arrangement, and a physical hospital organization;

(3) "panel" means an expert advisory panel established under AS 09.55.536;

HB

6

<TARGET><BILL>HB 6</BILL><SUBJECT>HB 6</SUBJECT><COMM>HJUD27</COMM></TARGET>

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Email:
Rep.Max.Gruenberg@legis.state.ak.us

received 2/23/11 1:1pm

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr.

DATE: February 16, 2011

RE: HB 6: Removing a Regent

****

Please consider this memorandum as a request for the House Judiciary Committee to schedule a hearing on House Bill 6. Accompanying this memo are the following documents:

- Sponsor Statement
- Sectional Analysis
- House Bill 6 (27-LS0027\A)
- CS for House Bill 6 (EDC) (27-LS0027\D)
- Explanation of changes
- Legislative Legal Counsel Memo from Jean Mischel April 17, 2007
- Informal Legal Opinion from Michael Barnhill, Assistant Attorney General February 2, 2007
- Relevant statutes upon which this bill was modeled

Thank you for considering my request for a hearing on House Bill 6. Please contact my legislative aide, Ted Madsen, at 465-2840 with any questions.

HOUSE BILL NO. 6

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES GRUENBERG, Peggy Wilson

Introduced: 1/18/11
Referred: Education, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

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

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) the framers of the Constitution of the State of Alaska intended to insulate the University of Alaska and the Board of Regents from politics, but did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight;

(2) under AS 14.40.170(b)(1), the legislature has delegated to the Board of Regents the power to regulate itself, but the Board of Regents has not adopted self-governance rules that authorize the board to remove or suspend a regent in appropriate

circumstances; and

(3) the legislature has the power to create procedures under which the governor may remove a regent for good cause or suspend a regent in appropriate circumstances, if the procedures ensure that

(A) the regent is accorded due process; and

(B) the University of Alaska and the Board of Regents remain insulated from politics.

(b) The purpose of AS 14.40.155, added by sec. 2 of this Act, is to

(1) clarify that the governor may not remove a regent without good cause;

(2) clarify that the governor may remove a regent with good cause;

(3) prescribe a due process procedure under which the governor may remove a regent for good cause;

(4) prescribe a due process procedure under which the governor may suspend a regent in certain circumstances; and

(5) accomplish each of the above purposes in a manner that ensures the University of Alaska and the Board of Regents remain insulated from politics.

*** Sec. 2.** AS 14.40 is amended by adding a new section to read:

Sec. 14.40.155. Removal and suspension of regents. (a) The governor may remove a member of the Board of Regents for good cause by providing to the member

(1) a copy of the allegations pertaining to the reasons for removal;

(2) an opportunity for a hearing on the allegations; and

(3) at least 30 days' notice of a hearing if a hearing is requested; the notice must include the applicable rules governing the conduct of the hearing.

(b) After removal of a regent for good cause under (a) of this section, the governor shall file with the lieutenant governor a copy of the allegations made against the former regent, the governor's findings on each of the allegations, and a complete record of the removal proceedings.

(c) The governor may, after providing notice and an opportunity for a hearing, suspend a member of the Board of Regents while final disposition is pending on

(1) a criminal complaint, presentment, information, or indictment involving a felony in any jurisdiction;

(2) an information or formal criminal charges of a misdemeanor described under (g)(3) of this section; or

(3) allegations of nonfeasance in office described under (g)(4) of this section under consideration by the governor.

#3 clarified

(d) A regent who has been suspended under (c) of this section may, at any time, request a hearing to lift the suspension.

#2 our

(e) In a hearing involving the suspension of a regent under (c) of this section, the governor or the governor's designee shall provide the regent an opportunity to defend against the stated grounds for suspension or to show cause why the suspension should be lifted after a suspension is imposed.

(f) The governor may delegate the conduct of a hearing under this section to the office of administrative hearings under AS 44.64.030(b).

(g) In this section, "good cause" means

(1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act);

(2) conviction of a felony in any jurisdiction;

(3) conviction of a misdemeanor in any jurisdiction if the misdemeanor involves

(A) dishonesty;

(B) breach of trust; or

(C) the University of Alaska;

(4) nonfeasance in office, including

(A) misconduct in office;

(B) an inability to serve;

(C) neglect of duty;

(D) incompetence;

(E) unjustified failure to perform the duties of the Board of Regents;

(5) failure to possess the qualifications of a regent under AS 14.40.130.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct

and acts occurring before, on, or after the effective date of this Act.

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
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House Bill 6:
Removing a Regent
Sponsor Statement

This bill creates a statutory due process procedure under which the governor may suspend or remove a University of Alaska regent for good cause.

This bill is in response to a 2007 incident in which a regent was federally indicted on multiple counts of fraud. He refused to resign his position until impeachment proceedings began. The board of regents' by-laws do not set forth a procedure remove a regent. The legislative legal counsel has concluded that regents serve at the pleasure of the governor and thus can be removed. An informal attorney general's opinion states that the governor does not have the authority to remove a regent without cause. That AG opinion concluded that the governor does have the authority to remove a regent so long as cause is established and due process granted.

It should be noted that during the 25th legislature letters were sent to the board of regents asking that it, under the authority of 14.40.170(b)(1), adopt procedures for the removal and/or suspension of a regent, but it has not done so.

It is important to acknowledge that the constitution does bear upon this bill due to the governor's powers being enumerated in Article III of the Alaska Constitution while the board of regents is established in Article VII, section 6. The Alaska Supreme Court has ruled that the UA is subject to a degree of legislative control. For example, the legislature can, without approval of the regents, dispose of UA land. Additionally, the legislature has, through law, provided the UA with a broad degree of autonomy; however, this implies the UA is still subject to laws enacted by the legislature. The legislature has been given broad authority under the constitution, indeed the only constitutional constraints on the power of the legislature to make laws regarding other agencies of the State of Alaska deal with the rules of court and the repeal of initiatives. In effect this legislation provides a check upon the powers of the university.

This bill secures the state's interest and the university's interest. This legislation will keep a cloud from hovering over the UA in a future scenario in which a regent must be removed or suspended for cause.

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
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Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Sectional Analysis for CS for HB 6 (EDC) (27-LS0027\D)

Section 1[1] sets forth the legislative findings and purposes of the bill. The legislature finds that the framers of the Alaskan Constitution intended to insulate the University of Alaska from politics, that the legislature delegated the power of self-governance to the UA under AS 14.40.170(b), and that the legislature has the power to create laws that pertain to the university. The purposes of the bill are to clarify that the governor may only remove a regent with good cause and that the governor must afford a regent due process in the proceedings dealing his or her removal or suspension. Finally, the legislative findings in this section affirm the political insulation of the university and the board of regents.

Section 2[2] adds a new section, AS 14.40.155, to AS 14.40 the chapter that governs the University of Alaska's Board of Regents. AS 14.40.155 is patterned after other statutory removal procedures for other boards, including the workers compensation appeals commission. See AS 23.30.007(j).

AS 14.40.155(a) sets forth the procedure for the governor to suspend a regent for good cause . The governor must provide the regent with notice and an opportunity for a hearing. Good cause is defined in subsection (g) to include a violation of the Executive Branch Ethics Act, a conviction of a felony, conviction of a misdemeanor involving a crime of dishonesty or the University of Alaska, malfeasance or nonfeasance in office, or failure to continue to meet the qualification requirements of a regent.

AS 14.40.155(b) allows the governor to remove a regent for good cause by providing the regent with an accusation and opportunity for a hearing and judicial review.

AS 14.40.155(c) details the procedure for a regent to either defend against a possible suspension or lift a suspension once it has been imposed.

AS 14.40.155(d) permits the governor to delegate the conduct of the hearing to the Office of Administrative Hearings. The standard of proof to be used in the hearing for removal for "good cause" is "clear and convincing," one of the highest standards.

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[1] Page 1, lines 5-14 through page 2, lines 1-11
[2] Page 2, lines 12-31 through page 3, lines1-30

AS 14.40.155(e) states that the Administrative Procedures Act (AS 44.62.330-44.62.630) applies to all of the proceedings of this section.

AS 14.40.155(f) sets out that the governor must file a copy of the allegations against the regent, the findings of the governor, and a complete record of the removal proceedings with the lieutenant governor.

Because this law deals with the conduct of the board of regents during their entire term in office it must apply retroactively to ensure that past violations do not go unchecked. **Section 3**[3] is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of this Act.

[3] Page 3, line 31 through page 4, lines 1-3

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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716 W 4th Avenue, Rm 350
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Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Explanation of changes between
HB 6 (27-LS0027\A) to CS for HB 6 (EDC) (27-LS0027\D)

There are a number of changes between the "A" and "D" versions, including minor grammatical and stylistic changes, and substantive changes.

There was one major change to **Section 1** of the bill. Subsection (a) paragraph (3) of the "A" version (page 2 lines 2-7) was deleted and subsection (a) paragraph (2) of the "D" version (page 1 lines 12-13) was added. The effect of this change is to show that the legislature has legislative authority over the University of Alaska.

There were a few changes to **Section 2** of the bill. Subsection (e) of the "A" version (page 3 lines 7-10) was deleted, as with the addition of new subsections in the "D" version it was unnecessary. Specifically, with designation that the proceedings in this section fall under the guidelines of the Administrative Procedures Act, the language in subsection (e) was not needed.

The other major change to **Section 2** of the "A" version was a reordering of the subsections to better reflect the flow of the proceedings.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 6(EDC)
(H) Publish Date: 2/23/11

HB006-DOA-OAH-02-07-11
Title: An Act authorizing governor to remove university regent
Sponsor: Representative Gruenberg & Representative Wilson
Requester: House Education

Dept. Affected: Administration
Appropriation: Centralized Administrative Services
Allocation: Office of Administrative Hearings
OMB Component Number: 2771

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time	**0.0**	0.00	0	0	0	0	0
Part-time	0.0	0	0	0	0	0	0
Temporary	0.0	0	0	0	0	0	0

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by: Terry L. Thurbon, Chief Administrative Law Judge
Phone: 465-1886
Division: Office of Administrative Hearings
Date/Time: 02/07/2011 11:39 a.m.
Approved by: John Cramer, Deputy Commissioner
Department of Administration
Date:

(Revised 1/27/2011 OMB)

FISCAL NOTE#1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 6(EDC)

Analysis

This bill authorizes the governor to remove a member of the University of Alaska Board of Regents for good cause and establishes procedures for removal. The procedures include an opportunity for a hearing. Under section 2, the hearing function could be delegated by the governor to the office of administrative hearings. Removals likely would be infrequent. OAH, therefore, does not anticipate that this bill would result in an appreciable increase in caseload and expectsto be able to provide any hearing-related services required with existing authorized personnel. The cost to OAH of performing the services would be recovered from the Office of the Governor through interagency receipts, based on the time commitment required for hearings.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 6(EDC)
(H) Publish Date: 2/23/11

Identifier (file name) HB006-UA-Sysbra-2-9-11
Title: Removing a Regent
Sponsor: Representative Gruenberg
Requester: House Education

Dept. Affected: University of Alaska
Appropriation: University of Alaska
Allocation: Sysbra
OMB Component Number: 1296

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Michelle Rizk
Division: Statewide Budget, University of Alaska
Approved by: Michelle Rizk
Statewide Budget, University of Alaska

Phone: 450-8187
Date/Time: 2/9/11 1:00 PM
Date: 2/9/11 1:00 PM

(Revised 1/27/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 6(EDC)

Analysis

HB6 will have a zero fiscal impact on the Univeristy of Alaska

LEGAL SERVICES

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MEMORANDUM January 28, 2011

SUBJECT: Interpretation of statutory phrases defining "good cause" in HB 6 (Work Order No. 27-LS0027\A)

TO: Representative Max Gruenberg
Attn: Ted Madsen

FROM: Jean M. Mischel
Legislative Counsel

You have asked for an interpretation of the phrases used in the definition of "good cause" at proposed sec. 14.40.155(g)(3) and (4) in section 2 of the above-referenced bill. Those phrases provide as follows:

> (3) conviction of a misdemeanor in any jurisdiction if the misdemeanor involves
>
> (A) dishonesty;
>
> (B) breach of trust; or
>
> (C) the University of Alaska;
>
> (4) nonfeasance in office, including
>
> (A) misconduct in office;
>
> (B) an inability to serve;
>
> (C) neglect of duty;
>
> (D) incompetence;
>
> (E) unjustified failure to perform the duties of the Board of Regents;

As you know, nothing in the bill defines or otherwise modifies the plain meaning of the above phrases. A court will construe undefined terms by applying the plain meaning and, if ambiguous, will look to legislative intent to determine the meaning. The committee records may be used in some cases of ambiguity. In addition, a court may rely by analogy on interpretations by agencies, courts, or the attorney general of similar phrasing used in other state statutes. A memorandum to you in 1991 describing the statutory instances of "removal for cause" is attached.

The term "nonfeasance" is defined in dictionaries and is used in at least two other instances for removal of a state officer. See, for example, AS 23.30.007 pertaining to the Workers' Compensation Appeals Commission. The term "dishonesty" is used in several instances in state law in relation to barrier crimes for licensing. See, for example,

AS 05.15.105 pertaining to gaming and AS 06.50.020(a), pertaining to financial institutions.

With the exception of the term, "unjustified" as used in (g)(4)(E), I find nothing ambiguous in the phrases identified. A court would therefore interpret the wording according to its plain meaning, including dictionary definitions and common usage. The hearing officer, if one is appointed, or the governor must make the initial determination of what may be considered "justified" until a court is asked to interpret the term and looks to legislative intent.

If you wish to further define the terms used in the bill, let me know.

JMM:plm
11-040.plm

Enclosure

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Mail Stop 3101

MEMORANDUM February 11, 1991

SUBJECT: Statutory Criteria for Dismissal of Members of Boards and Commissions (W.O. 7LS-0703)

TO: Representative Max Gruenberg

FROM: Terri Lauterbach
Legislative Counsel

You have asked several questions in regard to dismissal of members of boards and commissions in Alaska[1]:

(I) Which statutes refer to dismissal for cause?[2] How is that term defined in Alaska Statutes or Alaska case law?

(II) What are the statutory criteria for dismissal in statutes that do not refer to dismissal for cause? How have those criteria been defined?

(III) What procedural protections, if any, are there for dismissed members?

These questions do not admit of short answers, so I'll just plunge into a discussion that I hope will give you the information you seek.[3]

---

[1] You also asked questions about dismissal of members of boards and commissions in other states. Those questions have been forwarded to the Legislative Research Agency.

[2] Your memo actually only referred to "just or good cause." However, since there is only one statute (AS 08.04.030) that refers to "just cause" and none that refer to "good cause," I have treated your questions as pertaining to "cause."

[3] I do not attempt in this memo to determine whether any given statutory criteria would be upheld as constitutional. As I am sure you are aware, the legislature's power to inhibit the governor's power of removal may extend only to "section 26" boards and commissions. I understand your request to be one aimed at knowing what our current statutes say with regard to this area.

I. REMOVAL FOR CAUSE

May be removed for cause

There are 22 boards and commissions listed in AS 08.01.010 that are occupational licensing boards. According to AS 08.01.020, members of these boards and commissions "serve at the pleasure of the governor." However, the last sentence of AS 08.01.020 also states that "a board may provide by regulation that three or more unexcused absences from meetings are **cause** for removal."

This combination of serving at the governor's pleasure and being removable for cause also shows up in the specific statutes relating to three of the boards listed in AS 08.01.010. Statutes relating to the Board of Chiropractic Examiners, the Board of Nursing Home Administrators, and the Board of Pharmacy each provide

> A member of the board may be removed from office by the governor **for cause.** The board may by regulation provide that unexcused absences from meetings constitute **cause** for removal.[4]

Another occupational licensing board, the Board of Public Accountancy, has a specific removal statute, too, even though it is also listed in AS 08.01.010 and is covered by the general language of AS 08.01.020. Its specific statute provides

> The governor **shall** remove any member of the board whose certificate, license or permit has been revoked or suspended. The governor **may, after hearing,** remove any member for **neglect of duty** or **other just cause.**[5]

The members of boards and commissions can also be removed for cause under AS 39.52 (Alaska Executive Branch Ethics Act), which provides that violation of AS 39.52 "is grounds for removal of a board or commission member **for cause.**"[6]

Members of the board of directors of the Alaska Science and Technology Foundation may be removed for cause under AS 37.17.040(a). Under AS 41.37.050, members of the Citizens' Advisory Commission on Federal Areas in Alaska "may be removed by the

---

[4] See, respectively, AS 08.20.025, AS 08.70.055, and AS 08.80.105.

[5] See AS 08.04.030.

[6] See AS 39.52.410(b).

appointing authority **for cause after notice and hearing** or after missing three consecutive meetings of the commission."[7]

May be removed **only** for cause

In addition to the instances cited above where the statutes give the governor the discretion to remove a board member for cause, there are four statutes that provide specifically that the governor may remove members of certain agencies **only** for cause.

Members of the Labor Relations Agency, the personnel board, and the Alaska Public Broadcasting Commission may **only** be removed for "cause" under AS 23.05.360(c), AS 39.25.060(c), and AS 44.21.258(a).

The fourth statute providing that members may "only" be removed for cause relates to the Alaska Mental Health Board. It is a little more explanatory, providing that

> Members may be removed **only** for cause, including, but not limited to, poor attendance or lack of contribution to the board's work.[8]

Definitions of "cause"

My research has not uncovered any definitions of "cause" in Alaska Statutes or in Alaska case law relating to dismissal of members of boards and commissions other than the reference to "poor attendance" and "lack of contribution" noted in the preceding quotation concerning the Alaska Mental Health Board.

However, there is a definition of "cause" in the statute that allows the State Board of Education to dismiss the commissioner of education "for cause." It provides that, for purposes of that section, "cause" means

> (1) incompetency which is the inability or the unintentional failure to perform the duties of the commissioner;
> (2) immorality which is the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude; or
> (3) malfeasance or misfeasance in office which includes, but is not limited to, the failure of the commissioner to comply with the rules or regulations adopted by the board.[9]

---

[7] Although this is the only statute I found that refers to removal for cause "after notice and hearing," it is likely that all removals for cause would be construed to require notice and hearing. See discussion of procedural protections that begins on page 6.

[8] See AS 47.30.663(c).

Other definitions of "cause," "just cause," and "good cause" may be found in general authorities like Corpus Juris Secondum and Black's Law Dictionary. (Excerpts enclosed.) For instance, Black's provides that "cause," as used with reference to the removal of an officer or employee, means

> a just, not arbitrary, cause; one relating to a material matter or affecting the public interest; ...conduct indicating unworthy or illegal motives or improper administration of power; ...misfeasance or nonfeasance.[10]

C.J.S.'s general definition of "cause" is that which is

> sufficient or necessary to authorize a removal from office..., that is, reasons which the law and sound public policy recognize as sufficient warrant for removal and not merely a cause which the appointing power in the exercise of discretion may deem sufficient.[11]

II. REMOVAL FOR REASONS OTHER THAN "CAUSE"[12]

Misconduct, neglect of duty, etc.

Under AS 08.48.041, the governor "may" remove a member of the State Board of Registration for Architects, Engineers, and Land Surveyors for "misconduct, incompetency or neglect of duty."

Under AS 14.20.430, the governor "may" remove a member of the Professional Teaching Practices Commission for "misconduct, malfeasance or nonfeasance in office, or incapacity."

Under AS 16.05.280 and AS 41.17.045(a), respectively, the governor "may" remove a member of the Board of Fisheries or Game or the Board of Forestry for "inefficiency, neglect of duty, or misconduct in office."

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[9] See AS 14.07.145(f).

[10] Black's Law Dictionary, page 279.

[11] 67 C.J.S. 487 (OFFICERS, sec. 120 b.)

[12] Some statutes cited in this section may be construed as referring to dismissal for cause for purposes of procedural protections; however, they do not use the term "cause" so they are discussed separately, as your memo requested.

Under AS 18.60.057(b) and AS 18.67.020, respectively, the governor "may" remove a member of the OSHA Review Board or the Violent Crimes Compensation Board for "inefficiency, neglect of duty or malfeasance in office."

I have found no statutes defining terms like "misconduct," "misfeasance," "malfeasance," or "nonfeasance," but I have enclosed an excerpt from C.J.S. that discusses them.[13]

Other non-"cause" reasons for removal

Under AS 44.21.200(d), the Older Alaskans Commission "may" request the governor to remove a member who has failed to attend three consecutive meetings of the commission.[14]

Under AS 42.40.230(e), the members of the board of directors of the Alaska Railroad Corporation "may" recommend to the governor that a board member be removed for intentionally violating the conflict of interests provisions of AS 42.40.230.

Two other statutes do not refer to a specific reason for removal but do require that a statement of reasons be given. These statutes are AS 37.13.070(a) (Alaska Permanent Fund) and AS 44.33.705(c)(2) (members of the Alaska Tourism Marketing Council that are appointed by the trade association).

Removal not specifically addressed

My research indicates that there are at least 28 advisory boards and commissions. None of their statutes carries a reference to removal powers or reasons for removal. A few state that the members serve at the pleasure of the governor, but none speaks to removal, per se.[15]

III. PROCEDURAL PROTECTIONS.

Statutory protections

---

[13] See 67 C.J.S. 490 - 495 (OFFICERS, sec. 121 - 124).

[14] This is similar to the situation for occupational licensing boards covered by AS 08.01.010 and 08.01.020, but the Older Alaskans' statute does not use the term "cause." (Members of the Older Alaskans Commission serve "at the pleasure of the governor" under AS 44.21.200(c) just as the members of licensing boards do under AS 08.01.020.)

[15] See AS 03.17.020; AS 14.40.087; AS 14.42.030; AS 18.07.011; AS 18.08.020; AS 18.60.030; AS 23.20.025; AS 37.14.120; AS 38.06.020; AS 41.15.310; AS 41.21.510 and 41.21.625; AS 41.23.430; AS 41.37.010; AS 44.19.101, 44.19.110, 44.19.120, 44.19.155, 44.19.165, 44.19.181, 44.19.255, and 44.19.561; AS 44.29.100; AS 44.46.030; AS 44.88.174; AS 46.30.020; and AS 47.07.110.

Only two Alaska statutes relating to removal for "cause" specify any procedures that must be followed. One says the removal must be "after hearing"[16] and the other says "after notice and hearing."[17]

Three statutes that should probably be considered to be "cause" statutes, even though that term is not used,[18] also specify some procedures to follow. One requires "due notice and hearing";[19] two require "a written copy of charges," "an opportunity to be heard in person or through counsel at a public hearing...upon 10 days' notice," and allows the removed member to "confront and cross-examine witnesses."[20]

Constitutional protections

Members of boards and commissions who serve "at the pleasure of the governor" probably are not entitled to any procedural protections attendant to their removal unless the governor removes them for cause. If they are removed for cause, they are probably entitled to reasonable notice of the charges and an opportunity to be heard, even if the statute governing their agency does not so provide.

The Alaska Supreme Court, in Breeden v. City of Nome, 628 P.2d 924, held that

> A person who is employed "at the pleasure" of his employer has no "property" interest in continued employment that is protected by due process.

However, removal of persons serving "at the pleasure of the governor" is probably still governed by the same types of exceptions the courts have found applicable to the "at will" doctrine, e.g., discrimination, unfair labor practice, "whistleblower," and other violations of public policy.

Persons who are removed for cause, whether or not they had been serving at the pleasure of the appointing authority may be entitled to notice and an opportunity to be heard. This

---

[16] AS 08.04.030 (Board of Public Accountancy).

[17] See AS 41.37.050(a) (Citizens' Advisory Commission on Federal Areas in Alaska).

[18] Although not using the term "cause," the statutes relating to the Boards of Fisheries and Game, the Violent Crimes Compensation Board, and the Board of Forestry all refer to removal for something akin to "cause," such as neglect of duty, misconduct in office, and malfeasance.

[19] See AS 18.67.020 (Violent Crimes Compensation Board).

[20] See AS 16.05.280 (Boards of Fisheries and Game) and AS 41.17.045 (Board of Forestry).

is so because removal for cause may tend to stigmatize them or injure their reputations; hence, they are entitled to defend themselves.[21]

IV. CONCLUSION.

Removal "for cause" is used in a number of Alaska Statutes relating to members of boards and commissions, but not uniformly and with no definition of the term. Only three statutes that use the term purport to restrict removal **only** to situations involving cause. Some members who are removable for cause serve at the pleasure of the governor; some do not.

Procedural protections afforded by statute are minimal, spelled out in less than a handful of statutes. Procedural protections arising from the constitution will vary, depending on the type of board or commission involved and whether or not dismissal was for cause.

I hope you find this memo and the enclosed information helpful. Please let me know if I can be of further assistance.

TML:gc
91-068.glc

Enclosure(s)

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[21] See 67 C.J.S. 538 (OFFICERS, sec. 148), copy enclosed.

LEGAL SERVICES

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MEMORANDUM April 17, 2007

SUBJECT: Removal of a University Regent (HB 237)
(Work Order No. 25-LS0839\A)

TO: Representative Bob Lynn
Attn: Nancy Manly

FROM: Jean M. Mischel
Legislative Counsel

You asked whether the governor may remove a University regent. In my opinion, the answer is yes. In fact, the constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent by the governor is the subject of considerable debate. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and therefore the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session . . . .

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, *and may be removed as provided by law* . . . .

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

> As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26

> mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. (Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976))

The University's status as a "body corporate" does not imply a legislative role in removal of a regent (apart from the impeachment process available to the legislature as to all civil officers). Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law serve at the pleasure of the governor. (Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966)) The Court stated:

> The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 240 (citations omitted).

I am aware of a recent informal attorney general opinion that suggests in a footnote that the legislature has some authority over removal of a regent without any judicial support for that position. The addition of legislative control over suspension of a regent is even more questionable. I do not know how a court would view the kind of intrusion proposed in HB 237 into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:med
07-247.med

MEMORANDUM

State of Alaska
Department of Law

To: Talis J. Colberg
Attorney General

Thru: Craig J. Tillery
Deputy Attorney General

From: Michael A. Barnhill
Assistant Attorney General
Labor and State Affairs Section

Date: February 2, 2007

File No: 663-06-0103

Tel. No.: (907) 465-3600

Fax: (907) 465-2520

Subject: Governor's Power to Remove a University of Alaska Regent

We have been asked whether the Governor has the power to remove a University of Alaska regent without cause. In our view, the answer is no.

We acknowledge that this question has been posed to different counsel and different conclusions reached. Legislative counsel has concluded in a written opinion that regents serve at the pleasure of the governor and may be removed at any time. University of Alaska counsel has concluded in a verbal opinion that a regent may be removed only through impeachment by the legislature.

For the reasons set forth below, we do not fully agree with the conclusions of either legislative counsel or university counsel. That being said, we do agree with both legislative counsel and university counsel that impeachment is an option that may be pursued in order to remove a regent. But we disagree with university counsel that it is the only option.

The basis for our views is grounded primarily in the constitution and discussions of the framers regarding the University of Alaska during the constitutional convention. We start there.

I. Historical Background

The University of Alaska was created by the territorial legislature in 1935. ch. 49, SLA 1935. The Board of Regents was created at that time as well, with the governor empowered to appoint regents subject to confirmation by a joint session of the legislature. *Id.* at sec. 3. The term of a regent was eight years and a regent was to serve "until their successors are appointed and have qualified." *Id.* The original statute made no mention

of how a regent should be removed. This law has essentially remained unchanged through today, though the number of regents was increased to eleven in 1975. *See* AS 14.40.120; 14.40.140; AS 14.40.150.

From the University's inception through statehood we are aware of no instance of a governor removing a regent prior to the end of a regent's term. We recognize that it is possible such could have happened, but it would take further historical research to determine this.

The constitutional convention considered the University of Alaska several times during the course of the convention. Before considering these passages, however, it is important to understand that the territory of Alaska had suffered from a fragmented executive branch with several elected officials and multiple governing boards designed to erode the power of the federally appointed governor. A fundamental goal of the convention was to establish a strong governor who was completely in control of the executive branch of government.[1]

During the consideration of the executive branch article, however, concerns were raised regarding the appropriate place for the University of Alaska within the constitutional design for the new government. These concerns were often expressed in terms of the need to insulate education from politics. Alaska Constitutional Convention Proceedings at 2043, 2246. During the discussions of the provisions that ultimately

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[1] Delegate Fischer later wrote, "[Territorial] government was neither responsible nor responsive to the people. As a result, convention delegates were ready to make basic structural changes so the people could hold the governor wholly responsible for the conduct of state administration." V. Fischer, Alaska's Constitutional Convention at 106 (1975).

became sections 25 and 26 of Article III,[2] questions were raised concerning the extent to which these sections governed appointments to the Board of Regents. The chair of the Executive Branch Committee, Victor Rivers, and a member of that Committee, Katherine Nordale, both responded that section 26 of Article III only applied to "principal departments" and that the University of Alaska was not a principal department. Alaska Constitutional Convention Proceedings at 2034, 2037, 2246. Therefore, in their mind, the University of Alaska did not fall under section 26 of Article III.

Other delegates, however, remained concerned that in order to insulate the University from politics it needed to be made explicit that the University was not subject to section 26 of Article III. In particular, certain delegates were concerned that if section 26 did apply to the University, that the Board of Regents' appointment of a president would be subject to approval by the governor. Accordingly, these delegates sought to amend section 26 to state that the provision did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2245-2258. Ultimately, these attempts failed because the members of the Executive Branch committee persuaded the convention that section 26 simply did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2246, 2257. Moreover, several delegates noted that a separate article was being drafted to govern the University of Alaska. *Id.* at 2247-48, 2250, 2255.

During the debate, some delegates expressed observations as to the status of the University. The chair of the Executive Committee, Victor Rivers, stated that the Executive Branch article would have no impact on the University:

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[2] Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state.

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

> Walsh: May I ask a question, Mr. Rivers? I think to clarify in the minds of several people here it might be well for me, that [as] one of those serving on the Board of Regents of the University of Alaska, composed of eight members, and the Board of Regents select the President of the University. The governor, as I understand it, does not have the power of the removal of the president of the University. It is a matter for the Board. Would this situation change that, Mr. Rivers?
>
> Rivers: No, in regard to the University, this would not affect their present setup. They are a private corporation, or rather a nonprofit corporation, and under the specific law providing for their make-up, and you would still have a board of regents appointed by the governor and confirmed by the legislature, and the powers as you now have them would be identical to what they now are as I visualize them.

Id. at 2033-34. Delegate Taylor stated that the "University is not a part of the Territorial government whatsoever; it is an independent agency." *Id.* at 2253. Notably, Delegate Nordale expressed the view that by explicitly putting the University in a separate article it would "make it very clear that it can never be dissolved and that it is not part of the executive branch of government." *Id.* at 2256.

Later in the convention, the Executive Branch committee proposed language regarding the University. Chair Rivers introduced the language as follows:

> Mr. President, you have heard the reading of this article and it was considered important that in the constitution there be included an article of this type. It gives the University, as a corporate body, the authority to receive and hold property which will be granted to them under the enabling act. It also gives them the authority for administering and disposing of that according to law. It sets up the board of regents and the governing body of the University, and I think the main point of this article has is that constitutionally the University of Alaska shall be the only state university in Alaska.

Id. at 2792. Perhaps notably, the Executive Branch committee saw fit to clear the language of the proposed article with the President of the University prior to bringing it to the floor of the convention.[3] *Id.*

II. Analysis

With this summary of the constitutional history of the University in mind, we think it is fair to draw the following conclusions. First, the convention intended to create a very strong governor with full appointive power. Second, despite the strong governor model, the convention nevertheless intended to insulate the University from politics, including the governor. Third, the convention intended that the University would not be subject to section 26 of Article III of the Alaska Constitution. Fourth, the convention intended to constitutionalize the existence of the University. Finally, some members of the convention believed that the University resided outside the executive branch of government in 1955 and that the constitution preserved that status.[4]

Nowhere in the convention minutes is there any discussion regarding removal of a regent.[5] But the above conclusions are sufficient to give us pause that the governor's power to remove certain executive branch appointees without cause extends to the University Board of Regents. This view is consistent with the views previously expressed by this office. In 1979, we opined:

> Under the state constitution, the University of Alaska is 'governed' by the Board of Regents. Alaska Const., art. VII, § 3. The regents are appointed by the governor, subject to confirmation by the legislature. Id. They serve for terms of eight years. Thus, while the regents are appointed by and are responsible to the governor, they do not serve at his pleasure but rather for fixed terms, and they may, therefore, be

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[3] In other words, it is doubtful that President Patty, the University president at the time, would have approved this language if he thought it allowed the governor to remove a regent without cause.

[4] By observing this latter point, we do not conclude that in fact the convention succeeded in fully removing the University from the executive branch.

[5] Though at one point, Chair Rivers states that "[t]he law could provide no doubt for means of removal . . ." *Id.* at 2255-56. He appears to be referring to the chief executive of the University, not the regents, however.

> removed from office solely for cause. 67 C.J.S. Officers § 120 (1978); 63 Am. Jur.2d Public Officers and Employees § 189 (1972). As a result, the governor's supervision over the university is made distinctly indirect. Unless the members of the Board of Regents commit acts of malfeasance, misfeasance, or nonfeasance sufficient to constitute cause for their removal, the governor possesses no check upon them and no power to direct their activities.

1979 Inf. Op. Att'y Gen. 1 (Jan. 23; J-66-103-79). We have reiterated this view over the years[6] and see no reason to stray from it today.

For the reasons expressed above, the University is accorded unique constitutional status. We must be mindful of these reasons when considering the applicability of Alaska Supreme Court precedents. A number of these cases have been cited by other counsel, but we doubt that a court would find them controlling on the issue of whether the governor may remove a regent without cause. For instance, *Walker v. Alaska State Mortgage Assoc.*, 416 P.2d 245 (Alaska 1966) does not involve the University of Alaska, but rather pertains to a board of a public corporation that does not have a unique constitutional status. The cases involving the University do not have issues that directly implicate the political independence of the University, one of the reasons for the University's unique constitutional status. *See, e.g., University of Alaska v. Nat'l Aircraft Leasing,* 536 P.2d 121 (Alaska 1975) (University is instrumentality of state for purposes of sovereign immunity); *McGrath v. University of Alaska,* 813 P.2d 1370 (Alaska 1991) (legislature may subject University to Administrative Procedures Act). Instead, we think a court if faced with the issue of whether the governor may remove a regent without cause would be more likely to focus on the constitutional history of the University set forth above.

Finally, legislative counsel contends that under AS 39.05.060(d) regents serve at the pleasure of the governor and may be removed at any time. This interpretation is at odds with the express intention of the constitutional convention that the University be insulated from politics. Moreover, review of the fairly lengthy legislative history of this statute demonstrates that the legislature never intended AS 39.05.060(d) to reach the

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[6] In 1998, an assistant attorney general stated that, "Regents are considered to be sort of in a class by themselves. We've always advised the governor that it's inadvisable to remove the regents at a change of an administration. Legal complications may ensue." 1998 Anchorage Daily News (quoting AAG James Baldwin).

Board of Regents. This statute was originally enacted as part of the State Organization Act of 1959, under which the executive branch of the new State of Alaska was formed. *See* ch. 64, SLA 1959. The University of Alaska is not within the scope of this Act—it was not mentioned in the Act and was left out of the organization of the executive branch accomplished by this Act. *Id.* When initially enacted, AS 39.05.060 only referred to boards that were explicitly mentioned in the State Organization Act of 1959. While the scope of AS 39.05.060 has both expanded and contracted over the years, it has never been broadened to include the Board of Regents.[7]

In summary, we conclude that the Governor may only remove a regent if cause is established, preferably at a hearing prior to removal. We would be happy to address in another memo the evidence necessary to establish cause, and the criteria for an appropriate hearing process.

MAB:ajh

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[7] We note, however, that it may be possible for the legislature to provide for removal of a regent through enactment of a statute consistent with the constitution. Such a statute would have to preserve the University's politically independent constitutional status and probably could only provide for removal if it were for some cause that was established at a hearing prior to removal.

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AK ST § 23.30.007 Page 1

AS 23.30.007

c
ALASKA STATUTES
Title 23. Labor and Workers' Compensation.
Chapter 30. Alaska Workers' Compensation Act.
Article 1. Administration.

Sec. 23.30.007 Workers' Compensation Appeals Commission.

(a) There is established in the Department of Labor and Workforce Development the Workers' Compensation Appeals Commission. The commission has jurisdiction to hear appeals from final decisions and orders of the board under this chapter. Jurisdiction of the commission is limited to administrative appeals arising under this chapter.

(b) The commission consists of five members appointed by the governor and confirmed by a majority of the members of the legislature in joint session. The members shall be appointed as follows:

(1) a member appointed as chair who meets the requirements of (c)(2) of this section;

(2) two members who meet the qualifications in (c)(1) of this section and, because of their employment or affiliations, may be classified as a representative of employees covered by this chapter;

(3) two members who meet the qualifications in (c)(1) of this section and, because of their employment or affiliations, may be classified as a representative of employers covered by this chapter.

(c) To be eligible for appointment under this section,

(1) a member must

(A) be a citizen of the United States;

(B) be a resident of the state for the five years preceding the appointment;

(C) have not been convicted of either a

(i) felony; or

(ii) misdemeanor related to workers' compensation; and

(D) have served for a total of not less than 18 months as a member of the Alaska Workers' Compensation Board;

(2) the chair must

(A) meet the criteria specified in (1) of this subsection, except for the requirement in (1)(D) of this subsection;

(B) be licensed to practice law in this state and be a member in good standing with the Alaska Bar Association; and

(C) have engaged in the active practice of law for at least five years with experience in workers' compensation in this state.

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AS 23.30.007

(d) An individual seeking appointment as a member or as chair shall submit an application to the chief administrative law judge appointed under AS 44.64.010. The application must show that the applicant meets requirements in (c) of this section that are applicable to the position for which the application is submitted. For each vacant position, other than the chair, the chief administrative law judge shall select not less than two eligible individuals and submit the names of those individuals to the governor. For the chair, the chief administrative law judge shall select not less than three for submission to the governor.

(e) The term of service on the commission is five years. A member may be reappointed so long as the reappointment complies with the provisions of this section, including the application and appointment process described in (d) of this section.

(f) A vacancy arising in the commission shall be filled by appointment by the governor and confirmed by a majority of the members of the legislature in joint session. Except as provided in AS 39.05.080(4), an appointee selected to fill a vacancy shall hold office for the unexpired term of the member whose vacancy is filled. A vacancy in the commission does not impair the authority of a quorum of members to exercise all the powers and perform all the duties of the commission.

(g) A member may act and receive compensation under this section from the date of appointment until confirmation or rejection by the legislature.

(h) The chair of the commission is in the exempt service under AS 39.25.110 and shall receive a monthly salary that is not less than Step A nor more than Step F of Range 27 of the salary schedule in AS 39.27.011(a) for Anchorage, Alaska.

(i) An appeal to the commission shall be heard and decided by a three-member panel of the commission. An appeal panel shall consist of the chair of the commission and two members of the commission assigned by the chair, one member classified as representing employees, and one member classified as representing employers. At other meetings to conduct commission business, the number of commission members classified as representing employees must equal the number of commission members classified as representing employers. The chair of the commission and two representative members of the commission, one classified as representing employees and one classified as representing employers, constitute a quorum.

(j) A member of the commission may be removed from office by the governor for good cause. To be removed for cause, a member of the commission shall be given a copy of the charges and afforded an opportunity to be heard in person or by counsel in the member's own defense upon not less than 10 days' notice. If the member is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the member, the governor's findings on the charges, and the record of any proceedings. In this subsection, "good cause" includes

(1) misconduct in office or violation of AS 39.52;

(2) conviction of a felony;

(3) conviction of a misdemeanor related to workers' compensation;

(4) inability to serve, neglect of duty, incompetence, unjustified failure to handle the caseload assigned, or similar nonfeasance of office; and

(5) failure to continue to meet the requirements of this section relating to qualification for office.

(k) Representative members are entitled to compensation in the amount of $400 a day for each day spent in actual

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hearing of appeals or on authorized official business incidental to their duties, and to transportation and per diem as provided by law. Compensation shall be paid pro rata for each portion of a day spent in actual hearing of appeals or on authorized official business.

(*l*) A member of the commission may not hear an appeal under this chapter if

(1) a party is an employee or was, in the past seven years, an employee of the commission member or of a business that employs the commission member; this paragraph does not apply to the chair of the commission when the State of Alaska is or was the employer of a party;

(2) a party is a member or was, in the past seven years, a member of the same union or employee association as the commission member;

(3) a party has a contractual relationship with the commission member, a business that employs the commission member, or a union or employee association of which the commission member is a member;

(4) the commission member is unable to be fair, impartial, and unbiased toward the appeal participants; or

(5) participation in the appeal is a violation of AS 39.52.

(m) If the chair of the commission is unable to hear an appeal for reasons of absence or illness in excess of 10 days, or for reasons set out in (*l*) of this section, the chief administrative law judge appointed under AS 44.64.010 shall appoint a person who meets the qualifications of this section to serve as chair to hear the appeal as chair pro tempore. The person shall receive the compensation provided in (k) of this section. Appointment of a chair pro tempore does not require legislative confirmation.

(n) Each member of the commission, before entering upon the duties of office, shall take and subscribe to the oath prescribed for principal officers of the state. A member of the commission, during tenure, may not

(1) hold or campaign for elective office;

(2) be an officer of a political party, political committee, or group;

(3) permit the member's name to be used, or make any contributions whatsoever, in support of or in opposition to a candidate or proposition or question that appears on any ballot in the state including but not limited to that of a municipality; however, contributions may be made to a candidate for the office of President of the United States;

(4) participate in any way in an election campaign or participate in or contribute to any political party; or

(5) lobby, employ, or assist a lobbyist.

(o) The offices of the commission shall be physically separate from the offices of the division.

(p) Notwithstanding (e) of this section, the terms of the individuals initially appointed to the commission shall be as follows:

(1) the chair, five years;

(2) one member, four years;

(3) one member, three years;

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AS 23.30.007

(4) one member, two years;

(5) one member, one year.

(§ 8 ch 10 FSSLA 2005)

HISTORICAL NOTES

Effective dates. -- Section 8, ch. 10, FSSLA 2005, which enacted this section, took effect on November 7, 2005.

A. S. 23.30.007, AK ST § 23.30.007

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AS 31.05.007

C
ALASKA STATUTES
Title 31. Oil and Gas.
Chapter 05. Alaska Oil and Gas Conservation Act.
Article 1. Administration.

Sec. 31.05.007 Term of office; vacancy; removal.

(a) The term of office of each member is six years. A commissioner, upon the expiration of a term, shall continue to hold office until a successor is appointed and qualified.

(b) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and, except as provided in AS 31.05.080(4), an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

(c) A vacancy in the commission does not impair the authority of a quorum of commissioners to exercise all the powers and perform all the duties of the commission.

(d) The governor may remove a commissioner from office for cause including but not limited to incompetence, neglect of duty or misconduct in office. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

(§ 1 ch 158 SLA 1978; am § 10 ch 168 SLA 1990; am § 10 ch 80 SLA 1996)

HISTORICAL NOTES

Opinions of attorney general. -- For a discussion of the effect of the term "appointed and qualified" as set out in (a) of this section to appointment to the commission, see June 8, 1995, Op. Atty. Gen.

A. S. 31.05.007, AK ST § 31.05.007

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AS 08.04.030

ALASKA STATUTES
Title 8. Business and Professions.
Chapter 04. Accountants.
Article 1. Board of Public Accountancy.

Sec. 08.04.030 Removal of members.

The governor shall **remove** any member of the board whose certificate or license has been revoked or suspended. The governor may, after hearing, **remove** any member for neglect of duty or other just **cause**.

(§ 2(2) ch 187 SLA 1960; am § 2 ch 66 SLA 1997)

HISTORICAL NOTES

Delayed amendment of section. -- Under §§ 4 and 58, ch. 16, SLA 2006, effective January 1, 2008, this section will read as follows: "Removal of members. The governor shall **remove** any member of the board whose license has been revoked or suspended. The governor may, after hearing, **remove** any member for neglect of duty or other just **cause**."

HISTORICAL NOTES

Effect of amendment. -- The 1997 amendment, effective July 1, 1997, rewrote this section.

A. S. 08.04.030, AK ST § 08.04.030

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AK ST § 04.06.070 Page 1

AS 04.06.070

C
ALASKA STATUTES
Title 4. Alcoholic Beverages.
Chapter 06. Alcoholic Beverage Control Board.

Sec. 04.06.070 Appointment and removal of director.

The governor shall appoint a director to serve as the executive officer of the board. The board may remove the director at its pleasure, and the governor may remove the director for misconduct, misfeasance, or malfeasance in office. The governor may not remove the director unless the director is given a copy of the charges and afforded an opportunity to be publicly heard, in person or by counsel, in defense against the charges upon at least 10 days' notice. If the director is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the director and the findings based on the charges, together with a complete record of any hearing.

(§ 1 ch 131 SLA 1980)

A. S. 04.06.070, AK ST § 04.06.070

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AK ST § 42.04.020 Page 1

AS 42.04.020

C
ALASKA STATUTES
Title 42. Public Utilities and Carriers.
Chapter 04. Regulatory Commission of Alaska.
Article 1. Commission and Staff.

Sec. 42.04.020 Commissioners.

(a) The commission consists of five commissioners appointed by the governor and confirmed by the legislature in joint session. To qualify for appointment as a commissioner, a person must be a member in good standing of the Alaska Bar Association or have a degree from an accredited college or university with a major in engineering, finance, economics, accounting, business administration, or public administration. Actual experience for a period of five years in the practice of law or in the field of engineering, finance, economics, accounting, business administration, or public administration is equivalent to a degree.

(b) The term of office of each member is six years. A commissioner, upon the expiration of a term, shall continue to hold office until a successor is appointed and qualified.

(c) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and, except as provided in AS 39.05.080(4), an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

(d) A vacancy in the commission does not impair the authority of a quorum of commissioners to exercise all the powers and perform all the duties of the commission.

(e) The governor may remove a commissioner from office for cause, including incompetence, neglect of duty, inability to serve, or misconduct in office or because the member, while serving on the commission, is convicted of a misdemeanor for violating a statute or regulation related to public utilities or is convicted of a felony. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

(f) Members of the commission are in the exempt service and are entitled to a monthly salary equal to Step C, Range 26, of the salary schedule in AS 39.27.011(a) for Juneau, Alaska. The chair of the commission is entitled to a monthly salary equal to Step C, Range 27, of the salary schedule in AS 39.27.011(a) for Juneau, Alaska.

(g) Each commissioner, before entering upon the duties of office, shall take and subscribe to the oath prescribed for principal officers of the state.

(§ 1 ch 25 SLA 1999)

A. S. 42.04.020, AK ST § 42.04.020

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AK ST § 08.01.020 Page 1

AS 08.01.020

C
ALASKA STATUTES
Title 8. Business and Professions.
Chapter 01. Centralized Licensing.
Sec. 08.01.020 Board organization.

Board members are appointed by the governor and serve at the pleasure of the governor. Unless otherwise provided, the governor may designate the chair of a board, and all other officers shall be elected by the board members. Unless otherwise provided, officers of a board are the chair and the secretary. A board may provide by regulation that three or more unexcused absences from meetings are cause for removal.

(§ 1 ch 59 SLA 1966; am § 2 ch 94 SLA 1987)

A. S. 08.01.020, AK ST § 08.01.020

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MEMORANDUM March 17, 2011

SUBJECT: Separation of powers issue (HB 6; Work Order No. 27-LS0027\A)

TO: Representative Steve Thompson
Attn: Jane Pierson

FROM: Jean M. Mischel
Legislative Counsel

You have asked about the constitutionality of HB 6. The constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent by the governor is the subject of considerable debate and raises a significant possibility of a separation of powers challenge. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and therefore the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. . . .

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, *and may be removed as provided by law*. . . .

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

> As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26

> mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government.

Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976).

The University's status as a "body corporate" does not imply a legislative role in removal of a regent (apart from the impeachment process available to the legislature as to all civil officers). Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law serve at the pleasure of the governor. Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966). The Court stated:

> The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 240 (citations omitted).

I am aware of an informal attorney general opinion that suggests in a footnote that the legislature currently has some authority over removal of a regent without any judicial support for that position. I do not know how a court would view the kind of intrusion proposed in this draft into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:ljw
11-177.ljw

Member

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Judiciary
Rules
State Affairs
Transportation

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Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Sectional Analysis for CS for HB 6 ( ) (27-LS0027\T)

Section 1[1] sets forth the legislative findings and purposes of the bill. The legislature finds that the framers of the Alaskan Constitution intended to insulate the University of Alaska from politics, that the legislature delegated the power of self-governance to the UA under AS 14.40.170(b), and that the legislature has the power to create laws that pertain to the university. The purposes of the bill are to clarify that the governor may only remove a regent with good cause and that the governor must afford a regent due process in the proceedings dealing his or her removal or suspension. Finally, the legislative findings in this section affirm the political insulation of the university and the board of regents.

Section 2[2] adds a new section, AS 14.40.155, to AS 14.40 the chapter that governs the University of Alaska's Board of Regents. AS 14.40.155 is patterned after other statutory removal procedures for other boards, including the workers compensation appeals commission. See AS 23.30.007(j).

AS 14.40.155(a) sets forth the procedure for the governor to suspend a regent for good cause . The governor must provide the regent with notice and an opportunity for a hearing. Good cause is defined in subsection (g) to include a violation of the Executive Branch Ethics Act, a conviction of a felony, conviction of a misdemeanor involving a crime of dishonesty or the University of Alaska, malfeasance or nonfeasance in office, or failure to continue to meet the qualification requirements of a regent.

AS 14.40.155(b) allows the governor to remove a regent for good cause by providing the regent with an accusation and opportunity for a hearing and judicial review.

AS 14.40.155(c) details the procedure for a regent to either defend against a possible suspension or lift a suspension once it has been imposed.

AS 14.40.155(d) permits the governor to delegate the conduct of the hearing to the Office of Administrative Hearings. The standard of proof to be used in the hearing for removal for "good cause" is "clear and convincing," one of the highest standards.

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[1] Page 1, lines 5-14 through page 2, lines 1-11
[2] Page 2, lines 12-31 through page 4, lines1-3

AS 14.40.155(e) states that the Administrative Procedures Act (AS 44.62.330-44.62.630) applies to all of the proceedings of this section.

AS 14.40.155(f) sets out that the governor must file a copy of the allegations against the regent, the findings of the governor, and a complete record of the removal proceedings with the lieutenant governor.

Because this law deals with the conduct of the board of regents during their entire term in office it must apply retroactively to ensure that past violations do not go unchecked. **Section 3**[3] is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of this Act.

[3] Page 4, lines 4-7

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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House Bill 6:
Removing a Regent
Explanation of changes between
HB 6 (EDC) (27-LS0027\M) to CS for HB 6 (EDC) (27-LS0027\T)

There are a few of changes between the "E" and "T" versions.

There are no changes to **Section 1** of the bill.

There are a few changes to **Section 2** of the bill. Changes were made to (a)(3)-(5) (page 2, lines 20-26). The change to (a)(3) (page 2, lines 20-21) reflected that mere allegations of an ethics violation under consideration by the Alaska Public Offices Commission should not be enough to suspend a regent. Instead this was changed to a determination of probable cause of a knowing ethics violation that results in a complaint being considered by the personnel board. The change to (a)(4) (page 2, lines 22-23) also reflected that mere allegations should not be enough to suspend a regent. Instead it must be a verified complaint. Paragraph (a)(5) was added to include that if a regent faces misconduct proceedings before a professional or occupational licensing body that relate to his or her ability to serve as a regent then he or she may be suspended.

The final change to **Section 2** of the bill is in (g)(5) (page 3, line 31-page 4, lines 1-2 of the "T" version. This paragraph was changed to reflect that only misconduct before a professional or occupation licensing body related to a regent's ability to serve should be grounds for removal.

There are no changes to **Section 3** of the bill.

27-LS0027\T
Mischel
2/25/11

CS FOR HOUSE BILL NO. 6( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS AND PURPOSES. (a) The legislature finds that

(1) the framers of the Constitution of the State of Alaska intended to insulate the University of Alaska and the Board of Regents from politics, but did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight;

(2) the legislature has the power to pass laws that pertain to the University of Alaska; and

(3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

Regents the power to regulate itself, but the Board of Regents has not adopted self-governance rules that authorize the board to remove or suspend a regent in appropriate circumstances.

(b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

(1) clarify that the governor may remove a regent only with good cause;

(2) prescribe a due process procedure under which the governor may remove a regent for good cause;

(3) prescribe a due process procedure under which, in certain circumstances, the governor may suspend a regent; and

(4) accomplish each of the above purposes in a manner that ensures the University of Alaska and the Board of Regents remain insulated from politics.

*** Sec. 2.** AS 14.40 is amended by adding a new section to read:

Sec. 14.40.155. Suspension and removal of regents. (a) The governor may, after providing notice and an opportunity for a hearing, suspend a member of the Board of Regents while final disposition is pending on

(1) a criminal complaint, presentment, information, or indictment involving a felony in any jurisdiction;

(2) an information or formal criminal charges of a misdemeanor described under (g)(3) of this section;

(3) a probable cause determination of a knowing ethics violation under AS 39.52 that results in a complaint under consideration by the personnel board;

(4) a verified complaint of malfeasance or nonfeasance in office described under (g)(4) of this section under consideration by the governor; or

(5) proceedings involving misconduct that is related to the regent's ability to serve as a regent under consideration by a professional or occupational licensing body.

(b) The governor may remove a member of the Board of Regents for good cause by providing to the member an accusation and an opportunity for a hearing and judicial review.

(c) Notwithstanding the procedure under AS 44.62.390, a regent who has been suspended under (a) of this section may, at any time, request a hearing to

(1) defend against the grounds for the suspension stated in the accusation; or

(2) lift the suspension.

(d) The governor may delegate the conduct of a hearing under this section to the office of administrative hearings under AS 44.64.030(b). If a hearing is requested, the hearing officer may prepare a proposed decision under AS 44.62.500(b) to

(1) remove a regent based on clear and convincing evidence of good cause for removal;

(2) not remove a regent; or

(3) continue a suspension or lift a suspension of a regent.

(e) AS 44.62.330 - 44.62.630 applies to all proceedings under this section.

(f) After a final decision by the governor that removes a regent for good cause under (b) of this section, the governor shall file with the lieutenant governor a copy of the allegations made against the former regent, the governor's findings on each of the allegations, and a complete record of the removal proceedings.

(g) In this section, "good cause" means

(1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act);

(2) conviction of a felony in any jurisdiction;

(3) conviction of a misdemeanor in any jurisdiction if the misdemeanor involves

(A) dishonesty;

(B) breach of trust; or

(C) the University of Alaska;

(4) malfeasance or nonfeasance in office, including

(A) misconduct in office;

(B) an inability to serve;

(C) neglect of duty;

(D) incompetence;

(E) unjustified failure to perform the duties of the Board of Regents;

(5) misconduct related to the regent's ability to serve as a regent and

resulting in the revocation or suspension of a professional or occupational license issued under state law;

(6) failure to possess the qualifications of a regent under AS 14.40.130.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct and acts occurring before, on, or after the effective date of this Act.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 22, 2011

SUBJECT: Misdemeanors (CSHB 6 ( )(Work Order No. 27-LS0027\T))

TO: Representative Max Gruenberg
Attn: Ted Madsen

FROM: Jean M. Mischel

You have asked for examples of misdemeanors in the state that may be construed to involve a breach of trust or dishonesty and for others that do not for purposes of interpreting the above-referenced bill.

A court would form its own interpretation of the phrases as used in the bill when presented with a specific set of facts. If the phrase is considered to be ambiguous the legislative history of the bill, including committee minutes, may be relied upon.

In my opinion, two examples of a misdemeanor involving a breach of trust are endangering the welfare of a vulnerable adult in the second degree, AS 11.51.210, and endangering the welfare of a child that results in physical injury to the child under AS 11.51.100.

For a misdemeanor involving dishonesty, a court would likely consider whether an element of the crime is knowledge or intent. For example, aiding the nonpayment of child support in the second degree under AS 11.51.122 requires proof that the person knows of an obligor's duty to pay child support. Another example of a misdemeanor involving dishonesty is theft in the third degree under AS 11.46.140. A third example is issuing a bad check under AS 11.46.280.

Some examples of misdemeanors that do not involve a breach of trust or dishonesty would likely involve personal use or possession of a small amount of a controlled substance. Criminal trespass in the first degree under AS 11.46.320 may not involve a breach of trust or dishonesty.

If I may be of further assistance, please advise.

JMM:plm
11-173.plm

27-LS0027\T.1
Mischel
3/22/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 6( ), Draft Version "T"

Page 3, line 17, following "Act)":

Insert "that results in a recommendation of removal under AS 39.52.410(b)(3)"

Page 3, line 26, following "serve":

Insert "for an extended period of time"

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If I may be of further assistance, please advise.

JMM:plm
11-173.plm

27-LS0027\T.1
Mischel
3/22/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 6( ), Draft Version "T"

Page 3, line 17, following "Act)":

Insert "that results in a recommendation of removal under AS 39.52.410(b)(3)"

Page 3, line 26, following "serve":

Insert "for an extended period of time"

27-LS0027\T.2
Kurtz/Mischel
3/23/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 6( ), Draft Version "T"

Page 2, line 21:

Delete "a complaint"

Insert "an accusation"

February 28, 2011

Representative Carl Gato, chairman House Judiciary Committee

On February 22, 2011 I sent the following e-mail to you and other members of the House Judiciary Committee:

> I am stunned that the House Education Committee has advanced House Bill 6 and sent it on to the Judiciary Committee. The bill's introduction is a knee-jerk reaction to a problem several years ago that has been solved under current law. If I read the bill correctly, it allows the governor to suspend a regent for a variety of real or imagined reasons including those listed on Lines 18-28 of Page 3. Under this bill, if the governor does not like the way a regent votes on some issue, or even the way the regent combs his or her hair, the sitting governor can suspend that regent and force the regent to show why he or she should not be removed from office. That is quite a threat, and it also seems to go against the idea that a person is innocent until proven guilty. If this bill is put into law it will be possible for a governor to pack the board of regents with members of his own party or persons who share his opinions on various issues such as evolution, abortion or other that could affect how the regent might vote on issues facing the governance of the University of Alaska. In essence, this bill puts the regents in the position of serving in office at the pleasure of the governor, and thereby voids the protection afforded by AS 14.40.140. This is a bad bill, detrimental to higher education in Alaska. If it comes to you for a vote, I strongly urge you to reject it--
> -T. Neil Davis, professor emeritus and alumnus, University of Alaska Fairbanks

I now wish to thank Representative Max Gruenberg, co-sponsor of House Bill 6, for telephoning me on February 23 and 24, 2011 to discuss my objections to the bill. In these discussions Rep. Gruenberg stated that the intent of the bill was to speed up the current process for removal of a University of Alaska Regent as stated in Article 2 Section 20 of the Alaska Constitution:

> All civil officers of the State are subject to impeachment by the legislature. Impeachment shall originate in the senate and must be approved by a two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.

I understand that such impeachment currently is the only way a University of Alaska regent can be removed from office because of the guarantee afforded by the Alaska Constitution Article 7, § 3. Board of Regents stating, "The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of

the board," and Alaska Statute § 14.40.140 which says, "Except for a student regent as specified in AS 14.40.150(b), the term of office of a regent is eight years. The term of office begins on the first Monday in February of the year in which the appointment is made. Each regent serves until a successor is appointed and qualifies."

I note that the governing board of the University of Alaska (initially called Trustees and later Regents) has been in existence for 94 years and that 145 Alaskans have served on the board. In only one instance has there been cause to initiate impeachment proceedings against a sitting regent, James C. Hayes in 2007, and that he then resigned at that point.

In view of these facts I contend that the wording of the Alaska Constitution and existing statutes have proven capable of solving all problems that have occurred during the course of almost a full century. Therefore, I further contend that there is no need for the drastic actions allowed by House Bill 6, and that such actions run counter to the intent of the framers of the Constitution of the State of Alaska to insulate the University of Alaska and the Board of Regents from inappropriate political action.

In our discussions of the matter Rep. Gruenberg stated that he believed the existing process for removal of a regent was too slow, and HB 6 would allow for rapid removal of a regent. I contend that the removal of a regent is a matter of serious nature that deserves deliberate due process spelled out by Article 2 Section 20 of the Alaska Constitution, describing the impeachment process. It should not be possible for the executive branch or the legislature to avoid such due process in seeking to remove a regent from his or her duties.

Representative Gruenberg stated to me that one objective of the proposed bill was to make certain that the full 11-member board was in existence at all times, and that the attendance of the full board was necessary for the board to conduct its duties. It is not clear to me that the proposed bill accomplishes this aim or that the attendance of the full board is necessary, since only a quorum of six is required to conduct business. In this connection I note that of the last eleven regent meetings during only six was the full board in attendance (see Board Minutes).

In the Legislative Findings and Purpose of HB 6 are the strange statements:

(2) under AS 14.40.170(b)(1), the legislature has delegated to the Board of Regents the power to regulate itself, but the Board of Regents has not adopted self-governance rules that authorize the board to remove or suspend a regent in appropriate circumstances;

(3) the legislature has the power to create procedures under which the governor may remove a regent for good cause or suspend a regent in appropriate circumstances....

Regarding the first of these statements: AS 14.40.170(b)(1) states that the Board of Regents may (not shall) "adopt reasonable rules, orders, and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents." It likely would be unconstitutional for the regents to adopt any rules that would allow them to suspend or remove a member. Similarly, with regard to the second statement, the Alaska Constitution does not award the legislature the power to cause removal of a regent for any reason whatsoever other than by impeachment.

One final point:

During our discussion, Rep. Gruenberg verified that the passage of HB 6 would allow a governor to notify a regent of suspension, and the suspension would be effective immediately

and remain in effect until the regent called for a hearing and the result of the hearing would not justify the suspension. So if the regent did not try to defend self, that would, at least temporarily, terminate the regent's service on the board. Even if without any justification whatsoever, such an act would cast doubt on the character of the regent and perhaps do irreparable damage to the regent's reputation. Just the knowledge that such an act could be committed is a threat to the aforementioned clear intent of the framers of the Constitution of Alaska to insulate the University of Alaska and the Board of Regents from politics.

Please reject this bill. And remember, there is good reason why the Constitution establishes the regent's term of office at not less than eight years—it is to insulate the regents from politics as much as possible.—Neil Davis, 375 Miller Hill Road, Fairbanks, AK 99709, 479-2732, neildavs@mosquitonet.com

LEGAL SERVICES

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MEMORANDUM March 22, 2011

SUBJECT: Misdemeanors (CSHB 6 ( )(Work Order No. 27-LS0027\T))

TO: Representative Max Gruenberg
Attn: Ted Madsen

FROM: Jean M. Mischel

You have asked for examples of misdemeanors in the state that may be construed to involve a breach of trust or dishonesty and for others that do not for purposes of interpreting the above-referenced bill.

A court would form its own interpretation of the phrases as used in the bill when presented with a specific set of facts. If the phrase is considered to be ambiguous the legislative history of the bill, including committee minutes, may be relied upon.

In my opinion, two examples of a misdemeanor involving a breach of trust are endangering the welfare of a vulnerable adult in the second degree, AS 11.51.210, and endangering the welfare of a child that results in physical injury to the child under AS 11.51.100.

For a misdemeanor involving dishonesty, a court would likely consider whether an element of the crime is knowledge or intent. For example, aiding the nonpayment of child support in the second degree under AS 11.51.122 requires proof that the person knows of an obligor's duty to pay child support. Another example of a misdemeanor involving dishonesty is theft in the third degree under AS 11.46.140. A third example is issuing a bad check under AS 11.46.280.

Some examples of misdemeanors that do not involve a breach of trust or dishonesty would likely involve personal use or possession of a small amount of a controlled substance. Criminal trespass in the first degree under AS 11.46.320 may not involve a breach of trust or dishonesty.

If I may be of further assistance, please advise.

JMM:plm
11-173.plm

27-LS0027\R
Mischel
3/25/11

CS FOR HOUSE BILL NO. 6( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS AND PURPOSES. (a) The legislature finds that

(1) the framers of the Constitution of the State of Alaska intended to insulate the University of Alaska and the Board of Regents from politics, but did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight;

(2) the legislature has the power to pass laws that pertain to the University of Alaska; and

(3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

Regents the power to regulate itself, but the Board of Regents has not adopted self-governance rules that authorize the board to remove or suspend a regent in appropriate circumstances.

(b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

(1) clarify that the governor may remove a regent only with good cause;

(2) prescribe a due process procedure under which the governor may remove a regent for good cause;

(3) prescribe a due process procedure under which, in certain circumstances, the governor may suspend a regent; and

(4) accomplish each of the above purposes in a manner that ensures the University of Alaska and the Board of Regents remain insulated from politics.

*** Sec. 2.** AS 14.40 is amended by adding a new section to read:

Sec. 14.40.155. Suspension and removal of regents. (a) The governor may, after providing notice and an opportunity for a hearing, suspend a member of the Board of Regents while final disposition is pending on

(1) a criminal complaint, presentment, information, or indictment involving a felony in any jurisdiction;

(2) an information or formal criminal charges of a misdemeanor described under (g)(3) of this section;

(3) a probable cause determination of a knowing ethics violation under AS 39.52 that results in an accusation under consideration by the personnel board;

(4) a verified complaint of malfeasance or nonfeasance in office described under (g)(4) of this section under consideration by the governor; or

(5) proceedings involving misconduct that is related to the regent's ability to serve as a regent under consideration by a professional or occupational licensing body.

(b) The governor may remove a member of the Board of Regents for good cause by providing to the member an accusation and an opportunity for a hearing and judicial review.

(c) Notwithstanding the procedure under AS 44.62.390, a regent who has been suspended under (a) of this section may, at any time, request a hearing to

(1) defend against the grounds for the suspension stated in the accusation; or

(2) lift the suspension.

(d) The governor may delegate the conduct of a hearing under this section to the office of administrative hearings under AS 44.64.030(b). If a hearing is requested, the hearing officer may prepare a proposed decision under AS 44.62.500(b) to

(1) remove a regent based on clear and convincing evidence of good cause for removal;

(2) not remove a regent; or

(3) continue a suspension or lift a suspension of a regent.

(e) AS 44.62.330 - 44.62.630 applies to all proceedings under this section.

(f) After a final decision by the governor that removes a regent for good cause under (b) of this section, the governor shall file with the lieutenant governor a copy of the allegations made against the former regent, the governor's findings on each of the allegations, and a complete record of the removal proceedings.

(g) In this section, "good cause" means

(1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that results in a recommendation of removal under AS 39.52.410(b)(3);

(2) conviction of a felony in any jurisdiction;

(3) conviction of a misdemeanor in any jurisdiction if the misdemeanor involves

(A) dishonesty;

(B) breach of trust; or

(C) the University of Alaska;

(4) malfeasance or nonfeasance in office, including

(A) misconduct in office;

(B) an inability to serve for an extended period of time;

(C) neglect of duty;

(D) incompetence;

(E) unjustified failure to perform the duties of the Board of Regents;

(5) misconduct related to the regent's ability to serve as a regent and resulting in the revocation or suspension of a professional or occupational license issued under state law;

(6) failure to possess the qualifications of a regent under AS 14.40.130.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct and acts occurring before, on, or after the effective date of this Act.

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Toll Free: (866) 465-4940
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Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Explanation of changes between
CS for HB 6 ( ) (27-LS0027\T) to CS for HB 6 ( ) (27-LS0027\R)

There are a few of changes between the "T" and "R" versions.

There are no changes to **Section 1** of the bill.

There are a few changes to **Section 2** of the bill. The phrase "a compliant" (page 2, line 21 of the "T" version) was changed to "an accusation" (page 2, line 21 of the "T" version). The phrase "that results in a recommendation of removal under AS 39.52.410(b)(3)" was added to page 3, line 17 of the "T" version (now page 3, lines 17-18 of the "R" version). The last change was to add "for an extended period of time" following "an inability to serve" (page 3, line 27 of the "R" version).

There are no changes to **Section 3** of the bill.

27-LS0027\R.1
Keller
03/21/2011

Conceptional Amendment

OFFERED IN THE HOUSE
TO: CS HB 06

BY: REPRESENTATIVE KELLER

Page 2 line 5

Delete all language and insert

(1) clarify that the governor may remove a regent for good cause, or a determination that the good of the university requires it;

27-LS0027\R.2
Keller
04/04/2011

Conceptional Amendment

OFFERED IN THE HOUSE
TO: CS HB 06

BY: REPRESENTATIVE KELLER

Page 2, line 14

after the word "suspend"

Add

14 …with or without pay….

27-LS0027\R.3
Keller
04/04/11

Conceptional Amendment

OFFERED IN THE HOUSE
TO: CS HB 06

BY: REPRESENTATIVE KELLER

Page 2 line 28

after "good cause" insert

28 … or for the good of the university,….

HB

7

<TARGET><BILL>HB 7</BILL><SUBJECT>HB 7</SUBJECT><COMM>HJUD27</COMM></TARGET>

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

Received 01/24/11 2:30pm SM

TO: Representative Carl Gatto
Judiciary Chair

CC: Sarah Munson
Judiciary Committee Aide

FROM: Representative Cathy Muñoz

DATE: January 19, 2011

RE: HB 7 Hearing Request

Please schedule HB 7 – Synthetic Cannabinoids as Schedule IIA in House Judiciary for hearing at your earliest convenience.

Attached to this memo please find the following documents

- HB 7 – Synthetic Cannabinoids as Schedule IIA
- Sponsor Statement
- Sectional Analysis
- NCSL Research Report
- Articles
- Support Letters
- Expected Testimony
    - Sgt. Robert Thompson, Fairbanks Police Department (via teleconference)
    - Scott Spickler (in person)
- Office Contact: Kendra Kloster, 465-4712, Kendra_kloster@legis.state.ak.us

Thank You.

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-3744 • FAX (907) 465-2213
REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

HB7 SYNTHETIC CANNABINOIDS AS SCHEDULE IIA
Witness List

In person:
Elizabeth Ripley (Mat-Su Health Foundation/Mat-Su Substance Abuse Prevention Coalition)
Dr. Robert Urata (Valley Medical Care)
Annie Carpeneti (Department of Law)

Homer LIO:
Julie Woodworth (Kenai Peninsula Business Banking/Wells Fargo)

Fairbanks LIO:
Sgt. Robert Thompson (Fairbanks Police Department)

REPRESENTATIVE CATHY MUÑOZ

HB7 - Ban on Controlled Substances

A new synthetic cannabinoid, commonly known as K2 or Spice, has become readily available at local stores and over the internet. Some users of this chemical compound experience severe adverse reactions including hallucinations, nausea, vomiting, agitation, and panic attacks.

The synthetic cannabinoid is a combination of herbal and chemical compounds that commonly produce a reaction similar to the use of marijuana. The popularity is increasing, especially among youth, due to easy accessibility, low cost, and the difficulty of detection on drug tests.

The first introduction to K2 came to my attention through an individual's story. Within moments of inhaling K2 the young man experienced adverse reactions that included severe vomiting, loss of reality, inability to walk and talk, and violent outbursts. Without the quick reaction of those nearby there may have been tragic ending to this story. Many similar stories have surfaced in communities throughout Alaska. To date, nine states have successfully enacted laws to prohibit synthetic cannabinoids.

HB7 will classify certain synthetic cannabinoids as schedule IIA controlled substances under Alaska Statute 11.71.150(b). Schedule IIA includes materials, compounds and mixtures which contain hallucinogenic substances. It is important that we get ahead of this problem and I urge your support for the passage of this bill.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 14, 2011

SUBJECT: Sectional Summary - HB 7 (Work Order No. 27-LS0044\D)

TO: Representative Cathy Muñoz
Attn: Kendra Kloster

FROM: Gerald P. Luckhaupt
Assistant Revisor

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

Section 1 of the bill amends AS 11.71.150(b), by adding certain compounds to the list of Schedule IIA controlled substances contained in that section. The compounds that are being included:

(21) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(22) (6aS,10aS)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(23) 1-Pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(24) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(25) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(26) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(27) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(28) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(29) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl)indole, also known as JWH-200;

(30) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and homologues

are commonly known, or have been identified by other states or the federal government, as forms of synthetic marijuana.

Section 2 of the bill provides an effective date.

GPL:ljw
11-019.ljw

27-LS0044\E
Luckhaupt
2/9/11

CS FOR HOUSE BILL NO. 7( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MUÑOZ, HERRON, KERTTULA, GATTO, LYNN, AND PRUITT, Costello, Thompson, Millett

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.160(f) is amended to read:

(f) Schedule IIIA includes**, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of its salts, isomers, whether optical, position, or geometric, or salts of isomers whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation:**

(1) hashish;

(2) hash oil or hashish oil;

(3) tetrahydrocannabinols;

(4) parahexyl;

(5) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product; [AND]

(6) nabilone;

(7) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(8) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(9) 1-pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(10) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(11) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(12) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(13) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(14) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(15) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole, also known as JWH-200;

(16) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and its dimethyloctyl (C8) homologue; in this paragraph, "homologue" means a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

Sec. **11.71.150**. Schedule IIA.

(a) A substance shall be placed in schedule IIA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than substances listed in schedule IA, but higher than substances listed in schedule IIIA.

(b) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, whether optical, position, or geometric, or salts of isomers whenever the existence of these salts, isomers, or salts of isomers is possible within the specific chemical designation:

(1) 4-bromo-2, 5-dimethoxy-amphetamine, also known as 4-bromo-2, 5-dimethoxy-a-methylphenethylamine and 4-bromo-2, DMA;

(2) 2,5-dimethoxyamphetamine, also known as 2,5-dimethoxy-a-methylphenethylamine and 2,5-DMA;

(3) 4-methoxyamphetamine, also known as 4-methoxy-a-methylphenethylamine and paramethoxyamphetamine, PMA;

(4) 5-methoxy-3,4-methylenedioxy-amphetamine;

(5) 4-methyl-2,5-dimethoxy-amphetamine, also known as 4-methyl-2,5-dimethoxy-a-methylphenethylamine;

(6) 3,4-methylenedioxy amphetamine;

(7) 3,4,5-trimethoxy amphetamine;

(8) bufotenine, also known as 3-(B-dimethylaminoethyl)-5-hydroxyindole, 3-(2-dimethylaminoethyl)-5-indolol, N, N-dimethylserotonin; 5-hydroxy-N, N-dimethyltryptamine, and mappine;

(9) diethyltryptamine, also known as N, N-diethyltryptamine and DET;

(10) dimethyltryptamine, also known as DMT;

(11) ibogaine, also known as 7-ethyl-6, 6B, 7, 8, 9, 10, 12, 13-octahydro-2-methoxy-6, 9-methano-5H-pyrido [1',2': 1, 2] azepino [5, 4-b] indole and tabernanthe iboga;

(12) lysergic acid diethylamide, also known as LSD;

(13) mescaline;

(14) n-ethyl-3-piperidyl benzilate;

(15) n-methyl-3-piperidyl benzilate;

(16) peyote;

(17) analogs of phencyclidine (PCP), including:

(A) ethylamine analog, also known by some trade or other names as follows: N-ethyl-1-phenylcyclohexylamine (1-phenylcyclohexyl)-ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, PCE;

(B) pyrrolidine analog, also known by some trade or other names as follows: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPY, PHP;

(C) thiophene analog, also known as 1-[1-(2-thienyl) cyclohexyl]piperidine and 2-thienylanalog of phencyclidine, TPCP, and TCP;

(D) 1-[1-(2-thienyl)-cyclohexyl]-pyrrolidine, also known as TCPy;

(18) psilocybine;

(19) psilocyn;

(20) 3,4-methylenedioxymethamphetamine (MDMA).

(c) Schedule IIA includes cocaine or coca leaves, and any salt, compound, derivative, mixture, isomer, ester, ether, or preparation of cocaine or coca leaves produced directly or indirectly by extraction from coca leaves, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, including the isomers, salts, and salts of isomers of cocaine and other derivatives of coca leaves whenever the existence of these esters, ethers, isomers or salts is possible, but does not include decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(d) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) amobarbital;

(2) mandrix or mandrax;

(3) mecloqualone;

(4) methaqualone;

(5) pentobarbital;

(6) phencyclidine, also known as PCP;

(7) secobarbital.

(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts;

(5) fenethylline;

(6) N-ethylamphetamine;

(7) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(9) 4-methylaminorex, also known as 2-amino-4-methyl-5-phenyl-2-oxazoline;

(10) N,N-dimethylamphetamine, also known as N,N,alpha-trimethylybenzencethaneamine or N,N,alpha-trimethylphenethyline, its salts, optical isomers, and salts of optical isomers.

(f) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, mixture, or preparation which contains any quantity of the following substances:

(1) immediate precursor to amphetamine and methamphetamine:

phenylacetone also known as phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone;

(2) immediate precursors to phencyclidine, also known as PCP:

(A) 1-phencylclohexylamine;

(B) 1-piperidinocyclohexanecarbonitrile, also known as PCC.

History -

(Sec. 2 ch 45 SLA 1982; am Sec. 3 - 5 ch 76 SLA 1990)

Decisions -

Annotators notes.Some of the cases cited in the notes below were decided under former AS 17.10.

Regulation of cocaine. - Word "narcotic" in common usage includes cocaine although cocaine is not a narcotic pharmacologically. State v. Erickson, 574 P.2d 1 (Alaska 1978).

The legislature specifically intended to regulate the use and possession of cocaine, regardless of its particular pharmacological status. State v. Erickson, 574 P.2d 1 (Alaska 1978).

Constitutionality of classification of cocaine as narcotic. - The classification of cocaine with narcotics under former AS 17.10 was not violative of equal protection or due process. State v. Erickson, 574 P.2d 1 (Alaska 1978).

When viewed from the overall legislative purpose of preventing the use of a drug harmful to the health and welfare of society, the classification of cocaine as a narcotic drug was not so irrational or arbitrary as to violate due process. State v. Erickson, 574 P.2d 1 (Alaska 1978).

Cocaine was not unconstitutionally classified as a narcotic drug by former AS 17.10. Johnson v. State, 577 P.2d 230 (Alaska 1978).

Cited in Williams v. State, 743 P.2d 397 (Alaska Ct. App. 1987); Snider v. State, 958 P.2d 1114 (Alaska Ct. App. 1998); Magee v. State, 77 P.3d 732 (Alaska Ct. App. 2003); Netling v. State, 145 P.3d 609 (Alaska Ct. App. 2006).

Sec. 11.71.120. Authority to schedule controlled substances.

(a) If, after considering the factors set out in (c) of this section, the committee decides to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 - 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.

(b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.

(c) In advising the governor of the need to add, delete, or reschedule a substance under AS 11.71.110(1), the committee shall assess the danger or probable danger of the substance after considering the following:

(1) the actual or probable abuse of the substance including

(A) the history and current pattern of abuse both in this state and in other states;

(B) the scope, duration, and significance of abuse;

(C) the degree of actual or probable detriment which may result from abuse of the substance;

(D) the probable physical and social impact of widespread abuse of the substance;

(2) the biomedical hazard of the substance including

(A) its pharmacology, in the effects and modifiers of the effects of the substance;

(B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;

(C) the risk to public health and the particular susceptibility of segments of the population;

(3) whether the substance is an immediate precursor of a substance already controlled under this chapter;

(4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;

(5) the relationship between the use of the substance and other criminal activity, including

(A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;

(B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;

(C) whether the commission of other crimes is one of the effects of abuse of the substance;

(D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

(d) *[Repealed, Sec. 40 ch 6 SLA 1984].*

(e) The committee has no authority over tobacco or alcoholic beverages as defined in AS 04.21.080.

History -
(Sec. 2 ch 45 SLA 1982; am Sec. 40 ch 6 SLA 1984)
History Reports -

For statement of the purpose of the 1984 repeal of subsection (d) of this section, see the 1984 House Journal at p. 2287, in the paragraph captioned "Section 40."

Decisions -

Construction of former law. - For construction of former AS 17.12.040, concerning regulations and authorizing the commissioner of health and social services to promulgate list of certain drugs, see State v. Erickson, 574 P.2d 1 (Alaska 1978).

Sec. 11.71.160. Schedule IIIA.

(a) A substance shall be placed in schedule IIIA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public less than the substances listed in schedule IIA but higher than substances listed in schedule IVA.

(b) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers whether optical, position, or geometric, and salts of these isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) benzphetamine;

(2) chlorphentermine;

(3) clortermine;

(4) *[Repealed, Sec. 12 ch 76 SLA 1990].*

(5) phendimetrazine;

(6) any compound, mixture, or preparation in dosage unit form containing any stimulant substance listed in schedule IIA, which compound, mixture, or preparation was listed on August 25, 1971, as an excepted compound under 21 C.F.R. Sec. 1308.32, and any other drug of the quantitative composition shown in that list for those substances, or which is the same except that it contains a lesser quantity of any controlled substance.

(c) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) amobarbital, secobarbital, or pentobarbital or any salt of these substances, combined with one or more other active medicinal ingredients which are not listed in any other schedule;

(2) amobarbital, secobarbital, or pentobarbital or any salt of these substances, approved by the federal Food and Drug Administration for marketing only as a suppository;

(3) any substance which contains any quantity of a derivative of barbituric acid or any salt of barbituric acid;

(4) chlorhexadol;

(5) glutethimide;

(6) lysergic acid;

(7) lysergic acid amide;

(8) methyprylon;

(9) sulfondiethylmethane;

(10) sulfonethylmethane;

(11) sulfonmethane;

(12) tiletamine and zolazepam, or any of their salts.

(d) Schedule IIIA includes nalorphine.

(e) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts calculated as the free anhydrous base or alkaloid, in the following quantities:

(1) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(2) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(3) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(4) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

(5) not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

(6) not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(7) not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(8) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(f) Schedule IIIA includes

(1) hashish;

(2) hash oil or hashish oil;

(3) tetrahydrocannabinols;

(4) parahexyl;

(5) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product; and

(6) nabilone.

History -

(Sec. 2 ch 45 SLA 1982; am Sec. 6, 7, 12 ch 76 SLA 1990)

Decisions -

Cited in Magee v. State, 77 P.3d 732 (Alaska Ct. App. 2003).

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: HB007
() Publish Date

Identifier (file name): HB007-LAW-CRIM-01-29-11
Dept. Affected: Law
Title: An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances; and providing for an effective date.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Representative(s) Munoz, Herron, Kerttula, Gatto, Lynn, Pruitt
Requester: (H) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager
Phone: 465-5427
Division: Administrative Services
Date/Time: 1/29/11 5:35 PM
Approved by: John J. Burns, Attorney General
Department of Law
Date: 1/29/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB007

Analysis

This bill adds several chemical forms of Synthetic cannabinoids to Schedule IIA of Alaska's prohibited substance Schedules. Currently, cannabis or Marijuana is a Schedule VIA prohibited substance. The anticipated fiscal impact is zero, however, if litigation ensues there will be addition costs in defending this litigation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB 7**
() Publish Date: 1/18/2011

Identifier (file name) HB7-DOC-OC-02-02-11
Title: "An Act classifying synthetic cannabinoids as schedule IIA
Sponsor: Rep. Munoz, Herron, Kerttula, Gatto, Lynn & Pruitt
Requester: Judiciary Committee

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time 2/2/2011 2:30 p.m.
Approved by: Joseph D. Schmidt, Commissioner — Date 2/2/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 7

Analysis

This legislation makes synthetic cannabinoids a schedule IIA controlled substance. Currently, possession of a schedule IIA is a Class C felony with a possible sentence of 0-2 years. Manufacturing or delivering a schedule IIA controlled substance is a Class B felony with a possible sentence of 0-4 years. The current average daily cost to house an inmate is $136.44. Therefore, housing an offender could cost the department anywhere from $0.0 (no time served) to $199,202.40 (for a 4-year sentence).

Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of actual violations that will occur.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB7**
() Publish Date

Identifier (file name): HB007-DPS-LAB-02-02-11
Title: "An Act Relating to Synthetic Cannabinoids As Schedule IIA"
Sponsor: Representative Munoz
Requester: House Judiciary

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Laboratory Services
OMB Component Number: 527

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	96.0		96.0	96.0	96.0	96.0	96.0
Travel	3.0		3.0	3.0	3.0	3.0	3.0
Services	8.5		5.6	5.6	5.6	5.6	5.6
Commodities	12.0		2.0	2.0	2.0	2.0	2.0
Capital Outlay	7.3						
Grants							
Miscellaneous							
TOTAL OPERATING	**126.8**		**106.6**	**106.6**	**106.6**	**106.6**	**106.6**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	126.8		106.6	106.6	106.6	106.6	106.6
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**126.8**	**0.0**	**106.6**	**106.6**	**106.6**	**106.6**	**106.6**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version.

Prepared by: Orin Dym, Laboratory Manager — Phone: (907) 269-5743
Division: Scientific Crime Detection Laboratory — Date/Time: 2/02/2011 3:30PM
Approved by: Joseph A Masters, Commissioner — Date: 2/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB7

Analysis

This proposed legislation would add certain synthetic cannabinoids to the schedule IIA list of controlled substances. This bill would become effective immediately upon passage.

The Alaska Scientific Crime Detection Laboratory (Crime Laboratory) provides analysis of suspected controlled substances, issues reports, and provides expert testimony for the state of Alaska. For calendar year 2010 the laboratory received 1,267 requests for controlled substances analysis. A full time position is capable of analyzing 480 requests per year. The Controlled Substances Section of the Crime Lab currently has 2.5 full time staff assigned to it.

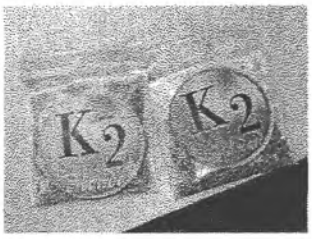
Once controlled, it is anticipated that the Crime Laboratory will receive significant requests for analysis related to the newly controlled substances. With the large presence of internet sales, and the ability for manufacturers to rapidly change the substances present in the materials sold, any suspected of containing these newly controlled substances will require scientific analysis at the Crime Laboratory.

This new position would come at an initial cost of $126,800. This includes a starting salary with benefits of $96,000, a work station start up cost of $7,300 for equipment , $2,000 for supplies, and there will be $3,000 in travel funds required for the ongoing training and education necessary for an analyst to maintain their expertise and certifications. There is an expected $5,000 in contractual costs as well, and this position also requires an initial $3,500 to obtain licensing required for the laboratory's LIMS database. Subsequently, there is a yearly 18% maintenance fee for that license. In addition to the above considerations involved with this new position, the Crime Laboratory would be required to obtain the standards necessary to analyze these nine new chemicals and their various isomers. This would be a one-time cost of $10,000.

In addition to the ongoing salary, benefits, and necessary travel costs relative to this position, all positions utilize an ongoing $2,000 for supply needs, and there is an ongoing licensing and maintenance cost of $5,600 per year. Therefore, the initial cost for this position would be $126,800, with a subsequent ongoing cost of $106,600.

Synthetic Cannabinoids (K2)

Posted October 5, 2010



NCSL Resources Related to Synthetic Cannabinoids

State Laws Related to Synthetic Cannabinoids

State Legislation on Synthetic Cannabinoids Pending on October 5, 2010

Synthetic Cannabinoids

Synthetic cannabinoids are chemically engineered substances, similar to THC—the active ingredient in marijuana—that, when smoked or ingested, can produce a high similar to marijuana. Initially developed for research related to treatment of pain and the effects of cannabis on the brain, these substances have recently become a popular alternative to marijuana. When sprayed onto dried herbs, the substances are marketed under names such as "Spice," "K2" or "Genie" and sold legally in local convenience stores or on the Internet.

The European Monitoring Centre for Drugs and Drug Addiction cautions that little research has been conducted on their effects on humans. As of September 2010, the American Association of Poison Control Centers documented more than 1,500 calls to poison control centers for symptoms such as racing heartbeat, nausea and elevated blood pressure following use of synthetic cannabinoid products. Only 14 such calls were received in 2009.

State Action

State lawmakers are acting quickly to curb the growing availability and use of these substances by passing laws to designate certain synthetic cannabinoids as schedule I controlled substances and outlaw their possession or distribution.

Because there are at least seven documented categories of synthetic cannabinoids, state laws identify specific types or specific chemical substances commonly found in them.

Synthetic Cannabinoids Listed in Statute	
Chemical Substance	*Trade Name (if applicable)*
1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole	JWH-200
1-Butyl-3-(1-naphthoyl)indole	JWH-073
1-hexyl-3-(1-naphthoyl)indole	JWH-019
1-pentyl-3-(1-naphthoyl)indole	JWH-018
1-pentyl-3-(2-methoxyphenylacetyl)indole	JWH-250
1-pentyl-3-(4-chloro-1-naphthoyl)indole	JWH-398
2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol)	CP 47, 497 and homologues

(2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone	JWH-015
(6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c] chromen-1-ol)	HU-210
Dexanabinol	HU-211
Dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol	HU-211

Federal Action

As of September 2010, the Federal Drug Enforcement Administration (DEA) identified five "spice cannabinoids"--CP 47, 497 and homologues; HU-210; HU-211; JWH-018; and JWH-073--as drugs of concern. Except for HU-210, no synthetic cannabinoids currently are controlled under the federal Controlled Substances Act. The DEA also reports that, except for HU-210, no studies have been conducted on the effects of these drugs on humans.

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NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Synthetic Cannabinoid State Laws

(Updated: October 5, 2010)

State	Related Bill Numbers	Classified as a Schedule I Controlled Substance	Crimes and Penalties	Chemical Substances*
Alabama	HB 697 (2010)	No	Subject to the same penalties as possession of marijuana in the first and second degree.	HU-210; JWH-018; and JWH-073.
Georgia	HB 1309 (2010)	Yes	Not Specified	CP 47, 497 and homologues; HU-210; and JWH-018.
Illinois	HB 6459 (2010)	Yes	Not Specified	JWH-018 and JWH-073.
Kansas	HB 2411 (2010)	Yes	Not Specified	HU-210; JWH-018; and JWH-073.
Kentucky	HB 265 (2010)	Yes	Possession of synthetic cannabinoid is a class B misdemeanor. Trafficking in synthetic cannabinoid and manufacturing synthetic cannabinoids are class A misdemeanors. Subject to the same penalties and exclusions as marijuana for certain controlled substances crimes.	Any chemical compound that contains CP 47, 497 and homologues; dexanabinol; JWH-018; or JWH-073. Excludes synthetic cannabinoids that require a prescription, are approved by the USDA and are legally dispensed.

State	Related Bill Numbers	Classified as a Schedule I Controlled Substance	Crimes and Penalties	Chemical Substances*
Louisiana	HB 121 (2010), HB 173 (2010), and SB 37 (2010)	Yes	Subject to the same penalties as possession, distribution and possession with intent to distribute of marijuana.	CP 47, 497 and homologues; HU-210; JWH-018; and JWH-073.
Michigan	HB 6038 (2010)	No	Not Specified	CP 47,497; HU-210; JWH-015; JWH-018; JWH-073; JWH-200; and JWH-250.
Mississippi	SB 2004 (2010)	Yes	Subject to the same penalties and exclusions as marijuana for certain controlled substances crimes.	CP-47, 497 and homologues; HU-210; JWH-018; JWH-019; JWH-073; JWH-200; JWH-250; and JWH-398.
Missouri	HB 1472 (2010)	Yes	Possession of 35 grams or less of synthetic cannabinoids is a class A misdemeanor, and possession of more than 35 grams is a class C felony.	HU-211; Indole or JWH-018; Indole or JWH-073; and Phenol CP 47, 497 and homologues.
Tennessee	SB 2982 (2010)	No	Subject to the same penalties as producing, manufacturing, distributing, possessing or possessing with intent to produce, manufacture or distribute salvia divinorium.	HU-210; HU-211; JWH-018; and JWH-073. Excludes synthetic cannabinoids lawfully prescribed or substances approved by the Food and Drug Administration.

*Synthetic Cannabinoid Chemical Substances and Trade Names:

- 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole [**trade name: JWH-200**]
- 1-Butyl-3-(1-naphthoyl)indole [**trade name: JWH-073**]
- 1-hexyl-3-(1-naphthoyl)indole [**trade name: JWH-019**]
- 1-pentyl-3-(1-naphthoyl)indole [**trade name: JWH-018**]
- 1-pentyl-3-(2-methoxyphenylacetyl)indole [**trade name: JWH-250**]
- 1-pentyl-3-(4-chloro-1-naphthoyl)indole [**trade name: JWH-398**]
- 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol) [**trade name: CP 47, 497 and homologues**]

- [(6a*R*,10a*R*)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c] chromen-1-ol)] [**trade name: HU-210**]
- (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone [**trade name: JWH-015**]
- Dexanabinol
- dexanabinol, (6a*S*,10a*S*)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol [**trade name: HU-211**]

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

State Legislation on Synthetic Cannabinoids
Pending on October 5, 2010

2010 PENDING LEGISLATION

New Jersey AB 2644
Adds the synthetic cannabinoids HU-210, JWH-018 and JWH-073 to the list of controlled substances as schedule I drugs.

New York SB 7081
Defines synthetic cannabinoid to include CP 47, 497; HU-210; HU-211; JWH-018; and JWH-073. Prohibits sale or distribution of any product containing a synthetic cannabinoid. Establishes a defense for FDA-approved over-the-counter drugs or lack of knowledge that the product contained a synthetic cannabinoid.

New York AB 10439
Adds HU-210, JWH-018, JWH-073 and the components of synthetic ecstasy 1-(3-[trifluoromethylphenyl]) piperazine (trade name: TFMPP) to the list of schedule I controlled substances.

New York AB 11216
Prohibits sale or distribution of any product containing a synthetic cannabinoid; defines the chemical compounds that constitute a synthetic cannabinoid; imposes a civil penalty of not more than $1,000 for a violation thereof; creates defenses based on over-the-counter drugs approved by the Food and Drug Administration or lack of knowledge that the product contained a synthetic cannabinoid.

Ohio SB 275
Adds JWH-018 and JWH-073 to the list of schedule I controlled substances.

Ohio HB 544
Adds synthetic cannabinoids commonly known as K2 or Spice to the list of Schedule I controlled substances; prohibits the possession of Spice; prohibits trafficking in Spice; provides that, if Spice is the drug involved in a violation of the offense of corrupting another with drugs, the penalty for the violation will be the same as if marihuana was the drug involved in the offense.

Pennsylvania HB 176
Adds CP 47, 497; HU-210; HU-211; JWH-018; and JWH-073 to the list of schedule I controlled substances.

NCSL's Criminal Justice Program is in Denver, Colo., at (303) 364-7700 or cj-info@ncsl.org.
Statutes and bills may be edited or summarized; full text can be retrieved from NCSL's website.

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STRAIGHT TOX

Herbal Incensed

Synthetic Cannabinoids Detected in Herbal Incense and Smoking Blends

by Dwain C. Fuller, D-FTCB, TC-NRCC

I am a skeptic by nature. I am particularly circumspect about believing anecdotal accounts of just about anything. I've become even more jaded in light of the number of urban legends that otherwise intelligent people send to my inbox each week. Thus is my reason for waiting this long to cover the Spice/K2 issue. It was my contention that I should wait and see what happens. I figured that if one is willing to smoke some mix of herbs that one doesn't even know the identity of, a person is likely to get sick and have some bad experiences, as well as some real, or perhaps imagined, good experiences, i.e. placebo effect. However, there now appears to be reliable scientific evidence that at least some of these products contain potent cannabinoid-like compounds.

What are "K2" and "Spice"?

K2 and Spice are trade names for two different products, but what they have in common is that they are sold as "herbal incense" or "herbal smoking blends". These products have become very popular with teenagers across the nation who are using them in place of marijuana, fueled by their ease of purchase (internet and "head shops") and their legal status in most areas. The users of these and similar products are beginning to show up in emergency rooms with hallucinations, nausea, vomiting, hypersomnolence, agitation, and other adverse reactions.

The origins of Spice and K2 appear to be primarily in Europe, China and Korea, with many competing products, or "knock-offs", appearing for sale on the internet daily. A check of one website offered various K2 products: K2 Summit, K2 Blue, K2 Pink, K2 Mango, K2 Citron, and K2 Bubblegum, for sale at prices ranging from about $10 to $15 per gram. The

ingredient list on the package claims that it contains a number of herbal products. However, there is growing evidence that herbs are not the only active ingredients.

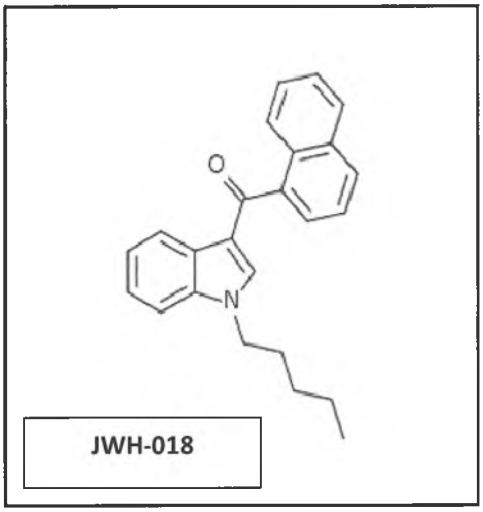
- On December 15, 2008 the German pharmaceutical company, THCPharm, announced that it had found the synthetic cannabinoid, JWH-018, in at least three versions of Spice.
- On January 19, 2009 the University of Freiburg in Germany announced that another synthetic cannabinoid known as CP 47,497 had been detected in Spice.
- In March 2009 the Drug Enforcement Administration reported in the *Microgram Bulletin* that Customs and Border Protection – Chicago Laboratory, had recently found the synthetic cannabinoid, HU-210, in "small but verifiable amounts" in "incense" labeled as "Spice Gold", "Spice Silver", "Spice Diamond", "Genie", and "Yucatan Fire".
- Not to be outdone, in October 2009 the Johnson County Criminalistics Laboratory in Mission, Kansas reported that it detected the presence of two synthetic cannabinoids, JWH-018 and JWH-073, in a K2 product submitted to the laboratory.

Synthetic Cannabinoids, a Primer:

This subject is too vast to cover in depth in an article such as this, so I will provide an overview of the various synthetic cannabinoids that have been implicated in these "herbal blends":

JWH-018

All of the "JWH" designated cannabinoids take their prefix initials from Clemson University organic chemist, John W. Huffman. Dr. Huffman's research interests include the synthesis of analogues and metabolites of THC, with the goal of developing new pharmaceutical products and elucidating the geometry of the CB_1 and CB_2 receptor.



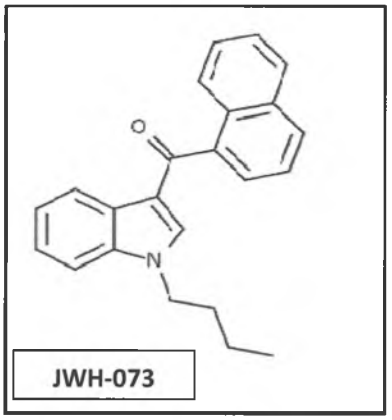
JWH-018

Dr. Huffman first synthesized JWH-018 in the mid-1990's, but notes that JWH-018 was being sold as a plant growth stimulant in China and Korea even before he published a book chapter of the synthetic scheme for this and other cannabinoid agonists.

JWH-018 has a molecular mass of 341.45 and bears the IUPAC name, Naphthalen-1-yl-(1-pentylindol-3-yl)methanone. JWH-018 acts as an agonist at both the CB_1 and CB_2 receptors with some selectivity for the CB_2, and produces marijuana-like effects of somewhat longer duration. JWH-018 is not currently scheduled in the United States.

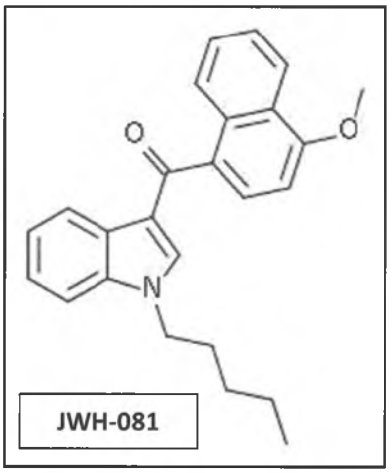
JWH-073

JWH-073 has a molecular mass of 327.42 and bears the IUPAC name, Naphthalen-1-yl-(1-butylindol-3-yl)methanone, differing by only by a methylene group in the alkyl chain on the indole portion of the molecule from JWH-018. JWH-073 is a CB_1 and CB_2 receptor agonist with approximately 5 times the affinity for the CB_2 compared to the CB_1 receptor. JWH-073 is not currently scheduled in the United States.



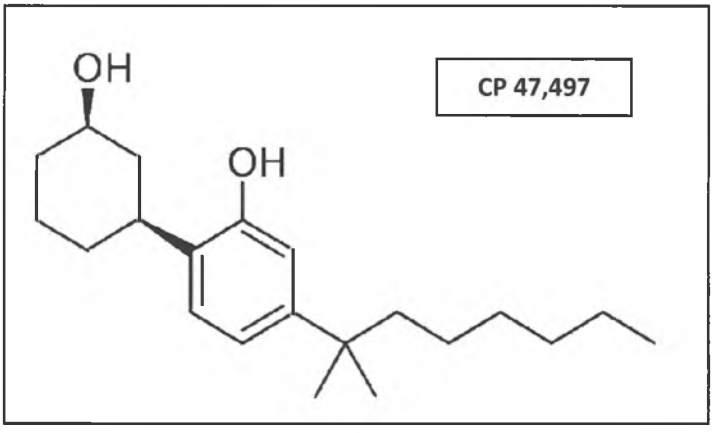
JWH-081

JWH-081 has a molecular mass of 371.47 and bears the IUPAC name, 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone, differing from JWH-018 by a methoxy group in the 4 position of the naphthalene portion of the molecule. JWH-081 is a CB_1 and CB_2 receptor agonist with selectivity for the CB_1 receptor approximately 10 times that of the CB_2 receptor. There is speculation that JWH-081 is replacing JWH-018 in herbal blends that are being marketed in states where the latter is being banned. JWH-081 is not currently scheduled in the United States.



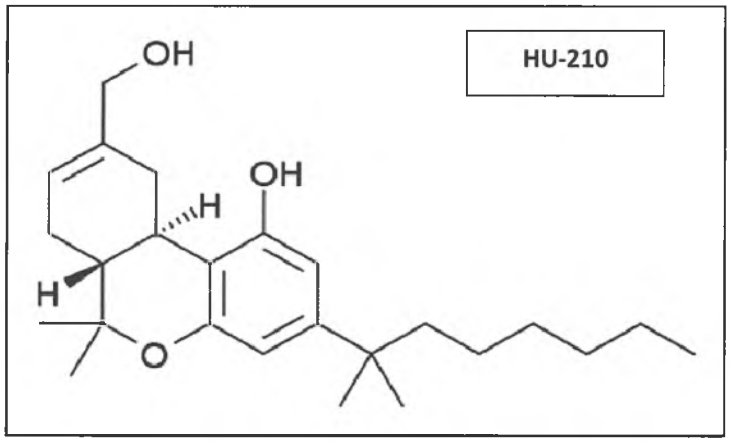
CP 47,497

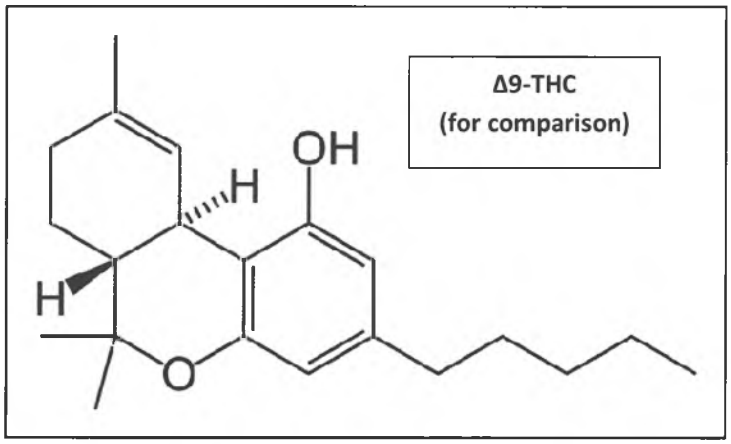
CP 47,497 has a molecular mass of 318.49 and bears the IUPAC name, 2-[(1R,3S)-3-hydroxycyclohexyl]- 5-(2-methyloctan-2-yl)phenol. CP 47,497 was developed by Pfizer in the 1980's and is reported to be a potent CB_1 agonist. CP 47,497 is not currently scheduled in the United States.



HU-210

HU-210 has a molecular mass of 386.57 and bears the IUPAC name, (6a*R*,10a*R*)- 9-(Hydroxymethyl)- 6,6-dimethyl- 3-(2-methyloctan-2-yl)- 6a,7,10,10a-tetrahydrobenzo [c]chromen-1-ol. Noteworthy is the extreme similarity to Δ9-THC, differing only in the alkyl group, an additional hydroxyl group, and the position of the double bond, which is analogous to Δ8-THC. HU-210 was first synthesized by a group at Hebrew University (thus the "HU" designation) led by Professor Raphael Mechoulam. In mice HU-210 decreased overall activity, produced analgesia, decreased body temperature, and produced catalepsy. In in-vitro studies, HU-210 bound both the CB_1 and CB_2 receptors. HU-210 is reported to be 100 – 800 times more potent than THC with an extended duration of action. HU-210 is a schedule I controlled substance in the United States.





Legality

For the most part, K2, Spice and related products are not illegal in the United States based on their stated ingredients. Their continued legal status will depend, in part, on whether they are found to universally contain synthetic cannabinoids, whether those substances are controlled, as is HU-210, and whether any of the other included cannabinoids will be deemed to fall under the Federal Analog Act, which is a rather confusing document in its own right.

Summary

The use of clandestine synthetic cannabinoids in the guise of herbal preparations appears to be an increasing problem, especially among teens. Only time will tell if the trend continues. If it does, laboratories will need to gain access to standards for these compounds and to develop assays to detect these substances, which in some incidences are many times more potent than Δ9-THC.

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Army punishes 36 for using synthetic pot

SPICE AND K2: U.S. Army Alaska banned head shop product in August.

The Associated Press

(12/21/10 11:33:48)

The U.S. Army Alaska says it has punished 36 soldiers for the use of synthetic marijuana since it banned the substance.

Seven soldiers were tried at courts-martial, and 29 received nonjudicial punishments, the Fairbanks Daily News-Miner reported.

Synthetic marijuana is known as Spice or K2. It's a blend of spices and herbs sprayed with a compound similar to the psychoactive ingredient in marijuana. It's commonly sold in head shops.

Some users think the substance can't be detected in drugs tests. But the Army says its urine tests can now find the chemicals used in Spice.

In March, a 25-year-old Fort Richardson soldier just back from Iraq was convicted of driving under the influence of Spice. He was arrested after driving his Chevrolet Avalanche over three raised medians, into a concrete wall and down a sidewalk with flat tires and a broken axle.

The U.S. Army Alaska banned Spice in August.

It had seen an increase in users with high blood pressure and heart rates admitted to hospitals at Fort Richardson in Anchorage and Fort Wainwright in Fairbanks.

The soldiers have had life-threatening reactions in some cases, the commander of U.S. Army Alaska, Brig. Gen. Raymond Palumbo, wrote in a commentary published in the Fort Richardson and Fort Wainwright newspapers.

"We have no idea what the long-term effects are since the chemicals vary and have not been fully tested," Palumbo wrote. "But we do know that in the short term, bad things happen when people use Spice."

This month, the Anchorage Assembly voted unanimously to make the chemicals illegal in the city as of Jan. 6. It will be a misdemeanor to sell, make, have or use products containing cannabinoids, which are versions of the active ingredients in marijuana. The products are found in convenience stores and tobacco shops in parts of the country where they're not illegal.

In October, state Sen. Kevin Meyer, R-Anchorage, proposed a bill to outlaw Spice after state troopers arrested a Fairbanks man who used the substance, broke into a house, stripped naked and slept in the homeowners' bed. He told troopers God had told him to do so.

The U.S. Drug Enforcement Agency has started a process to outlaw five chemicals commonly used in synthetic marijuana.

adn.com
Anchorage Daily News

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Assembly outlaws chemical known as 'synthetic marijuana'

By ROSEMARY SHINOHARA
rshinohara@adn.com
(12/08/10 20:59:04)

A street chemical that authorities say can cause severe reactions will be illegal in Anchorage starting in early January.

The Anchorage Assembly on Tuesday voted unanimously to ban the sale, possession or use of products containing synthetic versions of cannabinoids. The products go by a variety of names such as K2, Spice and Spike, and are found in convenience stores and tobacco shops in parts of the country where they're not illegal.

Cannabinoids, natural and synthetic, are versions of the active ingredients in marijuana.

"These products pose serious and significant health risks up to and including death, and they offer nothing positive to anyone ingesting it," said Assembly member Paul Honeman, a former police officer. Assembly members Honeman, Dick Traini and Mike Gutierrez and Mayor Dan Sullivan sponsored the new city law.

State Sen. Kevin Meyer, R-Anchorage, has pre-filed a legislative bill for consideration next year that would criminalize such products on a statewide basis.

In Anchorage, it will be a misdemeanor to sell, make, have or use products containing cannabinoids starting on Jan. 6.

The Anchorage School District made public its fears about use of the synthetic chemical last April, and said some Anchorage teens have been hospitalized. In October, school district spokeswoman Heidi Embley said regular marijuana is still much more prevalent, and that the district knew of probably only a handful of synthetic cannabinoid cases.

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JuneauEmpire.com

CBJ readying to outlaw synthetic cannabis

Substance is banned in as many as 15 states, city attorney says

Tuesday, January 11, 2011

Story last updated at 1/11/2011 - 1:33 am

CBJ readying to outlaw synthetic cannabis
Substance is banned in as many as 15 states, city attorney says

By Sarah Day | JUNEAU EMPIRE

The City and Borough of Juneau may soon preempt the state in making synthetic marijuana illegal. A draft ordinance could be ready by the next Borough Assembly meeting.

City Attorney John Hartle gave an update Monday on research he'd done on the legal aspect of banning the substances, per the request of Assemblyman Merrill Sanford.

Synthetic marijuana is currently banned in 13 to 15 states, Sanford said. According to an article in the Boston Globe in late December, the U.S. Drug Enforcement Administration is looking at banning five of the chemicals used in synthetic marijuana — often called K2 or Spice. The drug is currently legal on a national basis, and can be purchased from smoke shops, convenience and grocery stores.

"There's been a number of cases reported at the hospital and some cases reported through the Juneau Police Department about the use and hazards of using the Spice drug," Sanford said. "Of course, some people can use it like other drugs and get away with it without having ill effects. Some people have been in the hospital for a week or more recovering from the use."

Sanford said synthetic marijuana is not regulated and the quantity of the components varies.

The City of Anchorage enacted an ordinance last month making use, possession or sale of synthetic marijuana illegal.

Hartle recommended drafting an ordinance based on Anchorage's. Hartle said typically this is the domain of state and federal governments. Bills criminalizing the substance are going before state lawmakers, Hartle said. "If those are adopted, those will take maybe nine months to take effect."

Hartle recommended the Assembly include an automatic repeal once a state law similar to the city ordinance goes into effect.

Sanford agreed. "I don't think we should lose any opportunities at all to get this stuff off the streets as much as possible," he said.

Juneau's police department hasn't yet had a chance to comment on the proposal.

- Contact reporter Sarah Day at 523-2279 or at sarah.day@juneauempire.com.

The Oakland Press (**theoaklandpress.com**), Serving Oakland County

Sports

Frightening new drug becoming concern in athletics

Saturday, May 1, 2010

By The Associated Press

KANSAS CITY, Mo. (AP) — The company that does drug testing for the NFL, NCAA and more than 100 U.S. schools is coming up with a way to detect a troubling new synthetic substance that mimics the effects of marijuana and is so far legal in 49 states.

The lab-made drug known as K2, King Krypto and Spice, among other names, is well known in Europe and authorities say it's been banned in countries including Germany, Russia, Sweden and England.

It began showing up in the United States only about six months ago, federal authorities say, and Kansas outlawed it in March. A ban at the federal level could take months, if not years.

The NCAA declined to comment on the drug, but the agency it pays to conduct drug testing is already working on a test to detect K2 use after hearing from a number of schools concerned about it.

By this fall, the National Center for Drug Free Sport Inc. hopes to have a test ready to go for college athletes, many of whom may be especially tempted by the drug.

"What you see with college kids is they're young and they think they're invincible," said Barbara Carreno, a spokeswoman for the U.S. Drug Enforcement Agency. "They don't have a sense of their own mortality yet. And with this, they're not going to get thrown in jail. It's got a lot of appeal."

The NCAA bans a broad swath of substances, including marijuana, and anything "chemically related" to those substances whether they are performance enhancers or recreational drugs.

Drug Free Sport contracts with the NFL, NCAA, several athletic conferences and schools to administer more than 20,000 drug tests annually. Athletes are tested at NCAA championships and randomly throughout the academic year, and Drug Free Sport tests athletes who fall under suspicion by coaches or trainers.

"We started receiving phone calls about K2 after the first of the year from a few schools," said Frank Uryasz, president of the Kansas City-based company. "They were concerned that they were hearing athletes talk about K2."

Uryasz is confident K2 will eventually be banned in college athletics and Carreno is equally certain states will outlaw it.

But so far, Kansas lawmakers are alone in taking action.

"We found out about it in October," said Jeremy Morris, a senior forensics scientist at the Johnson County, Kan., criminal investigation laboratory. "And by March, the governor signs the bill and we have it controlled. Kids were getting sick, going to the hospital, and we couldn't stop it. But now we can."

Officials interviewed for this story were not aware of any deaths resulting from the use of K2. But many expressed concern about the drug's effects.

"It's rather frightening," said Dr. Anthony Scalzo, director of the Missouri Regional Poison Control Center in St. Louis and a consultant in cases of suspected K2 use around the country.

"We've had people come in with dreadful symptoms. They're agitated. Their heart's racing. Their blood pressure is up," Scalzo said. "They feel terrible. Some are even paranoid and having hallucinations. And the tests come back negative, even for marijuana. So doctors wind up scratching their heads and wondering what's going on here.

"I've also had patients say, 'Hey, Doc, I know you're trying to do your best on this, but I had some K2 and let me tell you, I felt perfectly fine.'"

Like the NCAA, the Big Ten Conference declined to comment when asked about the new drug. Ed Stewart, an assistant commissioner of the Big 12, said he had not heard of it.

But calls and e-mails about K2 have begun coming into Drug Free Sport's Resource and Exchange Center, a service that answers questions from anonymous athletes, trainers, or anyone connected with college sports.

"They were all anonymous, so we don't know where they came from or who they came from, or if they were using it or just trying to learn more about it," said Dan Regan, a staff member at Drug Free Sport. "But there have been inquiries."

K2, in whatever form, is available for roughly the same price as marijuana and it can be purchased over the counter. Steve Vogt can hardly keep the stuff in stock at Weedz, a shop he owns near the Las Vegas Strip.

"You can make $7,000 a day if you've got a busy shop," Vogt said in a telephone interview. "I don't think I want to say exactly how much. But I'm going through a lot. All I do is keep buying more. More and more people are hearing about it. More and more people are buying it."

The DEA said the drug is made primarily abroad, in Europe and China, and Scalzo said K2 was developed in laboratory experiments in the mid-90s as scientists sought ways to restore the appetite of emaciated chemotherapy patients.

"I think we can make a pretty good guess that somebody was doing some research on synthetic cannabinoids and came across this paper and realized that was something that could be a pretty good drug," said Morris, the Kansas forensics expert.

A perfected test would be cheered by the DEA.

"God bless them and good luck," said Carreno, the agency spokeswoman. "It's not difficult to make a test, but there are so many different chemicals to test for to be comprehensive. You might be testing for HU-210 and your athletes are using JWH-018. Or JWH-173. There's a number of these chemicals and you have to test for all of them to know that you're catching them all."

URL: http://www.theoaklandpress.com/articles/2010/05/01/sports/doc4bdb8518a0e3f559107891.prt

Testimony for HB7

I would have to start by saying that I never thought I would have had a bad trip on synthetic herb, most times people have bad trips from mushrooms or acid but that herb I had was unlike anything I'd ever heard of. I had started smoking spice in February of this year and smoked on weekends. The appealing side of this herb was that it gave a marijuana like high for about 3 hours with just a couple of hits and the best part being that you didn't have to worry about drug tests because it passed for friends that I knew in the military so passing standard tests was not a problem.

Now another plus to this herb was that unlike normal weed, this herb is not supposed to produce any paranoia, and there was no sign of being high at all, such as no red eye, no half open eyes and you were able to basically be a functional stoner, you could be in public and not look or smell high in anyway. This of course was very appealing to me and many of my friends who also couldn't smoke weed because of drug tests at their jobs.

The brand of spice I had been smoking for about 6 months was called red dawn, spark 20. The herb I smoked the night of my incident was called spike, max. I only had 2 hits and less than 2 minutes later I was losing my perception of what was real in every way, it turned everything into a fuzzy cartoon like picture and I lost control of my legs that I couldn't walk at all. I couldn't talk. I could hear what I thought and what I wanted to say, but all I was spitting out was gibberish. This went on for what felt like many hours. I can remember thinking to myself that I wasn't actually going come out of this craziness and this might be how I end up dying! I remember telling my brother to call 911 and remember going into the ambulance and ending up in the hospital for a day. The doctors haven't had an incident with synthetic herb until that night and I had to basically be flushed out for 10 hours.

I know many people are still going to want to try spice but the fact it's just a bunch of chemicals sprayed on tobacco and nobody knows what the long term affects of this herb are and the scary thing is that this stuff is so easy to purchase. The price has dropped here in town from $53 a gram down to $30 a gram, which is just a bit more than the going rate for actual weed.

I would have thought this herb was completely harmless but the fact that a regular smoker such as myself could even have a bad experience as bad as mine was a huge eye opener to just how bad this stuff really is. The fact that it's very easy to get in town and that it only takes a little bit to get to a mind altering high is spooky. I know a large number of kids in town have had a substance abuse problem and this drug is dangerous because of the fact you can have an herb that twists reality in such a way that you can't tell what's real and what's a hallucination. I see this problem getting worse in the near future because it's a new drug that is easy to obtain and has a weed like high and at the same time has dangerous side effects.

FAIRBANKS POLICE
911 Cushman Street
Fairbanks, Alaska 99701-4616
Phone (907) 450-6500
Fax (907) 452-1588
Email: fpd@ci.fairbanks.ak.us

January 21, 2011

Representative Cathy Munoz
State Capitol Room 403
Juneau AK 99801

Dear Representative Munoz:

As the Chief of Police for the Fairbanks Police Department, I would like to extend my support of House Bill No. 7 "An Act classifying certain synthetic cannabinoids as schedule IIA controlled substances."

According to the U.S. Department of Justice Drug Enforcement Administration, these substances have no known therapeutic use and are known to cause a variety of effects including seizures, hallucinations, psychotic episodes, and non-responsiveness. In addition the Alaska Information Analysis Center (AKIAC) has reported in studies that subjects have reported having difficulties with balance, slurred speech, and being light headed.

These cannabinoids present a significant threat to the safety of Alaska's citizens as long as they remain unclassified. Without this new legislation a person who is under the influence of synthetic cannabinoids while operating a motor vehicle is not in violation of the law. This presents a clear danger to the citizens of Alaska, as someone could potentially be under the influence of a synthetic cannabinoid while driving and experience hallucinations, seizures, or a psychotic episode. This is not a hypothetical situation and the Fairbanks Police Department has already investigated a motor vehicle accident where the driver of the vehicle was having seizures as a result of consuming synthetic cannabinoids.

By classifying synthetic cannabinoids as a schedule II controlled substance, the act of operating a motor vehicle under the influence of a synthetic cannabinoid would become an illegal act. This bill would therefore have a direct impact on the safety of the citizens of the State of Alaska.

Sincerely

Laren Zager
Chief of Police
Fairbanks Police Department

Mat-Su Substance Abuse Prevention Coalition

January 31, 2011

Alaska House of Representatives

RE: Synthetic Cannabinoids

To Whom it May Concern,

The purpose of this correspondence is to support House Bill 7 that would list certain synthetic cannabinoids found in "K2" or "Spice" as Scheduled controlled substances which will provide law enforcement will have the necessary authority to prosecute the sell and possession of these substances. These drugs are currently being sold in several local venders which sends the social message that they are not harmful and social acceptable; thereby, increasing the risk for youth consumption and related consequences.

K2/Spice products are a mixture of herbal/spice plant products sprayed with potent psychotropic drugs, often contaminated with unidentified toxic substances which is marketed under variety of names including K2, Spice, Pep Spice, Spice Silver, Spice Gold, Spice Diamond, Smoke, Sence, Skunk, Yucatan Fire, Genie & Zohai and sold in variety of colors/flavors-usually sold in foil packaging

The growing popularity of these drugs is causing increasing alarm among law enforcement officials, lawmakers, and health care professionals across America. "Spice" has been banned by some U.S. domestic and overseas military commands as well as in Germany and other European countries because substances have been identified in the product to have the presence of chemicals with tetrahydrocannabinol (THC)-like effects.

The danger in smoking "Spice" is that the product is unregulated and not manufactured in a controlled environment. Smoking this product could be very harmful because the substance could also include unknown contaminants. Therefore, there is no way to accurately determine what the potential harmful effects could be. [1] Medical officials concur that smoking "Spice" can cause adverse effects to one's health. Hospitals have reported incidents of people, mostly

[1] 4Mind Hacks: Spice flow: the new street drug pharmacology December 01, 2009, Accessed 13 May 2010 and Wikipedia Accessed 13 May 2010

teenagers, visiting emergency rooms for: heart palpitations, respiratory issues, panic attacks, hallucinations, delusions, and, one case where a teen lapsed into a coma.[2]

The Mat-Su Substance Abuse Prevention Coalition seeks to reduce substance abuse among youth by advocating for and implanting evidence-based environmental strategies. These drugs are currently sold at local shops which increases access to the drug and sends the social message to young people that they are acceptable and not harmful.

I have attached legislation adopted by the state of Missouri which contains a list of the compounds used to create these drug which can be used by the Senate as a template to draft a similar bill/ordinance.

The Mat-Su Substance Abuse Prevention Coalition appreciates your time and consideration of this issue. If you would like any additional information, please contact the project coordinator, undersigned. Thank you for your time.

Sincerely,

Desiree Compton, for Mat-Su Substance Abuse Prevention Coalition
Project Coordinator
124 W. Swanson, Suite C
Wasilla, AK 99654
(907) 373-5818
dcompton@unitedwaymatsu.org

Mat-Su Substance Abuse Prevention Coalition

Vision: Our vision is to enhance our community by supporting healthy lifestyles and drug free alternatives.

Mission Statement: To reduce substance abuse among youth and, over time, among adults by addressing the factors in our community that increase the risk of substance abuse and promoting the factors that minimize the risk of substance abuse.

---

[2] "Synthetic Marijuana A Growing Trend Among Teens, Authorities Say", CNN/WIBW.com March 24, 2010. Accessed 10 May 2010

Kendra Kloster

From: bruce@donabel.biz on behalf of Bruce Abel [bruce@donabel.biz]
Sent: Tuesday, January 25, 2011 10:07 AM
To: Kendra Kloster
Subject: HB-7/SB17

Dear Representatives Munoz and Kerttula and Senator Egan:

I would like express my support and encourage you to pass HB 7 and SB 17 banning synthetic marijuana and the chemical substances that lace these "Herbal Incense". These substances should not be sold to anyone for any reason. The sale of such material should be designated a criminal act with penalties severe enough to discourage their sale and distribution.

As an employer with strict drug use policies the legal sale of synthetic narcotics creates untold liability. I think it is safe to say that if my fully loaded boom truck is in an accident with your loved ones and the driver has been enjoying "Herbal Incense" prior to the accident you won't be satisfied with a defense that the product was sold over the counter by a local business and is legal. Dead is dead. Legalizing these materials creates a liability nightmare for employers, school sports programs and endangers the public.

Alaska has more than its share of substance abuse problems so lets join with other states that have already passed legislation of this particular poison from being so readily available on store shelves.

Sincerely,

Bruce Abel
President/CEO
Don Abel Bilding Supply
9999 Glacier Highway
Juneau, AK. 99801

Kendra Kloster

From: frank.b@gci.net on behalf of Frank Bergstrom [frank.b@gci.net]
Sent: Tuesday, January 25, 2011 10:26 AM
To: Kendra Kloster
Subject: HB-7 and SB-17

Honorable Representatives Munoz and Kerttula, and Senator Egan:

Please support the above bills and outlaw synthetic cannabis products (Spice, K2, etc.).

- This family of drugs is intended to produce a high – thus users are impaired in any activities they may undertake (e.g. driving)
- These products appear to be falsely labeled and do not contain herbal plants, but rather cannabinoid compounds related to THC (active ingredient in pot); i.e., they lie

It would appear these products are a thinly veiled effort to bypass anti-marijuana rules to sell pot by-any-other-name. Whether it is pot or other, the stated intent is to produce a drugged high. That alone is sufficient to merit regulation as a controlled substance. At a minimum it should be so regulated – at best it would be made illegal. It's market is based on wriggling around anti-drug law. Let's close the door on the deceptive marketing of pot by-any-other-name. It is a drug (or group of drugs) being made available to the public essentially as an unregulated nutraceutical. This is a sham and should be ended.

Respectfully,

Frank Bergstrom

Frank Bergstrom
PO Box 22909
Juneau, AK 99802
907-523-1995 phone/fax
907-321-3637 cell
frank.b@gci.net

Kendra Kloster

From: Kasen Spickler [kasen_spickler@hotmail.com]
Sent: Monday, January 24, 2011 8:59 PM
To: Kendra Kloster
Cc: Scott Spickler
Subject: HB-7, SB17

To whom it may concern,

I would like to voice my opinion in favor of banning synthetic marijuana in Alaska. It's a very dangerous drug and it doesn't belong in our state.

I have seen what smoking this does to a person and it was a very scary experience. Vomiting, very intense hallucinations, and high heart rate just to name a few symptoms. I believe if I wasn't around during this episode this person very well could have died. I think it's just a matter of time before it does take someones life.

I hope Alaska follows in many other states footsteps and bans this substance.

Kasen Spickler
9690 N. Douglas Hwy.
Juneau, AK 99801

(907) 723-9330

Kendra Kloster

From: Scott Spickler [sspickler@gmail.com]
Sent: Monday, January 24, 2011 4:07 PM
To: Kendra Kloster
Subject: HB-7,SB17

To Representives Munoz and Kerttula and Senator Egan

I would like to voice my support for the passage of HB 7 and SB 17 banning synthetic marijuana and the chemical substances that these "Herbal Incense" are laced with.

I feel that for this product to be sold off the shelf by local businesses to anyone is a criminal act and the penalities should be severe enough to discourage the sale and distribution of this meth like product.

The target market for synthetic pot, in my opinion, is typically anyone that is trying to avoid drug use detection by their employers, (including the military), as well as students participating in school sports at districts that have a drug testing program in place.

While people over 18 should know better than to smoke this substance, many do not understand the consequences of inhaling the unregulated chemicals sprayed on these herbs. I fear that the drug is going to cause irreparable harm or death to someone, and sadly that someone will likely be under the age of 18 to get the public's attention and to shed the light on the potential harm that this product can cause. However, passage of a law to criminalize the sale and possession can help circumvent that concern.

The Federal Government regulates the importation of toys painted with lead from China, sometimes not all that well quite honestly. Alaska should join the ranks of several other states that have already passed legislation of this particular poison from being so readily available on store shelves.

We don't need to make it easy for people to gain access to this drug.

Thank you,

Scott Spickler
10754 Horizon Dr.
Juneau, AK. 99801

789-3780 W.

(xiii) Lysergic acid diethylamide.
(xiv) Mescaline.
(xv) 4-methoxyamphetamine.
(xvi) Methoxymethylenedioxyamphetamine (MMDA).
(xvii) Methylenedioxyamphetamine (MDA).
(xviii) 3, 4-methylenedioxymethamphetamine.
(xix) 3, 4-methylenedioxy-N-ethylamphetamine.
(xx) N-ethyl-3-piperidyl benzilate (JB-318).
(xxi) N-hydroxy-3, 4-methylenedioxyamphetamine.
(xxii) N-methyl-3-piperidyl benzilate (JB-336).
(xxiii) N-(1-phenylcyclohexyl) ethylamine (PCE).
(xxiv) Nabilone.
(xxv) 1-(1-phenylcyclohexyl) pyrrolidine (PHP).
(xxvi) 1-(1-(2-thienyl)-cyclohexyl) piperidine (TCP).
(xxvii) 1-(1-(2-thienyl)-cyclohexyl) pyrrolidine.
(xxviii) Para-methoxyamphetamine (PMA).
(xxix) Psilocybin.
(xxx) Psilocyn.
(xxxi) Synhexyl.
(xxxii) Trifluoromethylphenylpiperazine (TFMPP).
(xxxiii) Trimethoxyamphetamine (TMA).
(xxxiv) 1-PENTYL-3-(NAPHTHOYL)INDOLE (JWH-018 AND ISOMERS).
(xxxv) 1-BUTYL-3-(NAPHTHOYL)INDOLE (JWH-073 AND ISOMERS).
(xxxvi) 1-HEXYL-3-(NAPHTHOYL)INDOLE (JWH-019 AND ISOMERS).
(xxxvii) 1-PENTYL-3-(4-CHLORO NAPHTHOYL)INDOLE (JWH-398 AND ISOMERS).
(xxxviii) 1-(2-(4-(MORPHOLINYL)ETHYL))-3-(NAPHTHOYL)INDOLE (JWH-200 AND ISOMERS).
(xxxix) 1-PENTYL-3-(METHOXYPHENYLACETYL)INDOLE (JWH-250 AND ISOMERS).
(xl) (2-METHYL-1-PROPYL-1H-INDOL-3-YL)-1-NAPHTHALENYL-METHANONE (JWH-015 AND ISOMERS).
(xli) (6aR, 10aR)-9-(HYDROXYMETHYL)-6,6-DIMETHYL-3-(2-METHYLOCTAN2-YL)-6a,7,10,10a-TETRAHYDROBENZO[C]CHROMEN-1-OL) (HU-210).
(xlii) 5-(1,1-DIMETHYLHEPTYL)-2-(3-HYDROXY CYCLOHEXYL)-PHENOL (CP 47,497 AND ISOMERS).
(xliii) 5-(1,1-DIMETHYLOCTYL)-2-(3-HYDROXY CYCLOHEXYL)-PHENOL (CANNABICYCLOHEXANOL, CP-47,497 C8 HOMOLOGUE AND ISOMERS).

(b) Any material, compound, mixture or preparation which contains any quantity of the following substances and their salts, optical isomers, and salts of optical isomers having a potential for abuse associated with a stimulant effect on the central nervous system:

(i) Amphetamine.
(ii) Benzphetamine.
(iii) Benzylpiperazine (BZP).
(iv) Butorphanol.
(v) Cathine ((+)-norpseudoephedrine).

(xx) N-ethyl-3-piperidyl benzilate (JB-318).
(xxi) N-hydroxy-3, 4-methylenedioxyamphetamine.
(xxii) N-methyl-3-piperidyl benzilate (JB-336).
(xxiii) N-(1-phenylcyclohexyl) ethylamine (PCE).
(xxiv) Nabilone.
(xxv) 1-(1-phenylcyclohexyl) pyrrolidine (PHP).
(xxvi) 1-(1-(2-thienyl)-cyclohexyl) piperidine (TCP).
(xxvii) 1-(1-(2-thienyl)-cyclohexyl) pyrrolidine.
(xxviii) Para-methoxyamphetamine (PMA).
(xxix) Psilocybin.
(xxx) Psilocyn.
(xxxi) Synhexyl.
(xxxii) Trifluoromethylphenylpiperazine (TFMPP).
(xxxiii) Trimethoxyamphetamine (TMA).

(b) Any material, compound, mixture or preparation which contains any quantity of the following substances and their salts, optical isomers, and salts of optical isomers having a potential for abuse associated with a stimulant effect on the central nervous system:

(i) Amphetamine.
(ii) Benzphetamine.
(iii) Benzylpiperazine (BZP).
(iv) Butorphanol.
(v) Cathine ((+)-norpseudoephedrine).
(vi) Cathinone.
(vii) Chlorphentermine.
(viii) Clortermine.
(ix) Diethylpropion.
(x) Fencamfamin.
(xi) Fenethylline.
(xii) Fenproporex.
(xiii) Mazindol.
(xiv) Mefenorex.
(xv) Methamphetamine.
(xvi) Methcathinone.
(xvii) 4-methylaminorex.
(xviii) Methylenedioxymethcathinone
(xix) Methylenedioxypyrovalerone
(xx) Methylmethcathinone
(xviii) Methylphenidate.
(xix) Modafinil.
(xx) N-ethylamphetamine.
(xxi) N, N-dimethylamphetamine.
(xxii) Pemoline.
(xxiii) Phendimetrazine.
(xxiv) Phenmetrazine.
(xxv) Phentermine.
(xxvi) Pipradol.
(xxvii) Propylhexedrine.
(xxviii) Pyrovalerone.
(xxix) Sibutramine.
(xxx) Spa ((-)-1-dimethylamino-1,2-diphenylethane).

(c) Any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

From: Messick, Jennifer [mailto:MessickJ@ci.anchorage.ak.us]
Sent: Wednesday, February 09, 2011 1:06 PM
To: Christine Marasigan; Kendra Kloster; gregory.wilkinson@alaska.gov; Ruggles, Jennifer L.
Cc: Wheeler, Dennis A.
Subject: Info on SPice Incidents

SYMPTOMS

- Dangerously high BP (200+ / 100+)
- Tachycardia – 2 known incidents where heart stopped altogether, both died.
- Hallucinations
- Delusions
- Super-Human Strength (Polce and EMT safety risk)
- Unconsciousness
- Memory Loss (sustained)

For statistics, this would be a rough estimate, but combining information we have from APD, medics and EMTs, AFD, the schools, department of corrections, probations, youth organizations, treatment professionals, and the courts – several hundred incidents since April 2010. The rate of usage is, of course much higher as the police and EMTs don't usually get called unless something bad happened.

By incident, I mean a person who used it (either an admission, or the drug was found on the person and symptoms were consistent with Spice usage) and they had some kind of negative effect (loss of consciousness, hospitalized for high blood pressure, crashed a vehicle, irrational behavior, super-human strength used to assault officers or medics, memory loss, death, homicide, etc) I also included reports from department of corrections, school resource officers, felony probation officers and parents who report having found the substance in the possession of inmates/kids or where use was admitted.

The estimate of several hundred is also consistent with other states. This drug is everywhere at the same time, it is unlike meth where it was first in Hawaii and gradually moved to the west coast and took about 10 years to reach the east coast; Spice is in wide use in every state.

Examples in Anchorage include:

- High school student hospitalized overnight after loss of consciousness and uncontrollable high BP (confirmed no other drugs onboard)
- Traffic fatality – packet of spice found in center console of suspect vehicle who caused the crash
- High school student hallucinating – black rabbits hoping out of the ground wearing heads of dead people trying to kill him
- Delusion of death, pleading with AFD medics not to let him die. He was fine except for the drug usage
- Hallucination of 3 ghosts trying to kill user (DUI defendant)
- Numerous incidents where the user lost consciousness for anywhere from 15 minutes – 5 hours.
- One death in anchorage where the user ingested Spice just prior to him losing consciousness (awaiting blood confirmation)
- Suspected death Whittier
- User grabbed officer's gun, lifting officer up off ground. Officers broke wooden night stick oer user's head, tazed user twice, each time user reengaged and went for officer's weapons, eventually choked user unconscious.
- Ft Wainwright – Military soldier exhibiting symptoms in lock-down 30 hours after smoking spice/K2

Several other shocking incidents, each of which posed a danger to the community and the officers responding

National Incidents include:

- Approx 1800 spice/K2 calls to poison control in 2010 (increase of nearly 600% over the previous year. Similar increases were seen for ER admissions in about 40 states, but we don't have a reliable number nationally)
- Death in Montana 16 year old student – no other drugs detected; high levels of JWH-018 detected
- Suicide by 17 year old in Iowa within 5 minutes of ingesting Spice/K2
- Washington State Patrol – user unable to talk, stand or function even 16 hours after ingestion
- Most common age group of users is 14-27, across every ethnicity; not linked to any one ethnicity or sex.
-

MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney
Civil Division, Suite 730

Telephone: 907-343-4545
Fax: 907-343-4550

Mayor Dan Sullivan

February 8, 2011

Chairman Carl Gatto
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Vice-Chair Steve Thompson
House Judiciary Committee
State Capitol, Room 428
Juneau, Alaska 99801-1182

Re: House Bill 7 and Senate Bill 17 - *Synthetic Cannabinoids*

Dear Representatives:

The Municipality of Anchorage supports the bills currently before the legislature. As I indicated last Friday before your Committee, the primary reasons to treat synthetic cannabinoids more serious than their organic equivalents is because the potency of the synthetics has been found to be up to 800 times greater than the organic, and the potency from sample to sample varies widely. We have evidence that this high potency induces hallucinogenic reactions and unpredictable behaviors that are far more dangerous to the user, and those who may come into contact with them, than marijuana. The variations in the strength of any one dose can cause users to get a mild reaction in one instance and fall into unconsciousness in another instance. We have had one death in Anchorage that can be directly attributed to the use of synthetic cannabinoids. The Municipality believes felony prosecution for the manufacture, production, distribution, and sale of synthetics is a necessary tool that should be available to law enforcement to discourage the use of these drugs.

The Municipality supports providing the State Crime Lab with necessary resources to test for these drugs. As of a couple of months ago, we were aware of only two labs nationally that could test for these products in blood or urine. One lab could test urine samples and the other could test blood samples. In order to successfully prosecute people in the chain of production and consumption, we need the capability of testing both seized products and the bodily fluids of users. If properly resourced, having these tests performed locally and having local technicians available to testify, may save both money and time over using out-of-state labs.

Please find included in our email the Powerpoint presentation our Traffic Safety Resource Prosecutor uses. We have been making these presentations to the local military, business groups, and governmental agencies. We look forward to providing additional testimony on the bills in the coming weeks. If you have any questions, please do not hesitate to contact me.

Sincerely,

Dennis A. Wheeler
Municipal Attorney

cc: Sara Gill, Special Assistant to the Mayor

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
(907) 465-3908 fax
research@legis.state.ak.us

Memorandum

TO: Representative Cathy Muñoz
FROM: Chuck Burnham, Legislative Analyst
DATE: February 8, 2011
RE: Comparing States' Laws on Synthetic Cannabinoids to Selected Alaska Drug Laws
LRS Report 11.159

You asked us for information on states' laws on synthetic cannabinoids. Specifically, you asked for an account of where such substances appear on states' schedules of controlled substances and the crime classifications and penalties for possessing those substances. You also asked us to compare those other states' penalties for such crimes to those indicated for possession of substances in Alaska's controlled substance schedules IIA and IIIA.

We identified 11 states with laws prohibiting the possession of synthetic cannabinoids.[1] Classifications and penalties for a first criminal offense of possession in these states range from a Class B misdemeanor in Kentucky, which carries a maximum term of imprisonment of 90 days and a $250 fine, to an unclassified felony in Georgia, for which an offender is subject to a prison sentence of 2-15 years. In addition to the 11 states that have synthetic cannabinoid prohibitions in place, at least 21 states, including Alaska, are currently considering similar legislation.

In Alaska, as you know, controlled substances are placed on a given level within the schedule of controlled substances based on the degree of danger or probable danger a given drug poses to a person or the public. Those schedules range from "IA," containing the most dangerous substances, to "VIA," which are perceived to be the least dangerous drugs. Possession of a Schedule IIA controlled substance in Alaska constitutes the crime of "misconduct involving a controlled substance in the fourth degree." That offense is a Class C felony punishable by a maximum of 5 years in prison and a $50,000 fine. Please note, however, that the presumptive sentencing guideline in Alaska is far less severe, and a suspended sentence is possible for a first offense. Possession of a Schedule IIIA controlled substance in Alaska is a Class A misdemeanor for which an offender can receive a maximum of 1 year in prison and a $10,000 fine.[2]

The attached table summarizes crime classifications and penalties for possessing synthetic cannabinoids in the eleven states where that activity has been criminalized, and compares that information to the crime classification and penalties for possession of items on Alaska' controlled substances Schedules IIA and IIIA. Please note that the penalties listed in our table are either maximum sentences or ranges of incarceration periods. Actual penalties are generally subject to considerable discretion by the sentencing courts.

We hope this is helpful. If you have questions or need additional information, please let us know.

[1] Those states are Alabama, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Oklahoma, and Tennessee. According to the National Conference of State Legislatures (NCSL), synthetic cannabinoids are "chemically engineered substances, similar to THC—the active ingredient in marijuana—that, when smoked or ingested, can produce a high similar to marijuana. Initially developed for research related to treatment of pain and the effects of cannabis on the brain, these substances have recently become a popular alternative to marijuana. The NCSL maintains information about these substances and states' responses to the issue at *http://www.ncsl.org/?tabid=21398*.

[2] Controlled Substance Schedules in Alaska are enumerated at AS § 11.71.140-190.

Comparing States' Laws on Synthetic Cannabinoids to Selected Alaska Drug Laws				
State	**Citation**	**Controlled Substance Schedule**	**Crime Classification** (1st Offense--Possession)	**Penalty**
Alaska	AS § 11.71.040 and § 12.55.125	Schedule IIA (as proposed in HB 7)	Class C felony	Maximum 5 years imprisonment and $50,000 fine (presumptive sentence is far less--suspended sentence possible)
	AS § 11.71.050	Schedule IIIA	Class A misdemeanor	Maximum 1 year imprisonment and $10,000 fine
Alabama	CA § 13A-12-213 to 14.1	Not scheduled	Class A misdemeanor	Sentencing guidelines: up to 32 month sentence typically allotted by court among probation, community corrections, county jail/work release or an alternative
Georgia	OCGA § 16-30-25 and 16-13-30	Schedule I	Unclassified felony	2-15 years imprisonment
Illinois	720 ILCS § 570/204 and 402(c) and 730 ILCS § 5/5-4.5-45 and 5-4.5-50	Schedule I	Class 4 felony	1-3 years imprisonment and $25,000 fine
Kansas	KSA § 21-36a06 and 4708	Schedule I	Class A non-person misdemeanor	Sentencing guidelines: typically, 10-12 months of probation
Kentucky	KRS § 218A.1427 and 534.040	Schedule I	Class B misdemeanor	Maximum imprisonment of 90 days and fine of $250
Louisiana	LSA § 40:966	Schedule I	Unclassified	Maximum 6 months in jail and $500 fine
Michigan	MCL § 333.7403	Schedule I	Unclassified misdemeanor	Maximum 1 year imprisonment and $2,000 fine
Mississippi	MC § 41-29-113 and 139	Schedule I	Unclassified misdemeanor or felony depending upon amount of drug	For example, 0.1 grams to 2 grams, up to 2 years imprisonment and $50,000 fine; 10-30 grams, 6-24 years imprisonment and up to $50,000 fine.
Missouri	MRS § 195.202, 558.011, and 560.016	Schedule I	Class A misdemeanor	Maximum 1 year imprisonment and $1,000 fine
Oklahoma	OSA 63 § 2-204 and § 2-402	Schedule I	Unclassified felony	2-10 years imprisonment and $5,000 fine
Tennessee	TCA § 39-17-438	Not scheduled	Class A misdemeanor	Sentencing guidelines--wide latitude to courts

Notes and Source: This table provides information gleaned from the *Lexis* database of state statutes on first offenses for possessing small amounts of synthetic cannabinoids or the referenced drug schedule, as applicable. Please note that a variety of crime-specific circumstances and elements of criminal procedure impact actual sentences.

News Release
FOR IMMEDIATE RELEASE
November 24, 2010
Contact: DEA Public Affairs
Number: 202-307-7977

DEA Moves to Emergency Control Synthetic Marijuana

Agency Will Study Whether To Permanently Control Five Substances

NOV 24 -- WASHINGTON, D.C. – The United States Drug Enforcement Administration (DEA) is using its emergency scheduling authority to temporarily control five chemicals (JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol) used to make "fake pot" products. Except as authorized by law, this action will make possessing and selling these chemicals or the products that contain them illegal in the U.S. for at least one year while the DEA and the United States Department of Health and Human Services (DHHS) further study whether these chemicals and products should be permanently controlled.

A Notice of Intent to Temporarily Control was published in the *Federal Register* today to alert the public to this action. After no fewer than 30 days, DEA will publish in the *Federal Register* a Final Rule to Temporarily Control these chemicals for at least 12 months with the possibility of a six-month extension. They will be designated as Schedule I substances, the most restrictive category, which is reserved for unsafe, highly abused substances with no medical usage.

Over the past year, smokable herbal blends marketed as being "legal" and providing a marijuana-like high, have become increasingly popular, particularly among teens and young adults. These products consist of plant material that has been coated with research chemicals that mimic THC, the active ingredient in marijuana, and are sold at a variety of retail outlets, in head shops and over the Internet. These chemicals, however, have not been approved by the FDA for human consumption and there is no oversight of the manufacturing process. Brands such as "Spice," "K2," "Blaze," and "Red X Dawn" are labeled as incense to mask their intended purpose.

Since 2009, DEA has received an increasing number of reports from poison centers, hospitals and law enforcement regarding these products. Fifteen states have already taken action to control one or more of these chemicals. The Comprehensive Crime Control Act of 1984 amends the Controlled Substances Act (CSA) to allow the DEA Administrator to emergency schedule an abused, harmful, non-medical substance in order to avoid an imminent public health crisis while the formal rule-making procedures described in the CSA are being conducted.

"The American public looks to the DEA to protect its children and communities from those who would exploit them for their own gain," said DEA Acting Administrator Michele M. Leonhart. "Makers of these harmful products mislead their customers into thinking that 'fake pot' is a harmless alternative to illegal drugs, but that is not the case. Today's action will call further attention to the risks of ingesting unknown compounds and will hopefully take away any incentive to try these products."

###

CS FOR HOUSE BILL NO. 7(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MUÑOZ, HERRON, KERTTULA, GATTO, LYNN, AND PRUITT, Costello, Thompson, Millett

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.160(f) is amended to read:

(f) Schedule IIIA includes**, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of its salts, isomers, whether optical, position, or geometric, or salts of isomers whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation:**

(1) hashish;

(2) hash oil or hashish oil;

(3) tetrahydrocannabinols;

(4) parahexyl;

(5) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product; [AND]

(6) nabilone**;**

(7) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as HU-210;

(8) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol, also known as Dexanabinol or HU-211;

(9) 1-pentyl-3-(1-naphthoyl)indole, also known as JWH-018;

(10) 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073;

(11) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone, also known as JWH-015;

(12) 1-pentyl-3-(4-chloro-1-naphthoyl)indole, also known as JWH-398;

(13) 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as JWH-250;

(14) 1-hexyl-3-(1-naphthoyl)indole, also known as JWH-019;

(15) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole, also known as JWH-200;

(16) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol, also known as CP 47, 497, and its dimethyloctyl (C8) homologue; in this paragraph, "homologue" means a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain.

* **Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

(e) The committee may not meet less than twice a year.

(f) Five members of the committee constitute a quorum, except that a smaller number may adjourn a meeting in the absence of a quorum. A quorum being present, a majority vote of the total membership is required to take official action. (§ 2 ch 45 SLA 1982)

Sec. 11.71.110. Duties of committee. The committee shall

(1) advise the governor of the need to add, delete or reschedule substances in the schedules in AS 11.71.140 — 11.71.190;

(2) recommend regulations for adoption by the Board of Pharmacy to prevent excessive prescription of controlled substances and the diversion of prescription drugs into illicit channels;

(3) evaluate the effectiveness of programs in the state providing treatment and counseling for persons who abuse controlled substances;

(4) recommend programs to the Alaska Court System to be instituted as alternatives to the prosecution or imprisonment of offenders who have no prior criminal record involving controlled substance offenses and who are charged with crimes involving controlled substances;

(5) review and evaluate enforcement policies and practices of the Department of Public Safety and the Department of Law with regard to crimes involving controlled substances, and recommend modifications of those policies and practices consistent with the committee's assessment of the probable danger of particular controlled substances; and

(6) review budget requests and recommend amounts for appropriations to the governor and the legislature for departments and agencies responsible for

(A) enforcing criminal laws pertaining to controlled substances;

(B) providing treatment and counseling of persons who abuse controlled substances; and

(C) regulating the legitimate handling of controlled substances. (§ 2 ch 45 SLA 1982)

Sec. 11.71.120. Authority to schedule controlled substances. (a) If, after considering the factors set out in (c) of this section, the committee decides to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 — 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.

(b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.

(c) In advising the governor of the need to add, delete, or reschedule a substance under AS 11.71.110(1), the committee shall assess the danger or probable danger of the substance after considering the following:

(1) the actual or probable abuse of the substance including

(A) the history and current pattern of abuse both in this state and in other states;

(B) the scope, duration, and significance of abuse;

(C) the degree of actual or probable detriment which may result from abuse of the substance;

(D) the probable physical and social impact of widespread abuse of the substance;

(2) the biomedical hazard of the substance including

(A) its pharmacology, in the effects and modifiers of the effects of the substance;

(B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;

(C) the risk to public health and the particular susceptibility of segments of the population;

(3) whether the substance is an immediate precursor of a substance already controlled under this chapter;

(4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;

(5) the relationship between the use of the substance and other criminal activity, including

(A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;

(B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;

(C) whether the commission of other crimes is one of the effects of abuse of the substance;

(D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

(d) *[Repealed, § 40 ch 6 SLA 1984.]*

(e) The committee has no authority over tobacco or alcoholic beverages as defined in AS 04.21.080. (§ 2 ch 45 SLA 1982; am § 40 ch 6 SLA 1984)

Legislative history reports. — For statement of the purpose of the 1984 repeal of subsection (d) of this section, see the 1984 House Journal at p. 2287, in the paragraph captioned "Section 40."

NOTES TO DECISIONS

Construction of former law. — For construction of former AS 17.12.040, concerning regulations and authorizing the commissioner of health and social services to promulgate list of certain drugs, see State v. Erickson, 574 P.2d 1 (Alaska 1978).

Sec. 11.71.140. Schedule IA. (a) A substance shall be placed in schedule IA if it is found under AS 11.71.120(c) to have the highest degree of danger or probable danger to a person or the public.

(b) Schedule IA includes, unless specifically excepted or listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts, but including the following:

(A) raw opium;

(B) opium extracts;

(C) opium fluid extracts;

(D) powdered opium;

(E) granulated opium;

(F) tincture of opium;

(G) codeine;

(H) ethylmorphine;

(I) etorphine hydrochloride;

(J) hydrocodone;

(K) hydromorphone;

(L) metopon;

(M) morphine;

(N) oxycodone;

(O) oxymorphine;

(P) thebaine;

(2) any salt, compound, derivative, or preparation of a substance included in (b)(1) of this section which is chemically equivalent or identical to any of the substances referred

USA TODAY

States race to ban risky 'bath salts' drug

Updated 5h 15m ago |

By **Jessie Halladay**, USA TODAY

A growing number of states are moving to ban a new synthetic drug known as "bath s alts" that can cause severe side effects, including paranoia, hallucinations and sometimes violent behavior.

By Rogelio V. Solis, APThese are examples of fake 'bath salts,' which contain toxic chemicals that some people are using to get a psychotic high.Enlarge

By Rogelio V. Solis, AP

These are examples of fake 'bath salts,' which contain toxic chemicals that some people are using to get a psychotic high.

Emergency bans have been issued in Louisiana, North Dakota and Florida. Legislators in Hawaii, Kentucky, North Dakota and Mississippi have introduced bills to ban the drug, which can be sold legally in stores and online in most places.

Calls to poison centers across the nation have skyrocketed in recent weeks as the drug has grown in popularity, officials in several states say.

Nationwide, there have been more than 360 calls about the drug this year, said Mark Ryan, director of the Louisiana Poison Center, who has been studying the trend.

There were 291 calls in all of 2010, Ryan said.

The drug has been compared to cocaine and methamphetamine because of its addictive characteristics, Ryan said.

Many of the products, sold under names such as Cloud Nine, Ivory Wave and Blue Silk, contain methylenedioxypyrovalerone, or MDPV, which is a chemical not approved for medical use in the United States.

Packages containing the powdery substance are typically labeled "not for human consumption" and marketed as "bath salts," Ryan said, or as plant food or insect repellent.

Users mostly snort the drug, similar to cocaine. But it is versatile and can be

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injected, smoked or even eaten, he said.

"It's some serious stuff," said Steven Spady, a Kentucky physician who has treated patients suffering from the effects of bath salts. Patients have exhibited signs of high anxiety, hypertension and agitation and, in one case, the patient was "quite psychotic," Spady said.

Last week, White House drug czar Gil Kerlikowske issued a warning against taking the synthetic products.

"They pose a serious threat to the health and well-being of young people and anyone who uses them," Kerlikowske said in a statement.

Louisiana Gov. Bobby Jindal, a Republican, issued an emergency ban on Jan. 6 for six substances, including MDPV and mephedrone, the most common chemicals in the drug.

Florida Attorney General Pam Bondi also issued an emergency ban that took effect Jan. 26.

"These are dangerous drugs that should not be confused with any type of common bath product," Bondi said.

Sen. Charles Schumer, D-N.Y., said last week that he will introduce legislation to ban bath salts nationwide.

John Moody of St. Joseph, Mo., knows firsthand the devastation bath salts can have. His 29-year-old son, Jarrod, killed himself in October after using the drug for at least two weeks. Moody said his son had struggled with a painkiller addiction a couple of years before.

"I'm sure Jarrod bought this stuff over the counter thinking this stuff can't be that strong, can't be that dangerous," John Moody said. "But, oh my gosh, are they ever."

Ryan said he's certain people don't know what they are in for when they try the drug.

"If you take the worst characteristics of LSD, PCP, Ecstasy, cocaine and methamphetamine and put all those together, you've got one big bad thing," Ryan said.

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(xiii) Lysergic acid diethylamide.
(xiv) Mescaline.
(xv) 4-methoxyamphetamine.
(xvi) Methoxymethylenedioxyamphetamine (MMDA).
(xvii) Methylenedioxyamphetamine (MDA).
(xviii) 3, 4-methylenedioxymethamphetamine.
(xix) 3, 4-methylenedioxy-N-ethylamphetamine.
(xx) N-ethyl-3-piperidyl benzilate (JB-318).
(xxi) N-hydroxy-3, 4-methylenedioxyamphetamine.
(xxii) N-methyl-3-piperidyl benzilate (JB-336).
(xxiii) N-(1-phenylcyclohexyl) ethylamine (PCE).
(xxiv) Nabilone.
(xxv) 1-(1-phenylcyclohexyl) pyrrolidine (PHP).
(xxvi) 1-(1-(2-thienyl)-cyclohexyl) piperidine (TCP).
(xxvii) 1-(1-(2-thienyl)-cyclohexyl) pyrrolidine.
(xxviii) Para-methoxyamphetamine (PMA).
(xxix) Psilocybin.
(xxx) Psilocyn.
(xxxi) Synhexyl.
(xxxii) Trifluoromethylphenylpiperazine (TFMPP).
(xxxiii) Trimethoxyamphetamine (TMA).
(xxxiv) 1-PENTYL-3-(NAPHTHOYL)INDOLE (JWH-018 AND ISOMERS).
(xxxv) 1-BUTYL-3-(NAPHTHOYL)INDOLE (JWH-073 AND ISOMERS).
(xxxvi) 1-HEXYL-3-(NAPHTHOYL)INDOLE (JWH-019 AND ISOMERS).
(xxxvii) 1-PENTYL-3-(4-CHLORO NAPHTHOYL)INDOLE (JWH-398 AND ISOMERS).
(xxxviii) 1-(2-(4-(MORPHOLINYL)ETHYL))-3-(NAPHTHOYL)INDOLE (JWH-200 AND ISOMERS).
(xxxix) 1-PENTYL-3-(METHOXYPHENYLACETYL)INDOLE (JWH-250 AND ISOMERS).
(xl) (2-METHYL-1-PROPYL-1H-INDOL-3-YL)-1-NAPHTHALENYL-METHANONE (JWH-015 AND ISOMERS).
(xli) (6aR, 10aR)-9-(HYDROXYMETHYL)-6,6-DIMETHYL-3-(2-METHYLOCTAN2-YL)-6a,7,10,10a-TETRAHYDROBENZO[C]CHROMEN-1-OL) (HU-210).
(xlii) 5-(1,1-DIMETHYLHEPTYL)-2-(3-HYDROXY CYCLOHEXYL)-PHENOL (CP 47,497 AND ISOMERS).
(xliii) 5-(1,1-DIMETHYLOCTYL)-2-(3-HYDROXY CYCLOHEXYL)-PHENOL (CANNABICYCLOHEXANOL, CP-47,497 C8 HOMOLOGUE AND ISOMERS).

(b) Any material, compound, mixture or preparation which contains any quantity of the following substances and their salts, optical isomers, and salts of optical isomers having a potential for abuse associated with a stimulant effect on the central nervous system:

(i) Amphetamine.
(ii) Benzphetamine.
(iii) Benzylpiperazine (BZP).
(iv) Butorphanol.
(v) Cathine ((+)-norpseudoephedrine).

(xx) N-ethyl-3-piperidyl benzilate (JB-318).
(xxi) N-hydroxy-3, 4-methylenedioxyamphetamine.
(xxii) N-methyl-3-piperidyl benzilate (JB-336).
(xxiii) N-(1-phenylcyclohexyl) ethylamine (PCE).
(xxiv) Nabilone.
(xxv) 1-(1-phenylcyclohexyl) pyrrolidine (PHP).
(xxvi) 1-(1-(2-thienyl)-cyclohexyl) piperidine (TCP).
(xxvii) 1-(1-(2-thienyl)-cyclohexyl) pyrrolidine.
(xxviii) Para-methoxyamphetamine (PMA).
(xxix) Psilocybin.
(xxx) Psilocyn.
(xxxi) Synhexyl.
(xxxii) Trifluoromethylphenylpiperazine (TFMPP).
(xxxiii) Trimethoxyamphetamine (TMA).

(b) Any material, compound, mixture or preparation which contains any quantity of the following substances and their salts, optical isomers, and salts of optical isomers having a potential for abuse associated with a stimulant effect on the central nervous system:

(i) Amphetamine.
(ii) Benzphetamine.
(iii) Benzylpiperazine (BZP).
(iv) Butorphanol.
(v) Cathine ((+)-norpseudoephedrine).
(vi) Cathinone.
(vii) Chlorphentermine.
(viii) Clortermine.
(ix) Diethylpropion.
(x) Fencamfamin.
(xi) Fenethylline.
(xii) Fenproporex.
(xiii) Mazindol.
(xiv) Mefenorex.
(xv) Methamphetamine.
(xvi) Methcathinone.
(xvii) 4-methylaminorex.
(xviii) Methylenedioxymethcathinone
(xix) Methylenedioxypyrovalerone
(xx) Methylmethcathinone
(xviii) Methylphenidate.
(xix) Modafinil.
(xx) N-ethylamphetamine.
(xxi) N, N-dimethylamphetamine.
(xxii) Pemoline.
(xxiii) Phendimetrazine.
(xxiv) Phenmetrazine.
(xxv) Phentermine.
(xxvi) Pipradol.
(xxvii) Propylhexedrine.
(xxviii) Pyrovalerone.
(xxix) Sibutramine.
(xxx) Spa ((-)-1-dimethylamino-1,2-diphenylethane).

(c) Any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

HB

8

<TARGET><BILL>HB 8</BILL><SUBJECT>HB 8</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

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REPRESENTATIVE WES KELLER
DISTRICT 14

MEMO

To: Representative Carl Gatto, Chair
House Judiciary Committee

Fm: Representative Wes Keller

Cc:

Date: February 7, 2011

Re: Request for hearing on HB 8 (27-LS0052\A

Please consider this as a request for you to schedule HB 8 "Federal Regulations and Executive Orders" before the House Judiciary Committee. I have included a packet of information and will be glad to provide your committee staff a .pdf version if they so desire.

HB 8 puts in place statutory language that Alaska will review and if necessary nullify federal regulations and executive orders if it is determined they are unconstitutional or improperly filed. More and more the administration is circumventing Congress and imposing its own interpretation of the rule of law. HB 8 gives us a tool to respond.

If you have any questions please feel free to contact my office.

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ALASKA STATE LEGISLATURE

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REPRESENTATIVE WES KELLER
DISTRICT 14

House Bill 8
Sponsor Statement

"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

HB 8 clarifies in Alaska Statute that a federal regulation or a presidential executive order that is not properly adopted or is unconstitutional does not preempt state law. The Attorney General will continue to review and report federal regulations and executive orders that appear to have not been properly adopted. Under HB 8 those reports will be forwarded to the legislature for consideration.

HB 8 presumes Alaska Legislative interest in an important legal process called "nullification". Nullification is when a state 'nullifies' a federal law, proclaiming it to be void and inoperative, or 'non-effective' within the boundaries of that state. In other words it is not a law as far as that state is concerned. In HB 8 a negative review by the Attorney General would generate an alert to our Judiciary Committees so nullification legislation can be considered.

There has been disagreement regarding nullification going back to the late eighteenth century. Not surprisingly, federal courts have often leaned toward favoring federal power over state sovereignty in spite of the fact that our founding fathers clearly intended otherwise. Federalism is our historically unique and profound arrangement where sovereign and separate states got together and carefully designed a central government with carefully limited powers. It is an illogical perversion of one of our most important founding principles to presume states must comply with unconstitutional federal laws. HB 8 presumes a proper State responsibility to uphold and protect our constitution.

HB 8 is intended to provide important information to the Alaska State Legislature by tapping the expertise and evaluation of our Attorney General. Certainly the legislature has a responsibility to consider its response whenever there is question of constitutionality of a federal regulation or executive order.

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REPRESENTATIVE WES KELLER
DISTRICT 14

MEMO

To: Members of the Alaska Legislature

Date: February 15, 2011

Re: Sectional of House Bill 8 (27-LS0052\A

House Bill 8 is broken into five sections:

1. Legislative findings that establish an understanding of the Supremacy Clause in relationship to state statute. It also recognizes that the U.S. Supreme Court has ruled that federal regulations, provided they are properly adopted, may also apply in Supremacy rules. The section also indicates that some executive orders and federal regulations do not always meet the constitutional or properly adopted criteria and therefore may not preempt state law.

2. Places into state statute that unconstitutional or improperly adopted executive orders and regulations do not preempt state statute.

3. Directs the Judiciary committee's in each house upon receipt of a report from the Attorney General that an executive order or regulation that preempts state statute and does not meet stated criteria to consider a response to the findings.

4. Directs the Attorney General to submit reports of potential preemptive executive orders or regulations that are unconstitutional or improperly adopted to the appropriate committees and establishes what documents need to be included in that report.

5. Effective date

E-Mail: Representative_Wes_Keller@legis.state.ak.us
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

CS FOR HOUSE BILL NO. 8(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLER, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS. The legislature finds that

(1) the Supremacy Clause of art. VI, clause 2, Constitution of the United States, provides that the Constitution of the United States and the laws of the United States made under and in conformity with the Constitution of the United States are the supreme law of the land;

(2) the United States Supreme Court, in City of New York v. Federal Communications Commission, 486 U.S. 57 (1988), stated that "[t]he phrase, 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization";

(3) federal regulations and presidential executive orders that are unconstitutional and not properly adopted in accordance with statutory authority are not laws of the United States for the purposes of the Supremacy Clause; and

(4) federal regulations and presidential executive orders that are not properly adopted in accordance with statutory authority may not preempt state laws that are not in conflict with federal statutory authority and regulations properly adopted in accordance with that statutory authority.

* **Sec. 2.** AS 01.10 is amended by adding a new section to read:

Article 5. Laws of the United States.

Sec. 01.10.200. Federal preemption; effect of certain federal regulations and presidential executive orders. A federal regulation or presidential executive order that is unconstitutional or was not properly adopted in accordance with federal statutory authority may not be considered to preempt a state law.

* **Sec. 3.** AS 24.05 is amended by adding a new section to article 4 to read:

Sec. 24.05.188. Federal regulations and executive orders. After receiving a report from the attorney general under AS 44.23.020(h) that a state law is in conflict with a federal regulation or presidential executive order that is unconstitutional or was not properly adopted in accordance with federal statutory authority, the house and senate committees having jurisdiction over judicial matters may each consider whether legislative action is necessary in response to the findings by the attorney general.

* **Sec. 4.** AS 44.23.020 is amended by adding a new subsection to read:

(h) If the attorney general finds that a federal regulation or presidential executive order would preempt a state law if constitutional and properly adopted in accordance with federal statutory authority but also finds that the federal regulation or presidential executive order is unconstitutional or was not properly adopted in accordance with federal statutory authority, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include

(1) a copy of the federal regulation or presidential executive order that the attorney general finds was not properly adopted in accordance with federal statutory authority;

(2) a citation to the state law that is in conflict with the federal regulation or presidential executive order identified in (1) of this subsection;

(3) a written opinion explaining

(A) the basis for finding that the federal regulation or presidential executive order is unconstitutional or was not properly adopted in accordance with federal statutory authority;

(B) the conflict between the federal regulation or presidential executive order identified in (1) of this subsection and the state law identified in (2) of this subsection and why, if properly adopted, the federal regulation or presidential executive order would preempt the state law; and

(C) the effect on the state if the state law identified in (2) of this subsection is found by a court to be preempted by the federal regulation or presidential executive order identified in (1) of this subsection; and

(4) other information relevant to the findings by the attorney general.

* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB008**
() Publish Date

Identifier (file name): HB008-LAW-CIV-02-15-11
Dept. Affected Law
Title An Act relating to federal reg. and presidential exec. orders; relating to the duties of attorney general; and providing for an effective date.
Appropriation Civil
Allocation Opinions, Appeals and Ethics
Sponsor Representative(s) Keller
Requester (H) Judiciary
OMB Component Number 2716

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/15/11 9:15 AM
Approved by John J. Burns, Attorney General
Date 2/15/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 008

Analysis

HB 008 would require the Attorney General to review federal regulations and presidential executive orders that "may be in conflict with and may preempt state law." If the Attorney General were to find that a federal regulation or executive order (1) is unconstitutional or was not properly adopted and (2) would preempt a state law if it were constitutional and properly adopted, the Attorney General would be required to report those findings to the chairs of the appropriate legislative committees. The Attorney General would be required to include in the report an explanation of the grounds for the findings.

The Code of Federal Regulations includes more than 157,000 pages. This bill would require the analysis as to whether a particular regulation was constitutional, properly adopted, or preemptive.

As such, the fiscal impact of this legislation to the Department of Law would likely be substantial but cannot be accurately determined at this time.

SUPREMACY CLAUSE

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, Paragraph 2

Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. It has long been established that "a state statute is void to the extent that it actually conflicts with a valid federal statute" and that a conflict will be found either where compliance with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Edgar v. Mite Corp., 457 U.S. 624, 631 (1982). Similarly, we have held that "otherwise valid state laws or court orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme." Stone v. City and County of San Francisco, 968 F.2d 850, 862 (9th Cir. 1992), cert. denied, 113 S. Ct. 1050 (1993).

Due to concerns of comity and federalism, the scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only. Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987). This is critical because "a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority." Id.

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In *Pennsylvania v. Nelson,* 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), the Supreme Court developed criteria for assessing whether federal law preempts state action when Congress has not specifically stated its intent. These criteria include whether the scheme of federal regulations is "so pervasive as to make the inference that Congress left no room for the States to supplement it," whether the federal interest "is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject," or whether the enforcement of a state law "presents a serious danger of conflict with the administration of the federal program."

The Tenth Amendment to the U.S. Constitution reads:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Ratified in 1791, the Tenth Amendment to the Constitution embodies the general principles of Federalism in a republican form of government. The Constitution specifies the parameters of authority that may be exercised by the three branches of the federal government: executive, legislative, and judicial. The Tenth Amendment reserves to the states all powers that are not granted to the federal government by the Constitution, except for those powers that states are constitutionally forbidden from exercising.

For example, nowhere in the federal Constitution is Congress given authority to regulate local matters concerning the health, safety, and morality of state residents. Known as POLICE POWERS, such authority is reserved to the states under the Tenth Amendment. Conversely, no state may enter into a treaty with a foreign government because such agreements are prohibited by the plain language of Article I to the Constitution.

At the time the states adopted the Tenth Amendment, two primary conceptions of government were under consideration. Many federalists supported a centralized national authority, with power concentrated in a single entity. This type of government was exemplified by the English constitutional system, which vested absolute authority in the monarchy during the seventeenth century and in Parliament during the eighteenth century.

On the other hand, many anti-federalists supported a more republican form of government consisting of a loose confederation of sovereign states that would form an alliance only for the purpose of mutual defense. The Articles of Confederation, which governed the 13 states in national matters until 1787, when the Constitution was ratified, epitomized this form of government. Under the Articles of Confederation, the national government was unable to levy and collect taxes on its own behalf.

Many federalists, such as James Madison, argued that the Tenth Amendment was unnecessary because the powers of the federal government are carefully enumerated and limited in the Constitution. Because the Constitution does not give Congress, the president, or the federal judiciary the prerogative to regulate wholly local matters, Madison concluded that no such power existed and no such power would ever be exercised. However, British oppression had made the Founding Fathers fearful of unchecked centralized power. The Tenth Amendment was enacted to limit federal power. Although it appears clear on its face, the Tenth Amendment has not been consistently applied.

Before the Civil War, nearly every state urged a broad reading of the Tenth Amendment. Although no state wanted a federal government that was impotent against internal enemies or foreign aggressors, many state politicians challenged the authority of the federal government to regulate any matter that could otherwise be handled by local authorities. For example,

immediately after the U.S. Revolution, all 13 states resisted federal efforts to force local governments to return the property of British loyalists taken during the war. During the first half of the nineteenth century, Southern states objected to federal legislation that attempted to limit Slavery. State sovereignty reached its height when 11 states seceded from the Union to form the Confederacy.

Following the Civil War, the Tenth Amendment was virtually suspended. For a number of years during the Reconstruction era, the federal government occupied the former Confederate states with military troops and required each occupied state to ratify the Civil War Amendments, which outlawed slavery, gave African Americans the right vote, and declared the equality of all races. To a large extent the federal government ran local matters in Southern states during this period.

In 1883, the Tenth Amendment regained some of its force. In that year the Supreme Court invalidated the federal CIVIL RIGHTS ACT of 1875 (18 Stat. 335), which criminalized RACIAL DISCRIMINATION in public accommodations, such as hotels and restaurants, because it violated state sovereignty under the Tenth Amendment (CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 [1883]). In 1909, the Supreme Court struck down the White Slave Traffic Act (34 Stat. 898), which Congress had passed to prohibit the harboring of alien women for the purposes of prostitution, because it violated the Tenth Amendment (*Keller v. United States,* 213 U.S. 138, 29 S. Ct. 470, 53 L. Ed. 737 [1909]).

Nine years later the Court struck down another congressional law prohibiting the interstate shipment of products that had been manufactured by certain businesses that employed children under the age of 14 (HAMMER V. DAGENHART, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 [1918]). "In interpreting the Constitution," the Court said in *Hammer,* "it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them the powers not expressly delegated to the national government are reserved."

During the depth of the Great Depression, the Tenth Amendment returned to a dormant condition. President FRANKLIN ROOSEVELT

worked with Congress to pass the New Deal,a series of programs designed to stimulate the troubled economy. After the Supreme Court upheld a provision of the National Labor Relations Act (mandatory Collective Bargaining) in NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), Congress began exercising unprecedented lawmaking power over state and local matters. For the next 40 years, the Supreme Court upheld congressional authority to regulate a variety of matters that had been traditionally addressed by state legislatures. For example, in one case the Supreme Court upheld the Agricultural Adjustment Act of 1938 (7 U.S.C.A. §§ 1281 et seq.) over objections that it allowed Congress to regulate individuals who produced and consumed their own foodstuffs entirely within the confines of a family farm (*Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 [1942]).

The Tenth Amendment enjoyed a brief resurgence in 1976 when the Supreme Court held that the application of the Fair Labor Standards Act of 1938 (29 U.S.C.A. §§ 201 et seq.) to state and local governments was unconstitutional. In *National League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Court said that the Minimum Wage and maximum hour provisions of this act significantly altered and displaced the states' abilities to structure employment relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These services, the Court emphasized, are historically reserved

to state and local governments. If Congress may withdraw from the states the authority to make such fundamental employment decisions, the Court concluded, "there would be little left of the states' separate and independent existence," or of the Tenth Amendment.

National League of Cities proved to be an unworkable constitutional precedent. It cast doubt on congressional authority to regulate many aspects of local affairs that most of society had come to rely upon. It was unclear, for example, whether the Occupational Safety and Health Administration (OSHA), a federal agency established by Congress to regulate workplace safety, retained any constitutional authority after the Supreme Court announced its decision in *National League of Cities.*

The Supreme Court eliminated these concerns by overturning *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). In *Garcia* the Court upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act as it applied to a city-owned public transportation system. In reaching this decision, the Court said that if certain states are worried about the extent of federal authority over a particular local matter, the residents of such states should contact their senators and representatives who are constitutionally authorized to narrow federal regulatory power through appropriate legislation. Judicial Review of federal regulations under the Tenth Amendment, the Supreme Court suggested, is not the proper vehicle to achieve this end.

The ebb and flow of Tenth Amendment Jurisprudence reflects the delicate constitutional balance created by the Founding Fathers. The states ratified the Constitution because the Articles of Confederation created a national government that was too weak to defend itself and could not raise or collect revenue. Although the federal Constitution created a much stronger centralized government, the Founders did not want the states to lose all of their power to the federal government, as the colonies had lost their powers to Parliament. The Tenth Amendment continues to be defined as courts and legislatures address the balance of federal and state power.

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When Idaho Governor C.L. "Butch" Otter signed HO391 into law on 17 March 2010, the "national" news media circled the wagons and began another assault on State sovereignty. The bill required the Idaho attorney general to sue the federal government over insurance mandates in the event national healthcare legislation passed. The lead AP reporter on the story, John Miller, quoted constitutional "scholar" David Freeman Engstrom of Stanford Law School as stating that the Idaho law would be irrelevant because of the "supremacy clause" of the United States Constitution.

In his words, "That language is clear that federal law is supreme over state law, so it really doesn't matter what a state legislature says on this." Now that Barack Obama has signed

healthcare legislation into law, almost a dozen States have filed suit against the federal government, with Idaho in the lead. Battle lines have been drawn. Unfortunately, the question of State sovereignty and the true meaning of the "supremacy clause" may be swallowed up in the ensuing debate.

Engstrom's opinion is held by a majority of constitutional law "scholars," but he is far from correct, and Idaho and the thirty seven other States considering similar legislation have a strong case based on the original intent of the powers of the federal government vis-à-vis the States.

The so-called "supremacy clause" of the Constitution, found in Article 6, states, "This Constitution, and the Laws of the United States *which shall be made in Pursuance thereof;* and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding [emphasis added]."

The key, of course, is the italicized phrase. All laws made in pursuance of the Constitution, or those clearly enumerated in the document, were supreme, State laws notwithstanding. In other words, the federal government was supreme in all items clearly listed in the document.

A quick reading of the Constitution illustrates that national healthcare is not one of the enumerated powers of the federal government, so obviously Engstrom's blanket and simplistic statement is blatantly incorrect, but his distortion of the supremacy clause goes further.

The inclusion of such a clause in the Constitution was first debated at the Constitutional Convention on 31 May 1787. In Edmund Randolph's initial proposal, called the Virginia Plan, the "national" legislature had the ability to "legislate in all cases to which the separate states are incompetent…" and "to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union…." John Rutledge, Pierce Butler, and Charles Pinckney of South Carolina challenged the word "incompetent" and demanded that Randolph define the term. Butler thought that the delegates "were running into an extreme, in taking away the powers of the states…" through such language.

Randolph replied that he "disclaimed any intention *to give indefinite powers to the national legislature*, declaring that he was entirely opposed to such an inroad on the state jurisdictions, and that he did not think any considerations whatever could ever change his determination [emphasis added]." James Madison, the author of the Virginia Plan, was not as forthcoming as to his sentiment. Ultimately, Madison preferred a negative over State law and wished the national legislature to be supreme in call cases. But he was not in the majority.

The Convention again broached a federal negative on State law on 8 June 1787. Charles Pinckney, who presented a draft of a constitution shortly after Randolph offered the Virginia Plan, believed a national negative necessary to the security of the Union, and Madison, using imagery from the solar system and equating the sun to the national government, argued that without a national negative, the States "will continually fly out of their proper orbits, and destroy the order and harmony of the political system." Such symbolism made for a beautiful picture, but it belied reality.

To most of the assembled delegates, the national government was not the center of the political universe and the States retained their sovereignty. Hugh Williamson of North Carolina

emphatically stated he "was against giving a power that might restrain the states from regulating their internal police."

Elbridge Gerry of Massachusetts was against an unlimited negative, and Gunning Bedford of Delaware believed a national negative was simply intended "to strip the small states of their equal right of suffrage." He asked, "Will not these large states crush the small ones, whenever they stand in the way of their ambitious or interested views?"

When the negative power was put to a vote, seven States voted against it and three for it, with Delaware divided (and Virginia only in the affirmative by one vote). Roger Sherman of Connecticut summarized the sentiment of the majority when he stated he "thought the cases in which the negative ought to be exercised might be defined." Since the negative did not pass, such a definition was unnecessary.

Thus, the federal government was supreme only in its enumerated powers and it did not have a negative over State law. Supremacy had limits.

By the time the Constitution was debated in the several State ratifying conventions in 1787 and 1788, the "supremacy clause" galvanized opponents of the document. The Constitution, they said, would destroy the States and render them impotent in their internal affairs. The response from *proponents* of ratification illuminates the true intent of the clause. William Davie, a delegate to the Constitutional Convention from North Carolina and proponent of the Constitution, responded to attacks levied on the "supremacy clause" by stating that:

This Constitution, as to the powers therein granted, is constantly to be the supreme law of the land. Every power ceded by it must be executed without being counteracted by the laws or constitutions of the individual states. Gentlemen should distinguish that it is not the supreme law in the exercise of power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations [emphasis added].

Davie wasn't alone in this opinion. Future Supreme Court justice James Iredell of North Carolina argued that, "This clause [the supremacy clause] is supposed to give too much power, when, in fact, it only provides for the execution of those powers which *are already given in the foregoing articles*....If Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution [emphasis added]."

Furthermore, in a foreshadowing of nullification, Iredell argued that, "It appears to me merely a general clause, the amount of which is that, when they [Congress] pass an act, if it be in the execution of a power given by the Constitution, it shall be binding on the people, *otherwise not* [emphasis added]. Other ratifying conventions had similar debates, and proponents of the Constitution continually reassured wavering supporters that the Constitution would only be supreme within its delegated authority.

Most bought their assurances, though to staunch opponents, the Constitution still vested too much power in the central authority. The States would lose their sovereignty, they argued, and as a result, these men demanded an amendment to the Constitution that expressly maintained the sovereignty of the States and placed limits on federal power. Even several moderate supporters of the Constitution embraced this idea.

Ultimately, the three most powerful States in the Union, New York, Massachusetts, and Virginia, demanded that a bill of rights be immediately added to the Constitution; near the top of those recommended amendments on every list, a State sovereignty resolution. These ultimately became the Tenth Amendment to the Constitution, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Clearly the intent of this amendment was to mitigate any design the federal government had on enlarging its powers through the "supremacy clause." If the power was not enumerated in the Constitution and the States were not prohibited by the Constitution from exercising said power, then that power was reserved to the States.

Several other constitutional "scholars" have weighed in on the debate in the last week, and each has invoked the "supremacy clause" to defend their opposition to State action against healthcare. Duke Law Professor Neil Siegel went so far as to suggest that the States are not reading the Tenth Amendment correctly. In perhaps the most outlandish statement of the debate, he also said, "Any talk of nullification bothers me because it's talk of lawlessness."

I guess Mr. Siegel has failed to consider that Idaho bill HO391 was passed by a legitimate legislative body elected by the people of the State. That would make it lawful.

Of course, this debate ultimately boils down to loose interpretation verses strict construction. Thomas Jefferson had the best line on this issue. When asked to read between the lines to "find" implied powers, Jefferson responded that he had done that, and he "found only blank space."

The original intent of both the "supremacy clause" and the Tenth Amendment indicate that Idaho and the other States challenging Obamacare are justified and correct and that the legal profession is either in the tank for the federal government or has not read either the debates of the Constitutional Convention and/or the State ratifying debates. This should make people like Engstrom and Siegel, rather than legitimate State law directed at unconstitutional authority, irrelevant.

Brion McClanahan holds a Ph.D in American history from the University of South Carolina and is the author of ***The Politically Incorrect Guide to the Founding Fathers*** *(Regnery, 2009).*

Executive Orders

Dateline: 12/18/97

Executive Orders Defined
An Executive Order (EO) is a directive issued to executive-level agencies, department heads, or other employees from the President under the President's statutory, or constitutional powers. In many ways, the EO is similar to written orders, or instructions the president of a corporation might send to department heads or directors.Thirty days after it is officially published in the Federal Register, an EO becomes law. While the EO does bypass the U.S. Congress and the standard legislative law making process, no part of an EO may be illegal or unconstitutional. The first EO was issued in 1789 by none other than George Washington. Not until 1907 were EOs given official numbers.

Reasons for Issuing an Executive Order
Presidents typically issue an EO for one of these purposes:
1. Operational management of the executive branch
2. Operational management of federal agencies or officials
3. To carry out statutory presidential responsibilities

- - *In 1970, President Nixon used this 398 word Executive Order establishing NOAA*.

How Executive Orders May be Vacated
The President can retract an EO at any time. The President may also issue an EO that supersedes an existing one. New incoming Presidents may choose to follow the EOs of their predecessors, replace them with new ones of their own, or revoke the old ones completely. In extreme cases, Congress may pass a law that alters an EO, and the Supreme Court can declare them unconstitutional.

Executive Orders vs. Proclamations
Presidential Proclamations differ from EOs in that they are either ceremonial in nature or deal with issues of trade and may or may not carry legal effect. All EOs become law.

Constitutional Authority for Executive Orders
Article II, section 1 of the Constitution reads, in part, *"The executive power shall be vested in a president of the United States of America."* And, Article II, section 3 asserts that, *"The President shall take care that the laws be faithfully executed..."* Since the Constitution does not specifically define executive power, critics of Executive Orders argue that these two passages do not imply Constitutional authority. But, Presidents of the United States since George Washington have argued that they do.

Modern Use of Executive Orders
Until World War I, the Executive Order was used for relatively minor, usually unnoticed acts of state. A trend that changed drastically with passage of the War Powers Act of 1917. This act passed during WWI granted the President temporary powers to immediately enact laws regulating trade, economy, and other aspects of policy as they pertained to enemies of America. A key section of the War Powers act also contained language specifically excluding American citizens from its effects.

The War Powers Act remained in effect and unchanged until 1933 when a freshly elected President Franklin D. Roosevelt found America in the panic stage of the Great Depression. The first thing FDR did was to convene a special session of Congress where he introduced a bill amending the War Powers Act to remove the clause excluding American citizens from being bound by its effects. This would allow the President to declare "national emergencies" and unilaterally intact laws to deal with them. This massive amendment was approved by both houses of Congress in under 40 minutes without debate.

Hours later, FDR officially declared the depression a "national emergency" and stared issuing a string of Executive Orders that effectively were the "New Deal."

While some of FDR's actions were, perhaps, constitutionally questionable, history recognizes them as averting the growing panic and starting our economy on its way to recovery.

All Those Opposed
Many people strongly oppose the Executive Order as being an unconstitutional, even potentially dictatorial application of power. While the purpose of this article is not to state an opinion, or editorialize either way, I feel it only fair that this alternative point of view be represented.

The WINDS.org - Presidential Executive Orders

The opinions expressed in the web sites linked above are those of their authors, contributors, and representatives only and in no way represent the opinions of this Web site, your Guide, or the Mining Company, Inc.

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FT.com
FINANCIAL TIMES

US state pensions becoming federal issue

By Nicole Bullock in New York and Hal Weitzman in Chicago
Published: May 19 2010 20:44 | Last updated: May 19 2010 20:44

Illinois used to have a plan to pay off the gaping shortfall in the pension funds that pay retired teachers, university employees, state workers, judges and politicians, Dan Long recalls.

Mr Long, director of the Commission on Government Forecasting and Accountability, the non-partisan auditing arm of the Illinois state legislature, remembers that, back in 1994, the state laid out a proposal that would have paid off most of what was then a $17bn gap by 2011.

But Illinois could not stick to the plan.

With financial year 2011 less than six weeks away, the pension arrears of the 1990s look quaint. Instead of a balanced system, the state faces unfunded liabilities of about $78bn, the biggest pension hole in the US, and contributions of more than $4bn for 2011, the largest single element of its $13bn budget deficit.

Illinois is the poster child of unfunded pensions in the US. But state retirement systems could become a national concern, new research shows.

Joshua Rauh, associate professor of finance at the Kellogg School of Management at Northwestern University said that, without reform, some state pensions might run out within the decade. By 2030, as many as 31 states may not have the money to pay pensions. And, if these funds exhaust their assets, the size of payments for the benefits they have promised will be too large to cover through taxes, putting pressure on the federal government for a bail-out that could potentially cost more than $1,000bn, he says.

"It is more than a local problem," Mr Rauh said. "The federal government could be on the hook."

Estimates put the unfunded liabilities at between $1.000bn and $3.000bn after years of states promising benefits but not contributing enough in both good times and bad to cover them.

Many states base their calculations on an 8 per cent annual return and use an accounting method called smoothing, which staggers gains and losses over several years, two factors that some observers warn could mask the size of the shortfalls. The problem has come to the fore with the financial crisis and recession. Pension funds, like most money managers, suffered losses. The tax revenues that fund annual contributions to pensions, along with essential services such as healthcare and education, have plummeted, leaving little room to reimburse the losses.

States have begun reforms, with some lowering return expectations and raising employee contributions and retirement ages.

Mr Rauh said such measures were cosmetic and states needed comprehensive, federally sponsored reform that would require closing the systems to new members, shifting state workers to Social Security and individual plans similar to those that are used by the private sector in order to obtain incentives to borrow to bridge the gaps.

Mr Rauh said subsidising pension borrowing would cost a net $75bn with new contributions to the national Social Security programme offsetting some of the subsidies.

By his calculations, which assume the 8 per cent return, Illinois would run out by 2018 followed by Connecticut, New Jersey and Indiana in 2019. Some 20 states will have run out by 2025.

Five states would never run out, including New York and Florida, and 17 other states have a horizon of 2030 or beyond.

Robert Megna, New York's budget director, said his state had had to make "tough choices" to keep funding its pensions despite budget shortfalls over the past few years. On March 31, the state made a nearly $1bn payment for the last fiscal year.

"We had to make cuts: education, healthcare, local government support and not-for-profit providers," Mr Megna said of the last year's budget process.

New York's governor has proposed borrowing from the pension system, which is about 94 per cent funded, as the state did after the September 11 attacks, and repaying it with interest if low tax collections persist, Mr Megna said.

For fiscal 2010, Illinois sold $3.5bn of bonds to pay for its annual contribution.

But in an election year, there is no political support in Springfield, the capital of Illinois, for another bond issue, particularly since it requires a two-thirds majority in the state legislature.

The most likely outcome is that the state will defer the issue to next year. "That'll have an impact in terms of lost investment opportunities, and they'll have to sell some of the portfolio to pay the pensions," said Mr Long.

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Utah gov. OKs eminent domain use on federal land

Posted: Mar 28, 2010 11:35 AM Updated: Mar 28, 2010 12:36 PM
By BROCK VERGAKIS
Associated Press Writer

SALT LAKE CITY (AP) - Fed up with federal ownership of more than half the land in Utah, Republican Gov. Gary Herbert on Saturday authorized the use of eminent domain to take some of the U.S. government's most valuable parcels.

Herbert signed a pair of bills into law that supporters hope will trigger a flood of similar legislation throughout the West, where lawmakers contend that federal ownership restricts economic development in an energy-rich part of the country.

Governments use eminent domain to take private property for public use.

The goal is to spark a U.S. Supreme Court battle that legislators' own attorneys acknowledge has little chance of success.

But Utah Attorney General Mark Shurtleff and other Republicans say the case is still worth fighting, since the state could reap millions of dollars for state schools each year if it wins.

More than 60 percent of Utah is owned by the U.S. government, and policy makers here have long complained that federal ownership hinders their ability to generate tax revenue and adequately fund public schools.

Utah spends less per student than any other state and has the nation's largest class sizes. Under the measure Herbert has approved, the state will set aside $3 million to defend the law.

Lawmakers recently slashed education funding by $10 million and raised taxes on cigarettes by $1 a pack. Democrats have decried the eminent domain measure as a waste of money, and Democratic gubernatorial hopeful Peter Corroon is making it an issue in this year's special election.

But if the law is as bad as Democrats say it is, a court will quickly overturn it and the state won't have to spend much money defending it, Herbert said.

Initially, the state would target three areas for the use of eminent domain, including the Kaiparowits plateau in Grand Staircase-Escalante National Monument, which is home to large coal reserves.

Many people in Utah are still angry that then-President Bill Clinton's designated the area as a national monument in 1996, a move that stopped development on the land and greatly pleased environmentalists as he ran for re-election.

Utah lawmakers contend the federal government should have long ago sold the land it owns in the state. Because it hasn't, the federal government has violated a contract made with Utah when statehood was granted, they say.

Eminent domain would also be used on parcels of land where Interior Secretary Ken Salazar last year scrapped 77 oil and gas leases around national parks and wild areas.

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The States Can Stop Obama

By Sheriff Richard Mack (Ret.)

By now we have all heard the cliches and seen the posters from the "Tea Parties" espousing freedom, less government, and perhaps most of all, how the federal government had better back off trying to shove their national healthcare down our otherwise healthy throats. The truth of the matter is all the slogans of "Don't Tread On Me" or "Give Me Liberty Or Give Me Death" or "We're Mad As Hell And We're Not Taking It Anymore," don't mean a thing when compared to reality; the real and actual answer to all the protests, marches, and outrage. The answer is in our own backyards! *The States can stop every bit of it!* That's right, the individual States can stop "Obamacare" and all other forms of out-of-control federal government mandates and "big brother" tactics. If Arizona, Hawaii, New Hamshire, Texas, etc. want nothing to do with National Healthcare as proposed by Barack Obama or Congress, then all they have to do is say "No!"

For you skeptics who think the States could no more do this than fly to the moon, let's look at the law. First, the U.S. Constitution is the ultimate and supreme law of the land. More specifically, the Bill of Rights was established, because some of our Founding Fathers, feared that the Constitution did not go far enough in restricting or limiting the central government. Hamilton was one of a select few who wanted a bigger and powerful federal government. However, several key states and powerful delegates such as Patrick Henry, said they would not support the formation of a new government if the Constitution did not contain a Bill of Rights, a supreme law to establish basic and fundamental human rights that could never, for all future American generations, be violated, altered or encroached upon by *government*. So the Framers of our Constitution came up with ten; ten God-given freedoms that would forever be held inviolable by our own governments.

The last of these basic foundational principles was the one to protect the power, sovereignty, and the autonomy of the States; the Tenth Amendment. This amendment and law underscores the entire purpose of the Constitution **to limit** government and forbids the federal government from becoming more powerful than the "creator." Let's be very clear here; the States in this case were the creator. They formed the federal government, not the other way around. Does anyone believe rationally that the States intended to form a new central government to control and command the States at will? Nothing could be further from the truth. Article 1, Section 8 of the Constitution details what duties the federal government will be responsible for under our new system of "balanced power." Anything not mentioned in Article 1, Sec. 8, is "reserved to the States respectively, or to the people." (Tenth Amendment) Hence, the federal government was not allowed creativity or carte blanche to expand or assume power wherever and whenever they felt like it. The feds had only discrete and enumerated and very limited powers. Omnipotency was the last thing the Founding Fathers intended to award the newly formed federal government. They had just fought the Revolutionary War to stop such from Britain and their main concern was to prevent a recurrence here in America.

In perhaps the most recent and powerful Tenth Amendment decision in modern history, the U.S. Supreme Court ruled in Mack/Printz v U.S. that "States are not subject to federal direction." But today's federal Tories argue that the "supremecy clause" of the U.S. Constitution says that the federal government is supreme and thus, trumps the States in all

matters. Wrong! The supremacy clause is dealt with in Mack/Printz, in which the Supreme Court stated once and for all that the only thing "supreme" is the constitution itself. Our constitutional system of checks and balances certainly did not make the federal government king over the states, counties, and cities. Justice Scalia opined for the majority in Mack/Printz, that "Our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." So yes, it is the duty of the State to stop the Obamacare "incursion." To emphasize this principle Scalia quotes James Madison, "The local or municipal authorities form distinct and independent portions of the *Supremacy,* no more subject within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The point to remember here is; where do we define the "sphere" of the federal government? That's right; in Article 1, Section 8 of the Constitution and anything not found within this section belongs to the States or to the People. So where does health care belong? The last place it belongs is with the President or Congress. It is NOT their responsiblity and the States need to make sure that Obama does not overstep his authority.

Just in case there is any doubt as to what the Supreme Court meant, let's take one more look at Mack/Printz. "This separation of the two spheres is one of the Constitution's structural protections of liberty. Hence, a double security arises to the rights of the people. The different governments will control each other..." What? The Constitution, the supreme law of the land, has as a "structural protection of liberty" that States will keep the federal government in check? No wonder it was called a system of "checks and balances." The States (and Counties) are to maintain the balance of power by keeping the feds within their proper sphere.

So do the States have to take the bullying of the federal government? Not hardly! The States do not have to take or support or pay for Obamacare or anything else from Washington DC. The States are not subject to federal direction. They are sovereign and "The Constitution protects us from our own best intentions." (Mack/Printz) Which means the States can tell national healthcare proposals or laws to take a flying leap off the Washington monument. We are not subject to federal direction!

In the final order pursuant to the Mack/Printz ruling Scalia warned, "The federal government may neither, issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. Such commands are fundamentally incompatible with our constitutional system of dual sovereignty." It is rather obvious that nationalized healthcare definitely qualifies as a "federal regulatory program."

Thus, the marching on Washington and pleas and protests to our DC politicians are misdirected. Such actions are "pie in the sky" dreaming that somehow expects the tyrants who created the tyranny, will miraculously put a stop to it. Throughout the history of the world such has never been the case. Tyrants have never stopped their own corrupt ways. However, in our system of "dual sovereignty," the States *can* do it. If we are to take back America and keep this process peaceful, then state and local officials will have to step up to the plate. Doing so is what States' Rights and State Sovereignty are all about.

WorldNetDaily wnd commentary
Friday, February 11, 2011

The perversion of the U.S. Constitution

Posted: July 08, 1998
1:00 am Eastern

By Joseph Farah
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"Stroke of the pen. Law of the land. Kinda cool."
--Clinton presidential aide Paul Begala, July 1998

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
--Article 1, U.S. Constitution, 1789

The greatest fear of the Founding Fathers was the establishment of a strong central government and an ambitious, power-hungry political leader at the center of that government. They had had their fill of kings and dictators. They believed the best assurance against centralized authority was a loose association of sovereign states, which maintained most governmental power at the local level.

President Clinton's glib announcement that he will issue a barrage of executive orders to further his legislative agenda while bypassing Congress is the ultimate fulfillment of those fears. More chilling yet is the timing of the ominous announcement. It comes less than two months after Clinton issued, while on foreign soil, Executive Order 13083, which annihilates the principles of federalism that have guided the nation for the last 200 years.

The 10th Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Under EO 13083, Clinton has effectively tacked on to that clear, forthright, inspired, unambiguous statement a list of exceptions. He has done it single-handedly, with the stroke of a pen. And, no Mr. Begala, there is nothing cool about totalitarianism.

Say what you will about him, Bill Clinton is a bright and educated man. His actions and his words are carefully considered. He knows what he is doing. That's what makes this trend so frightening. Where does he want to take the nation? How far from its founding principles are we to stray? Is America about to transform itself from a nation governed by laws to a nation ruled by men?

How far we've come from the days of statesmen like James Madison, who believed "That all power is originally vested in, and consequently derived from, the people. That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty and the right of acquiring property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government whenever it be found adverse or inadequate to the purpose of its institution."

Note that Madison said "the people" -- not the government -- have a right to change their government. Bill Clinton has taken on this mission as his own God-given responsibility. He is acting like a strongman, an ayatollah, a czar, a potentate, a Fuhrer.

Even before Clinton abused his office so egregiously, the United States was in grave danger of concentrating too much power in Washington and too much power in the Oval Office. Clinton, ever the opportunist, has taken full advantage of Americans' ignorance of their constitutional heritage and usurped much of the remaining congressional legislative authority.

Potentially, the worst abuse of all is the executive order. For 30 years, Americans have lived under the shadow of executive orders that could -- as Mr. Begala inelegantly stated it -- with "the stroke of a pen," turn America into just another fascist dictatorship. Fortunately, America has been blessed with leaders -- some good, some bad -- who have restrained themselves from signing away our freedoms.

Without congressional approval, the president has the power to relocate whole populations of Americans, the power to shut down the free press, to force a national registration of all people. There doesn't need to be a war to justify such an action -- just a crisis, be it domestic or foreign, violent or merely economic.

I count at least a dozen executive orders, today standing as the law of the land, which would suspend the Constitution and the Bill of Rights in their entirety with such a stroke of the pen. Such power should not be in the hands of any one man -- particularly one as ambitious, driven and morally contemptible as Bill Clinton.

Oh, what a delicate thread from which our liberty is suspended.

ZIP code or keyv

Topix

Null. Void. Of No Effect.

Michael Boldin Tenth Amendment Center
January 21, 2011

When Washington D.C. violates the constitution – as it does every single day – the essential question is –"what do we do about it?"

For countless decades, Americans have been responding through protests, lawsuits, and "voting the bums out." Yet, year in and year out, federal power always grows. And it doesn't matter which political party is in power, or what person occupies the white house either.

THE RIGHTFUL REMEDY

In 1798, Thomas Jefferson wrote that

"whensoever the general government assumes undelegated powers….a nullification of the act is the rightful remedy."[emphasis added]

Notice that TJ didn't advise us to use nullification as a remedy "once in a while." And he certainly didn't tell us that a nullification is the rightful remedy after "we vote some bums out" or "we sue the federal government in federal court" or after anything else for that matter. Jefferson was pretty straightforward and recommended that every single time the federal government exercises powers not delegated to it in the constitution (there's about 30 powers and nothing more), that we're to reject and nullify those acts on a state level as they happen.

HAPPENING NOW

Already, more than two dozen states have virtually stopped the 2005 Real ID act dead in its tracks. How? By refusing to implement it. Fifteen states – most recently Arizona – are using the principles of the 10th Amendment to actively defy federal laws (and a supreme court ruling, too!) on marijuana. Eight states have passed Firearms Freedom Acts in an attempt to reject some federal gun laws and regulations. And seven states have passed Health Care Freedom Acts to block health care mandates from being enforced.

NULL. VOID. OF NO EFFECT.

Get used to reading these words, because the political climate is starting to swing a new direction. There is a growing number of people in America that are recognizing a simple truth – Asking, demanding, or suing to get the federal government to fix problems caused by the federal government just doesn't work.

Take, for example, the Federal Health Care Nullification Act, first introduced in Texas as HB297, and now also introduced in Montana (SB161), Wyoming (HB0035), Oregon (SB498) and Maine (LD58). Here's an excerpt:

"the federal law known as the "Patient Protection and Affordable Care Act," signed by President Barack Obama on March 23, 2010, is not authorized by the Constitution of the United States and violates its true meaning and intent as given by the Founders and Ratifiers, and is hereby declared to be invalid, shall not be recognized, is specifically rejected, and shall be considered null and void and of no effect."

But these bills, as introduced in Texas, Maine, Montana, Oregon, and Wyoming are far more than mere declarations or position statements

ENFORCEMENT

Implied in any nullification legislation is enforcement of the state law. In the Virginia Resolution of 1798, James Madison wrote of the principle of interposition:
That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

In his famous speech during the war of 1812, Daniel Webster said:

"The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State governments exist"

Here Madison and Webster assert what is required of nullification laws to be successful – that state governments not only have the right to resist unconstitutional federal acts, but that, in order to protect liberty, they are "duty bound to interpose" or stand between the federal government and the people of the state.

All five bills explicitly include this principle, and if passed, would impose penalties on federal agents for attempting to enforce National Health Care mandates in their state. For example, from Wyoming's HB35:

Any official, agent, employee or public servant of the state of Wyoming as defined in W.S. 6-5-101, who enforces or attempts to enforce an act, order, law, statute, rule or regulation of the government of the United States in violation of this article shall be guilty of a felony punishable by a fine of not more than five thousand dollars ($5,000.00), imprisonment in the county jail for not more than two (2) years, or both.

Sources close to the Tenth Amendment Center tell us to expect approximately ten states to introduce such bills in the 2011 legislative session.

[CONFERENCE PRINT]

112TH CONGRESS
1ST SESSION

H. RES. 5

Adopting rules for the One Hundred Twelfth Congress.

IN THE HOUSE OF REPRESENTATIVES

M__._____ submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Adopting rules for the One Hundred Twelfth Congress.

Resolved, That the Rules of the House of Representatives of the One Hundred Eleventh Congress, including applicable provisions of law or concurrent resolution that constituted rules of the House at the end of the One Hundred Eleventh Congress, are adopted as the Rules of the House of Representatives of the One Hundred Twelfth Congress, with amendments to the standing rules as provided in section 2, and with other orders as provided in sections 3, 4, and 5.

SECTION 2. CHANGES TO THE STANDING RULES.

(a) CITING AUTHORITY UNDER THE CONSTITUTION.—

(1) In clause 7 of rule XII, add the following new paragraph:

"(e)(1) A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

"(2) Before consideration of a Senate bill or joint resolution, the chair of a committee of jurisdiction may submit the statement required under subparagraph (1) as though the chair were the sponsor of the Senate bill or joint resolution.".

(2) In clause 3(d) of rule XIII, strike subparagraph (1) (and redesignate the succeeding paragraphs accordingly).

(b) THREE-DAY AVAILABILITY FOR UNREPORTED MEASURES.—In rule XXI, add the following new clause:

"11. It shall not be in order to consider a bill or joint resolution which has not been reported by a committee

Senate Resolution 632

By: Senators Pearson of the 51st, Rogers of the 21st, Williams of the 19th, Wiles of the 37th, Mullis of the 53rd and others

ADOPTED SENATE

A RESOLUTION

Affirming states' rights based on Jeffersonian principles; and for other purposes.

WHEREAS, the Ninth Amendment of the United States Constitution states "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" and the Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE that this body reaffirms the principles of government expressed by Thomas Jefferson in a resolution written for the Kentucky legislature in 1798 stating that the several States composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a General Government for special purposes, -- delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress; and

That the Constitution of the United States, having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offences against the law of nations, slavery, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," therefore all acts of Congress which assume to create, define, or punish crimes, other than those so enumerated in the Constitution are altogether void, and of no force; and that the power to create, define, and punish such other crimes is reserved, and, of right, appertains solely and exclusively to the respective States, each within its own territory; and

That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people: that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed. And thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same. And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press": thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violated either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That, therefore, all acts of Congress of the United States which do abridge the freedom of religion, freedom of speech, freedom of the press, are not law, but are altogether void, and of no force; and

That the construction applied by the General Government (as is evidenced by sundry of their proceedings) to those parts of the Constitution of the United States which delegate to Congress a power "to lay and collect taxes, duties, imports, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," and "to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof," goes to the destruction of all limits prescribed to their power by the Constitution: that words meant by the instrument to be subsidiary only to the execution of limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part to be so taken

as to destroy the whole residue of that instrument: that the proceedings of the General Government under color of these articles, will be a fit and necessary subject of revisal and correction; and

That a committee of conference and correspondence be appointed, which shall have as its charge to communicate the preceding resolutions to the Legislatures of the several States; to assure them that this State continues in the same esteem of their friendship and union which it has manifested from that moment at which a common danger first suggested a common union: that it considers union, for specified national purposes, and particularly to those specified in their federal compact, to be friendly to the peace, happiness and prosperity of all the States: that faithful to that compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-government and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of these States; and that therefore this State is determined, as it doubts not its co-States are, to submit to undelegated, and consequently unlimited powers in no man, or body of men on earth: that in cases of an abuse of the delegated powers, the members of the General Government, being chosen by the people, a change by the people would be the constitutional remedy; but, where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact, (*casus non foederis*), to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them: that nevertheless, this State, from motives of regard and respect for its co-States, has wished to communicate with them on the subject: that with them alone it is proper to communicate, they alone being parties to the compact, and solely authorized to judge in the last resort of the powers exercised under it, Congress being not a party, but merely the creature of the compact, and subject as to its assumptions of power to the final judgment of those by whom, and for whose use itself and its powers were all created and modified: that if the acts before specified should stand, these conclusions would flow from them: that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism -- free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go. In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. That

this State does therefore call on its co-States for an expression of their sentiments on acts not authorized by the federal compact. And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited government, whether general or particular. And that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked in a common bottom with their own. That they will concur with this State in considering acts as so palpably against the Constitution as to amount to an undisguised declaration that that compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States, of all powers whatsoever: that they will view this as seizing the rights of the States, and consolidating them in the hands of the General Government, with a power assumed to bind the States, not merely as the cases made federal, (*casus foederis*,) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: that this would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that the co-States, recurring to their natural right in cases not made federal, will concur in declaring these acts void, and of no force, and will each take measures of its own for providing that neither these acts, nor any others of the General Government not plainly and intentionally authorized by the Constitution, shall be exercised within their respective territories; and

That the said committee be authorized to communicate by writing or personal conferences, at any times or places whatever, with any person or person who may be appointed by any one or more co-States to correspond or confer with them; and that they lay their proceedings before the next session of the General Court.

BE IT FURTHER RESOLVED that any Act by the Congress of the United States, Executive Order of the President of the United States of America or Judicial Order by the Judicatories of the United States of America which assumes a power not delegated to the government of the United States of America by the Constitution for the United States of America and which serves to diminish the liberty of the any of the several States or their citizens shall constitute a nullification of the Constitution for the United States of America by the government of the United States of America. Acts which would cause such a nullification include, but are not limited to:

I. Establishing martial law or a state of emergency within one of the States comprising the United States of America without the consent of the legislature of that State.

II. Requiring involuntary servitude, or governmental service other than a draft during a declared war, or pursuant to, or as an alternative to, incarceration after due process of law.

III. Requiring involuntary servitude or governmental service of persons under the age of 18 other than pursuant to, or as an alternative to, incarceration after due process of law.

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IV. Surrendering any power delegated or not delegated to any corporation or foreign government.

V. Any act regarding religion; further limitations on freedom of political speech; or further limitations on freedom of the press.

VI. Further infringements on the right to keep and bear arms including prohibitions of type or quantity of arms or ammunition; and

That should any such act of Congress become law or Executive Order or Judicial Order be put into force, all powers previously delegated to the United States of America by the Constitution for the United States shall revert to the several States individually. Any future government of the United States of America shall require ratification of three quarters of the States seeking to form a government of the United States of America and shall not be binding upon any State not seeking to form such a government.

BE IT FURTHER RESOLVED that the Secretary of the Senate is authorized and directed to transmit an appropriate copy of this resolution to the President of the United States, each member of the United States Congress.

HOUSE RESOLUTION NO. 9

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES KELLY, Johnson, Keller, Harris, Gatto, Johansen, Dahlstrom, Wilson

Introduced: 2/25/09
Referred: Rules

A RESOLUTION

Relating to sovereign powers of the state.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

WHEREAS the Tenth Amendment to the Constitution of the United States reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; and

WHEREAS the Tenth Amendment defines the total scope of federal power as being that specifically granted by the Constitution of the United States and no more; and

WHEREAS the scope of power defined by the Tenth Amendment means that the federal government was created by the states specifically to be an agent of the states; and

WHEREAS some federal actions weaken states' rights protected by the Tenth Amendment to the Constitution of the United States; and

WHEREAS the Tenth Amendment assures that we, the people of the United States of America and each sovereign state in the Union of States, now have, and have always had, rights the federal government may not usurp; and

WHEREAS art. IV, sec. 4, Constitution of the United States, reads, "The United States shall guarantee to every State in this Union a Republican Form of Government," and

the Ninth Amendment to the Constitution of the United States reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and

WHEREAS the United States Supreme Court has ruled in New York v. United States, 112 S.Ct. 2408 (1992), that the United States Congress may not simply commandeer the legislative and regulatory processes of the states; and

WHEREAS all states, including Alaska, find themselves regularly facing proposals from the United States Congress that weaken states' rights protected by the Tenth Amendment;

BE IT RESOLVED that the House of Representatives hereby claims sovereignty for the state under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States; and be it

FURTHER RESOLVED that this resolution serves as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers; and be it

FURTHER RESOLVED that all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding be prohibited or repealed.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; and all other members of the 111th United States Congress.

Delete page 2, line 8 through line 20:

Delete page 2, lines 22 through line 29:

Insert

"(h) If the attorney general finds that a federal regulation or presidential executive order has the effect of preempting state law and that the regulation or order is unconstitutional or was not properly adopted, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include"

486 U.S. 57

108 S.Ct. 1637

100 L.Ed.2d 48

CITY OF NEW YORK, City of Miami, City of Wheaton and National League of Cities, Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION et al.

No. 87-339.

Argued March 29, 1988.

Decided May 16, 1988.

Syllabus

In 1974, after two years of unsatisfactory experience with conflicting federal and local technical standards governing the transmission of cable television broadcast signals, the Federal Communications Commission (FCC or Commission) promulgated regulations pre-empting the field of signal-quality regulation. In 1984, this Court broadly approved the pre-emptive authority that the FCC had asserted over cable system regulation. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580. A few months later, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), which empowers state or local authorities to enfranchise cable systems and to specify the facilities and equipment that franchisees could use, but which also authorizes the FCC to establish technical standards for such facilities and equipment. Pursuant to the latter provision, the FCC adopted regulations establishing technical standards governing the quality of cable signals and forbidding local authorities to impose more stringent technical standards. Petitioners sought review of the regulations in the Court of Appeals, contesting the scope of the FCC's claimed pre-emptive authority and asserting that franchising authorities could impose stricter technical standards than the Commission's. The court upheld the regulations.

Held: The FCC did not exceed its statutory authority by forbidding local authorities to impose technical cable signal quality standards more stringent than those set forth in the Commission's regulations. Pp. 63-70.

(a) Whether a federal agency has properly determined that its authority in a given area is exclusive and pre-empts any state regulatory efforts does not depend on the existence of express congressional authorization to displace state law. Rather, the correct focus is on the agency itself and on the proper bounds of its lawful authority to undertake such action. If the agency's decision to pre-empt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute, the accommodation should not be disturbed unless it appears from the statute or its legislative history that the accommodation "is not one that Congress would have

sanctioned." *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908. Pp. 63-64.

(b) In adopting the regulations at issue, the FCC explicitly stated its intent to continue its prior policy of exercising exclusive authority and of pre-empting state and local regulation, in order to address the potentially serious adaptability and cost problems created for cable system operators and consumers by technical standards that vary from community to community. Thus, this case does not turn on whether there is an actual conflict between federal and state law, or whether compliance with both federal and state standards would be physically impossible. Pp. 65-66.

(c) The FCC acted within its authority under the Cable Act when it pre-empted state and local regulation. In adopting the statute, Congress acted against a 10-year background of federal pre-emption on this particular issue and at a time shortly after *Crisp* approved FCC pre-emption in very similar respects. Nevertheless, Congress sanctioned in relevant respects the regulatory scheme that the Commission had already been following, without indicating explicit disapproval of the Commission's pre-emption of local technical standards. Given the difficulties the FCC had experienced with inconsistent local standards, it is doubtful that Congress would have meant to overturn pre-emption without discussion or even any suggestion that it was doing so. To the contrary, the legislative history makes clear that the Cable Act was not intended to work any significant change. Thus, nothing in the Act compels the conclusion that the decision to pre-empt "is not one that Congress would have sanctioned." Pp. 66-70.

259 U.S.App.D.C. 191, 814 F.2d 720 (1987), affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Stephen J. McGrath, New York City, for petitioners.

Lawrence G. Wallace, Washington, D.C., for federal respondent, F.C.C.

H. Bartow Farr, III, Washington, D.C., for respondent, National Cable Television.

Justice WHITE delivered the opinion of the Court.

1

The Federal Communications Commission has adopted regulations that establish technical standards to govern the quality of cable television signals and that prohibit local authorities from imposing more stringent technical standards. The issue is whether in doing so the Commission has exceeded its statutory authority.

2

* This case deals with yet another development in the ongoing efforts of federal, state, and local authorities to regulate different aspects of cable television over the past three decades. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-705, 104 S.Ct. 2694, 2700-2703, 81

L.Ed.2d 580 (1984); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-178, 88 S.Ct. 1994, 1996-2005, 20 L.Ed.2d 1001 (1968). With the incipient development of cable television in the 1950's and 1960's from what had been more generally known as community antenna television systems, the Federal Communications Commission began to assert regulatory authority in this area. See *CATV Second Report and Order,* 2 F.C.C.2d 725 (1966). In 1972, the Commission first asserted authority over technical aspects of cable television and devised technical standards to govern the transmission of broadcast signals by cable, though without pre-empting regulation of similar matters by state or local franchising authorities. *Cable Television Report and Order,* 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union v. FCC,* 523 F.2d 1344 (CA9 1975).1 Within two years, however, the Commission became convinced from its experience with conflicting federal and local technical standards that there is "a compelling need for national uniformity in cable television technical standards" which would require it to pre-empt the field of signal-quality regulation in order to meet the "necessity to rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jurisdictions." *Cable Television Report and Order,* 49 F.C.C.2d 470, 477, 480 (1974). The Commission explained that a multiplicity of mandatory and nonuniform technical requirements undermined "the ultimate workability of the over-all system," could have "a deleterious effect on the development of new cable services," and could "seriously imped[e]" the "development and marketing of signal source, transmission, and terminal equipment." *Id.* at 478-479.2

3

In 1984, the Court approved the pre-emptive authority that the Commission had asserted over the regulation of cable television systems. We held that in the Communications Act of 1934, Congress authorized the Commission "to regulate all aspects of interstate communication by wire or radio," including the subsequently developed medium of cable television, and that the Commission's authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.' " *Crisp, supra,* 467 U.S. at 700, 104 S.Ct. at 2701, quoting *FCC v. Midwest Video Corp.,* 440 U.S. 689, 706, 99 S.Ct. 1435, 1444, 59 L.Ed.2d 692 (1979). Although the state law that was invalidated in *Crisp* regulated commercial advertising on cable television, rather than the technical quality of cable television signals, the Court recognized that for 10 years the Commission had "retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards." *Crisp, supra,* 467 U.S. at 702, 104 S.Ct. at 2702.

4

A few months after the Court's decision in *Crisp,* Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), 98 Stat. 2780, 47 U.S.C. §§ 521-559 (1982 ed., Supp. IV). Among its objectives in passing the Cable Act, Congress purported to "establish a national policy concerning cable communications" and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §§ 521(1), (6) (1982 ed., Supp. IV). The Act was also intended to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" through procedures and standards that "encourage the growth and development of cable systems and which assure that cable

systems are responsive to the needs and interests of the local community." §§ 521(3), (2) (1982 ed., Supp. IV).

5

The Cable Act left franchising to state or local authorities; those authorities were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were "consistent with this title." Cable Act, §§ 624(a), (b), 47 U.S.C. §§ 544(a), (b) (1982 ed., Supp. IV). Section 624(e) of the Cable Act provided that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. § 544(e) (1982 ed., Supp. IV).

6

In 1985, the Commission promulgated regulations that would establish technical standards governing signal quality for one of four different classes of cable television channels and that would forbid local cable franchising authorities to impose their own standards on any of the four classes of channels. 50 Fed.Reg. 7801, 7802 (1985), 47 CFR pt. 76 (1986). The Commission eventually adopted a modified version of these regulations, which reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television. 50 Fed.Reg., at 52462, 52464-52465. The Commission found its statutory authority to adopt the regulations in § 624(e) of the Cable Act, 47 U.S.C. § 544(e) (1982 ed., Supp. IV), and in 47 U.S.C. §§ 154(i) and 303(r). 50 Fed.Reg., at 52466. Petitioners (the cities of New York, Miami, and Wheaton, and the National League of Cities) sought review of the regulations in federal court, where they contested the scope of the pre-emptive authority claimed by the Commission and insisted that franchising authorities could impose stricter technical standards than those specified by the Commission.

7

The Court of Appeals granted partial relief to petitioners. 259 U.S.App.D.C. 191, 814 F.2d 720 (1987). It noted that the Commission had adopted technical standards applicable to one class of cable television channels, but had left the other three classes of channels completely unregulated. It agreed with petitioners that the Commission had acted arbitrarily and capriciously when it did not adopt technical standards for the latter three classes of channels, yet prohibited local authorities from adopting such standards and ignored the apparent conflict between these actions and the language of the Cable Act. It therefore vacated this part of the rule and remanded to the Commission for further proceedings. The court's holding was unanimous on this point, and that part of its decision is not at issue here.3

8

The Court of Appeals divided, however, over the propriety of the Commission's technical standards that apply to the first class of cable channels and that pre-empt more stringent local regulations. The majority of the panel upheld pre-emption, ruling that Congress intended federal regulations like these to supersede local law and that the Commission acted within the broad

confines of the pre-emptive authority delegated to it by Congress when it adopted the regulations with respect to this one class of channels. One judge dissented, contending that the majority had sanctioned pre-emption without a clear manifestation of congressional intent, contrary to this Court's decisions. We granted certiorari, 484 U.S. 962, 108 S.Ct. 449, 98 L.Ed.2d 389 (1987), and we now affirm.

II

9

When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. The phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, see *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986), we have also recognized that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law. *Id.*, at 369, 106 S.Ct. at 1898-1999.

10

This case involves the latter kind of pre-emption, and here the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power. Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154, 102 S.Ct. 3014, 3023, 73 L.Ed.2d 664 (1982). Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. *Crisp*, 467 U.S., at 700, 104 S.Ct. at 2700; *De la Cuesta, supra*, 458 U.S., at 152-154, 102 S.Ct., at 3022-3023. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have

sanctioned." *United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961); see also *Crisp, supra,* 467 U.S., at 700, 104 S.Ct., at 2700.

III

A.

11

In this case, there is no room for doubting that the Commission intended to pre-empt state technical standards governing the quality of cable television signals. In adopting the regulations at issue here, the Commission said:

12

"Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the *Notice* to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations.

13

* * * * *

14

"After a review of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This pre-emption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted." 50 Fed.Reg., at 52464.

15

As noted above, the policy adopted by the Commission in 1974, which was continued in effect by the 1985 regulations, was a pre-emptive policy applying in the area of technical standards governing signal quality. 49 F.C.C.2d, at 477-481. Since the Commission has explicitly stated its intent to exercise exclusive authority in this area and to pre-empt state and local regulation, this case does not turn on whether there is an actual conflict between federal and state law here, or whether compliance with both federal and state standards would be physically impossible. *De la Cuesta, supra,* 458 U.S., at 153, 102 S.Ct., at 3022.

B

16

The second part of the inquiry is whether the Commission is legally authorized to pre-empt state and local regulation that would establish complementary or additional technical standards, where it clearly is possible for a cable operator to comply with these standards in addition to the federal standards. We have identified at least two reasons why this part of the inquiry is crucial to our determination of the pre-emption issue. "First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Comm'n,* 476 U.S., at 374, 106 S.Ct., at 1901. The second reason was particularly relevant in *Louisiana Public Service Comm'n* because there we were obliged to assess the import of a statutory section in which Congress appeared to have explicitly limited the Commission's jurisdiction, so as to prohibit it from pre-empting state laws concerning the manner in which telephone companies could depreciate certain plant and equipment. *Id.,* 476 U.S., at 369-376, 379, 106 S.Ct., at 1899-1902, 1904, construing 47 U.S.C. § 152(b).

17

We conclude here that the Commission acted within the statutory authority conferred by Congress when it pre-empted state and local technical standards governing the quality of cable television signals. When Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue. For the preceding 10 years, the Commission had pre-empted such state and local technical standards under its broad delegation of authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter [the communications laws, Title 47 of the U.S. Code, Chapter 5]," as a means of implementing its legitimate discretionary power to determine what the "public convenience, interest, or necessity requires" in this field. 47 U.S.C. §§ 303 and 303(r); see also 49 F.C.C.2d, at 481; 47 U.S.C. § 154(i). The Court's decision in *Crisp,* which was handed down during the time Congress was considering the legislation that within a few months became the Cable Act, broadly upheld the Commission's pre-emptive authority in very similar respects. 467 U.S., at 701-705, 104 S.Ct., at 2701-2703.

18

In the Cable Act, Congress sanctioned in relevant respects the regulatory scheme that the Commission had been following since 1974. In § 624 of the Cable Act, Congress specified that the local franchising authority could regulate "services, facilities, and equipment" in certain respects, and could enforce those requirements, but § 624(e) of the Act grants the Commission the power to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. §§ 544(a)-(e) (1982 ed., Supp. IV). This mirrors the state of the regulatory law before the Cable Act was passed, which permitted the local franchising authorities to regulate many aspects of cable

services, facilities, and equipment but not to impose technical standards governing cable signal quality, since the Commission had explicitly reserved this power to the Federal Government.

19

It is also quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission's pre-emption of local technical standards.[4] Given the difficulties the Commission had experienced in this area, which had caused it to reverse its ground in 1974 after two years of unhappy experience with the practical consequences of inconsistent technical standards imposed by various localities, we doubt that Congress intended to overturn the Commission's decade-old policy without discussion or even any suggestion that it was doing so. To the contrary, the House Report which discusses this section of the Act portrays it as nothing more than a straightforward endorsement of current law:

20

"Subsection (e) allows the Commission to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchising agreement. This provision does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection." H.R.Rep. No. 98-934, p. 70 (1984), U.S.Code Cong. & Admin.News, 1984, pp. 4655, 4707.

21

This passage from the House Report makes clear that the Act was not intended to work any significant change in the law in the respects relevant to this case. By noting that § 624(e) authorizes "the Commission to set technical standards related to facilities and equipment" and that it "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment" that are not inconsistent with Commission standards, the House Report indicates both that Congress did not intend to remove from the Commission its longstanding power to establish pre-emptive technical standards, and that Congress did not intend to "affect the authority of a franchising authority" to set standards in these and similar matters regarding cable facilities and equipment. In particular, Congress did not manifest any intent to "affect the authority" of local franchising authorities by giving them the power to supplement the technical standards set by the Commission with respect to the quality of cable signals, a power which they generally had not been permitted to exercise for the last 10 years and which, according to the Commission's consistent view, disserves the public interest.[5] Petitioners insist that under § 624, as evidenced by the passage from the House Report quoted above, a franchising authority may specify any technical standards that do not conflict with Commission standards and hence may set stricter standards for signal quality. But this disregards the Commission's own power to pre-empt, an authority that we do not believe Congress intended to take away in the Cable Act. And it also disregards the Commission's explicit findings, based on considerable experience in this area, that complementary or additional technical standards set by state and local authorities do conflict with the basic objectives of federal policy with respect to cable television—findings that

the Commission first articulated in 1974 and then reiterated in 1986. See 49 F.C.C.2d, at 478-479; 50 Fed.Reg., at 52464-52465.

22

In sum, we find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt local technical standards governing the quality of cable signals "is not one that Congress would have sanctioned." *Shimer,* 367 U.S., at 383, 81 S.Ct. at 1560.6 We therefore affirm the judgment of the Court of Appeals.

23

It is so ordered.

1

The "technical standards" established by the Commission describe, in quantitative terms, various electrical characteristics of the audio and video components of the signals delivered by the cable system to its subscribers, including such specific items as visual carrier frequency, aural center frequency, visual signal level, terminal isolation, and radiation and signal leakage. See 47 CFR §§ 76.601, 76.605 (1987).

2

Although the Commission recognized that "[t]he broad pre-emptive policy we are adopting today will ultimately affect all cable systems," 49 F.C.C.2d, at 480, it fashioned this policy to have a more gradual effect. Because "many of the pre-existing technical standards adopted by cities and states cannot be shown to adversely affect our stated goals," the Commission decided to extend a "grandfather" approval to those technical standards that were already operational or certified to the Commission by January 1, 1975. *Ibid.* In addition, a mechanism was established (and remains in effect) that allows state and local authorities to impose "different or additional technical standards" if they obtain a specific waiver from the Commission. *Id.,* at 480-481; see n. 5, *infra.*

3

At argument, petitioners contended that the question of the Commission's statutory authority to regulate these other three classes of cable channels is properly presented to the Court in this case. Tr. of Oral Arg. 5-7, 9-10. We disagree. The Court of Appeals explicitly failed to resolve this question because it agreed "with petitioner's alternative argument that the FCC's . . . rulemaking was arbitrary and capricious." 259 U.S.App.D.C. 191, 197-198, 814 F.2d 720, 726-727 (1987). The Court of Appeals' disposition with respect to these three classes of cable channels was to vacate those portions of the rule and to remand to the Commission for further proceedings. In their brief, moreover, petitioners refer specifically to "a vote of 2-1 [in] the Court of Appeals" in stating the questions presented, which was the disposition below only with respect to the one class of cable channels. Brief for Petitioners i.

4

Petitioners argue that by empowering local franchising authorities to take into account whether "the quality of the operator's service, including signal quality . . . has been reasonable in light of community needs," 47 U.S.C. § 546(c)(1)(B) (1982 ed., Supp. IV), Congress implicitly recognized that local franchising authorities would need a comprehensive set of additional technical standards in order to carry out this task. Yet this argument simply ignores the fact that local authorities are able to assess signal quality against the technical standards set by the Commission, which it has found are adequate to ensure "an acceptable quality of service at the worst subscriber location and thus a better quality of service to the average subscriber." 50 Fed.Reg. 52462, 52463, n. 2 (1985).

5

Petitioners and other state and local authorities remain free, of course, to petition the Commission for an individualized waiver that would permit them to "impose additional or different requirements," which they may seek to obtain by demonstrating that particular local conditions create special problems that make the federal technical standards inadequate. See 47 CFR § 76.7 (1987).

6

Since we conclude that the Commission is authorized under § 624(e) of the Cable Act to pre-empt technical standards imposed by state and local authorities, we need not also consider whether the Commission retains the same broad pre-emptive authority in the area of cable television under §§ 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303, that it had exercised before the Cable Act was enacted in 1984. In adopting the regulations at issue here, the Commission claimed to possess statutory authority under those two sections of the Communications Act as well as under the new Cable Act. 50 Fed.Reg., at 52466. Petitioners claim that the Cable Act withdrew such authority from the Commission, and their claim draws some support from new language in 47 U.S.C. § 152(a) (1982 ed., Supp. IV), which states that "[t]he provisions of [the Communications Act] shall apply with respect to cable service . . . as provided in [the Cable Act]." On the other hand, the House Report suggests that this language is merely a more explicit grant of "exclusive jurisdiction" to the Commission over specified aspects of cable service, see H.R.Rep. No. 98-934, pp. 95-96 (1984), U.S.Code Cong. & Admin.News 1984, pp. 4732, 4733, which settles matters that had occasionally been in dispute. In addition, § 303 of the Communications Act continues to give the Commission broad rulemaking power "as may be necessary to carry out the provisions of this chapter," 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters. But since in any event the Commission possesses statutory authority to adopt the regulations at issue in this case under § 624(e) of the Cable Act, we do not decide whether the Commission's actions are authorized on this alternative basis as well.

HB 8 Conceptual Amendment – Adopted in HJUD 02.16.11

Delete page 2, lines 22 through line 29:

Insert

"(h) If the attorney general finds that a federal regulation or presidential executive order has the effect of preempting state law and that the regulation or order is unconstitutional or was not properly adopted, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include"

HB

14

<TARGET><BILL>HB 14</BILL><SUBJECT>HB
14</SUBJECT><COMM>HJUD27</COMM></TARGET>

Member

Standing Committees:
Judiciary
State Affairs
Transportation
Rules

Finance Subcommittees:
Transportation
Courts
Law

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
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MEMORANDUM

TO: Representative Carl Gatto, Chair
House Judiciary Committee

received
02/09/11 12:30 pm

FROM: Representative Max Gruenberg

DATE: February 9, 2011

RE: HB 14 – Executive Ethics: Legal Fees/Family Travel

****

Please consider this memo as a request for House Bill 14 to be heard in the House Judiciary Committee. Accompanying this memo are the following documents:

- HB 14 (27-LS0124\A)
- Sponsor Statement
- Sectional Analysis
- Expected Witness List
- Relevant Regulations
- Fiscal Note (0.0)
- Legal Opinion (dated 2/31/10) from Dan Wayne, Legislative Counsel
- Legal Opinion (dated 1/31/11) from Dan Wayne, Legislative Counsel

Thank you for considering my request for a hearing on HB 14. Please contact my legislative aide, Gretchen Staft, at 465-4940 with any questions.

Member

Standing Committees:
Rules
Judiciary
State Affairs
Transportation

Finance Subcommittees:
Corrections
Courts
Law

Alaska State Legislature

House of Representatives

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UPDATED SPONSOR STATEMENT
HB 14 - EXECUTIVE ETHICS: LEGAL FEES/FAMILY TRAVEL

House Bill 14 sets forth in statute the substance of the Attorney General's recently-enacted regulations establishing standards for (1) reimbursement of legal fees and costs for any executive branch employees accused of ethical violations, and (2) payment of travel expenses for the families of only the governor and lieutenant governor.

HB 14 differs from the regulations in two important ways. First, although both the regulations and HB 14 authorize the use of state funds to pay the travel costs of children of the governor and lieutenant governor to certain events, HB 14 would authorize this payment not just for minor children, but also for mentally and physically disabled children who are dependent on the governor or lieutenant governor for care.[1] Second, the regulations authorize the state to pay, *in advance of exoneration*, the ongoing legal fees and costs of an employee accused of an ethics violation. If the employee is not exonerated of the ethics charges, the state must then attempt to recoup the funds it advanced to defend the guilty employee. HB 14, on the other hand, would require that an employee *be exonerated* before the state could reimburse the employee for his or her fees and costs.[2] HB 14 cures both problems.

If you have any questions, please contact my legislative aide, Gretchen Staft, at 465-4940.

Thank you for your consideration of HB 14.

[1] See page 3, lines 5-10 of the bill.
[2] See page 4, lines 6-11 of the bill.

Member

Standing Committees:
Judiciary
State Affairs
Transportation
Rules

Finance Subcommittees:
Corrections
Courts
Law

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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SECTIONAL ANALYSIS
HB 14 - EXECUTIVE ETHICS: LEGAL FEES/FAMILY TRAVEL

Sec. 1. Deletes definition of "for partisan political purposes." This definition section is moved to section 3 on page 3, line 30 to page 4, line 4.

Sec. 2. Conforms AS 39.52.120(f) to the change proposed in section 1.

Sec. 3. Adds language to AS 39.52.120 that would allow, with exceptions, the use of state resources to cover costs of transporting members of the governor's and lieutenant governor's families to certain events.

Sec. 4. Creates an exception to AS 39.52.120 by *allowing* (but not requiring) a state agency to pay the reasonable costs of private legal representation relating to the defense of an ethics complaint by a person accused of an Executive Branch Ethics Act violation, in certain circumstances.

Sec. 5. Makes section 4 of the bill applicable only to ethics complaints filed on or after the effective date of the bill.

Member

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HB 14
EXECUTIVE ETHICS: LEGAL FEES/FAMILY TRAVEL

Expected Witnesses

Anchorage LIO:
Judy Bockmon (Department of Law)

Remote Call-In:
Dan Wayne (Legislative Legal Services)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 14
(H) Publish Date: 2/2/11

Identifier (file name): HB014-LAW-CIV-01-21-11
Title: An Act relating to Executive Branch Ethics; legal fees; and limitations on state paid family travel.
Sponsor: Representative Gruenberg
Requester: (H) State Affairs

Dept. Affected: Law
Appropriation: Civil
Allocation: Opinions, Appeals and Ethics
OMB Component Number: 2716

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							
FUND SOURCE		(Thousands of Dollars)					
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 1/21/11 6:00 PM
Approved by: John J. Burns, Attorney General — Date: 1/21/2011
Department of Law

(Revised 12/29/2010 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 14

Analysis

This bill authorizes state agencies to pay private legal fees and costs incurred by persons exonerated of alleged Alaska Executive Branch Ethics Act violations. Allows certain public officers and former public officers to accept state payments to offset private legal fees and costs related to defending against an Alaska Executive Branch Ethics Act complaint. Creates certain exceptions to Alaska Executive Branch Ethics Act limitations on the use of state resources to provide or pay for transportation of spouses and children of the governor and lieutenant governor. Department of Law does not anticipate a fiscal impact from this bill.

9 AAC 52.040. UNWARRANTED BENEFITS OR TREATMENT. (a) As used in AS 39.52.120 (a), "unwarranted benefits or treatment" includes

(1) a deviation from normal procedures for the award of a benefit, regardless of whether the procedures were established formally or informally, if the deviation is based on the improper motivation; and

(2) an award of a benefit if the person receiving the benefit was substantially less qualified, in light of the formal or informal standards set out for the award, than another person who was or reasonably should have been considered for the award if the award is based on an improper motivation.

(b) A public officer may not grant or secure an unwarranted benefit or treatment, regardless of whether the result is in the best interest of the state.

(c) Subject to the requirements of AS 39.52.110, 39.52.120, 39.52.150, and AS 39.90.020, neither the Ethics Act nor this chapter prohibits a public officer from

(1) considering a person who has a relationship with an officer for a state contract or job if the person is considered on an equal basis with other applicants; or

(2) considering an individual's political affiliation or political support in determining whether to appoint the individual to a state board or commission or to hire the individual for an exempt or partially exempt state job.

(3) accepting money to reimburse the public officer for reasonable expenses incurred for professional legal services to defend against a complaint brought under AS 39.52.310 - 39.52.390, if

(A) the public officer is exonerated of a violation of the Ethics Act for which payment is made;

(B) the complaint concerns conduct that occurred during the public officer's employment or service as a public officer;

(C) the public officer executes a written agreement to repay any money requested and paid in advance of exoneration if the public officer is not exonerated of the violation; and

(D) the public officer repays any money paid in advance if the public officer is not exonerated of the violation; or

(4) approving money to reimburse another public officer for reasonable expenses incurred for professional legal services to defend against a complaint brought under AS 39.52.310 - 39.52.390, entering into an agreement to pay those expenses on behalf of another public officer, or authorizing payment to secure those professional legal services on behalf of another public officer, if

(A) the complaint concerns conduct that occurred during the public officer's employment or service as a public officer;

(B) the payment is made by a state agency that has money appropriated that may be lawfully used for the purpose of paying the expenses; and

(C) the public officer whose expenses are paid

(i) has been exonerated of a violation of the Ethics Act for which payment is made; or

(ii) has executed a written agreement to repay any money paid in advance of exoneration, if the public officer is not exonerated of the violation.

(d) For purposes of (c)(3) and (4) of this section,

(1) exoneration of a violation of the Ethics Act

(A) occurs when an allegation in a complaint brought against a public officer under AS 39.52.310 - 39.52.390 is

(i) dismissed under AS 39.52.310(d), 39.52.320, or 39.52.370(d);

(ii) resolved with only preventive action recommended under AS 39.52.330 to avoid a potential violation; or

(iii) dismissed after appeal under AS 39.52.370(f); and

(B) does not include the dismissal or resolution of an allegation in a complaint when corrective action is required under AS 39.52.330;

(2) expenses are reasonable if, based on an evaluation of the complexity of the alleged claim, the attorney's fee or hourly rate, the hours expended, the relationship between the amount of work performed and the significance of the alleged claim, and other relevant factors, the expenses were necessarily incurred to defend against an allegation in a complaint brought under AS 39.52.310 - 39.52.390; those expenses may

(A) include attorney's fees, fees incurred for professional legal services customarily performed by an attorney but delegated to and performed by an investigator, paralegal, or law clerk, and related costs; and

(B) be apportioned by alleged violation if a complaint alleges more than one violation, but only if the public officer provides clear documentation that the expenses paid were limited to the alleged violation for which the public officer is exonerated; and

(3) payment under this section may be made to or on behalf of a current public officer or a former public officer who was the subject of a pending complaint when the officer left state service or becomes the subject of a complaint after leaving state service.

(Eff. 4/24/94, Register 130; am 12/22/10, Register 196)

Authority: *AS 39.52.120*
AS 39.52.950

9 AAC 52.045. TRANSPORTATION OF FAMILY MEMBERS OF GOVERNOR AND LIEUTENANT GOVERNOR. (a) The use or authorization of use of state money or other state resources for transportation of a family member of the governor or lieutenant governor does not violate AS 39.52.120(a) or (b)(3) if transportation is provided to an event at which the family member's presence benefits the state. The presence of a family member of the governor or lieutenant governor benefits the state if the family member's presence

(1) is required for official action of the state; or

(2) has a public purpose related to the governor's or lieutenant governor's official duties, including

(A) attending a state-sponsored event that the family of the governor or lieutenant governor customarily attends;

(B) attending an event at which the family member serves as an officially designated representative of the state; or

(C) accompanying, as an invited guest, the governor or lieutenant governor to an event related to issues important to the state when the family member's attendance is appropriate for the event, such as youth- or family-related events.

(b) For purposes of AS 39.52.120(a) and (b)(3) and (a) of this section, transportation of a family member to attend a political or campaign event held for partisan political purposes does not benefit the state.

(c) For purposes of AS 39.52.120(a) and (b)(3), the use or authorization of use of state money or other state resources for transportation of a family member that does not benefit the state is presumed insignificant if the governor or lieutenant governor pays the state the cost of the family member's transportation. Except for transportation by state aircraft for partisan political purposes under AS 39.52.120(f), the agency that authorized or paid for the travel shall determine the cost of the transportation based on either

(1) the actual fare paid; or

(2) the fare for equivalent commercial transportation, if the travel was by state aircraft, vessel, or vehicle.

(d) In this section,

(1) "child" has the meaning given in AS 39.52.960;

(2) "family member" means a spouse or minor child of the governor or lieutenant governor;

(3) "for partisan political purposes" has the meaning given in AS 39.52.120(b)(6).

(Eff. 12/22/10, Register 196)
Authority: *AS 39.52.120*
AS 39.52.950

9 AAC 52.050. USE OF STATE TIME, PROPERTY, EQUIPMENT, OR OTHER FACILITIES. (a) Unless the attorney general has issued a general opinion against the use or advised the public officer against the use, a public officer who uses state time, property, equipment, or other facilities to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person does not violate AS 39.52.120(a) or (b)(3) if the officer's designated supervisor determines that the use is insignificant.

(b) For purposes of determining whether a public officer has violated AS 39.52.120(a) or (b)(3), the use of a state cellular telephone to benefit the officer, an immediate family member of the officer, the officer's personal or financial interest, or another person is presumed insignificant if

(1) the cellular telephone service plan provides, for a set monthly fee, an allowance of usable minutes or an unlimited number of usable minutes;

(2) the use does not exceed

LEGAL SERVICES

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MEMORANDUM February 12, 2010

SUBJECT: Are ethics regulations proposed December 8, 2009, within the scope of the Department of Law's regulation-making authority? (Work Order No. 26-LS1493)

TO: Representative David Guttenberg

FROM: Dan Wayne
Legislative Counsel

You have asked if the Executive Branch Ethics Act regulations proposed by the Department of Law on December 8, 2009, are within the department's regulation-making authority or if the changes proposed would first require a change in statute by the legislature.

The Administrative Procedure Act says, at AS 44.62.020:

> Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

In this instance, the department's regulation-making authority comes from AS 39.52.950, which says:

> The attorney general may adopt regulations under the Administrative Procedure Act necessary to interpret and implement this chapter.

I see two places where this limited authority may be exceeded by the proposed regulations. Proposed 9 AAC 52.045 would allow the state to pay the transportation expenses of family members of the governor and lieutenant governor, even though the Act, at AS 39.52.120, prohibits that type of payment. The attorney general has previously covered this in a September 30, 2004, opinion, that said:

> For purposes of the Ethics Act, it is irrelevant that it does not cost the state more to fly the King Air with more of its seats occupied. The focus of the Ethics Act is on the benefit being conferred on the administration official

> who would not have to pay the cost of a commercial air ticket to fly his or her spouse to a location, not the cost to the state.
>
> Therefore, under current law, the Ethics Act precludes the spouses of administration officials from flying on the King Air unless the official reimburses the state the cost of a coach fare ticket for the spouse.
>
> . . .
>
> An amendment to the Ethics Act would be required to enable the Governor to allow spouses of administration officials to accompany the official on King Air flights free of charge.

Op. Attn'y Gen. (September 30, 2004); *redated for publication March 9, 2007*; 2007 Alas. AG LEXIS 5. Under the facts of this opinion there was no additional cost to the state in transporting the accompanying spouse. The 2004 opinion did not address the proposition, which the proposed 9 AAC 52.045 seems to rest upon, that the offices of governor and lieutenant governor should be considered apart from other administrative offices, as a matter of public policy, for the purpose of determining whether the state receives a benefit from the governor and lieutenant governor being accompanied by their spouses or children when traveling on state business.

The 2004 opinion said that AS 39.52.120 prohibits a public officer from securing or granting an unwarranted benefit for a spouse. "Unwarranted benefits" have been defined in existing regulations, at 9 AAC 52.040, as benefits that deviate from normal procedure and are improperly motivated. "Improper motivation" means, as defined by 9 AAC 52.990(b)(4), giving primary consideration to a person's relationship with a public officer. The 2004 A.G. Opinion reasoned that if a spouse of an administration official accompanies the official on a state trip without having to pay, there is a benefit to the spouse, and "[t]he primary consideration in granting the benefit would be the spouse's relationship with the administration official and the official's relationship with the Governor -- precisely the type of motivations that are prohibited by the Ethics Act."

In proposed 9 AAC 52.045, the accompanying spouse or child would have to demonstrate that the spouse's or child's transportation is of benefit to the state. However, as can be seen from existing regulations already adopted by the department, the department's past interpretation of AS 39.52.120 regarding state payment of family transportation costs does not, on balance, support a "benefits the state" exception to the prohibition. In fact, 9 AAC 52.040(b), which is not being amended by the proposed regulations, says that a public officer may not grant an unwarranted benefit "regardless of whether the result is in the best interest of the state." Although the proposed 9 AAC 52.045 appears to be in conflict with existing 9 AAC 52.040(b), that does not mean that a court would invalidate the proposed regulation. A court may or may not determine that a "benefits the state" exception allowing spouses and children of the governor and lieutenant governor to be transported with the governor without

reimbursement of transportation costs, exceeds the scope of AS 39.52.120; I am not able to predict which way the court would go on that question.

The proposed regulations would allow an exception to the prohibition for a spouse or child if the presence of the spouse or child is required for state business or if the purpose of transportation of the spouse or child is performance of a customary or ceremonial duty as an "official representative of the state." There is no legal authority to suggest that a person who is not a public employee or public official can be an "official representative" of the state. Being the spouse or child of a public officer does not legally confer official representative status on a person, and it follows from this that if the governor's or lieutenant governor's family member does serve the state it is in an unofficial role. I would note, nonetheless, that the governor's and lieutenant governor's families do serve a ceremonial role that is much more significant than the role served by the families of other administrative officials. The proposed regulations could be upheld on this basis if challenged.

The proposed regulations would also provide for reimbursement of private legal expenses incurred by public officers who are exonerated of allegations in an ethics complaint. The Executive Branch Ethics Act is silent with respect to legal representation of a public officer by private counsel during a complaint proceeding. The attorney general acknowledged the Act's silence on this point but argued, in a recent opinion, that public officers exonerated in ethics complaint proceedings should be reimbursed for private legal expenses incurred because it is consistent with the public's best interest and consistent with the state's general policy of paying legal expenses for public officers who defend against civil or criminal allegations arising from their service to the state.[1] A court might agree with this policy argument and still find that the legal expense reimbursement provisions of the proposed regulations go beyond the scope of the authority, granted to the Department of Law by AS 39.52.950 to adopt regulations "necessary to interpret and implement this chapter."

The legislature might appropriately choose to consider the public policy issues presented by these regulations and attempt to resolve them with legislation. Please let me know if you would like a bill drafted.

DCW:ljw
10-086.ljw

[1] Op. Attn'y Gen. file no. AN2009102807 (August 5, 2009); 2009 Alas. AG LEXIS 8.

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MEMORANDUM January 31, 2011

SUBJECT: State reimbursement of legal costs for defending against ethics complaints. (HB 14; Work Order No. 27-LS0124\A)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dan Wayne
Legislative Counsel

You have asked for a further explanation of the term "apportionment" as used on page 4, lines 12 - 13 of HB 14, and the term "necessarily incurred," as used on page 4, line 31.

1. "Apportionment" would allow for partial reimbursement of legal expenses where a single ethics complaint alleges more than one ethics violation, if an accused person is exonerated of fewer than all of the violations alleged. 9 AAC 52.040 allows apportionment as well. 9 AAC 52.040(d)(2)(B) says that legal expenses paid may "be apportioned by alleged violation if a complaint alleges more than one violation, but only if the public officer provides clear documentation that the expenses paid were limited to the alleged violation for which the public officer is exonerated."

2. The term "necessarily incurred" is relied on by Alaska courts when awarding attorney fees under Rule 82 of the Alaska Rules of Civil Procedure. Rule 82(b)(2) requires that, in cases in which the prevailing party does not win a money judgment, the court shall award the prevailing party a percentage of that party's "reasonable actual attorney's fees which were necessarily incurred." The court does not pay the awarded fees; it orders them paid by the party who opposed the prevailing party. The percentage is 30 percent if the case goes to trial and 20 percent if it's resolved without a trial, although under Rule 82(b)(3) that amount can be increased or decreased based on fairness to the parties, the complexity of the litigation, the length of trial, vexatious or bad faith conduct, the relationship between the amount of work performed and the significance of the matters at stake, the extent to which the fees incurred by the prevailing party suggest they were influenced by considerations apart from the case (such as a desire to discourage claims by others), and the reasonableness of the hourly rate, number of hours expended, and number of attorneys used.

If I may be of further assistance, please advise.

DCW:plm
11-045.plm

LEGISLATIVE RESEARCH SERVICES

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Memorandum

TO: Representative Max Gruenberg
FROM: Patricia Young, Manager
DATE: January 25, 2011
RE: State Payment of Legal Fees Incurred in Defense of an Ethics Complaint against a Public Official
LRS Report 11.122

You wished to know of any instances in Alaska or other jurisdictions where the government is authorized to reimburse a public official or state employee for legal fees and costs that the individual incurs in defending against an ethics complaint. You also wished to know of instances in Alaska or other jurisdictions where the government is authorized to pay such fees and costs in advance of exoneration.

Authorization for reimbursement of legal fees appears to be relatively common, although in a number of jurisdictions, the reimbursement is authorized to be gained from the person who brought the complaint. We identified at least three jurisdictions in which reimbursement comes through the government.[1]

- A 2008 amendment to the ethics laws on investigations in Alberta, Canada, provides for reimbursement of legal expenses through the Legislative Assembly.

- Connecticut law provides for reimbursement of legal fees by the state when charges of ethics violations are held to be without foundation. The Connecticut law further authorizes that if the complainant brought the charge knowing that it was baseless, the public official or state employee will have a cause of action against the complainant for double the amount of damage caused. If the action is successful, the courts may also award the individual the costs and reasonable attorneys' fees for the action.

- An agreement between Alaska's Division of Risk Management and the Alaska Court System establishes that in exchange for interagency assessments, Risk Management provides coverage for third party tort liability and workers' compensation claims for the Court System and its employees, for the Alaska Judicial Council and its members and employees, and for the Alaska Commission on Judicial Conduct and its members and employees. Risk Management provides limited coverage for disciplinary proceedings before the Alaska Commission on Judicial Conduct, the Alaska Bar Association, the Alaska Public Offices Commission, or any similar entity if the alleged conduct is within the scope of the employee's or member's office or employment and does not allege a conflict of interest. The annual aggregate limit is $45,000 per fiscal year, and each disciplinary proceeding is limited to $15,000. The employee must retain independent counsel and pay the first $3,000 for actual incurred attorney's fees and related costs. Thereafter, Risk Management pays up to $15,000 for the representation. In proceedings alleging a conflict of interest, no reimbursement is made unless a final adjudication establishes that no conflict existed.[2]

While there may be other jurisdictions that provide for advance payment of legal fees in such cases, we identified only the following in the timeframe of this report: in December 2010, the Alaska executive branch promulgated regulations establishing standards for the use of state money to reimburse or to pay in advance of exoneration a public officer's ongoing legal fees and costs for defending against an ethics complaint. In either case, the public officer must repay any money if not exonerated. Language of the new provisions follows.[3]

---

[1] Given the timeframe for this response, we searched the 2010 and 2009 Ethics Updates for the *COGEL Blue Book*, published annually by the Council on Governmental Ethics Laws and the websites of selected state ethics commissions. We also contacted Peggy Kerns, director of the Center for Ethics in Government at the National Conference of State Legislatures. Although traveling at this time, Ms. Kerns noted that she may be able to provide additional information on this topic in the future. We will forward any additional information upon its arrival.

[2] A copy of the Memorandum of Agreement between the Division of Risk Management and the Alaska Court System is attached.

[3] We also note that some states—including California, Michigan, and North Carolina—allow candidates for elective office or elective officials to create legal defense funds.

9 AAC 52.040. Unwarranted Benefits or Treatment.

. . .

(c) Subject to the requirements of AS 39.52.110, 39.52.120, 39.52.150, and AS 39.90.020, neither the Ethics Act nor this chapter prohibits a public officer from

. . .

(3) accepting money to reimburse the public officer for reasonable expenses incurred for professional legal services to defend against a complaint brought under AS 39.52.310 - 39.52.390, if

(A) the public officer is exonerated of a violation of the Ethics Act for which payment is made;

(B) the complaint concerns conduct that occurred during the public officer's employment or service as a public officer;

(C) the public officer executes a written agreement to repay any money requested and paid in advance of exoneration if the public officer is not exonerated of the violation; and

(D) the public officer repays any money paid in advance if the public officer is not exonerated of the violation; or 3

(4) approving money to reimburse another public officer for reasonable expenses incurred for professional legal services to defend against a complaint brought under AS 39.52.310 - 39.52.390, entering into an agreement to pay those expenses on behalf of another public officer, or authorizing payment to secure those professional legal services on behalf of another public officer, if

(A) the complaint concerns conduct that occurred during the public officer's employment or service as a public officer;

(B) the payment is made by a state agency that has money appropriated that may be lawfully used for the purpose of paying the expenses; and

(C) the public officer whose expenses are paid

(i) has been exonerated of a violation of the Ethics Act for which payment is made; or

(ii) has executed a written agreement to repay any money paid in advance of exoneration, if the public officer is not exonerated of the violation.

(d) For purposes of (c)(3) and (4) of this section,

(1) exoneration of a violation of the Ethics Act

(A) occurs when an allegation in a complaint brought against a public officer under AS 39.52.310 - 39.52.390 is

(i) dismissed under AS 39.52.310(d), 39.52.320, or 39.52.370(d);

(ii) resolved with only preventive action recommended under AS 39.52.330 to avoid a potential violation; or

(iii) dismissed after appeal under AS 39.52.370(f); and

(B) does not include the dismissal or resolution of an allegation in a complaint when corrective action is required under AS 39.52.330;

(2) expenses are reasonable if, based on an evaluation of the complexity of the alleged claim, the attorney's fee or hourly rate, the hours expended, the relationship between the amount of work performed and the significance of the alleged claim, and other relevant factors, the expenses were necessarily incurred to defend against an allegation in a complaint brought under AS 39.52.310 - 39.52.390; those expenses may

(A) include attorney's fees, fees incurred for professional legal services customarily performed by an attorney but delegated to and performed by an investigator, paralegal, or law clerk, and related costs; and

(B) be apportioned by alleged violation if a complaint alleges more than one violation, but only if the public officer provides clear documentation that the expenses paid were limited to the alleged violation for which the public officer is exonerated; and

(3) payment under this section may be made to or on behalf of a current public officer or a former public officer who was the subject of a pending complaint when the officer left state service or becomes the subject of a complaint after leaving state service.

(Eff. 4/24/94, Register 130; am 12/22/10, Register 196)
Authority: AS 39.52.120
AS 39.52.950

We hope this information is helpful. If you have questions or need additional information, please let us know.

Memorandum of Agreement for
Representation and Liability Coverage
and Workers' Compensation Coverage

between

State of Alaska,
Department of Administration,
Division of Risk Management

and

State of Alaska,
Alaska Court System

RECEIVED
JUN 01 2010
DEPARTMENT OF ADMINISTRATION
COMMISSIONER'S OFFICE

The Division of Risk Management and the Alaska Court System agree that Risk Management will provide representation and liability coverage and workers' compensation coverage under the terms of this Memorandum of Agreement ("Agreement") for the Alaska Court System and its employees, for the Alaska Judicial Council and its members and employees, and for the Alaska Commission on Judicial Conduct and its members and employees.

The Alaska Court System, the Alaska Judicial Council, and the Alaska Commission on Judicial Conduct ("Court System") pay interagency assessments to Risk Management in exchange for coverage of tort liability and workers' compensation claims. Because Risk Management provides a program of self-insurance, this Agreement is not an insurance agreement.

This agreement confirms that based upon the receipt of these interagency funds the Division of Risk Management will provide the following services to the employees and members of the Court System:

(1) Defense and indemnity of third party tort liability claims for damages made against the Court System or its employees or members when acting within the scope of the employee's or members office or employment. For purposes of this agreement "acting within the scope of the employee's office or employment" is defined as set forth in AS 09.50.253(h)(1) and this definition is incorporated by reference. Third party liability claims for damages does not include claims or litigation arising out of employment scenarios (such as wrongful discharge, constructive discharge, employment related torts);

(2) Defense and indemnity of third party claims for damages brought pursuant to 42 USC sec. 1983 which meet the criteria in (1) above;

(3) If the criteria in (1) above is met, legal representation of employees and members will be provided to defend claims for punitive damages; however this agreement does not provide indemnity for punitive damage awards or judgments;

(4) Defense counsel for the above services will be provided through the State of Alaska, Department of Law, through Risk Management's RSA, unless there is an ethical conflict barring representation; and

(5) Claim processing and payment of workers compensation claims made by Court System employees where the Court System is the employer.

The Division of Risk Management will provide the following additional services to the Court System as set forth below:

(1) Risk Management will not provide representation or indemnification to an employee for disciplinary proceedings. However, Risk Management will provide limited coverage for disciplinary proceedings, if the alleged conduct is within the scope of the employee's or member's office or employment as defined in AS 09.50.253(h)(1) and does not allege a conflict of interest.

(a) For each disciplinary proceeding, an employee who retains a private attorney will be reimbursed up to $15,000 for the actual incurred costs (independent attorney fees and related legal expenses) incurred for that representation. Reimbursement will be made per disciplinary proceeding, notwithstanding the number of allegations contained within any complaint or charging document.

(b) Prior to reimbursement, the employee must first pay $3,000 for actual incurred costs (independent attorney fees and related legal expenses) for private representation.

(c) There is an annual aggregate limitation to this reimbursement by the Division of Risk Management to $45,000 per fiscal year (the period of July 1 through June 30).

(d) Risk Management will not provide reimbursement for proceedings that allege a conflict of interest between the employee's official capacity and the activities of the employee as a director, officer, partner, investor, or trustee of any private, public, or charitable organization, or to any other conflict of interest claim, unless a final adjudication has been made and no conflict was found to exist.

(e) "Disciplinary proceedings" means proceedings before the Alaska Commission on Judicial Conduct, the Alaska Bar Association, the Alaska Public Offices Commission, or any similar entity, but does not include proceedings brought under the Alaska Court System's Personnel Rules, or under any personnel rules adopted by the Alaska Judicial Council or the Alaska Commission on Judicial Conduct.

This agreement may be cancelled by either party upon 60 days' notice.

ALASKA COURT SYSTEM

FOR Christine Johnson
Administrative Director
DATED: 5-19-10

DEPARTMENT OF ADMINISTRATION

for Annette Kreitzer
Commissioner
DATED: 6-1-10

ALASKA JUDICIAL COUNCIL

Larry Cohn
Executive Director
DATED: 5/20/10

ALASKA COMMISSION ON JUDICIAL CONDUCT

Marla Greenstein
Executive Director
DATED: 5-20-10

CS FOR HOUSE BILL NO. 14(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE GRUENBERG

A BILL

FOR AN ACT ENTITLED

"An Act authorizing state agencies to pay private legal fees and costs incurred by persons exonerated of alleged Alaska Executive Branch Ethics Act violations; allowing certain public officers and former public officers to accept state payments to offset private legal fees and costs related to defending against an Alaska Executive Branch Ethics Act complaint; and creating certain exceptions to Alaska Executive Branch Ethics Act limitations on the use of state resources to provide or pay for transportation of spouses and children of the governor and the lieutenant governor."

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

* **Section 1.** AS 39.52.120(b) is amended to read:

(b) A public officer may not

(1) seek other employment or contracts through the use or attempted use of official position;

(2) accept, receive, or solicit compensation for the performance of

official duties or responsibilities from a person other than the state;

(3) use state time, property, equipment, or other facilities to benefit personal or financial interests;

(4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest;

(5) attempt to benefit a personal or financial interest through coercion of a subordinate or require another public officer to perform services for the private benefit of the public officer at any time; or

(6) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for **a** partisan political **purpose** [PURPOSES]; this paragraph does not prohibit use of the governor's residence for meetings to discuss political strategy and does not prohibit use of state aircraft or the communications equipment in the governor's residence so long as there is no charge to the state for the use [; IN THIS PARAGRAPH, "FOR PARTISAN POLITICAL PURPOSES"

(A) MEANS HAVING THE INTENT TO DIFFERENTIALLY BENEFIT OR HARM A

(i) CANDIDATE OR POTENTIAL CANDIDATE FOR ELECTIVE OFFICE; OR

(ii) POLITICAL PARTY OR GROUP;

(B) BUT DOES NOT INCLUDE HAVING THE INTENT TO BENEFIT THE PUBLIC INTEREST AT LARGE THROUGH THE NORMAL PERFORMANCE OF OFFICIAL DUTIES].

* **Sec. 2.** AS 39.52.120(f) is amended to read:

(f) Use of state aircraft for **a** partisan political **purpose** [PURPOSES] is permitted under (b) of this section only when the use is collateral or incidental to the normal performance of official duties and does not exceed 10 percent of the total of the use of the aircraft for official purposes and partisan political purposes, combined, on a single trip. A public officer who authorizes or makes any partisan political use of a state aircraft under (b) of this section shall disclose the authorization and use under AS 39.52.210 or 39.52.220 for each trip, and the person who uses the aircraft shall

reimburse the state for the proportionate share of the actual cost of the use.

* **Sec. 3.** AS 39.52.120 is amended by adding new subsections to read:

(g) Notwithstanding (a) and (b)(1) - (5) of this section, state resources may be used to transport or pay the cost of transporting a person who is the spouse or child of the governor or lieutenant governor to an event. This subsection authorizes transportation or payment of the cost of transportation of a person who is a child of the governor or lieutenant governor if the person is a biological child, an adoptive child, or a stepchild of the governor or lieutenant governor and is under 19 years of age or, without regard to age, is dependent on the governor or lieutenant governor for care because of a physical or mental disability. Under this subsection, use of state resources is permitted if the event does not have a partisan political purpose and

(1) the person is transported with the governor or lieutenant governor and the state is reimbursed for the actual cost or, if the actual cost is not reasonably calculable, the fair market value of the person's transportation; or

(2) the person's attendance is a benefit to the state; under this paragraph, a benefit to the state is presumed when

(A) the person's attendance at the event is required for official action of the state;

(B) the event is state-sponsored and the person's attendance has been customary at similar events;

(C) the person is attending as an officially designated representative of the state; or

(D) the person is invited by the sponsor of the event before the transportation occurs, the event is related to issues important to the state, the governor or lieutenant governor attends, and

(i) the event is a family or youth oriented event at which the person's attendance is particularly appropriate; or

(ii) the invitation and the person's attendance have been customary for similar events.

(h) In this section, "partisan political purpose"

(1) means a purpose intended to differentially benefit or harm a

(A) candidate or potential candidate for elective office; or

(B) political party or group;

(2) does not include a purpose intended to benefit the public interest at large through the normal performance of official duties.

* **Sec. 4.** AS 39.52 is amended by adding a new section to article 5 to read:

Sec. 39.52.470. Legal fees and costs. (a) Notwithstanding AS 39.52.120, a state agency may pay the fees and costs of private legal representation that are incurred by a person who is a public officer or a former public officer while defending against a complaint initiated or filed under AS 39.52.310 concerning conduct by the person during a period when the person was serving or employed as a public officer, if the person has been exonerated. When a complaint has alleged more than one violation against a public officer or a former public officer, payments may be apportioned by alleged violation.

(b) A payment made under this section must be from funds that have been appropriated to a state agency and that may lawfully be used for the payment.

(c) Notwithstanding AS 39.52.120, a public officer or former public officer who is the subject of a complaint may accept a payment under (a) of this section.

(d) A public officer may not act for the state in the matter of a payment under this section if the payment is to the public officer or an immediate family member of the public officer.

(e) In this section,

(1) "exonerated" means that an allegation of a violation of AS 39.52 (Alaska Executive Branch Ethics Act) has, without corrective action under AS 39.52.330, been

(A) dismissed under AS 39.52.310(d), 39.52.320, or 39.52.370(d);

(B) dismissed after an appeal under AS 39.52.370(f); or

(C) resolved solely with a recommendation for preventive action under AS 39.52.330;

(2) "fees and costs of private legal representation" means reasonable fees and related costs of legal representation that are necessarily incurred in defense

against the allegations in the complaint and may include fees for services customarily performed by an attorney but delegated to and performed by a person working under the supervision of an attorney licensed to practice in the state.

* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 39.52.470, enacted by sec. 4 of this Act, applies only to complaints under AS 39.52.310 - 39.52.390 that are initiated or filed on or after the effective date of this Act.

HB

15

<TARGET><BILL>HB 15</BILL><SUBJECT>HB
15</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Mike Doogan
Representative
District 25, Anchorage

MEMORANDUM

To: Representative Carl Gatto, Chair
House Judiciary Committee

From: Representative Mike Doogan

Date: April 4, 2011

Re: Hearing request for HB 15: Preventing, evaluating and liability for concussions in student athletes.

I respectfully request that House Bill 15, An Act relating to prevention and evaluation of and liability for concussions in student athletes, be scheduled for a hearing in the House Judiciary Committee.

Attached you will find a current version of the bill, a copy of the original bill, a sponsor statement, a sectional analysis, and pertinent background information.

We expect to have testimony from a representative of the National Football League, the Alaska Brain Injury Network, The Alaska School Activities Association and the Alaska Athletic Trainers Association. At least two of these will be off-net callers.

Please feel free to contact me or my aide, Frank Ameduri, with questions or thoughts at 465-2734.

Mike Doogan

received
04/04/11 2:50pm JM

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Juneau, AK 99801
907-465-4998 or 800-689-4998
Fax 907-465-4419

716 West 4th Avenue
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Rep.Mike.Doogan@legis.state.ak.us

Alaska State Legislature

Mike Doogan
Representative
District 25, Anchorage

SPONSOR STATEMENT

HB 15

An Act relating to prevention and evaluation of and liability for traumatic brain injuries in student athletes

More than 60,000 high school student athletes sustain concussions each year. The number is much greater when you include middle school and younger children. The National Football League has recently begun focusing on concussions and brain trauma, raising public awareness of this serious problem, and many states are now moving to add protections for students who participate in sports or other potentially dangerous activities. While concussions and brain trauma are more prevalent in football, many other sports and activities are also dangerous, with girls' soccer resulting in the second-most concussions.

A concussion results from the brain striking the inside of the skull, and can be caused by a blow to the head, or by violent motion of the head. Though the risk can be somewhat reduced with a helmet, it cannot be prevented with external equipment. While it is nearly impossible to completely prevent an initial concussion or brain trauma, this legislation seeks to minimize complications and more permanent conditions that can be caused when athletes continue to practice or play after receiving a concussion.

HB 15 is modeled after legislation that recently passed in Washington State, known as the Zackery Lystedt Law. Zackery was a middle-school football player who was returned to a game after suffering a concussion. He sat out for about 15 minutes, and then returned to the game, forcing a game-saving fumble, but suffering a further head injury on the play. The second injury caused a brain hemorrhage that ultimately lead to the removal of both sides of Zackery's cranium, leaving him drifting in and out of a coma for three months. He has battled his way back to some sense of normalcy, but will never fully recover from this avoidable injury.

HB 15 simply requires school districts, in consultation with the Alaska School Activities Association, to develop and publish guidelines and information to educate coaches, student athletes and parents about the nature and risks of concussions and traumatic brain injuries. The bill will require that a student athlete suspected of suffering a concussion or brain trauma be removed from practice or play, and not be allowed to return until cleared by a licensed health care professional.

While there is no way to completely prevent concussions or traumatic brain injuries, we can strive to prevent the serious complications and potentially life-altering or life-threatening ramifications that can occur from continuing to practice or compete once a brain injury has occurred. This is a critical public health issue, and a responsibility to our children we should take seriously.

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Rep.Mike.Doogan@legis.state.ak.us

SECTIONAL ANALYSIS

HB 15
An Act relating to prevention and evaluation of and liability for traumatic brain injuries in student athletes.

Section 1: Adds a new section to the uncodified law of the State of Alaska that will explain statistics, risks and challenges related to youth-related concussions, including:

(1) Concussions rank high in reported brain trauma injuries to children participating in sports and recreational activities.
(2) The CDC estimates nearly 4 million sports- and rec-related concussions in the US every year.
(3) Provides the definition of a concussion and some of the consequences of concussions – the effects may or may not include loss of consciousness; disruption of normal brain function.
(4) Explains how concussions may occur during organized or unorganized sports and rec. activities – such as through a fall or from a collision with another player.
(5) Explains that the risks of catastrophic injury or death from head injuries increase without proper evaluation and management, and if the athlete is allowed to continue participating following the concussion.
(6) Explains that, in spite of nationwide guidelines recommending individual assessment and gradual return to play following concussions, athletes continue to be returned to play prematurely – increasing risk of greater injury.

Section 2: Amends AS 14.30 by adding new sections to article 3 that would establish requirements for school district governing bodies relating to prevention and reporting. It also clarifies points of liability and damages (more details below, if needed):

Sec. 14.30.142. Concussions in student athletes: prevention and reporting.
(a) Requires school district governing body to consult with Alaska School Activities Association to develop and publish guidelines, etc. to educate coaches, student athletes and parents about the nature and risks of concussions.
(b) A student suspected of having a concussion or traumatic brain injury is immediately removed from the practice or game.
(c) Before returning to play or practice, the student must be cleared by a licensed health care provider who has received training in evaluating and managing traumatic brain injuries, including concussions.
(d) This provision explains that an evaluator may not be held liable for civil damages, except where he/she acted recklessly or with intentional misconduct or gross negligence.

Sec. 14.30.143. Concussions: school district immunity.
(a) Explains that a school district may not be held liable for injury or death resulting from the action or inaction of an employee or contractor with a non-profit youth organization if –
(1) the action/inaction occurred on school property during the delivery of services by the district or organization;

(2) the organization is under contract with the district to provide the services, and

(3) before the provision of services, the organization provided to the district written verification of –

(A) a valid insurance policy covering the injury or death in an amount not less than $50,000 per person and $100,000 per incident;

(B) compliance with the protocol for prevention and reporting of traumatic brain injury required in AS 14.30.142.

(b) This section may not be construed to impair or modify a person's ability to recover damages for harm due to negligent or reckless actions of a school or district employee or contractor or by the existence of a condition, equipment, program or structure known by the school district or organization to be unsafe.

(c) "Youth organization" means a public or private entity, qualified to do business in the state, that provides a program or service to persons under 19 years old.

HB 15: An Act relating to prevention and evaluation of and liability for concussions in student athletes

Changes from original version

The current version of the bill before you has been changed in a few minor ways from the original bill.

- The title has changed, listing "concussions in student athletes," rather than "traumatic brain injuries in student athletes."
- On P. 3, lines 1-4, the definitions of qualified people who can release student athletes back to play have been expanded from the original bill, to address access challenges in rural communities, and also to allow certified athletic trainers to participate.
- On P. 3, line 14 the words "on school property" were deleted. Many school sponsored athletic events in Alaska do not happen on school property.

Original version

27-LS0130\A

HOUSE BILL NO. 15

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES DOOGAN, Kerttula, Johnson, Muñoz

Introduced: 1/18/11
Referred: Education, Health and Social Services

A BILL

FOR AN ACT ENTITLED

"An Act relating to prevention and evaluation of and liability for traumatic brain injuries in student athletes."

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

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRAUMATIC BRAIN INJURY; FINDINGS. The legislature finds that

(1) concussions rank among the most commonly reported traumatic brain injuries in children and adolescents who participate in sports and recreational activities;

(2) the United States Centers for Disease Control and Prevention estimates that as many as 3,900,000 concussions occur each year in the United States as a result of sports and recreational activities;

(3) a concussion is caused by a blow to or jarring of the head or body that causes the brain to move rapidly inside the skull, resulting in a mild to severe traumatic brain injury, which may occur with or without loss of consciousness, and may disrupt normal brain

function;

(4) a concussion may occur during an organized or unorganized sport or recreational activity as a result of a fall or from players colliding with each other or another obstacle;

(5) the risk of catastrophic injury or death from a concussion or other head injury increases when the injury is not properly evaluated and managed, and the athlete is allowed to continue to participate in sports or recreational activities following the concussion;

(6) although voluntary nationwide guidelines for managing concussion in sports recommend assessing concussions on an individual basis, with gradual return to play, athletes continue to be returned to play prematurely, putting them at risk for greater injury or death.

* **Sec. 2.** AS 14.30 is amended by adding new sections to article 3 to read:

Sec. 14.30.142. Traumatic brain injury in student athletes: prevention and reporting. (a) The governing body of a school district shall consult with the Alaska School Activities Association to develop and publish guidelines and other information to educate coaches, student athletes, and parents of student athletes regarding the nature and risks of concussions and other traumatic brain injuries. Guidelines developed under this section must include a description of the risks of return to play and standards for return to play, including the procedures required under (b) and (c) of this section.

(b) A student who is suspected of having sustained a concussion or other traumatic brain injury during a practice or game shall be immediately removed from the practice or game.

(c) A student who has been removed from participation in a practice or game for suspicion of concussion or other traumatic brain injury may not return to play until the student has been evaluated and cleared for participation by a licensed health care provider who has received training in the evaluation and management of traumatic brain injuries, including concussions.

(d) A person who conducts an evaluation under (c) of this section may not be held liable for civil damages resulting from an act or omission during the evaluation, except that the person may be held liable for reckless or intentional misconduct and

for gross negligence.

Sec. 14.30.143. Traumatic brain injury: school district immunity. (a) A school district may not be held liable for an injury to or the death of a person resulting from the action or inaction of a person employed by or under contract with a nonprofit youth organization if

(1) the action or inaction occurred on school property during the delivery of services by the district or organization;

(2) the organization is under contract with the district to provide the services; and

(3) before the provision of services, the organization provided to the district written verification of

(A) a valid insurance policy covering the injury or death in an amount not less than $50,000 for each person and $100,000 for each incident;

(B) compliance with the protocol for prevention and reporting of traumatic brain injury required in AS 14.30.142.

(b) This section may not be construed to impair or modify the ability of a person to recover damages for harm caused by the negligent or reckless actions of an employee or contractor of a school district or by the existence of a condition, equipment, program, or structure known by the school district or organization to be unsafe.

(c) In this section, "youth organization" means a public or private entity qualified to do business in the state that provides a program or service to persons under 19 years of age.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 15(EDC)
(H) Publish Date: 3/31/11

Identifier (file name): HB15-EED-TLS-3-11-11
Dept. Affected: EED
Title: "An Act relating to prevention and evaluation of and liability for traumatic brain injuries to student athletes."
Appropriation: Teaching & Learning Support
Allocation: Student & School Achievement
Sponsor: Reps. Doogan, Kerttula, Johnson, Munoz & Gruenberg
Requester: (H)EDC
OMB Component Number: 2796

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Cynthia Curran , Director
Phone: 465-2851
Division: Teaching & Learning Support
Date/Time: 3/11/11 2:55 PM
Approved by: Mike Hanley
Date: 3/11/2011
Commissioner

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 15(EDC)

Analysis

This legislation has no fiscal impact on the Department of Education and Early Development.

Boston University School of Medicine

Department of Veterans Affairs

EMBARGOED UNTIL August 18, 2010, 8 a.m. E.T.

Contact: Gina DiGravio, 617-638-8480, **gina.digravio@bmc.org**
Jenny Eriksen, 617-638-6841, **jenny.eriksen@bmc.org**
Kristin Pressly, 781-687-4988, **kristin.pressly@va.gov**

BOSTON UNIVERSITY AND DEPARTMENT OF VETERANS AFFAIRS RESEARCHERS DISCOVER BRAIN TRAUMA IN SPORTS MAY CAUSE A NEW DISEASE THAT MIMICS ALS

Two former NFL players died after being diagnosed with Lou Gehrig's Disease; New findings suggest they had a new disease associated with repetitive brain trauma

(BOSTON) – The Center for the Study of Traumatic Encephalopathy (CSTE) at Boston University School of Medicine (BUSM) and Department of Veterans Affairs (VA) announced today that they have provided the first pathological evidence that repetitive head trauma experienced in collision sports is associated with motor neuron disease, a neurological condition that affects voluntary muscle movements. The most common form of motor neuron disease is amyotrophic lateral sclerosis (ALS) or Lou Gehrig's disease. The findings will be published in the September issue of the *Journal of Neuropathology and Experimental Neurology* (**http://journals.lww.com/jneuropath**).

The finding was discovered by Ann McKee, MD, and colleagues at the CSTE. McKee, a CSTE Co-Director, is an associate professor of neurology and pathology at BUSM, as well as Director of Neuropathology for the Department of Veterans Affairs at the Bedford VA Medical Center, where this research was conducted.

McKee and the CSTE researchers made this groundbreaking pathological discovery while examining the brains and spinal cords of 12 athletes donated by family members to the CSTE Brain Bank at the Bedford VA Medical Center. Three of these 12 athletes, including former professional football players Wally Hilgenberg and Eric Scoggins, as well as an unidentified former military veteran and professional boxer, developed motor neuron disease late in their lives. The former football players were diagnosed clinically with ALS, which is a progressive neurodegenerative disease that attacks motor nerve cells in the brain and spinal cord, resulting in muscle weakness and atrophy. ALS affects fewer than two in 100,000 patients annually, and 30,000 Americans currently live with the disease. The majority of ALS cases (90-95 percent) are considered "sporadic," meaning of unknown cause, although it has long been suspected to involve a complex interaction between multiple genetic and environmental risk factors.

In this study, funded in part by an unrestricted gift from the National Football League (NFL) to the CSTE, McKee found that when they died, all 12 athletes showed neuropathological evidence of chronic traumatic encephalopathy (CTE), a progressive degenerative brain disease characterized by deposits of an abnormal form of *tau* protein and believed to be caused by repetitive head trauma. In the three athletes with motor neuron disease, abnormal *tau* protein deposits were not only found throughout the brain, but also in the spinal cord.

CSTE researchers also discovered that 10 of 12 CTE victims had a second abnormal protein, TDP-43, in their brains. Of those 10, only three had TDP-43 in the brain *and* the spinal cord, and those were the three athletes diagnosed with motor neuron disease. TDP-43 is also found in individuals with sporadic ALS although in the athletes with repetitive brain trauma, the TDP-43 pathology was more severe than found in sporadic ALS and was accompanied by extensive *tau* pathology. The brains and spinal cords of normal individuals show no TDP-43 or *tau* deposition.

These new findings suggest that the motor neuron disease that affected the three athletes is similar to, but distinct from sporadic ALS and represents a disease never described previously in the medical literature. This new disease, referred to as chronic traumatic encephalomyopathy (CTEM) by McKee and colleagues is likely caused by the repetitive head trauma experienced by athletes in contact sports.

The association between head trauma and ALS is supported by the medical literature, in which the risk of ALS has been reported to be higher among contact sport athletes and veterans. A study of professional soccer players in Italy found that the incidence rate of ALS was 6.5 times higher than in the general population. An increased incidence of ALS has also been reported in American football players, including three players from the 1964 San Francisco 49ers who died from ALS. Based on the number of retired NFL players with ALS, it is estimated that the risk is at least 8 times higher than in the adult male population. Among Veterans with a history of head injuries, their risk of ALS was 2.3 times higher than normal, and Gulf War Veterans have a twofold increased risk. In fact, since 2008, the US Department of Veterans Affairs has considered ALS as a presumptively compensable illness for all veterans. The discovery of this new ALS-like disease by the BU CSTE investigators suggests that one possible reason for the increased risk of clinically diagnosed ALS in veterans and in contact sport athletes may be the exposure to repetitive head trauma, including concussions, subconcussive blows and blast injuries.

These findings raise the question of whether head injuries may have contributed to Lou Gehrig's motor neuron disease, and whether he also suffered from CTEM. Gehrig, nicknamed the "Iron Horse," played football at Columbia University before becoming a legendary member of the New York Yankees and playing in 2,036 consecutive games, a record that stood for more than 60 years. Gehrig suffered at least five documented concussions and was reported to have been knocked unconscious for five minutes after taking a pitch to the head while not wearing a helmet. He played the next day.

"When we read reports about cases of the disease being linked to specific activities or experiences, such as the increased risk associated with military service, or this one regarding professional athletes, we are reminded of just how complex of a disorder ALS is. We're hopeful that this new work may shed light on potentially exciting new possibilities for biomarker and therapy development," said Steve Perrin, PhD, CEO and Chief Scientific Officer of the ALS Therapy Development Institute.

Responding to these new findings, Hunt Batjer, MD and Richard Ellenbogen, MD, the co-chairmen of the NFL's new Head, Neck and Spine Committee, stated, "We are pleased that the NFL has provided the support necessary for this research and look forward to continued discussion of the findings within our medical committee and with other researchers to better understand their clinical implications."

McKee now has analyzed the brains of more than 35 athletes and found evidence of CTE in 12 of 13 former NFL players. These brains were acquired primarily through the efforts of CSTE co-director Chris Nowinski who is also president of the non-profit Sports Legacy Institute. The CSTE maintains a registry of more than 350 living athletes who have agreed to donate their brain and spinal cord following death and to undergo telephone-based interviews and assessments during life. Robert Stern, PhD, CSTE co-director and an associate professor of neurology at BUSM, oversees the CSTE registry as well as a study about to begin of retired NFL players who undergo extensive neurological, cognitive, psychiatric, cerebrospinal fluid and neuroimaging studies. Robert Cantu, MD, a clinical professor of neurosurgery at BUSM and co-director of the CSTE, was recently appointed senior advisor to the NFL Head, Neck and Spine Committee.

COORDINATES WOULD BE PLACED HERE

****

Wally Hilgenberg died in 2008 at the age of 66 after a three-year battle with ALS. After graduating from the University of Iowa, Mr. Hilgenberg played 12 seasons with the Minnesota Vikings and three with the Detroit Lions as a linebacker.

Eric Scoggins died in 2009 at the age of 49 after a two-year battle with ALS. After graduating from the University of Southern California, he played one season for the San Francisco 49ers before playing two seasons in the United States Football League, for the Los Angeles Express and the Houston Gamblers.

Early symptoms of ALS often include increasing muscle weakness, especially involving the arms and legs, and progressive problems with speech, swallowing and breathing. Because voluntary muscle action is progressively affected, patients in the later stages of the disease may become totally paralyzed. In nearly all cases, ALS is fatal.

The CSTE (**www.bu.edu/cste/**) was founded in 2008 and is the leading center in the world studying the long-term effects of repetitive brain trauma in sports and the military. The CSTE was created as a collaboration between Boston University (BU), Sports Legacy Institute (SLI) and the Department of Veterans Affairs. Co-directors of the BU CSTE include Robert Cantu, MD, a clinical professor of neurosurgery at BUSM, Ann McKee, MD, an associate professor of neurology and pathology at BUSM, Chris Nowinski, and Robert Stern, PhD, an associate professor of neurology at BUSM. The mission of the CSTE is to conduct state-of-the-art research of CTE, including its neuropathology and pathogenesis, the clinical presentation, biomarkers, and course, the genetics and other risk factors for CTE, and ways of preventing and treating this cause of dementia. Brain trauma is increasingly seen as a public health crisis due to the discovery of CTE in a number of recently deceased athletes, most of whom have been studied at the CSTE. McKee also identified CTE in the only former NHL player examined, Reggie Fleming. The CSTE's groundbreaking research created a dramatic change in the understanding of and response to brain trauma and concussions in all sports, especially football. The BU CSTE has received grants from the National Institute on Aging and the National Operating Committee on Standards in Athletic Equipment (NOCSAE), and has received an unrestricted gift from the NFL.

CTE, originally referred to as "dementia pugilistica" because it was believed to only affect boxers, is a progressive brain disease believed to be caused by repetitive trauma to the brain, including concussions and subconcussive blows. It is characterized by deposits of an abnormal protein called *tau* in the form of neurofibrillary tangles, glial tangles, and neuropil threads throughout the brain, and, in some cases, the presence of another abnormal protein – associated with motor neuron disease – known as TDP-43. These abnormal proteins are associated with the impaired functioning and eventual death of brain cells. Early on, CTE sufferers may display symptoms such as memory impairment, emotional instability, erratic behavior, depression and problems with impulse control. CTE may eventually progress to full-blown dementia. Although similar to Alzheimer's disease, CTE is pathologically distinct, and it is the only known preventable cause of dementia.

CSTE co-directors Cantu, McKee and Nowinski serve on the NFL Players Association Mackey/White Traumatic Brain Injury Committee, which includes, and is chaired by, CSTE registry member Sean Morey. In addition, Cantu serves as a senior advisor to the newly created NFL Head, Neck and Spine Committee.

Sports Legacy Institute is a 501(c)(3) nonprofit corporation founded in 2007 to solve the sports concussion crisis. SLI is dedicated to education, prevention, treatment and research on the effects of concussions and other brain injuries in athletes and the military. SLI partnered with Boston University School of Medicine to form the Center for the Study of Traumatic Encephalopathy in 2008.

BRAIN INJURY ASSOCIATION OF WASHINGTON

Journey Toward Understanding: Concussion & Mild Brain Injury

Introduction

Three little monkeys jumping on the bed.
One fell off and bumped his head.
Took him to the doctor and the doctor said,
"That's what you get for jumping on the bed!"

This nursery rhyme tells a story about concussion--the bumps, bangs and shakings to the brain that many adults and children experience. Unfortunately, just like the monkeys jumping on the bed, professionals may not understand concussion well enough to offer support and to help individuals who sustain concussions. People with concussions may just try and "shake it off" and, thus, not be evaluated and treated properly by professionals. It is not uncommon for individuals to be sent home from emergency rooms (ERs) with no follow-up care or to end up with long-term problems that no one understands. This paper will define concussion, present the common symptoms of concussions and discuss ways to help people who sustain concussions.

Each year, it is estimated that approximately 1.5 million people experience concussions. Vehicular crashes (cars, motorcycles, bicycles), sports/recreational activities (football, hockey, playgrounds), abuse/assault (shaken baby syndrome, beatings), falls (young children and the elderly) and other events all have been implicated. It is easy to see that almost any activity can put a person at risk for a concussion. It is a little surprising that people do so well avoiding concussions and equally not surprising that many of us have had concussions.

It is important to note that concussions clearly are associated with lifestyle and parallel other similar lifestyle injuries. If you are involved actively in sports that put your body at risk for muscle pulls, strains, sprains and broken bones, then your chances of a concussion also are great. The Centers for Disease Control and Prevention (CDC) estimates 300,000 sports-related concussions in the United States each year. The more risk to your body, the more risk of serious harm and permanent damage, and the greater the chances that a concussion or more permanent brain injury can occur.

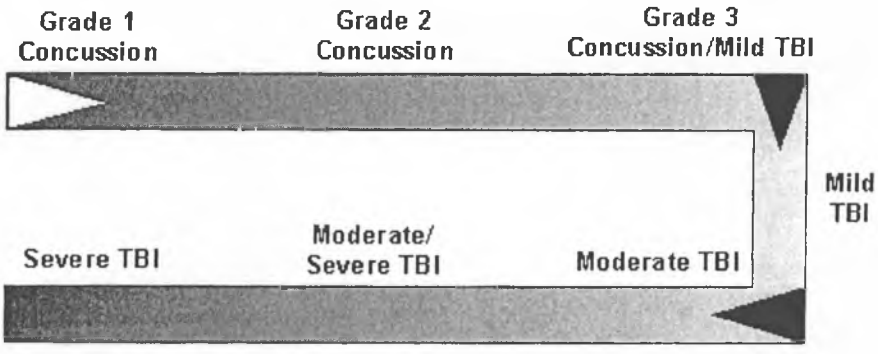
If your job involves heavy labor in farm or construction settings, your chances of physical injury increase and the chances of a concussion increases as well. The use of substances, such as alcohol, that alter your judgment and coordination about everyday activities, like driving or even walking, put you at risk for physical injury and, therefore, at similar risk for a concussion or more serious brain injury. Children--especially younger children--are susceptible to sustaining concussions from falls, play activities and abuse. Lastly, older individuals with balance problems may be prone to falls that can result in not only broken hips, but concussions as well.

What is Concussion?

It is important to understand that a concussion is a physical injury to the brain that causes a disruption of normal functioning just like any other physical injury disrupts your normal functioning. For example, some ankle injuries (i.e., sprains and fractures) are more disruptive

than others, just as some brain injuries are more disruptive than others. The better we understand any injury, the better our chances are for a speedier and healthier recovery.

There is some confusion as to the definition of a concussion and the definition of a mild traumatic brain injury (MTBI). Brain injury can be viewed along a continuum that incorporates concussion, mild brain injury, moderate brain injury and severe brain injury. Each type of brain injury varies depending upon: 1) whether the person was unconscious, 2) how long he/she was unconscious, 3) the length of their amnesia, 4) the resulting cognitive, behavioral and physical problems and 5) the recovery. Viewed as a continuum, the severity of brain injuries can be represented as follows:



As one can see, the definition for a Grade 3 concussion and a MTBI tend to overlap on this continuum.

To further clarify, a concussion is defined as a trauma (i.e., a blow to the head or a serious whiplash) that induces an alteration in mental status (physical or cognitive abilities) that may or may not involve a loss of consciousness.
Concussion as detailed by guidelines developed by the American Academy of Neurology (AAN) and the Brain Injury Association (BIA), commonly is divided into three different types.

Grade 1 Concussion

- Person is confused but remains conscious.
- SIGNS: Temporarily confused, dazed, unable to think clearly, has trouble following directions
- TIME: Symptoms clear within 15 minutes

Grade 2 Concussion

- Person remains conscious, but develops amnesia .
- SIGNS: Similar to Grade 1
- TIME: Symptoms last more than 15 minutes

Grade 3 Concussion

- Person loses consciousness
- SIGNS: Noticeable disruption of brain function exhibited in physical, cognitive and behavioral ways.
- TIME: Unconsciousness for seconds or minutes

It is important to note that a person can sustain a concussion (Grades 1 & 2) without losing consciousness. A Grade 3 concussion involves the loss of consciousness, even if only briefly. As defined by the American Congress of Rehabilitation Medicine, MTBI is a traumatically induced physiological disruption of brain function as manifested by some or all of the following:

- Any period of loss of consciousness
- Any loss of memory for events immediately before or after the incident
- Any alteration in mental state at the time of incident
- Focal neurological deficits that may or may not be transient but does not exceed:
  1. Loss of consciousness of approximately 30 minutes or less
  2. An initial Glasgow Coma Scale score of 13-15 after 30 minutes
  3. Post-traumatic amnesia (PTA) of no more than 24 hours

If concussion and MTBI are seen as part of the brain injury continuum, with Grade 3 concussion and MTBI overlapping, one can get a better understanding of how these definitions compliment each other and enhance our understanding. BIA estimates that approximately 75% of all brain injuries fall in the "concussion-MTBI continuum."

The Functional Mechanics of Concussion

Two mechanisms currently are believed to underlie the changes following concussion. In the first, a sudden movement or direct force applied to the head can set the neural matter of the brain in motion even though the brain is well protected in the skull and very resilient. This motion squeezes, stretches and sometimes tears the neural cells, changing the precise balance and distance the cell's axons and dendrites maintain to transmit or process information.

The second mechanism involves changes that occur in the neuron's ability to produce energy for the cell's vital functions in structures called mitochondria. An initial increase in energy production occurs followed by a dramatic decrease that affects the ability of the cell to produce structural proteins to preserve the diameter of the axon. This change occurs gradually after the time of impact and may be responsible for the delay in symptoms sometimes observed.

The changes that occur affect the electrical or chemical aspects of neural cell functioning and result in unusual processing of normal information. (For this reason, radiologic studies that look at the structure of the brain, such as CT scans and MRI, are most frequently read as normal after concussion/MTBI.) This actually is quite adaptive because the brain cells automatically keep working to reconnect or establish normal impulse transmission. Even the loss of consciousness is adaptive, because the brain shuts down all unnecessary functions until the most important life sustaining neural adjustments are made. Unfortunately, sometimes these neural adjustments cannot be made quickly enough and death can occur.

As a person recovers, the cells re-establish the precise balance needed to ensure effective information processing, but this may mean some compensation or adjustments to the neural cell's original alignments. The more often neural cells must compensate or adjust to injury, the more likely the task takes longer and may not be as complete. For example, when a person sprains or fractures an ankle, professionals recommend cold/heat treatments, rest and supports (i.e., cast, brace) and specific exercises to help the ankle adjust to the injury and recover maximal function. Depending on the severity of the ankle injury (i.e., sprain, fracture) and what is required after recovery (i.e., long distance running, ballet), the severity of the injury to the ankle can disrupt a person's life. Obviously, a human brain is much more complicated than an ankle. Yet similarly, rest, supports (i.e., compensations, modifications) and "exercises" (i.e., therapies, education) for the brain may be recommended to rehabilitate and restore useful

function. Depending on the severity of the concussion and what the person needs to do (i.e., care for a family, return to work or school, manage a large company), a concussion can disrupt a person's life for a short period of time or even longer.

To review, a concussion causes a disruption of normal brain function that may be a temporary inconvenience or result in permanent changes in brain function. Where there are complicating factors, the disturbance in brain function can be fatal. Because of the potential life-threatening danger associated with brain injury, the severity of any brain injury--including concussion--is determined at the time of the injury, based on measures of physical, cognitive and behavioral responsiveness. Again, the three categories commonly used to describe brain injury--mild, moderate and severe--indicate only how seriously impaired the person was at the time of the injury. Thus, on the brain injury scale of severity, a concussion usually is classified as a MTBI because the alterations in brain function are not severe enough or do not last long enough to be classified as moderate or severe brain injury. In the moderate and severe classifications, there appears to be direct damage to the brains neural network with long-term difficulties related to the sites of the damage. The long-term effects of MTBI on brain cell recovery and functioning and behavior vary across individuals. However, for most individuals, no long-term neuronal changes are noted after three to four months and the cognitive and behavioral adjustments return to normal.

Exceptions to this rule exist. Studies indicate that age (i.e., 40 years or older), the presence of a systemic disease (i.e., diabetes mellitus), and possibly female gender affect the recovery process. Other risk factors for delayed recovery include a history of previous brain injury or when situational and personality factors play a role in recovery. For example, individuals who sustain a second concussion while still symptomatic from the first one may sustain what is termed "second impact syndrome." This condition is very serious and can result in lifelong impairments, coma and even death. Individuals who sustain a series of multiple concussions over time (i.e., boxers, abused children) may be left with permanent impairments and disabilities. People who have mental health issues or other disabilities (i.e., attention deficits, learning disabilities) may find that a concussion further complicates their behavioral and learning challenges. Also, even litigation issues may complicate a person's recovery.

The symptoms of concussions cover a wide range of perceptual, sensory, cognitive, emotional and behavioral features. The TABLE below lists the common early and late symptoms of concussion:

Early Symptoms:

- Headache
- Dizziness or vertigo
- Lack of awareness of surroundings
- Nausea with or without memory dysfunction
- Vomiting

Later Symptoms:

- Persistent low grade headache
- Lightheadedness
- Poor attention and concentration
- Excessiveness or easy fatigue
- Intolerance of bright light or difficulty focusing vision
- Intolerance of loud noises
- Ringing in the ears

- Anxiety and depressed mood
- Irritability and low frustration tolerance

As you can see, many of the symptoms listed above are common to a variety of other natural human experiences. Feeling scared or anxious can make our vision change and cause dizzy feelings and numerous "fight or flight" reactions. Muscle cramps in the neck can give headaches, just as not having our usual dose of caffeine causes headaches. A virus can make us feel "spaced-out" and affect our balance. Depression can affect our cognitive abilities and memory. Being angry over changes due to an injury such as a broken arm can make us irritable and affect our motivation. And, as with concussion, if everyone else feels you "should be over it by now," being treated unfairly may cause hopelessness that makes it difficult to concentrate and sleep.

Recovery Variations after Concussion

Concussions vary, depending upon the type and the individual, hence, recovery varies as well. Some commonly asked questions by individuals who sustained concussions include:

Why is there so much variation in symptom presentations? This variation can best be explained because people differ and their perceptual experience of sensations such as pain and distress remains subjective. Without a technology (i.e., more sophisticated CT/MRI scanning technology) to measure these individual experiences, it remains difficult to determine when the brain's coping or healing has taken place and when the individual's reaction to the process has left perceptual and learned phenomena. Thus, we need to monitor the symptoms of concussion in order to monitor recovery. The following checklist can help individuals and their families monitor their recovery one to three months after a concussion so they can report this information to their physician or therapist. Symptoms that persist beyond the usual recovery time for concussion need to be evaluated and treated more carefully.

Physical Symptoms

- Headache, dizziness, lightheadedness
- Vomiting or nausea
- Numbness or tingling
- Balance problems, clumsiness, drops things, trips often
- Fatigue, tires easily, needs extra sleep, drowsiness, trouble falling asleep or staying asleep
- Sensitivity to light and noise
- Blurry vision
- Ringing in ears

Cognitive Symptoms

- Confusion, in a "fog," has befuddled expression, gets mixed up about time and place
- Attention or concentration problems, inability to do more than one thing at a time, unable to return to a task if interrupted
- Memory problems, forgets things
- Takes longer to get things done or complete assignments
- Has problems organizing thoughts or words, misunderstands things

Behavioral Symptoms

- Restless, irritable, fussy
- Acts without thinking

- Becomes upset easily, loses temper
- Sadness, depressed mood
- Anxiety, nervousness

Why some people adjust better after a concussion than others? Research in cognitive-behavioral therapy supports the notion that: 1) looking at the positive aspects of recovery, 2) taking steps to gain control of your rehabilitation and 3) knowing that fundamental healthy behavior requires a focused rehearsed plan all can contribute to dealing better with the many sensations and feelings that often follow concussion. Concussion needs to be taken seriously and modifications to a person's life (i.e., home, work, school) need to be made during the recovery period. Just because a person "looks great" does not mean that they are recovered fully. Having a good plan for recovery and knowledge about concussion helps individuals feel more in control and lessens their anxiety.

Why do concussive symptoms change over time? It now appears that during the first months after concussion the brain begins to heal and evidence suggests that there is little trace of brain damage after three to four months. During this period of time, sleep patterns return to normal, sensations mirror the brains recovery and efforts to return to normal and develop a sense of self are influenced by the rehabilitation process. For example, many strange sensations accompany recovery from a sprained or fractured ankle, including pain from the efforts a person makes to accommodate the recovery time (such as muscle atrophy), as well as sleeping and exercise changes due to limitations. Brain function is much more complex to understand and monitor. Yet, just as an ankle can "return to normal" over time, so can the brain after concussion.

Why can't professionals tell if there is permanent brain injury over time? Without doing an autopsy, brain function can only be estimated. For example, neurological testing can provide information about what a person might be able to do at this point in time, but without the same information from before the concussion, it is only possible to estimate how a concussion affected performance. Many professionals use various tools to help them understand the degree of brain damage (i.e., CAT scans, MRI, neuropsychological batteries, neurolinguistic assessment, functional behavioral analysis), but these tools are only approximations and it is difficult to predict the total impact a brain injury may have on a person's life. The best "predictor" is the person with the injury working with a dedicated team of professionals to identify and compensate for permanent damage.

Is permanent brain damage always bad? This is a trick question because the easy answer is that damage always means a loss of brain cells. Yet, many people can attest that the loss of brain cells does not mean that they themselves are "lost". Rather, many individuals have found the strategies and techniques they have used to cope with brain injury have been helpful in assisting them to become the person they felt they wanted to be all along--happy, loved, productive and important. The experience of coping with a rehabilitation or treatment program has helped them: 1) appreciate their talents, 2) give up bad habits and 3) become more mindful of what they truly wanted out of life. This is not to minimize the tremendous changes brain injury causes for people and their families, but rather to emphasize the importance of good treatment programs and community support to help people re-define their lives.

Treatment Recommendations

The only cure for brain injury is prevention. Obviously, the treatment of concussion starts with prevention. Thoughtful preparation before activities--knowing your limits; minimizing risk to one's head by wearing protective gear such as seat belts, helmets, hard hats; and being

substance free when activities require concentration such as driving, bicycling, swimming, boating and skiing--all will reduce the likelihood of injury. Unfortunately, concussions often are difficult to prevent even with careful preparation and protective gear.

Immediately after a concussion, emergency care may be required. Since life-threatening complications--usually due to brain swelling and bleeding--can occur from any brain injury regardless of the type, all brain injuries must be taken seriously. The proper assessment of concussion by emergency medical professionals and physicians is critical.

AAN and the BIA have developed a clear, scientifically based set of guidelines for the medical management of concussion in sports that is used by team physicians, coaches and athletic trainers and can easily be adapted for all concussions. Thus, after the type of concussion has been determined, management guidelines are implemented. If an adult sustains a Grade 1 or 2 concussion, it may be wise for that person to rest for two or three days before returning to regular activities and not operate a motor vehicle for at least a week. If a child crashes a bicycle and the physician has examined and given them a clean bill of health, it is wise to keep the child off the bicycle for a week. As always with children, the rule should be that if it has wheels, you need a helmet.

The potential danger with concussion is sustaining a second one before allowing the brain time to rest and recovery from the first one (as we would for a broken ankle). The chart below summarizes AAN's management recommendations for athletes returning to play after concussion, but reworded for the general audience. Please remember that all concussions are potentially serious and an individual should be examined by a physician if there is any doubt about their safety.

Grade 1 Concussion Management Guidelines

If the person has no symptoms or mental status abnormalities 15 minutes after the injury, he/she can resume normal activities. All symptoms from the concussion must have disappeared, first at rest and then with exertional testing, before the individual can return to regular activities.

Grade 2 Concussion Management Guidelines

The individual should refrain from activities for at least one week, again only after the person is asymptomatic at rest and during exertion. Additionally, a physician should perform a neurological exam before the individual is allowed to go back to regular activities. If the individual experiences a worsening in headaches and other concussion symptoms and/or these symptoms last longer than a week, a CT scan or MRI is recommended.

Grade 3 Concussion Management Guidelines

One month should be the minimum period for an individual to return to rigorous activity. For an individual with a brief loss of consciousness (i.e., seconds), he/she can return to regular activities only after being asymptomatic for at least one week. For a person who had a prolonged loss of consciousness (i.e., minutes), he/she can resume normal activities no sooner than after two weeks of rest. A thorough neurological examination and a neuro-imaging study (i.e., CT scan, MRI) should be performed on all individuals who have been rendered unconscious for brief periods of time. The individual should be admitted to the hospital if any signs of pathology are detected and/or the mental status of the person remains abnormal.

Recovery after concussion--just like a sprained or fractured ankle--takes time. An individual with a broken ankle would not go out the next day and run a marathon. That individual likely would take time out from work, rest and put the leg up, use crutches, attend therapy, if necessary, and allow the ankle time to recover. Too often after concussion, many individuals immediately return to work or school, push themselves to think as well and as quickly as they did before and expect that in a day or two they are recovered fully. One of the problems with concussion is that people try and "get back on the horse" too quickly. The danger in doing this is that the person could sustain a second concussion (i.e., the athlete returns to the game; the child gets back on his/her bicycle; the person resumes driving a car) that could cause more serious injury to the brain. Or, if individuals push themselves to perform and/or are expected to perform by their colleagues and family too soon after the concussion, the symptoms may become exacerbated.
After a concussion, it is wise for people to modify their lives by: 1) reducing workloads, 2) building in rest periods, 3) giving more time to finishing projects, 4) developing a written plan to refer to when confused or uncertain, 5) using a notebook/calendar to write things down and check-off when completed, 6) writing down schedules with time, place and person and 7) avoiding the use of alcohol or other substances that may slow recovery.

It is also important to monitor symptoms over the next one to three months and report this data to one's physician and other treating professionals. Family members can become more knowledgeable about concussion and help the person make accommodations, monitor symptoms and ensure that--just like with a broken ankle--the person is given ample healing time. The use of other professionals, such as a Neuropsychologist, can help through testing to determine a person's strengths, needs and preferences. Psychologists and counselors may be extremely beneficial in helping people with more serious injuries to understand and adjust to any changes caused by the concussion. BIA, its chartered state affiliates and support groups may provide the person with education about concussion and where to go for additional help.

Conclusion

Concussion is the most common of all brain injuries. It needs to be better understood, evaluated and treated. Individuals who sustain concussions may experience an array of symptoms, both short, and long term. The important thing is to take any concussion seriously and recognize that recovery is dependent on many things.

About the Authors...

William Frey, PhD, maintains a private clinical psychology practice in Rutland, VT, specializing in behavioral medicine with a focus on traumatic brain in jury rehabilitation. He received his BA from Villanova University (1967) and his MS (1969) and PhD (1976) from the University of Vermont. In addition to his clinical practice, he has held faculty positions at the University of Vermont, St. Michael's College and Middlebury College and, most recently, had been interim Dean of Student Development at Green Mountain College in Poultney, VT. He has been a President of the Vermont Psychological Association (1985-1987) and a founding board member or the Vermont Head Injury/Stroke Independence Project (1983-1986). He has published articles on mild traumatic brain injury and the impact of brain injury on sense of self and has developed an ecologically-based rehabilitation model for traumatic brain injury.

Ronald C. Savage, EdD, has worked with children, adolescents and young adults with neurological injuries and disabilities for over 25 years. Presently, Dr. Savage is Executive Vice President for Professional Development at Bancroft NeuroHealth in New Jersey. He is the former Senior Vice President of Behavioral Health and Rehabilitative Services at The May

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TIME IN PARTNERSHIP WITH CNN

Thursday, Feb. 03, 2011

Headbanger Nation

By Jeffrey Kluger

I didn't get a good look at the little boy who injured my daughter in the science museum in Mexico City. He seemed to be about 7, my daughter Elisa was not yet 3, and the two of them were part of a scrum of kids playing on an indoor patio. At precisely the wrong moment, she turned left, he turned right, and they collided. Physics being physics, the smaller mass yielded to the larger one, and my daughter fell down. She landed first on her bottom, then tipped backward and hit her head on the floor.

The sound was one that parents dread: the singular clunk of skull striking cement. I winced, Elisa wailed, and I gathered her up. Soon she stopped crying and went off to play, but even as she did, a dangerous process had begun to unfold inside her skull. (Read Dr. Mehmet Oz's column about concussions.)

When Elisa's head hit the floor, the deceleration was sudden, but — physics again — her brain stayed in motion for an instant, moving through the small intracranial space until it collided with the back of the inside of her skull. Concussive energy radiated through the tissue. As it did, channels in the neurons opened wide, allowing calcium ions to flow into the cells, depressing their ability to metabolize energy. Brain tissue began swelling, but with nowhere to go, it squeezed up against the skull wall. Shearing forces tore axons connecting the cells, damaging their myelin sheathing, which can disrupt nerve signals. All of that was the best-case scenario. The worst case was a brain bleed, which could be fatal without immediate surgery.

Within 20 minutes, Elisa grew withdrawn. An hour later, back in our hotel, she vomited and then began thrashing convulsively. We rushed her to a hospital, where doctors struggled to get a line into one of the tiny veins in her arm, shouting at her to stay awake.

"Open your eyes!" I shouted at her in English. "*Abre tus ojitos!*" my wife echoed. Elisa understood both languages; she answered in neither.

Finally, the doctors got her into a CT scanner, then administered an EEG. There was no bleeding, but there was swelling. Elisa spent three days in the hospital taking antiseizure and antiswelling medication and finally was released. On the flight home, she was a terror — but only in the way a toddler is supposed to be. (See a graphic on the physics behind concussions.)

For us, that was a first-time — and, we dearly hoped, last-time — experience, but we're hardly alone in having gone through it. In the U.S., concussions are an alarmingly commonplace injury, particularly among kids and most particularly among active, athletic ones. Up to 3.8 million Americans are getting concussed per year, according to the Centers for Disease Control and Prevention, and even that big a figure is a moving target. In 2005, the number of children who visited emergency rooms for treatment of concussions was more than twice what it had been in 1997, according to a new study in the journal *Pediatrics*. High school football players alone sustain 100,000 full-blown, diagnosed concussions per year. Flying under the radar are injuries mild enough to get passed off by coaches as a mere ding or ignored by players anxious to get back on the field.

According to a study by neuroscientist Kevin Guskiewicz of the University of North Carolina, the average college football player sustains a breathtaking 950 to 1,100 subconcussive blows per season — hits that are enough to do cumulative damage to young brain tissue but not enough to cause immediate symptoms. "There's what we call a dose response," Guskiewicz says. "After a certain number of hits, the damage starts to show."

But while football is responsible for more than half the concussions kids suffer playing team sports, there's a lot more blame to go around. The success of Title IX, which forbids gender discrimination in scholastic athletics, has led to a 900% increase in girls' sports teams since the law's passage in 1972. But guaranteeing girls equal access to sports also guarantees them equal access to injuries. Girls' soccer accounts for nearly 12% of total team-sports concussions, compared with just 6.6% for boys' soccer. Girls' basketball causes 7%. Even volleyball weighs in at 1.1%. (See a special report on women and health.)

What's more, a third of all concussions among kids are caused by nonteam activities such as ice skating, bicycling and playground recreation. Gaining fast too are newer head-cracking activities like snowboarding and extreme skateboarding. Kids may be the first group to fall in love with such sports, but they're the last group — neurologically speaking — that should engage in them.

"The immature brain is still developing," says Julian Bailes, a neurologist at West Virginia University and the medical director for the Pop Warner Youth Football program. "That makes it more susceptible to damage and more likely to suffer repetitive injury." How this shapes overall development is unknown. A child's brain is like a ship en route to somewhere: a concussion can blow it off course.

The severity of the damage — both acute and chronic — is what researchers are now trying to understand and what legislators and the sports-equipment industry are trying to control. Even as scientists look deeper into the physics, neurochemistry and genetics of brain injury, lawmakers are imposing new rules governing how kids should be assessed for concussions and when they should and should not be eligible to play. Equipment manufacturers, particularly those who make football helmets, are being pushed to redesign their product lines and reform the testing standards that essentially allow the industry to police itself. Pro teams too are feeling the heat for selling an elbow-throwing, stick-swinging, head-butting ethos that may be

fine for millionaire athletes who know what they're getting into but is hurting, and in some cases killing, the kids who emulate them.

"I keep telling kids, Your brain is not your knee. It's not your shoulder. It's your future," says neuropsychologist Gerard Gioia, chief of pediatric neuropsychology at Children's National Medical Center in Washington. "We have to protect it better than we are." (See TIME's special report "How to Live 100 Years.")

The Science of a Hit

If it's football that receives most of the attention in conversations about concussions, it's partly because the hits inflicted in the game can be so shocking. In soccer, basketball or even hockey, violence is typically a by-product of aggressive play. In football, it is the play. Guskiewicz conducts his studies by placing accelerometers in players' helmets and recording not just how often they get hit but also how hard. The unit of measure he uses is g-force. Liftoff of a Saturn V moon rocket exposed its crew to a maximum of four g's. A roller coaster may exceed six g's. College football players, by contrast, collide with each other with an impact of nearly 23 g's — and that's the average. Higher-end blows range from 85 to 100 g's. "The highest we ever recorded was 180 g's," says Guskiewicz.

Worse, it's not necessary to be hit in the head for that kind of impact to do concussive damage. A player struck in the chest can suffer whiplash just like a passenger in a car accident, and when the head snaps back and forth, the brain sloshes around with it. "One sign," says Gioia, "is when a player complains of neck pain. That's often an indicator that the head has moved around hard."

Many of those blows don't necessarily lead to a concussion, and in a way, that's unfortunate. Only about 10% of concussions lead to loss of consciousness, but the other signs are hard to miss, including headache, vomiting, dizziness, balance problems, sensitivity to light or noise, confusion, irritability and amnesia. A player with any of those symptoms is likely to be sent to the bench — at least for a while. A player whose brain has been jolted at a subconcussive level is much likelier to stay on the field and return there week after week with no recuperation time. The damage that does can be deadly. (Read Dr. Mehmet Oz's column about concussions.)

In April 2010, University of Pennsylvania football star Owen Thomas committed suicide in his off-campus apartment, having never before exhibited any sign of mental illness. When researchers at Boston University examined his brain, they found it flecked with what are called tau proteins, telltale signs of a condition known as chronic traumatic encephalopathy (CTE), which is often seen among dementia patients and NFL players with a lifetime of concussions behind them. Thomas had never sustained a concussion, but that might not have mattered.

"He'd been playing since he was 9," says neuropsychologist Robert Stern, part of the team that conducted the analysis. "That suggests he had a great deal of exposure to repeated subconcussive blows."

The link between tau and brain damage is straightforward. The protein is one of the major structural materials of nerve tissues. When the brain is shaken too hard, nerve fibers are torn and the tau is released. The brain tries to clean up the mess, and given enough time, it could. If the hits keep coming, however, the proteins just accumulate. "I describe [the tau deposits] as a form of sludge," says Bailes.

It's not unusual for players like Thomas suffering from CTE to die in violent or otherwise dramatic ways. Bailes was part of a team that found tau protein in the brain of Chris Henry, a player for the Cincinnati Bengals who was killed in 2009 when he got into an argument with his fiancée and jumped on the back of her pickup truck as she drove away — taking a fatal tumble onto the road. In 2007 wrestler Chris Benoit murdered his wife and son and then hanged himself. In 2004 former Pittsburgh Steeler Justin Strzelczyk, who suffered from hallucinations, died when he drove his car into a tractor trailer while fleeing police. Both Benoit and Strzelczyk had CTE. "This disease starts young and progresses through life," says Stern.

Until recently, doctors didn't know just how young, but they're getting an idea. Michael (not his real name) is a ninth-grade football player visiting an outpatient concussion clinic Gioia runs in Rockville, Md. Michael got clobbered in a game in mid-September, suffered many of the immediate concussion symptoms and four months later is still not well. Recovery time varies for all patients, though three months is a good benchmark; four months suggests trouble. Michael's sleep remains disturbed, his temper remains erratic, and his school performance has cratered. An honor-roll student in eighth grade, he has gotten mostly D's and F's this year. "The change," says his mother, "it's shocking."

It's not possible to diagnose anything like CTE from just those symptoms, particularly because Michael's recent academic problems began before his concussion. But he already had a history of what he calls stingers, or head blows — none of which kept him off the field. What's more, his coach allowed him to return to play only a month or so after his recent concussion, a game in which he took another blow to the head, then lost his temper and got ejected.

Michael is hardly the only student athlete playing roulette with his brain, and his coach is hardly alone in abetting such recklessness. One study has shown that up to 40% of players who experience a concussion are back on the field before their brains have fully healed. That, Gioia says, is especially worrisome since sometimes two mild injuries can do more damage than one severe one. In some cases — mercifully rare — players who return to the field before they're fully recovered may even suffer what is known as malignant brain edema, or second-impact syndrome, in which another blow to the head leads to a fatal brain bleed. About half a dozen kids per year die from second impact. (Read Dr. Mehmet Oz's column about concussions.)

It's easy enough to make the case that any person who has suffered a brain injury needs a long period of recuperation before returning to vigorous physical activity. But what about vigorous intellectual activity? The brain is a cognitive machine, and it requires an enormous amount of energy to keep its gears moving. That's a fact concussed kids often confront when they resume their classwork after an injury and find that their symptoms return the moment they crack a book. "Cognitive exertion requires a high degree of

metabolic activity," says Gioia. "If you have a brain that's already impaired, that ability is going to be reduced."

Mary, a high school junior and another patient at Gioia's clinic, has suffered three concussions over the past three years as a goalie for her soccer team. Surprisingly, it is not heading the ball that leads to most concussions in soccer — though the limited studies that have been done have looked only at young adults, and none have explored subconcussive injury. Rather, the damage is done mostly by collisions with other players or, as in Mary's case, with equipment. Her third concussion came last November, when she hit her head against the frame of the goal. She remains an honors student in the International Baccalaureate program in her high school, but the struggle to keep up that level of academic excellence has been grueling.

"I didn't have any exams until two months after the injury," she says. "But when I did, the headaches and fatigue came back immediately. I lost focus during one test and had no idea what I'd just written." She got through all the same and has gone back to school full time, but every day is a battle with pain, exhaustion and sensitivity to noise and light. She has also accepted that soccer — which was a passion — is just not an option anymore. "I can't afford another concussion," she says. (See a graphic on the physics behind concussions.)

Digging Deep

The fact that no two concussions follow the same recovery arc is one of the things that makes them so challenging to diagnose and treat. But that same particularity of injury also provides scientists insights into which people are at the greatest concussive risk.

Gender, for one thing, seems to play a role. Mary may be recovering faster from her injury than Michael is, but on the whole, females are both more susceptible to concussions than males are and suffer more-severe symptoms. So far, the reason for that gap is unclear. There is some thought that a girl's comparatively weaker neck muscles may leave her head more susceptible to violent shock. Hormones too may play a role. Among epileptic girls and women, rising and falling estrogen levels are known to make the brain more or less vulnerable to seizures. The thinking is that this may apply to concussion symptoms as well — though it's unclear whether a girl's hormonal makeup leaves her more concussion-prone throughout the month or just during menstruation. (See a special report on women and health.)

Genes may also be involved. The fact is, plenty of athletes make it through their careers battered and scarred but cerebrally intact, while others who may not get hit with any greater frequency suffer all manner of brain damage. Researchers at the Children's National Medical Center are studying the genomes of both concussed and nonconcussed kids, looking for markers that may explain the difference.

"There could be a genetic predisposition that affects metabolic activity," says geneticist Susan Knoblach. "People always assume that there's a genetic component in degenerative conditions but not acute ones, but of course there can be."

Maryland's Fairfax County has instituted a program in which student athletes spit into cups so their genetic profiles can be taken. The genomes of the ones who come down with concussions can then be compared for key similarities. Early attention is focusing on a gene that codes for a protein called ApoE, which has been implicated in Alzheimer's disease. In the long run, teasing out concussion genes could lead to better drugs or gene therapy to treat or prevent the injury. In the short run, it could help parents and coaches determine in advance which sports kids are best suited to play. Says Gioia: "We may actually find out, 'You know what? You're not set up to be a football player. You might be a better tennis player.'"

Newer brain-scanning technology is also making a difference, helping doctors diagnose concussions and track recovery. The microscopic size of tau proteins and nerve fibers makes them impossible to see without a postmortem exam, but three noninvasive techniques can help sidestep that problem. Magnetic resonance spectroscopy measures not direct damage to the brain but its metabolic activity — a good way to evaluate the very system that breaks down first when a brain is concussed. Diffusion tensor imaging can observe transmission along nerve-fiber tracks, providing a sense of the integrity of the neural wiring. And resting fMRI allows physicians to watch the brain when it's not performing a task, providing a look at basic function. (See TIME's special report "How to Live 100 Years.")

Changing the Rules

Smart medicine, of course, can do only so much to reverse the number of concussions. Smart policy must do the rest. To keep kids from hurting themselves — and to prevent coaches from enabling them — 10 states, including New Jersey, Oregon, Virginia and football-mad Oklahoma, have passed return-to-play laws requiring kids who have sustained even a suspected concussion in any sport to be pulled from play and not returned until a doctor or certified athletic trainer declares them fit. A handful of other states are considering similar legislation, and last year two separate bills along the same lines were introduced in the House of Representatives. Both will have to be resubmitted under the new GOP majority. Still, the national trend is clear: "When in doubt, sit them out" is how the advocates put it.

Most major professional sports leagues in the U.S., as well as most large universities and 4,000 high schools, now also use a computer program known as ImPACT (for Immediate Post-Concussion Assessment and Cognitive Testing) that measures such basic skills as memory, word recognition and pattern recognition. Players are required to take a baseline test at the beginning of the season and are periodically retested, especially postconcussion, to determine if there's been any erosion of skills. "I used to sit across from athletes doing paper-and-pencil memory tests," says ImPACT developer Mark Lovell, a neuropsychologist at the University of Pittsburgh Medical Center. "That would never work with large groups of kids. There aren't that many neuropsychologists alive."

Reform is also coming — slowly — to the major manufacturers of football helmets, driven mostly by the NFL, which has imposed much stricter concussion and tackling rules in the past season. The NFL is anxious both to protect its players and to shake its image as a weekly tutorial for student athletes learning all the wrong safety lessons from pros who should know better. Currently, the group that certifies helmets is the National Operating Committee on Standards for Athletic Equipment (NOCSAE), which sounds

reassuringly official except for the fact that it's essentially funded by the manufacturers themselves. NOCSAE has come under fire not only for this seeming conflict of interest but also for what critics consider unreliable testing. The larger problem, though, is that the standard football helmet was designed to prevent only lacerations and fractures — a job it does very well — and to do little or nothing to prevent concussions. "The science just isn't there today," says Dr. Robert Cantu, a neurosurgeon at Boston University and a member of NOCSAE's board. (See a graphic on the physics behind concussions.)

That's not NOCSAE's or the NFL's fault, but they're trying to do something about it. In December the league and the helmet manufacturers convened a sort of head-injury summit in New York — a gathering that also included officials from NASCAR and the military — to consider helmet modifications that could reduce the concussive carnage. For football, those modifications could include better padding, stronger chin straps and redesigned face masks that distribute shock differently. Kids' helmets must also be more than simply smaller versions of those used by adults. The padding inside all helmets is designed to compress at the forces generated by colliding adult bodies. With the smaller forces kids produce, the padding stays rigid, essentially becoming one more hard surface for the head to strike. Innovations introduced in football could ripple out to other sports' playing fields, to say nothing of battlefields.

Athletics will never be stripped of all danger, and terrible as the blown knee or wrecked elbow may be, there is always an assumption of those risks when you elect to play the game. But the brain is more than a joint or a limb. It's the seat of the self. We overlook that fact at our peril and — much worse — at our children's.

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Youth Concussion Education, Awareness and Advocacy

AMERICAN COLLEGE of SPORTS MEDICINE

USA Football — Football's National Governing Body

NFL

BRAIN INJURY ASSOCIATION OF WASHINGTON

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The National Football League, USA Football, the Brain Injury Association of Washington, and the American College of Sports Medicine, among many other organizations, strongly support the adoption of laws to prevent traumatic brain injury in youth athletes in all fifty states. The Zackery Lystedt law, passed in Washington state, through the efforts and hard work of advocates in the medical, educational and athletic fields represents model legislation. The bill includes three elements essential to protecting youth athletes in all sports:

(1) Inform and educate youth athletes, their parents and guardians and require them to sign a concussion information form;
(2) Removal of a youth athlete who appears to have suffered a concussion from play or practice at the time of the suspected concussion; and
(3) Requiring a youth athlete to be cleared by a licensed health care professional trained in the evaluation and management of concussions before returning to play or practice.

This packet of materials includes information about the Zackery Lystedt law and frequently asked questions regarding it. In addition, educational materials on the topic of youth concussions are included. These documents published by the Centers for Disease Control and Prevention and USA Football and endorsed by the American College of Sports Medicine, the National Football League, USA Football, and the Brain Injury Association of Washington will provide significant information about youth concussions.

As of November 2010, nine states have adopted laws containing the three key provisions of the Zackery Lystedt law. We encourage you to adopt a similar law in your state and encourage you to reach out to our organizations if we can be of assistance.

Sincerely,

Jeffrey A. Miller
Vice President
Government Relations and Public Policy
National Football League

Stanley A. Herring, M.D.
Chairman
Advocacy and Education Subcommittee
NFL Head, Neck and Spine Committee

Richard Adler
Chairman/President
Executive Board
Brain Injury Association-Washington

James R. Whitehead
Executive Vice President and CEO
American College of Sports Medicine

Scott Hallenbeck
Executive Director
USA Football

FREQUENTLY ASKED QUESTIONS ABOUT CONCUSSION-PREVENTION LAWS

How widespread are concussions among youth athletes?

An estimated 400,000 high school athletes sustained concussions while participating in five major male sports and four major female sports during the 2005-2008 school years[i]. In addition, experts believe that the prevalence of sports-related concussions among young people in all sports is significantly higher than reported.

Moreover, the number of youth athletes taken to emergency rooms with sports-related concussions doubled during the 10-year-period from 1997 to 2007[ii]. Meanwhile, among youth aged 14 to 19, emergency room visits for concussions sustained during team sports more than tripled over the same period[iii].

What dangers do these head injuries pose to young athletes?

A concussion is a type of traumatic brain injury, or TBI, which changes the way the brain normally works. Recognizing and responding to concussions when they first occur help to aid recovery and to prevent prolonging concussion symptoms, chronic brain damage or even death. Yet, a recent study estimated that more than 40 percent of high school athletes return to participate in school athletics before they have fully recovered from these serious head injuries[iv].

Do concussions involve youth athletes in all sports and at any age or is it just an injury sustained by boys who play football?

Concussions can occur in athletes of any age and in any sport or recreational activity. In fact, each year, U.S. emergency departments treat an estimated 135,000 sports-related and recreation-related TBIs, including concussions, among children ages 5 to 18[v]. In addition, children and teens are more likely to get a concussion and take longer to recover than adults. While youth sports concussions often are associated with football, the rate of concussions in girl's high school soccer is almost as high. Research also indicates that there may be gender differences in how boys and girls recover from concussions.[vi]

How many states have enacted laws related to concussion-awareness, prevention and management?

As of October 2010, eight states have adopted similar concussion-awareness and prevention laws initially adopted in Washington, known as the Zackery Lystedt law, including Oregon, New Mexico, Connecticut, Oklahoma, Virginia, Massachusetts and Rhode Island. In many other states, active coalitions are pushing to enact similar legislation.

What are the key elements of a concussion-prevention and management bill?

An effective concussion-prevention bill follows the example of the State of Washington's Zackery Lystedt law. It includes three essential elements: (1) inform and educate student athletes, their parents and guardians and require them to sign a concussion information form; (2) removal of a student-athlete who appears to have suffered a concussion from play or practice at the time of the suspected

concussion; and (3) requiring an athlete to be cleared by a licensed medical professional trained in the evaluation and management of concussions before returning to play or practice.

There is an international consensus on return to play guidelines for youth, adopted at the 3rd International Conference on Concussion in Sport in Zurich, in November 2008, which states that "It is not appropriate for a child or adolescent athlete with concussion to RTP on the same day as the injury regardless of the level of athletic performance."[vii]

What is the cost of implementing a concussion prevention and awareness bill?

Zero. The bill is revenue neutral. There are no mandates in the bill and no requirements that resources be spent to hire or train medical professionals or to purchase equipment. Free information on concussions for high school and youth coaches, parents, athletes, as well as school professionals is publicly available on the Centers for Disease Control and Prevention's (CDC) website at www.cdc.gov/Concussion, including a youth concussions poster found at www.cdc.gov/concussion/pdf/poster_Eng.pdf designed to hang in every locker room across the country.

What are the penalties for violating the concussion prevention and awareness law? Who is liable if the law is not followed?

There is no liability attached to Washington's Zackery Lystedt law. It does not mandate any civil or criminal penalties, nor does it create greater liability for individuals and/or organizations. Indeed, the education and awareness efforts and requirement of medical clearance before return to play has decreased the variability of care and decreased liability. Wherever the law is passed, the community can determine if and how to monitor and enforce the law.

What about implementing the law in rural areas where it may be more challenging to find medical professionals?

The law does not require a specific medical specialist to participate in every evaluation. Rather, the language of the Washington statute requiring an athlete "to be cleared by a licensed medical professional trained in the evaluation and management of concussions before returning to play or practice" permits a wide range of qualified individuals to determine a youth athlete's suitability for returning to play. For example, in Washington State, the Washington Interscholastic Activities Association decided that qualifying medical professionals included: medical doctors, osteopaths, nurse practitioners, athletic trainers, and physician assistants.

What is the impact of concussion-prevention laws on private sports organizations?

These laws may be written in such a way as to apply not only to public sports organizations but also to private sports organizations, many of which maintain public-sector connections/affiliations (such as the use of public facilities). For example, in Washington private sports groups are required by law to carry insurance to play on publicly-owned playing fields. The Zackery Lystedt law amended that insurance-based law to require private nonprofits to comply with the policies on the management of concussions and head injuries in youth sports.

What impact have concussion-prevention laws had in states that have passed them?

The Zackery Lystedt law was the first concussion-prevention state law to pass in 2009. While no comprehensive and detailed assessment can yet be made, early and anecdotal data suggests that the law is having an immediate and positive impact. It is helping meet a critical goal -- preventing preventable brain injuries and making sports and recreational activities safer for youth.

What organizations have supported such measures?

A broad coalition of groups representing teachers and parents, sports medicine, medical professionals, school administrators, the disability community and athletic organizations have supported concussion-prevention legislation at the state and federal level. These organizations include the National Football League, American College of Sports Medicine, USA Football, National School Boards Association, Parent Teacher Association, National Association of School Nurses, National Council of Youth Sports, The Sarah Jane Brain Foundation, National Disability Rights Network, National Athletic Trainers' Association, National Association of Health and Fitness, the Brain Injury Association of America, the Brain Injury Association of Washington, and many others.

What law, if any, has Congress proposed or passed regarding concussion prevention and awareness?

The "Protecting Student Athletes from Concussions Act of 2010" incorporates the same core principles of the Lystedt law and was introduced in Congress in September of 2010. If passed, the bill would require school districts to develop and implement a minimum standard, community-based plan for concussion safety and management. Of course, states would be able to implement standards far exceeding these basic, minimum standards.

Where may I find/read a copy of the Zackery Lystedt law?

The Zackery Lystedt law may be found in this packet. It may also be found online by visiting: http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/2009pam3.pdf

Where may I find more information about the dangers of concussions and passing a law in my state?

More information about concussions may be found on the website of the CDC. You also may watch an NFL-produced video about enacting a concussions-prevention law in your state, which is available at NFL.com/youthconcussions and on the CDC's website as well.

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[i] Nationwide Children's Hospital, Concussions Clinic, Ohio State University
[ii] Bakhos L., Linakis J., et al. "Emergency Department Visits for Concussions in Young Child Athletes," Pediatrics, 2010.
[iii] Ibid.
[iv] Center for Injury Research and Policy at Nationwide Children's Hospital, Columbus, Ohio
[v] Morbidity and Mortality Weekly Report, Centers for Disease Control and Prevention, 2007.
[vi] Journal of Athletic Training, 2007
[vii] McCrory P, Meeuwisse W, et al. "Consensus Statement on Concussion in Sport, 3rd International Conference on Concussion in Sport," Clinical Journal of Sports Medicine, 2009.

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 1824

Chapter 475, Laws of 2009

61st Legislature
2009 Regular Session

YOUTH SPORTS--HEAD INJURY POLICIES

EFFECTIVE DATE: 07/26/09

Passed by the House April 20, 2009
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 2, 2009
Yeas 45 Nays 0

BRAD OWEN

President of the Senate

Approved May 14, 2009, 11:24 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 1824** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

May 18, 2009

Secretary of State
State of Washington

ENGROSSED HOUSE BILL 1824

AS AMENDED BY THE SENATE

Passed Legislature - 2009 Regular Session

State of Washington 61st Legislature 2009 Regular Session

By Representatives Rodne, Quall, Anderson, Liias, Walsh, Pettigrew, Priest, Simpson, Kessler, Rolfes, Johnson, Sullivan, and Morrell

Read first time 01/30/09. Referred to Committee on Education.

AN ACT Relating to requiring the adoption of policies for the management of concussion and head injury in youth sports; amending RCW 4.24.660; and adding a new section to chapter 28A.600 RCW.

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

Sec. 1. RCW 4.24.660 and 1999 c 316 s 3 are each amended to read as follows:

(1) A school district shall not be liable for an injury to or the death of a person due to action or inaction of persons employed by, or under contract with, a youth program if:

(a) The action or inaction takes place on school property and during the delivery of services of the youth program;

(b) The private nonprofit group provides proof of being insured, under an accident and liability policy issued by an insurance company authorized to do business in this state, that covers any injury or damage arising from delivery of its services. Coverage for a policy meeting the requirements of this section must be at least fifty thousand dollars due to bodily injury or death of one person, or at least one hundred thousand dollars due to bodily injury or death of two or more persons in any incident. The private nonprofit shall also

provide a statement of compliance with the policies for the management of concussion and head injury in youth sports as set forth in section 2 of this act; and

(c) The group provides proof of such insurance before the first use of the school facilities. The immunity granted shall last only as long as the insurance remains in effect.

(2) Immunity under this section does not apply to any school district before January 1, 2000.

(3) As used in this section, "youth programs" means any program or service, offered by a private nonprofit group, that is operated primarily to provide persons under the age of eighteen with opportunities to participate in services or programs.

(4) This section does not impair or change the ability of any person to recover damages for harm done by: (a) Any contractor or employee of a school district acting in his or her capacity as a contractor or employee; or (b) the existence of unsafe facilities or structures or programs of any school district.

NEW SECTION. **Sec. 2.** A new section is added to chapter 28A.600 RCW to read as follows:

(1)(a) Concussions are one of the most commonly reported injuries in children and adolescents who participate in sports and recreational activities. The centers for disease control and prevention estimates that as many as three million nine hundred thousand sports-related and recreation-related concussions occur in the United States each year. A concussion is caused by a blow or motion to the head or body that causes the brain to move rapidly inside the skull. The risk of catastrophic injuries or death are significant when a concussion or head injury is not properly evaluated and managed.

(b) Concussions are a type of brain injury that can range from mild to severe and can disrupt the way the brain normally works. Concussions can occur in any organized or unorganized sport or recreational activity and can result from a fall or from players colliding with each other, the ground, or with obstacles. Concussions occur with or without loss of consciousness, but the vast majority occurs without loss of consciousness.

(c) Continuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and

even death. The legislature recognizes that, despite having generally recognized return to play standards for concussion and head injury, some affected youth athletes are prematurely returned to play resulting in actual or potential physical injury or death to youth athletes in the state of Washington.

(2) Each school district's board of directors shall work in concert with the Washington interscholastic activities association to develop the guidelines and other pertinent information and forms to inform and educate coaches, youth athletes, and their parents and/or guardians of the nature and risk of concussion and head injury including continuing to play after concussion or head injury. On a yearly basis, a concussion and head injury information sheet shall be signed and returned by the youth athlete and the athlete's parent and/or guardian prior to the youth athlete's initiating practice or competition.

(3) A youth athlete who is suspected of sustaining a concussion or head injury in a practice or game shall be removed from competition at that time.

(4) A youth athlete who has been removed from play may not return to play until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider. The health care provider may be a volunteer. A volunteer who authorizes a youth athlete to return to play is not liable for civil damages resulting from any act or omission in the rendering of such care, other than acts or omissions constituting gross negligence or willful or wanton misconduct.

(5) This section may be known and cited as the Zackery Lystedt law.

Passed by the House April 20, 2009.
Passed by the Senate April 2, 2009.
Approved by the Governor May 14, 2009.
Filed in Office of Secretary of State May 18, 2009.

(INSERT SCHOOL/ORGANIZATION NAME HERE)
Concussion Information Sheet

A concussion is a brain injury and all brain injuries are serious. They are caused by a bump, blow, or jolt to the head, or by a blow to another part of the body with the force transmitted to the head. They can range from mild to severe and can disrupt the way the brain normally works. Even though most concussions are mild, **all concussions are potentially serious and may result in complications including prolonged brain damage and death if not recognized and managed properly.** In other words, even a "ding" or a bump on the head can be serious. You can't see a concussion and most sports concussions occur without loss of consciousness. Signs and symptoms of concussion may show up right after the injury or can take hours or days to fully appear. If your child reports any symptoms of concussion, or if you notice the symptoms or signs of concussion yourself, seek medical attention right away.

Symptoms may include one or more of the following:	
• Headaches • "Pressure in head" • Nausea or vomiting • Neck pain • Balance problems or dizziness • Blurred, double, or fuzzy vision • Sensitivity to light or noise • Feeling sluggish or slowed down • Feeling foggy or groggy • Drowsiness • Change in sleep patterns	• Amnesia • "Don't feel right" • Fatigue or low energy • Sadness • Nervousness or anxiety • Irritability • More emotional • Confusion • Concentration or memory problems (forgetting game plays) • Repeating the same question/comment

Signs observed by teammates, parents and coaches include:
• Appears dazed • Vacant facial expression • Confused about assignment • Forgets plays • Is unsure of game, score, or opponent • Moves clumsily or displays incoordination • Answers questions slowly • Slurred speech • Shows behavior or personality changes • Can't recall events prior to hit • Can't recall events after hit • Seizures or convulsions • Any change in typical behavior or personality • Loses consciousness

What can happen if my child keeps on playing with a concussion or returns too soon?

Adapted from the CDC and the 3rd International Conference on Concussion in Sport
Document created 6/15/2009

(INSERT SCHOOL/ORGANIZATION NAME HERE)

Concussion Information Sheet

Athletes with the signs and symptoms of concussion should be removed from play immediately. Continuing to play with the signs and symptoms of a concussion leaves the young athlete especially vulnerable to greater injury. There is an increased risk of significant damage from a concussion for a period of time after that concussion occurs, particularly if the athlete suffers another concussion before completely recovering from the first one. This can lead to prolonged recovery, or even to severe brain swelling (second impact syndrome) with devastating and even fatal consequences. It is well known that adolescent or teenage athletes will often fail to report symptoms of injuries. Concussions are no different. As a result, education of administrators, coaches, parents and students is the key to student-athlete's safety.

If you think your child has suffered a concussion

Any athlete even suspected of suffering a concussion should be removed from the game or practice immediately. No athlete may return to activity after an apparent head injury or concussion, regardless of how mild it seems or how quickly symptoms clear, without medical clearance. Close observation of the athlete should continue for several hours. The new "Zackery Lystedt Law" in Washington now requires the consistent and uniform implementation of long and well-established return-to-play concussion guidelines that have been recommended for several years:

> "a youth athlete who is suspected of sustaining a concussion or head injury in a practice or game shall be removed from competition at that time"
>
> and
>
> "...may not return to play until the athlete is evaluated by a licensed heath care provider trained in the evaluation and management of concussion and received written clearance to return to play from that health care provider".

You should also inform your child's coach if you think that your child may have a concussion. Remember it's better to miss one game than miss the whole season. And when in doubt, the athlete sits out.

For current and up-to-date information on concussions you can go to:
http://www.cdc.gov/ConcussionInYouthSports/

Student-athlete Name Printed	Student-athlete Signature	Date
Parent or Legal Guardian Printed	Parent or Legal Guardian Signature	Date

Adapted from the CDC and the 3rd International Conference on Concussion in Sport
Document created 6/15/2009

CHRISTINE O. GREGOIRE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • www.governor.wa.gov

December 8, 2010

Roger Goodell, Commissioner
National Football League
280 Park Avenue, Floor 12W
New York, NY 10017-1206

Dear Commissioner Goodell:

From the time I was first approached to support a law to protect youth athletes from the risks of concussions, I have focused on, and learned much about, this important issue. We all share the desire to protect our children from serious, yet preventable, health risks. This is why I am pleased to share Washington State's experience with the Zackery Lystedt Law.

I feel it is my responsibility to protect the health and safety of our young athletes while carefully limiting the cost to Washington State taxpayers. Our state, like many others in our country, is facing significant budget challenges, so any new expenditures have to be carefully scrutinized.

I am thrilled to report that the Zackery Lystedt Law is working. We are seeing a decrease in concussions and other head injuries in our student athlete population. I believe the adoption of this important legislation has saved our state money in emergency medical care, rehabilitation, and other services children need when they suffer the consequences of untreated brain injuries. In addition, school districts have not been required to hire medical professionals or trainers, and no additional significant investments were needed to comply with this law.

Thank you for your leadership in working to have a version of the Zackery Lystedt Law adopted around the country. Please feel free to share this with other states as you work to keep our country's children active and safe.

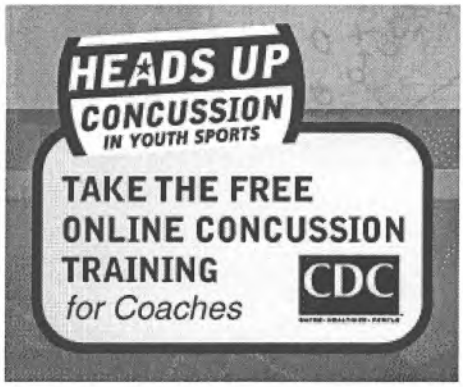
Sincerely,

Chris

Christine O. Gregoire
Governor

Happy holidays!

Centers for Disease Control and Prevention
Your Online Source for Credible Health Information



Heads Up Online Training Course

Heads Up: Concussion in Youth Sports is a free, online course available to coaches, parents, and others helping to keep athletes safe from concussion. It features interviews with leading experts, dynamic graphics and interactive exercises, and compelling storytelling to help you recognize a concussion and know how to respond if you think that your athlete might have a concussion.

What You Will Learn

This course will help you:

- Understand a concussion and the potential consequences of this injury,
- Recognize concussion signs and symptoms and how to respond,
- Learn about steps for returning to activity (play and school) after a concussion, and
- Focus on prevention and preparedness to help keep athletes safe season-to-season.

You can help make your league and school sports safer and healthier for all athletes. Learn when to make the call to pull an athlete off the field, ice, court, or track, and work with athletes, parents, and league and school officials to implement a concussion action plan and prevention strategies.

Course Highlights

Concussion Basics

- Understand concussion and what happens to the brain,
- Discover what causes a concussion, and
- Learn the potential consequences of concussion.

Recognize and Respond to a Suspected Concussion

- Focus on what to look for and when to pull athletes out of play,
- Watch for danger signs and seeking immediate medical attention, and
- Learn the four-step, "Heads Up" action plan when a concussion is suspected.

Helping Athletes Get Back to Play and to School

- Characterize the gradual steps for returning to activity (play and school), and
- Review a concussion preparedness checklist to guide you through pre-, mid-, and post-seasons.

Resource Center

- Access additional concussion information, videos, presentations by leading experts, fact sheets, communication strategies for talking with parents and athletes, and other tools.

Click here to take the training

Follow us on Facebook and learn more about concussion: www.cdc.gov/Concussion.

Page last reviewed: August 24, 2010
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Content source: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control

Centers for Disease Control and Prevention 1600 Clifton Rd. Atlanta, GA 30333, USA
800-CDC-INFO (800-232-4636) TTY: (888) 232-6348, 24 Hours/Every Day - cdcinfo@cdc.gov

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HEADS·UP CONCUSSION IN HIGH SCHOOL SPORTS

A FACT SHEET FOR PARENTS

What is a concussion?

A concussion is a brain injury. Concussions are caused by a bump, blow, or jolt to the head or body. Even a "ding," "getting your bell rung," or what seems to be a mild bump or blow to the head can be serious.

What are the signs and symptoms?

You can't see a concussion. Signs and symptoms of concussion can show up right after the injury or may not appear or be noticed until days after the injury. If your teen reports ***one or more*** symptoms of concussion listed below, or if you notice the symptoms yourself, keep your teen out of play and seek medical attention right away.

Signs Observed by Parents or Guardians	Symptoms Reported by Athlete
• Appears dazed or stunned • Is confused about assignment or position • Forgets an instruction • Is unsure of game, score, or opponent • Moves clumsily • Answers questions slowly • Loses consciousness *(even briefly)* • Shows mood, behavior, or personality changes • Can't recall events *prior* to hit or fall • Can't recall events *after* hit or fall	• Headache or "pressure" in head • Nausea or vomiting • Balance problems or dizziness • Double or blurry vision • Sensitivity to light or noise • Feeling sluggish, hazy, foggy, or groggy • Concentration or memory problems • Confusion • Just not "feeling right" or is "feeling down"

How can you help your teen prevent a concussion?

Every sport is different, but there are steps your teens can take to protect themselves from concussion and other injuries.

- Make sure they wear the right protective equipment for their activity. It should fit properly, be well maintained, and be worn consistently and correctly.
- Ensure that they follow their coaches' rules for safety and the rules of the sport.
- Encourage them to practice good sportsmanship at all times.

What should you do if you think your teen has a concussion?

1. **Keep your teen out of play.** If your teen has a concussion, her/his brain needs time to heal. Don't let your teen return to play the day of the injury and until a health care professional, experienced in evaluating for concussion, says your teen is symptom-free and it's OK to return to play. A repeat concussion that occurs before the brain recovers from the first—usually within a short period of time (hours, days, or weeks)—can slow recovery or increase the likelihood of having long-term problems. In rare cases, repeat concussions can result in edema (brain swelling), permanent brain damage, and even death.
2. **Seek medical attention right away.** A health care professional experienced in evaluating for concussion will be able to decide how serious the concussion is and when it is safe for your teen to return to sports.
3. **Teach your teen that it's not smart to play with a concussion.** Rest is key after a concussion. Sometimes athletes wrongly believe that it shows strength and courage to play injured. Discourage others from pressuring injured athletes to play. Don't let your teen convince you that s/he's "just fine."
4. **Tell all of your teen's coaches and the student's school nurse about ANY concussion.** Coaches, school nurses, and other school staff should know if your teen has ever had a concussion. Your teen may need to limit activities while s/he is recovering from a concussion. Things such as studying, driving, working on a computer, playing video games, or exercising may cause concussion symptoms to reappear or get worse. Talk to your health care professional, as well as your teen's coaches, school nurse, and teachers. If needed, they can help adjust your teen's school activities during her/his recovery.

If you think your teen has a concussion:
Don't assess it yourself. Take him/her out of play. Seek the advice of a health care professional.

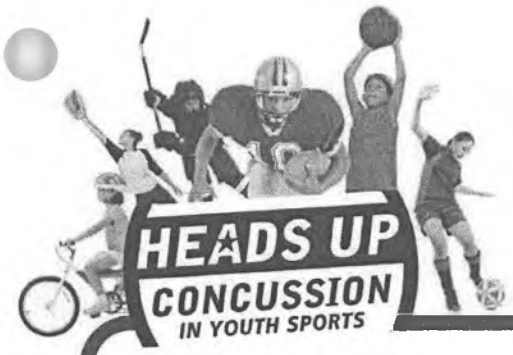
It's better to miss one game than the whole season.

For more information and to order additional materials ***free-of-charge***, visit: **www.cdc.gov/Concussion**.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR DISEASE CONTROL AND PREVENTION

June 2010

U.S. Department of Health and Human Services
Centers for Disease Control and Prevention



A Fact Sheet for **ATHLETES**

WHAT IS A CONCUSSION?

A concussion is a brain injury that:

- Is caused by a bump or blow to the head
- Can change the way your brain normally works
- Can occur during practices or games in any sport
- Can happen even if you haven't been knocked out
- Can be serious even if you've just been "dinged"

WHAT ARE THE SYMPTOMS OF A CONCUSSION?

- Headache or "pressure" in head
- Nausea or vomiting
- Balance problems or dizziness
- Double or blurry vision
- Bothered by light
- Bothered by noise
- Feeling sluggish, hazy, foggy, or groggy
- Difficulty paying attention
- Memory problems
- Confusion
- Does not "feel right"

WHAT SHOULD I DO IF I THINK I HAVE A CONCUSSION?

- **Tell your coaches and your parents.** Never ignore a bump or blow to the head even if you feel fine. Also, tell your coach if one of your teammates might have a concussion.
- **Get a medical check up.** A doctor or health care professional can tell you if you have a concussion and when you are OK to return to play.
- **Give yourself time to get better.** If you have had a concussion, your brain needs time to heal. While your brain is still healing, you are much more likely to have a second concussion. Second or later concussions can cause damage to your brain. It is important to rest until you get approval from a doctor or health care professional to return to play.

HOW CAN I PREVENT A CONCUSSION?

Every sport is different, but there are steps you can take to protect yourself.

- Follow your coach's rules for safety and the rules of the sport.
- Practice good sportsmanship at all times.
- Use the proper sports equipment, including personal protective equipment (such as helmets, padding, shin guards, and eye and mouth guards). In order for equipment to protect you, it must be:
  - The right equipment for the game, position, or activity
  - Worn correctly and fit well
  - Used every time you play

July 2007

It's better to miss one game than the whole season.

For more information and to order additional materials **free-of-charge**, visit:
www.cdc.gov/ConcussionInYouthSports

For more detailed information on concussion and traumatic brain injury, visit:
www.cdc.gov/injury

CONCUSSION

A Must Read for Young Athletes | Let's Take Brain Injuries Out of Play

CONCUSSION FACTS

- A concussion is a brain injury that affects how your brain works.
- A concussion is caused by a blow to the head or body:
  - from contact with another player, hitting a hard surface such as the ground, ice, or court, or
  - being hit by a piece of equipment such as a lacrosse stick, hockey puck, or field hockey ball.
- A concussion can happen even if you haven't been knocked unconscious.
- If you think you have a concussion, you should not return to play on the day of the injury and until a health care professional says you are OK to return to play.

CONCUSSION SYMPTOMS

- Concussion symptoms differ with each person and with each injury, and may not be noticeable for hours or days. Common symptoms include:
  - Headache
  - Confusion
  - Difficulty remembering or paying attention
  - Balance problems or dizziness
  - Feeling sluggish, hazy, foggy, or groggy
  - Feeling irritable, more emotional, or "down"
  - Nausea or vomiting
  - Bothered by light or noise
  - Double or blurry vision
  - Slowed reaction time
  - Sleep problems
  - Loss of consciousness

During recovery, exercising or activities that involve a lot of concentration (such as studying, working on the computer, or playing video games) may cause concussion symptoms to reappear or get worse.

WHY SHOULD I REPORT MY SYMPTOMS?

- Unlike with some other injuries, playing or practicing with concussion symptoms is dangerous and can lead to a longer recovery and a delay in your return to play.
- While your brain is still healing, you are much more likely to have another concussion. Repeat concussions can increase the time it takes for you to recover and the likelihood of long term problems.
- In rare cases, repeat concussions in young athletes can result in brain swelling or permanent damage to your brain. They can even be fatal.

For more information about concussion and other types of traumatic brain injuries, go to

www.cdc.gov/Concussion

A part of CDC's Heads Up series

What Should I Do if I Think I Have a Concussion?

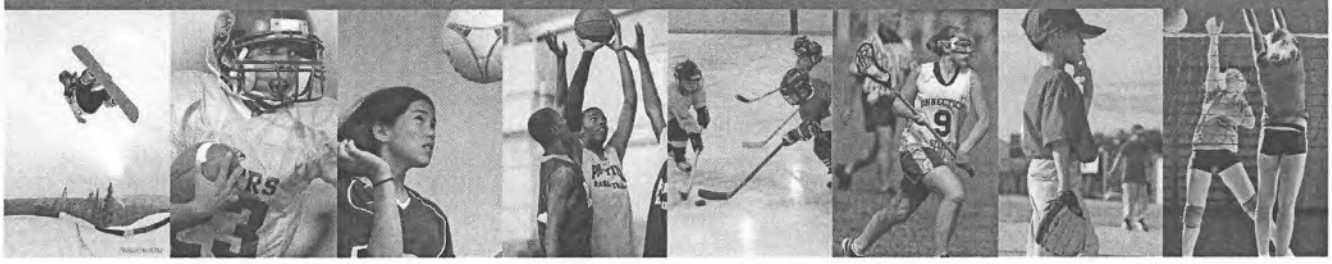
DON'T HIDE IT, REPORT IT. Ignoring your symptoms and trying to "tough it out" often makes symptoms worse. Tell your coach, parent, and athletic trainer if you think you or one of your teammates may have a concussion. Don't let anyone pressure you into continuing to practice or play with a concussion.

GET CHECKED OUT. Only a health care professional can tell if you have a concussion and when it's OK to return to play. Sports have injury timeouts and player substitutions so that you can get checked out and the team can perform at its best. The sooner you get checked out, the sooner you may be able to safely return to play.

TAKE CARE OF YOUR BRAIN. A concussion can affect your ability to do schoolwork and other activities. Most athletes with a concussion get better and return to sports, but it is important to rest and give your brain time to heal. A repeat concussion that occurs while your brain is still healing can cause long-term problems that may change your life forever.

All concussions are serious. *Don't hide it, report it. Take time to recover.*

It's better to miss one game than the whole season.



USA Football · US Lacrosse · USA Hockey · USA Baseball · USA · CDC · NFL · NFL Players

USA Football serves as the sport's national governing body on youth and amateur levels. An independent non-profit based in downtown Indianapolis, USA Football leads the game's development, inspires participation and ensures a positive experience for all youth and amateur players. USA Football was endowed by the NFL Youth Football Fund in 2002.

Working in partnership with the Centers for Disease Control and Prevention since 2007 as well as other credentialed medical organizations and doctors regarding player health and safety, USA Football stands among leaders in youth sports concussion education, particularly in youth football. The organization has built the first football-specific online youth football coaching course that includes chapters and comprehension quizzes encompassing concussion education and management, heat and hydration preparedness and equipment fitting guidelines. USA Football's members – youth football coaches, players, league commissioners and game officials – reside in all 50 states.

USA Football partners with collegiate athletic conferences, the NFL and its teams to promote concussion education through its 80-plus annual football training events and national campaigns. Dozens of articles, downloadable online resources and video promoting concussion education and management reside at usafootball.com and are available at no cost. Approximately 1 million visitors reach usafootball.com annually.

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HEALTH & SAFETY

Concussion Awareness

What Youth Football Coaches Should Know About Concussions

By Michael D. Goodlett, M.D., Lawrence J. Lemak, M.D.
March 11, 2009, revised December 28, 2009

Recognize the signs and symptoms of a concussion to ensure your players' safety. An easy rule of thumb to follow is when in doubt, sit them out.

WHAT COACHES SHOULD KNOW

*A concussion is any change in an athlete's behavior, awareness, and/or physical feelings caused by a direct or indirect blow to the head.

*Any concussion has the potential to be a serious injury.

*Before letting an athlete go back to play, a concussion should be evaluated by a doctor.

*An athlete should never return to play while exhibiting any signs or symptoms of a concussion either at rest or with exertion. When in doubt, sit them out!

*There is an increased risk of suffering subsequent concussions after a first concussion.

*Any head injury associated with loss of consciousness must be treated as a suspected head, neck, or back injury.

Knowing the signs and symptoms of a concussion will help a youth football coach feel more comfortable and be more prepared in case of an emergency.

*The only instances in which an athlete's helmet and shoulder pads should be removed is when a medical authority believes that it is necessary for the care of the athlete, or if the equipment interferes with the rescuers' ability to provide required CPR.

*If necessary to provide care for life-threatening conditions, it is recommended that the facemask be removed rather than the whole helmet. A tool to remove the facemask should be in the first aid kit.

*For any head injury, activate the Emergency Action Plan and follow the emergency action steps, Check-Call-Care.

When a player is hit, he may receive a blow to the head and become unconscious or demonstrate changes in behavior. If the player regains consciousness, seems to be alert and oriented, and is eager to play, a coach may feel the player is fully recovered and allow him back into the game or practice. However, the player has suffered a concussion. Failure to recognize a concussion can potentially lead to coma and death particularly if a second impact occurs. Coaches need to be aware of the signs of concussions and treat the situation properly.

Concussions are caused by a force being transmitted to the head. The force may be caused by any direct or indirect hit to the head or body and can cause changes in behavior, awareness, or physical feeling in the injured person. Concussions often go unrecognized by coaches because they are underreported by athletes who want to continue competing. Athletes often will minimize or deny symptoms. Maintaining a high level of suspicion and having some knowledge of the individual athlete's personality helps coaches in early detection of the signals of concussion. This awareness can prevent additional concussive injury, potential long-term brain damage, or other possible catastrophic outcomes.

On-The-Field Evaluations
If there is a forceful blow to the head, with or without loss of consciousness, the coach should suspect a head injury and also be concerned that the neck or back has been injured. When caring for the player on the field, tell him not to nod or shake his head during the assessment, but to say yes or no. The player's helmet should also be left in place. The goal is to minimize movement. If the head impact has caused the player to become unconscious or show the signs of concussion listed below, activate the Emergency Action Plan and follow the emergency action steps, **Check-Call-Care**. **Check** the scene for safety and check the ill or injured athlete, **Call** 9-1-1 or the local emergency number when needed, and

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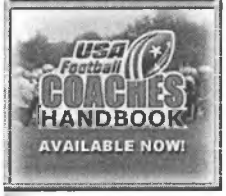

Care for the injured player until EMS personnel arrive.

To Care For Serious Injuries To The Head, Neck, And Back
Follow basic precautions to prevent disease transmission.

Minimize movement of the player's head, neck, and back by putting your hands on both sides of the player's helmet or head. Maintain an open airway using a jaw-thrust maneuver. Have the player remain in the position that you found him until EMS personnel arrive and take over.

Monitor the player's airway, breathing, and circulation.

If life-threatening symptoms are present, it is recommended that the facemask of the athlete's helmet be removed, rather than removing the entire helmet. This will allow access to an airway should the athlete stop breathing.

A tool for removing the facemask should be in the team's first aid kit.

The coach should evaluate the symptoms listed below if he suspects a player may have a concussion requiring immediate care.

The only instance in which an athlete's helmet and shoulder pads should be removed is when a medical authority believes that it is necessary for the care of the athlete, or if the equipment interferes with the rescuers' ability to provide CPR.

Symptoms that require immediate activation of the Emergency Action Plan and immediate removal to a medical facility are:

- *Period of unconsciousness;
- *Confusion, disorientation to time and place;
- *Severe headache or vomiting;
- *Appears sleepy, pale, and is sweating;
- *Blurred vision, slurred speech, and muscle weakness;
- *Neck pain.

Checking For Concussion
If the player is removed from the field after receiving a head impact, it is important to continue evaluating the player every five minutes for at least 30 minutes.

Look at the facial expression of the athlete.

- *Does the athlete have a vacant stare or a confused facial expression?

Check the athlete's behavior.

- *Is the athlete easily distracted or slow to answer questions or follow directions?
- *Does the athlete display unusual emotional reactions, such as *crying or laughing?
- *Does the athlete have a headache or complain of nausea?
- *Is the athlete irritable and easily frustrated?
- *Does the athlete appear unusually anxious or depressed?
- *Does the athlete appear sleepy?
- *Does the athlete have significantly decreased playing ability from earlier in the contest?

Check the athlete's orientation and memory.

- *Is the athlete aware of the time of day and date?
- *Is the athlete generally confused? Questions to ask
- *Which quarter or period is it?
- *Where are we? Which field or arena?
- *Which team are we playing?
- *Which side scored the last points?
- *Which team did the athlete play in the last game?
- *Did the athlete's team win or lose in the last game?

Check for posttraumatic amnesia (the athlete's ability to remember events after the injury).

- *Ask the athlete how he got injured?
- *Ask the athlete the first thing he remembers after the injury?
- *Ask the last thing the athlete remembers before the injury?

Medical attention is required if the athlete's expression, behavior, or memory is affected. Attention should be immediate if symptoms show a deteriorating situation. When an athlete has had a concussion, he should not be allowed to return to the current game or practice, and should not be left alone. Medical evaluation following the concussion is required before a return to participation is permitted.

Postconcussion syndrome
After a player is removed from the field, he may develop symptoms of postconcussion syndrome. This can occur immediately after the injury or many hours or days later. Symptoms of postconcussion syndrome include:

- *Blurred vision
- *Fatigue
- *Ringing in the ears
- *Trouble falling asleep
- *Dizziness

- *Sleeping more or less than usual
- *Headache
- *Increased sensitivity to light and noise
- *Nausea and vomiting
- *Feeling more emotional than normal
- *Poor coordination or balance
- *Difficulty concentrating
- *Increased irritability
- *Difficulty remembering
- *Slurred speech
- *Feeling dazed or stunned
- *Seeing stars or flashing lights
- *Having double vision.

A physician may conduct neuropsychological testing or neuroimaging to assess exactly when the athlete has recovered from a concussion. No athlete should go back to play before being free of all symptoms and signs, both at rest and during exertion, and a physician has indicated the player is ready to return to competition.

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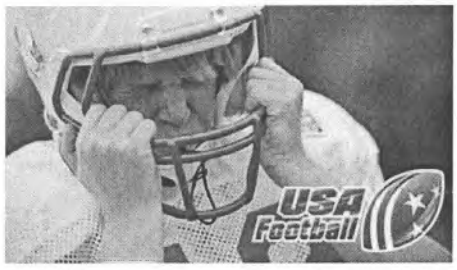
CDC, NFL unite national governing bodies of sport to teach young athletes about concussions

By Joe Frollo
October 11, 2010, revised October 28, 2010

Free poster available for download and distribution to all youth leagues

The Centers for Disease Control and Prevention (CDC), the NFL and 14 national governing bodies of sport, including USA Football, are promoting a free poster designed to increase concussion awareness among young athletes, parents and coaches.



Players, coaches and parents can better recognize concussion symptoms thanks to a poster being distributed by the Centers for Disease Control and Prevention, NFL, USA Football and other national governing bodies of sport.

The poster, created by the NFL's Head, Neck and Spine Medical Committee, the CDC and the NFL Players Association, is similar to the one displayed in NFL locker rooms but geared toward a younger audience. It stresses the importance of recognizing a concussion, taking time to recover and not returning to play too soon. By walking through the steps to recognize if the athlete - or a teammate - has suffered a concussion, the goal is increased concussion awareness in all sports.

"The NFL understands its obligation to educate and inform parents, teachers, coaches and especially young athletes about the risks of concussions," NFL Commissioner Roger Goodell said. "This poster is one element of the NFL's program to assist in the development and broad dissemination of reliable medical information on concussions, which will give players, parents, coaches and others the information they need."

The poster is available online for download and order at no cost at CDC's website or by calling (800) CDC-INFO. Information on recognizing and reacting to concussions also can be found at usafootball.com and through USA Football's Put Pride Aside For Player Safety program as well as through the following national governing bodies:

USA Football's Certified Coaching Education Program, employed by youth football coaches in all 50 states, includes chapters on concussion awareness and management as well as hydration and proper equipment fitting. Health and safety videos also are available at USA Football's Health and Safety page.

"Having more than one dozen different sports be part of this initiative underscores the point that coaches, athletes and parents across all youth athletics need to be informed about this issue," USA Football Executive Director ScottHallenbeck said.

"USA Football has worked with the CDC on concussion education since 2007, and we will continue to emphasize it while teaching coaches and players proper football fundamentals for fun and safe play."

Links related to this article:

NFL and CDC create poster to educate young atheltes about concussions

More media for this article

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HEALTH & SAFETY

Concussion Awareness

Redskins and USA Football Welcome High School Coaches for Concussion Education

By Steve Alic
April 23, 2010, revised April 29, 2010

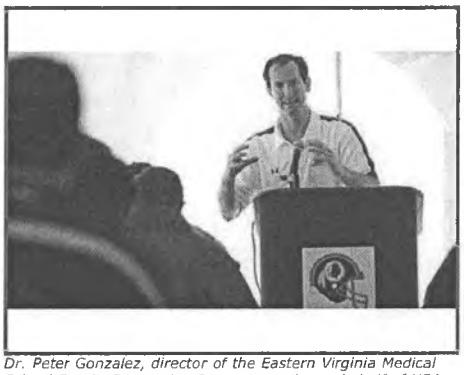
The Washington Redskins and USA Football partnered for the Redskins' inaugural Concussion Awareness and Education Forum on April 17 at Redskins Park.

Redskins Park has a history of preparing football teams for success.

Successful preparation at the football training facility earned a new and vital definition on April 17 when the Washington Redskins and USA Football partnered for the Redskins' inaugural Concussion Awareness and Education Forum for Maryland, Virginia and Washington, D.C. high school head football coaches.

Nearly 200 high school coaches traveled to Redskins Park as guests of the team to watch minicamp practice and participate in a 90-minute concussion education seminar led by USA Football's Peter Gonzalez, M.D.

Dr. Gonzalez is the director of the Eastern Virginia Medical School Sports Concussion Program in Norfolk, Va.



Dr. Peter Gonzalez, director of the Eastern Virginia Medical School Sports Concussion Program, spoke on behalf of USA Football regarding concussion awareness and management to 170 high school head football coaches at Redskins Park. The session was part of a full-day minicamp invitation that the Washington Redskins extended to high school coaches throughout Maryland, Virginia and Washington, D.C. (Photo courtesy of Ned Dishman/Washington Redskins)

Redskins General Manager Bruce Allen opened the day by welcoming the coaches and introduced Dr. Gonzalez. Each coach received a USA Football/CDC concussion awareness clipboard sticker listing concussion signs, symptoms and an action plan. This same material is given to thousands of coaches who attend USA Football's full-day coaching schools across the country. Concussion-related information is available at no cost throughout usafootball.com.

"The coaches asked good questions," Dr. Gonzalez said after the presentation. "The Redskins are to be commended - this was a great discussion and also was the largest group of high school coaches I've spoken to at any one time."

"I came to learn all I can," said Jason Meade, head football coach of Lee-Davis High School in Mechanicsville, Va., a two-hour drive from Redskins Park. Coach Meade enters his eighth season as head coach this fall. "Learning more when it comes to putting our players in a better, safer situation is important to us."

"We can't allow high school athletes who suffer concussions to return to play too soon," Dr. Gonzalez added. "If there's one thing a coach takes away from our session today, it's not allowing an athlete to return to play while still possessing the symptoms of a concussion.

"And if we even suspect someone to have suffered a concussion, there is no same-day return to play."

Concussion awareness and management is an important part of USA Football's online coaching education courses and its 80-plus training events held across the country for players, coaches and youth league commissioners.

USA Football is the official youth football development partner of the NFL, its 32 teams and the NFL Players Association. More than 60 of USA Football's events in 2010 are conducted in partnership with NFL clubs.

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For Immediate Release
Tuesday, December 7, 2010

Contact: Jeff Miller
National Football League
(202) 662-5593

Ellen Satlof
National Athletic Trainers' Association
(214) 637-6282 x159

NATIONAL FOOTBALL LEAGUE AND THE NATIONAL ATHLETIC TRAINERS' ASSOCIATION TEAM TO PASS STATE LAWS TO PROTECT YOUTH ATHLETES FROM THE RISKS OF CONCUSSIONS

Washington, D.C., December 7, 2010 – The National Football League and the National Athletic Trainers' Association today announced a joint effort to promote legislation to raise awareness and protect youth athletes from the risks of concussions. The new partnership was announced during the Youth Sports Safety Summit in the nation's capital.

"We are pleased to team with the National Athletic Trainers' Association on a state-based legislative effort to protect youth athletes," said Jeff Miller, the NFL's vice president of government relations. "We will advance a simple, but significant shared goal -- to help prevent concussions and make sports and recreational activities safer for young athletes around the country."

The NFL and NATA have agreed to work together to pass concussion awareness and prevention laws in every state throughout the country. The league and the association will promote laws modeled on the Zackery Lystedt law in Washington State, which contains three key elements: (1) concussion education for young athletes, parents and coaches on an annual basis; (2) immediate removal of a student athlete who appears to have suffered a concussion from play or practice; and (3) mandatory clearance of that student by a health care professional who is trained in the evaluation and management of concussions before returning to play or practice.

Marjorie J. Albohm, MS, ATC, president of the National Athletic Trainers' Association added, "We know from recent cases and studies that far too many youth athletes are either playing with undiagnosed symptoms of concussions or returning to play before fully recovering from them. That's why our organization of trained health care professionals supports legislation in every state that will help coaches, youth athletes, their parents and school officials to recognize and respond appropriately to concussions. Doing so will help prevent injury, chronic impairment and even death."

-more-

The NFL and NATA also have pledged to encourage and enlist the participation of other stakeholders and advocates. Organizations already supporting the adoption of such laws include USA Football, the American College of Sports Medicine and the Brain Injury Association of Washington. To date, nine states have enacted adequate concussion awareness and prevention laws including Washington, Oregon, New Mexico, Virginia, Rhode Island, Massachusetts, Oklahoma, Connecticut and New Jersey.

National Athletic Trainers' Association (NATA) – Health Care for Life & Sport

Athletic trainers are health care professionals who specialize in the prevention, diagnosis, treatment and rehabilitation of injuries and sport-related illnesses. They prevent and treat chronic musculoskeletal injuries from sports, physical and occupational activity, and provide immediate care for acute injuries. Athletic trainers offer a continuum of care that is unparalleled in health care. The National Athletic Trainers' Association represents and supports 32,000 members of the athletic training profession. Visit www.nata.org

# # #

CONTACTS

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Scott Hallenbeck
Executive Director
USA Football
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shallenbeck@usafootball.com

Alaska Athletic Trainers Association
PO Box 872710
Wasilla, AK 99687

March 15, 2011

Representative Doogan,

The Alaska Athletic Trainers Association fully supports the language of House Bill 15 and Senate Bill 22, *Student Athlete Traumatic Brain Injuries*. This legislation serves to raise awareness and protect youth athletes from the risks of concussions. The Alaska Athletic Trainers Association pledges to support the following key elements: (1) concussion education for young athletes, parents and coaches; (2) immediate removal of a student athlete who appears to have suffered a concussion from play or practice; and (3) mandatory clearance of that student by a health care professional who is trained in the evaluation and management of concussions before returning to play or practice.

Athletic trainers are health care professionals who specialize in the prevention, diagnosis, treatment and rehabilitation of injuries and sport-related illnesses. We prevent and treat chronic musculoskeletal injuries from sports, physical and occupational activity, and provide immediate care for acute injuries. Athletic trainers offer a continuum of care that is unparalleled in health care.

The Alaska Athletic Trainers Association is also working toward licensing athletic trainers in the state of Alaska. A licensed athletic trainer is one who has established qualifications and works within a scope of practice. Alaska is one of only three states that do not regulate athletic trainers and we feel it is time to change that. We hope you will support our professional endeavor for licensing athletic trainers in Alaska.

Sincerely,

B. Shelden

Brenda Shelden
Certified Athletic Trainer
President of the Alaska Athletic Trainers Association
(907)841-8942

alaska brain injury network

3745 Community Park Loop, Ste. 140
Anchorage, Alaska 99508
office: (907) 274-2824 fax: (907) 274-2826
www.alaskabraininjury.net

The Honorable Mike Doogan
Alaska House of Representatives
Alaska State Capitol, Rm 400
Juneau, Alaska 99801

Dear Representative Doogan,

Thank you for introducing HB 15, an act relating to prevention and evaluation of and liability for concussions in student athletes.

The Alaska Brain Injury Network, Inc (ABIN) is a non-profit organization dedicated to Alaskans whose lives have been changed by brain injury. ABIN's eighteen member board represents all regions of Alaska and at least 50 percent are TBI survivors or family members. We fully support HB 15.

ABIN has become the leader in understanding the needs of Alaskans with brain injury. ABIN has heard from 800 Alaskans requesting brain injury services since 2007. In addition, ABIN has heard public testimony from hundreds of Alaskans from Anchorage, Juneau, Fairbanks, Kenai, Barrow, Nome, Kodiak, Dillingham, Bethel, Copper River Basin, Tok, Ketchikan, Sitka, Homer, and more.

There are an estimated 10,000 Alaskans who have experienced long-term difficulties from a moderate to severe brain injury. The number of Alaskans experiencing a concussion or Mild TBI (mTBI) who visit the emergency department is estimated at 3,000 per year. Concussion and brain injury need to be taken seriously. With proper diagnoses, management, and treatment, research shows 80-90 percent of people experiencing a concussion or mTBI will recover fully. HB 15 is vital to ensuring our youth athletes have the best chance of recovery after an injury. When a concussion is not properly managed, prolonged recovery or even death from a second impact may result.

The National Football League, National Hockey League, the United States Olympic teams, majority of collegiate teams, and most recently in many states, even high school and youth sports teams have protocols and guidelines for concussion identification and return to play. Many of the leagues also require a cognitive baseline which is the first step to providing the best data to assess for a concussion when symptoms appear. If an athlete is suspected of a concussion, the assessment guidelines and return to play protocol are in place for the safety of the athlete, as well as ensuring the team has the strongest players in the game. A player who is normally elite, but then suffers a concussion, may temporarily have difficulty making quick decisions, their speed and reaction time may be compromised, and they may clumsily handle the ball. This compromised state caused by the concussion may hinder the team, and more importantly may put the athlete at risk for serious, life-long disability. No one wants to see an athletic child or young adult become disabled due to a decision to keep a kid in the game for a win or because of lack of education of what concussion symptoms may look like.

HB 15 will ensure that coaches have a basic understanding of concussion, student athletes will begin to understand the seriousness of concussion on and off the field, and parents may begin to understand brain injury better as well. This legislation is an opportunity to improve the public's awareness of the seriousness of concussion and brain injury, and keep our student athletes safe.

The future of our state depends on the brains of the individuals that reside here. HB 15 is one tool to giving Alaska's youth the best opportunity to become community and business leaders as adults.

The Alaska Brain Injury Network appreciates your leadership in sponsoring this important legislation. You have our support.

Sincerely,

Jill Hodges
Executive Director

NATIONAL FOOTBALL LEAGUE

March 15, 2011

The Honorable Mike Doogan
House of Representatives
Alaska State Capitol
Room 112
Juneau, Alaska 99801

RE: HB 15 – Student Athlete Traumatic Brain Injuries

Dear Representative Doogan:

The National Football League is pleased to support HB 15 – the Student Athlete Traumatic Brain Injuries bill. The bill will help raise awareness and protect youth athletes from the dangers of preventable brain injuries.

The NFL is playing a leading role on this important issue for the safety of our own players as well as athletes at all levels of sports. Our primary rule is this: the medical decisions of health care professionals take precedence over the playing decisions of coaches and players. Given our experience at the professional level, we believe a similar approach is appropriate and necessary when dealing with concussions in youth sports.

Concussions can occur in male and female athletes of any age and in any sport or recreational activity. In fact, the Centers for Disease Control and Prevention estimates that there may be as many as 3.8 million sports and recreational-related concussions each year in the United States.

In addition, medical researchers have determined that children and teenagers whose brains still are developing are more susceptible to concussions than adults, and they recover more slowly. Recognizing and responding to concussions when they first occur aids recovery and helps to prevent prolonged concussion symptoms, chronic impairment and even death.

That is the reason the NFL supports the passage of this bill and similar legislation in states throughout the country. HB 15 contains three core principles: (1) concussion education for youth athletes, parents and coaches on an annual basis; (2) immediate removal of a youth athlete who is suspected of sustaining a concussion from play or practice; and (3) mandatory clearance of that youth athlete by an appropriate licensed health care professional before returning to play or practice.

1201 Pennsylvania Avenue NW, Suite 645, Washington, DC 20004 Tel 202.662.6650 Fax 202.662.6860

The bill as drafted applies these principles to school-based youth sports. While this is vital, we encourage you to consider amending the legislation to include other youth sports leagues as well. All young athletes deserve the protections offered in this bill.

The youth concussion bill provides better protection for Alaska's youth athletes by mandating a more formal, aggressive and uniform approach to the treatment of concussions. We applaud you and offer our assistance in aiding the passage of this bill.

Parents, coaches, teachers and school personnel will benefit from this measure. And, most importantly, our youth athletes will as well.

Sincerely,

Jeff Miller
Senior Vice President

HB

22

<TARGET><BILL>HB 22</BILL><SUBJECT>HB
22</SUBJECT><COMM>HJUD27</COMM></TARGET>

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

TO: Representative Carl Gatto
Judiciary Chair

CC: Sarah Munson
Committee Aide

FROM: Representative Cathy Muñoz

DATE: March 9, 2011

RE: HB 22 Hearing Request

Please schedule HB 22 – Prohibit Cell Phone Use While Driving for a hearing in House Judiciary at your earliest convenience.

Attached to this memo please find the following documents

- CS HB 22 (TRA) – Prohibit Cell Phone Use While Driving
- Fiscal Notes from Dept. of Law & Public Safety
- Memo on explanation of changes
- Sponsor Statement
- Legislative Research Report
- National Highway Safety Stats
- 2010 Alaska Highway Safety Phone Survey
- Articles
- Support Letters
- Expected Testimony
    - Cindy Cashen, Administrator, Alaska Highway Safety Office, 957-2562, 465-4374

Office Contact: Kendra Kloster, 465-4712, Kendra_kloster@legis.state.ak.us

Thank You.

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-3744 • FAX (907) 465-2213
REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

REPRESENTATIVE CATHY MUÑOZ

CS HB22 (TRA): PROHIBIT CELL PHONE USE WHILE DRIVING

If enacted, House Bill 22 will prohibit cell phone use while driving, unless the person is over the age of 18 and a hands-free device is being used or an emergency situation exists. The allowance for hands-free devices for those over 18 years of age will accommodate commercial drivers, tour operators and others to allow flexibility in the implementation of the law. Nine states, and the District of Columbia, have prohibited the use of cell phones while driving for all drivers, twenty-eight states prohibit novice drivers – usually defined as drivers under 18 years old – and thirty states, and the District of Columbia, ban drivers from text messaging, including Alaska.

Cell phone use in the United States has been on a rapid increase in the past decade. According CTIA – The Wireless Association, there are about 293 million subscribers, representing more than 84 percent of the U.S. population, as of June 2010.

Distracted drivers create a risk to all motor vehicles, bicyclists and pedestrians. Driver performance is affected by the cognitive distractions associated with cell phone tasks which typically decrease reaction time, travel speed and increase lane deviations and steering wheel movements, resulting in a higher number of crashes.

The National Highway Traffic Safety Administration Distracted Driving Report (2009) estimates 5,474 people were killed and an additional 448,000 were injured in motor vehicle accidents that involved distracted driving. The University of Utah published a study showing motorists who talk on cell phones are as impaired as drunk drivers. Cell phone use in Alaska has also followed the upward trend of increased usage, according to the Alaska 2010 Highway Safety Phone Survey 61% of Alaskan drivers talk on their cell phone while driving.

HB22 will create safer roads for all travelers and help to prevent accidents caused by distracted drivers. I urge your support in the passage of HB22.

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

TO: Representative Carl Gatto
Judiciary Chair

CC: Sarah Munson
Committee Aide

FROM: Representative Cathy Muñoz

DATE: March 9, 2011

RE: Explanation of Changes to CS for HB22 (TRA)

The House Transportation Committee adopted an amendment to HB22 which would prohibit the use of cell phones for individuals under the age of 18 (including prohibiting the use of hands-free devices and a speaker function). Committee members stated teen drivers are more at risk for causing a collision due to their inexperience of driving - this has also been sighted in numerous studies. For those 18 years of age and over the use of a hands-free device is still permitted while operating a motor vehicle to accommodate commercial drivers, tour operators and other to allow flexibility.

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-3744 • FAX (907) 465-2213
REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB 022**
() Publish Date

Identifier (file name) HB022-DPS-DET-02-25-11
Dept. Affected Public Safety
Title "An Act prohibiting the use of cellular telephones when driving"
Appropriation Alaska State Troopers
Allocation AST Detachments
Sponsor Representative Munoz
Requester House Transportation
OMB Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Lt. Rodney Dial
Phone (907) 247-4480
Division Alaska State Troopers
Date/Time 2/25/11 3:38 PM
Approved by Joseph Masters, Commissioner
Department of Public Safety
Date 2/25/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB022

Analysis

This legislation would amend AS 28.35 by adding a new section that would prohibit the use of certain cellular telephones when driving a motor vehicle. Violation would be an infraction and considered a primary traffic offense.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB022**
() Publish Date

Identifier (file name): HB022-LAW-CRIM-02-25-11
Title: An Act prohibiting the use of cellular telephone when driving a motor vehicle; and providing for an effective date.
Sponsor: Representative(s) Munoz, Herron
Requester: (H) Transportation

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/25/11 3:30 PM
Approved by: John J. Burns, Attorney General — Date: 2/25/2011
Department of Law

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 022

Analysis

HB 22 makes it an infraction to operate a motor vehicle on a highway or vehicular way while using a cell phone. The bill excepts use of a cell phone for emergency purposes or with a cell phone that is voice-activated or may be used hands-free.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

LEGISLATIVE RESEARCH REPORT

JANUARY 26, 2011

REPORT NUMBER 11.132

LAWS REGARDING CELLULAR PHONE USE BY DRIVERS

PREPARED FOR REPRESENTATIVE CATHY MUÑOZ

BY TIM SPENGLER, LEGISLATIVE ANALYST

You wanted to know what states have done regarding limiting or banning the use of cellular (cell) phones by individuals operating motor vehicles.[1]

Alaska Legislation Regarding Driver Cell Phone Usage

Under Alaska law (AS 28.35.161), enacted September 1, 2008, drivers are effectively banned from text messaging while operating a motor vehicle. Alaska is one of the 30 states (and the District of Columbia) to ban text messaging for drivers—thought by many experts to be the most distracting cell phone activity. There have also been several attempts in Alaska this decade to limit or ban the use of cell phones by all drivers, but none has been successful.

Currently, the Alaska legislature is considering three bills—House Bill 22, House Bill 35 and House Bill 68—all of which would prohibit the use of cellular telephones by an individual, regardless of age, while driving a motor vehicle.

Legislation in Other States

According to the Insurance Institute for Highway Safety (IIHS), as of January 2011, the following cell phone bans or restrictions are in place across the nation:[2]

- Nine states and the District of Columbia impose state-wide bans on driving while talking on hand-held cell phones;[3]

---

[1] This report is essentially an update of Legislative Research Report 10.179 from February 18, 2010.

[2] The Insurance Institute for Highway Safety is an independent, nonprofit organization focused on reducing the losses — deaths, injuries, and property damage — from crashes on the nation's highways (*http://www.iihs.org/*).

[3] The nine states that impose state-wide bans on driving while using hand-held cell phones are California (Vehicle Code 23123), Connecticut (Public Act No. 05-159), Delaware (Del. Code 4176C), Maryland (Md. Code Ann. 21-1124.2), New Jersey (N.J.S.A. 30:4-97.3), New York (Vehicle and Traffic Law Section 1225c), Oregon (ORS 811.507), Utah (UT Code 41-6a-1715), and Washington (RCW 46.61.667). Utah considers talking on a cell phone, without a hands-free device, to be an offense only if a driver is also committing some other moving violation (other than speeding).

907-465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/laa/research/research.php

State Capitol
Juneau, AK 99801

- Nineteen states and the District of Columbia prohibit the use of a cell phone while operating a school bus;[4]
- Twenty-eight states and the District of Columbia prohibit novice drivers—usually defined as drivers under 18 years old—from using cell phones when operating vehicles;[5] and,
- Thirty states and the District of Columbia ban drivers from text messaging.[6]

We include, as Attachment A, a table from the Institute for Highway Safety that presents an overview of states' cell phone laws. Also in Attachment A, we include a *question and answer* sheet from the IIHS on cell phones and driving. It provides a summary of the myriad issues surrounding this topic. Arthur Goodwin, senior research associate at the Highway Safety Research Center, contends that laws banning or limiting cell phone use while operating a motor vehicle are of vital importance and are gaining momentum nationwide.[7] He likened the situation to when seat belt laws came to the fore in the United States: it took some time to educate the public, and for people to change their habits, but eventually most did. Mr. Goodwin believes this will be the case with cell phone laws—that it will take time and continued efforts for these laws to become solidified in our national consciousness.

All the experts with whom we spoke, and the literature we reviewed, support states enacting laws restricting the use of cell phones while driving.[8] While difficult to enforce, such legislation does highlight the reality that the behavior is unsafe.

We hope you find this information to be useful. Please let us know if you have questions or need additional information.

[4] School bus drivers in the following states are banned from using cell phones while driving: Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and Virginia.

[5] Novice drivers are banned from using cell phones while driving in the following states: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia.

[6] A ban on texting while driving is in place in the following states: Alaska, Arkansas, California, Colorado, Delaware, Connecticut, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

[7] The Highway Safety Research Center's stated mission is to improve the safety, security, access and efficiency of all surface transportation modes through a balanced, interdisciplinary program of research, evaluation and information dissemination (*http://www.hsrc.unc.edu/index.cfm*). Arthur Goodwin can be reached at (919) 843-5038.

[8] In addition to Mr. Goodwin, we also contacted Anne McCartt, Senior Vice President of the Insurance Institute for Highway Safety (703) 247-1534, and Dr. David Strayer of the University of Utah, who has studied distracted drivers issues for more than ten years (801) 581-5037.

Attachment A

Cellphone Laws, Insurance Institute for Highway Safety, January 2011

Q&As: Cellphones and Driving, Insurance Institute for Highway Safety, January 2011

Cellphone laws

January 2011

A jurisdiction-wide ban on driving while talking on a hand-held cellphone is in place in 9 states (California, Connecticut, Delaware, Maryland, New Jersey, New York, Oregon, Utah, and Washington) and the District of Columbia. Utah has named the offense careless driving. Under the Utah law, no one commits an offense when speaking on a cellphone unless they are also committing some other moving violation other than speeding.

Local jurisdictions may or may not need specific state statutory authority to ban cellphones or text messaging. Several of the many localities that have enacted restrictions on cellphone use include: Oahu, HI; Chicago, IL; Brookline, MA; Detroit, MI; Santa Fe, NM; Brooklyn, North Olmstead, and Walton Hills, OH; Conshohocken, Lebanon, and West Conshohocken, PA; Waupaca County, WI; and Cheyenne, WY.

The use of all cellphones while driving a school bus is prohibited in 19 states and the District of Columbia.

The use of all cellphones by novice drivers is restricted in 28 states and the District of Columbia.

Text messaging is banned for all drivers in 30 states and the District of Columbia. In addition, novice drivers are banned from texting in 8 states (Alabama, Indiana, Maine, Mississippi, Missouri, Oklahoma, Texas, and West Virginia) and school bus drivers are banned from text messaging in 2 states (Oklahoma and Texas).

The table below shows the states that have cellphone laws, whether they specifically ban text messaging, and whether they are enforced as primary or secondary laws. Under secondary laws, an officer must have some other reason to stop a vehicle before citing a driver for using a cellphone. Laws without this restriction are called primary.

Table | Map: hand-held bans | Map: young driver bans | Map: bus driver bans | Map: texting bans

Laws restricting cellphone use and texting

State	Hand-held ban	Young drivers all cellphone ban	Bus drivers all cellphone ban	Texting ban	Enforcement
Alabama	no	drivers age 16 and 17-year-old drivers who have held an intermediate license for fewer than 6 months	no	drivers age 16 and 17-year-old drivers who have held an intermediate license for fewer than 6 months	primary
Alaska	no	no	no	all drivers	primary
Arizona	no	no	school bus drivers	no	primary
Arkansas	drivers 18 or older but younger than 21	drivers younger than 18	school bus drivers	all drivers	primary: texting by all drivers and cellphone use by school bus drivers; secondary: cellphone use by young drivers[1]
California	all drivers	drivers younger than 18	school and transit bus drivers	all drivers	primary: hand held and texting laws; secondary: hands-free cellphone use by young drivers[1]
Colorado	no	drivers younger than 18	no	all drivers	primary
Connecticut	all drivers	drivers younger than 18	school bus drivers	all drivers	primary
Delaware	all drivers	learner's permit and intermediate license holders	school bus drivers	all drivers	primary
District of Columbia	all drivers	learner's permit holders	school bus drivers	all drivers	primary

Florida	no	no	no	no	not applicable
Georgia	no	drivers younger than 18	school bus drivers	all drivers	primary
Hawaii	no	no	no	no	not applicable
Idaho	no	no	no	no	not applicable
Illinois	drivers in construction and school speed zones	drivers younger than 19 and learner's permit holders younger than 19	school bus drivers	all drivers	primary
Indiana	no	drivers younger than 18	no	drivers younger than 18	primary
Iowa	no	learner's permit and intermediate license holders	no	all drivers	primary for learner's permit and intermediate license holders; secondary for texting
Kansas	no	learner's permit and intermediate license holders	no	all drivers	primary
Kentucky	no	drivers younger than 18	school bus drivers	all drivers	primary
Louisiana	with respect to novice drivers, see footnote[2]	all novice drivers, see footnote for detail[2]	school bus drivers	all drivers	primary[2]
Maine	no	learner's permit and intermediate license holders	no	learner's permit and intermediate license holders	primary
Maryland	all drivers	learner's permit and provisional license holders younger than 18	school bus drivers (hand-held ban)	all drivers	secondary; primary for texting
Massachusetts	no	drivers younger than 18	school bus drivers and passenger bus drivers	all drivers	primary
Michigan	no	no	no	all drivers	primary
Minnesota	no	learner's permit holders and provisional license holders during the first 12 months after licensing	school bus drivers	all drivers	primary
Mississippi	no	no	no	learner's permit and intermediate license holders	primary
Missouri	no	no	no	drivers 21 and younger	primary
Montana	no	no	no	no	not applicable
Nebraska	no	learner's permit and intermediate license holders younger than 18	no	all drivers	secondary
Nevada	no	no	no	no	not applicable
New Hampshire	no	no	no	all drivers	primary

New Jersey	all drivers	learner's permit and intermediate license holders	school bus drivers	all drivers	primary
New Mexico	no	no	no	no	not applicable
New York	all drivers	no	no	all drivers	primary; secondary for text messaging
North Carolina	no	drivers younger than 18	school bus drivers	all drivers	primary
North Dakota	no	no	no	no	not applicable
Ohio	no	no	no	no	not applicable
Oklahoma	learner's permit and intermediate license holders	no[3]	school bus drivers and public transit drivers	learner's permit holders, intermediate license holders, school bus drivers and public transit drivers	primary
Oregon	all drivers	drivers younger than 18	no	all drivers	primary
Pennsylvania	no	no	no	no	not applicable
Rhode Island	no	drivers younger than 18	school bus drivers	all drivers	primary
South Carolina	no	no	no	no	not applicable
South Dakota	no	no	no	no	not applicable
Tennessee	no	learner's permit and intermediate license holders	school bus drivers	all drivers	primary
Texas	drivers in school crossing zones	intermediate license holders for the first twelve months	bus drivers when a passenger 17 and younger is present	bus drivers when a passenger 17 and younger is present; intermediate license holders for first twelve months; drivers in school crossing zones	primary
Utah	all drivers	no	no	all drivers	primary for texting; secondary for talking on a hand-held cellphone[4]
Vermont	no	drivers younger than 18	no	all drivers	primary
Virginia	no	drivers younger than 18	school bus drivers	all drivers	secondary; primary for school bus drivers
Washington	all drivers	learner's permit and intermediate license holders	no	all drivers	primary
West Virginia	no	drivers younger than 18 who hold either a learner's permit or an intermediate license	no	drivers younger than 18 who hold either a learner's permit or an intermediate license	primary
Wisconsin	no	no	no	all drivers	primary
Wyoming	no	no	no	all drivers	primary

[1]The laws in Arkansas and California prohibit police from stopping a vehicle to determine if a driver is in compliance with the law. Clearly, that language prohibits the use of checkpoints to enforce the law, but it has been interpreted as the functional equivalent of secondary provisions that typically state the officer may not stop someone suspected of a violation unless there is other, independent, cause for a stop.

[2]In Louisiana, all learner's permit holders, irrespective of age, and all intermediate license holders are prohibited from driving while using a hand-held cellphone and all drivers younger than 18 are prohibited from using any cellphone. Effective April 1, 2010 all drivers, irrespective of age, issued a first driver's license will be prohibited from using a cellphone for one year. The cellphone ban is secondary for novice drivers age 18 and older.

[3]In Oklahoma, learner's permit and intermediate license holders are banned from using a hand-held electronic device while operating a motor vehicle for non-life-threatening emergency purposes.

[4]Utah's law defines careless driving as committing a moving violation (other than speeding) while distracted by use of a hand-held cellphone or other activities not related to driving.

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Q&As: Cellphones, texting, and driving

January 2011

More information on cellphones

Hide all answers

1 | How many people use cellphones?

Cellphone use in the United States has grown quickly during the past decade. There were about 293 million wireless cellphone subscribers as of June 2010, according to CTIA – The Wireless Association, an industry trade group.[1] That's up 51 percent from 194 million in June 2005 and 3 times the 97 million wireless subscribers in June 2000. Minutes of use have surged to about 2.3 trillion in June 2010 from 195 billion in June 2000.

2 | Do drivers frequently use phones behind the wheel?

Yes, though it's hard to determine accurately just how many drivers use phones. Combining observational and self-reported data on phone use, the federal government estimated that drivers using phones nearly tripled during 2000-08, from 4 to 11 percent, and then declined to 9 percent in 2009. Federal observational data indicate that 5 percent of drivers in 2009 were talking on hand-held phones at any moment during the day. This means about 672,000 passenger vehicles on the road at any moment during the day were driven by people talking on hand-held phones.[2]

A 2009 Institute telephone survey of 1,219 drivers 18 and older indicates phone use may be somewhat lower than government estimates. Drivers on average reported spending about an hour in the car each day, with about 4 minutes of that time on the phone. This translates into roughly 7 percent of time behind the wheel on the phone.[3] The discrepancy between the two estimates may be a result of drivers in the Institute survey understating how much phoning while driving they do because the practice has negative connotations. It also could reflect different methodologies. Government researchers observed hand-held phone use among drivers waiting at intersections during the daytime, then adjusted this for self-reported hands-free use. The Institute's survey estimates self-reported driver phone use on all kinds of roads during all hours.

3 | Who is most likely to talk on a cellphone while driving?

Young drivers ages 16-24 are more likely than other drivers to talk on hand-held cellphones according to daytime observational surveys of drivers the federal government conducted nationwide in 2009. Eight percent of drivers ages 16-24 were observed talking on hand-held phones, compared with 5 percent of those ages 25-69 and 1 percent of drivers 70 and older.[2] In the Institute's 2009 survey of drivers' self-reported phone use, people younger than 30 spent 16 percent of driving time on the phone, compared with 7 percent for drivers 30-59 years old, and just 2.5 percent for drivers 60 and older.[4]

Men in the Institute's survey reported spending slightly more time on the phone than women (7 percent versus 6 percent). This differs from the government's and other observations that female drivers use cellphones more. Drivers reported using phones more on weekdays and during afternoons and evenings. Use rates were 8 percent during these times.[3] This is in line with government observations that use is higher on weekdays.[2]

4 | Does using a cellphone while driving increase crash risk?

Yes. Two controlled studies link talking on a cellphone directly to increased crash risk. A 2005 Institute study of drivers in Western Australia found cellphone users four times as likely to get into crashes serious enough to injure themselves.[5] The study used cellphone billing records to verify phone use of crash-involved drivers. Increased risk was similar for males and females, drivers younger than 30 and those 30 and older, and hands-free and hand-held phones. The findings were consistent with 1997 research that showed phone use among Canadian drivers was associated with a fourfold increase in the risk of a property damage crash. The Canadian study also used cellphone billing records to verify phone use of drivers.[6]

5 | How many crashes have been caused by drivers using cellphones?

The federal government estimates that in 2009, 5,474 people were killed and an additional 448,000 were injured in motor vehicle crashes that were reported by police to have involved distracted driving. The government estimates that 18 percent of these deaths and 5 percent of these injuries involved cellphones.[7] However, these estimates are imprecise and likely underestimate distraction's role in crashes, as many police reports don't have information on distracting events. Police crash reports aren't a reliable way to count cellphone-related collisions because drivers often don't volunteer that they were on the phone.

It is possible to estimate the expected number of crashes linked to phoning while driving. An Institute analysis suggests this practice could account for 22 percent of all crashes, or about 1.3 million in 2008, based on how much phoning while driving motorists admitted to researchers and the estimated risk of driver phone use.[3] However, there is a disconnect between estimated crashes and real-world data, which indicate that crashes have been holding steady in recent years, even as cellphone use in general and driver use of phones in particular have proliferated.

About 5.5 million police-reported motor vehicle crashes occurred during 2009, the latest year for which federal data are available. This count doesn't differ much from the approximately 6 million crashes recorded annually during the early 1990s, when cellphones started getting popular, and it is lower than the 6.4 million crashes in 2000, when federal researchers began documenting the increase in phone use while driving.

An increase in cellphone-related crashes isn't showing up in insurance claims either. An analysis by the Highway Loss Data Institute indicates that the frequency of insurance claims for crash damage filed under collision coverage during 1998-2008 hasn't increased, even though driver phone use has escalated.[8]

A 2006 Virginia Tech Transportation Institute study used video cameras to monitor drivers in about 100 vehicles for about a year. Four percent of crashes or near-crashes were attributable to talking on a cellphone, researchers estimated.[9]

6 | Are hands-free cellphones safer?

No, at least not after the conversation begins. Two studies of crashes using cellphone billing records to verify phone use found about a fourfold increase in crash risk with conversing on both hands-free and hand-held phones.[5,6] The studies were unable to estimate crash risk from different types of hands-free devices. They also were unable to determine whether there was any benefit associated with hands-free devices while placing the call. Experimental research using driving simulators indicates that phone conversation tasks, whether using hand-held or hands-free devices, affect some measures of driving performance.[10,11] Hands-free phones may eliminate some of the physical distraction of handling phones, but the cognitive distraction from phone conversations remains.

7 | How does cellphone use affect driving performance?

An Institute review of more than 120 cellphone studies, about half of which were experimental studies using driving simulators or vehicles instrumented with video cameras, sensors, and other equipment, found that nearly all reported that some measures of driver performance were affected by the cognitive distractions associated with cellphone tasks.[11] Phone conversation tasks typically increased reaction times and travel speeds and increased lane deviations and steering wheel movements. Statistical analyses that aggregated the results of 33 studies and 23 studies, respectively, reported similar findings.[10,12] Some studies have found that older drivers' performance is more affected by cellphone tasks, particularly their reaction time. Few studies included drivers younger than 18, and evidence is mixed on the effects of phone use for teenage drivers compared with adult drivers. Findings also are mixed on whether driving performance while talking on a cellphone improves with practice. Some simulator studies suggest that the negative impact of phone use on driving performance may lessen with experience.[13,14] Other simulator research has found no change in performance with practice.[15]

Using functional magnetic resonance imaging, researchers at Carnegie Mellon University found a 37 percent reduction in brain activity associated with driving when research subjects listened via a headset to spoken sentences that they judged as true or false while steering in a driving simulator. Researchers concluded that listening and processing information from a phone conversation can draw mental

resources away from driving, worsening driving performance, even when drivers are not holding or dialing a phone.[16]

Further evidence comes from a few studies of small samples of people observed during their everyday driving. One study included drivers of 100 vehicles instrumented with video cameras and other monitoring technologies. Only a few serious crashes occurred, but researchers calculated the odds of being in a near-crash or crash were 2.8 times higher when dialing a hand-held phone than when phones weren't being used. The odds of a near-crash or crash were 1.3 times higher when talking on a hand-held phone, although this was not statistically significant. But because drivers spend more time talking on a hand-held phone than dialing, the percentage of crashes and near-crashes estimated to be attributable to talking and dialing on hand-held phones were both about 4 percent.[9]

8 | Do bans on hand-held phones work to reduce driver phone use?

Institute research has documented that all-driver bans on hand-held phoning can have large and lasting effects on phone use. In November 2001, New York became the first state to implement a universal ban on hand-held cellphones. Observed driver hand-held cellphone use declined by an estimated 47 percent immediately after the ban. Use then began going back up, but when measured more than 7 years after the ban, use was 24 percent lower than would have been expected without the ban. Soon after a ban was passed in the District of Columbia in 2004, observed driver hand-held phone use dropped by 41 percent. Nearly five years after the ban, the rate of phone use was 43 percent lower than would have been expected without a ban. Connecticut's ban took effect in 2005. Observed hand-held phone use declined an estimated 76 percent immediately after a ban; more than 3 years later, use was 65 percent lower than would be expected without a ban.[17]

In the Institute's telephone survey of cellphone use, drivers in states with hand-held bans were less likely to say they talk on phones while driving. Forty-four percent of drivers in states with bans reported they don't use phones when driving, compared with 30 percent in states without such laws. The percent of drivers who talk on phones and always talk hands-free was 22 in states with all-driver bans on hand-held phones, and 13 in states without all-driver bans.[4]

9 | Do hand-held phone bans reduce crashes?

There is no evidence so far that banning hand-held phone use reduces crashes, even though Institute research demonstrates that bans on hand-held phoning while driving can have big and long-term effects in curbing phone use. A 2009 analysis by the Highway Loss Data Institute found that hand-held bans had no effect on insurance claims. Researchers compared claims for crash damage in 4 jurisdictions before and after hand-held phone use bans, finding steady claim rates before and after laws went into effect.[8]

Many drivers still use hand-held phones where use is banned, and others may simply switch to hands-free phones. Given that crash risk increases substantially with drivers' use of either hand-held or hands-free phones, bans on hand-held cellphones won't eliminate the problem entirely. Laws prohibiting hands-free phones are difficult to enforce, plus drivers may be unfamiliar with restrictions in their state. In the Institute telephone survey, 18 percent of drivers in states with a universal ban on hand-held phone use either believed there was no law or were unsure. The proportion was even higher (48 percent) among drivers in states with a universal texting ban. Many drivers don't believe police pay much attention to them. Only 29 percent of drivers in states with universal hand-held phone bans who knew about the bans and 22 percent of drivers in states with universal texting bans who were aware of the restrictions felt they were strongly enforced.[4]

10 | How common are bans on hand-held cellphones and texting?

Bans are widespread in other countries and are becoming more common in the U.S. Nine states (California, Connecticut, Delaware, Maryland, New Jersey, New York, Oregon, Utah, and Washington) and the District of Columbia have enacted laws that ban drivers of all ages from using hand-held cellphones.

More common in the US are laws that restrict young drivers from using any type of cellphone. Teenage drivers in 28 states and the District of Columbia have such laws. School bus drivers in 19 states and the District of Columbia are restricted from using all cellphones while driving a bus.

In Australia, drivers in Victoria and Tasmania are banned from using all phones, except ones secured in a commercially designed holder fixed to the vehicle that can be operated without touching any part of the phone.

Text messaging is banned for all drivers in 30 states and the District of Columbia. In addition, novice drivers are banned from texting in 8 states (Alabama, Indiana, Maine, Mississippi, Missouri, Oklahoma, Texas, and West Virginia), and school bus drivers are banned from text messaging in 2 states (Oklahoma and Texas).

Cellphone laws in the US

11 | Why do more laws cover only teenage drivers?

Cellphone bans for young drivers are becoming more common amid concerns about the role distractions play in teenagers' elevated crash risk. Distractions of any type are a common factor in crashes of newly licensed 16-year-old drivers.[18] Some research also shows teenage drivers tend to use cellphones and other emerging technologies more than adult drivers.[19] States increasingly have graduated licensing laws that place restrictions on newly licensed drivers, e.g., limiting nighttime driving and the number of passengers a novice driver can carry. Cellphone bans are being added to those restrictions.

See Q&A: Teenagers — graduated driver licensing

More about the licensing law in your state, or any state

12 | Do teenagers comply with cellphone bans?

Young drivers often ignore cellphone restrictions, according to an Institute study of North Carolina's cellphone ban for young beginning drivers. The state bans the use of any telecommunications device by drivers younger than 18 under its graduated licensing system. Observed cellphone use by teenagers leaving high schools in the afternoon changed little from 1-2 months before to 5 months after the restriction took effect on Dec. 1, 2006.[20] About 11 percent of teenage drivers were seen using phones before the law. That percentage rose slightly to 12 percent in the postlaw survey. Cellphone use remained steady at about 13 percent at comparison sites in South Carolina, which doesn't restrict teenage drivers' phone use. When observed postlaw, less than 1 percent of teenage drivers in North Carolina were using hands-free phones. About 2 percent were observed dialing or texting and about 9 percent were holding a phone to their ear.

The study coupled driver observations with telephone surveys of North Carolina parents and their teenagers. In postlaw surveys, about two-thirds of teenagers said they knew about their state's law, compared with 39 percent of parents. Three-quarters of teenagers and 95 percent of parents said they approved of the law. The proportion of teenagers who reported using phones while driving declined somewhat following the law. However, of those who owned a phone and admitted to ever talking on the phone while driving, about half admitted they used their phones, if they had driven, on the day prior to the interview. There was no evidence of focused enforcement or publicity of the law. Only 22 percent of teenagers and 13 percent of parents believed the ban was being enforced fairly often or a lot.[20]

13 | Is cellphone use more distracting to drivers than other tasks?

Evidence is mixed. For example, some experimental studies found that phone conversations are more disruptive than conversations with passengers or adjusting a radio.[11] However, two statistical analyses combining the results of multiple experimental studies found similar decrements in reaction time for conversation tasks with passengers and with hand-held or hands-free phones.[10,12] Two studies reported that talking on cellphones or having a 0.08 percent blood alcohol concentration (BAC) — the legal threshold for impairment — has a comparable effect on some simulated driving tasks.[21,22] However, the risks associated with alcohol impairment accumulate over the entire duration of a trip, whereas the risks of cellphone use generally apply for only a portion of a trip. In addition, crash risk increases substantially at very high BACs, and the implications of the experimental studies for drivers in their own vehicles is unknown.

14 | Is texting while driving a problem?

Texting in general is on the increase. Annualized text messages soared to about 1.8 trillion in June 2010 from 57 billion in June 2005.[1] Many people report that they text while driving. A 2009 Institute survey found that 13 percent of drivers of all ages have texted while driving, and this jumps to 43 percent among 18-24-year-old drivers.[4] Similar results were found in other studies.[23,24]

There hasn't been a lot of research on the safety effects of texting and driving, but three studies of young drivers using driving simulators all found that receiving, and especially sending, text messages impeded drivers' reaction times and lane-keeping ability.[25,26,27] In a study involving large trucks instrumented with video cameras and other monitoring technology, the odds of a traffic conflict, lane drift, near-crash, or crash were 23 times higher when a truck driver was texting. A limitation is that less than 1 percent of the incidents involved crashes; most were lane drifts or other driver errors. It's unknown how such incidents relate to actual crashes. It also is unclear whether the results generalize to passenger vehicle drivers.[28]

15 | Do drivers comply with text messaging bans?

So far it appears that drivers, especially young adults, largely shrug off texting bans. An Institute study found that among 18-24 year-olds — the group most likely to text — 45 percent reported texting while driving in states that bar the practice, just shy of the 48 percent of drivers who reported texting in states without bans.[4] Among drivers 25-29, 40 percent reported texting in states with bans, compared with 55 percent in states without bans.

Many drivers are unclear about the laws in their state. Forty-eight percent of drivers in states with universal texting bans believed there was no law or were unsure. Plus, only 22 percent of drivers who were aware of the restrictions felt they were strongly enforced.[4]

16 | Do bans on driver text messaging reduce crashes?

Not according to research by the Highway Loss Data Institute. A 2010 study examined insurance claims filed for damage to vehicles before and after driver texting bans were enacted in four states. There was no reduction in claim rates relative to comparison states. Rather, there was a significant increase of 7-9 percent in the frequency of claims in 3 of the 4 study states. Increases in the frequency of claims also were found for rated drivers 25 and younger in these 3 states.[29]

17 | Can technology be used to prevent crashes caused by distracted driving?

Automakers are rolling out crash avoidance systems that warn drivers when they are not paying attention. Some systems may intervene if the system judges that a crash is imminent. Systems like lane-departure warning and forward-collision warning promise to prevent many kinds of distracted driving crashes, not just those that result from cellphone use (see *Status Report*, April 17, 2008). But this isn't a quick fix. Most new vehicles don't have crash avoidance features, and it will take some time before the systems are in wide use as newer vehicles supplant older ones. Plus, the effects of these technologies on real-world crashes have not yet been established.

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High Visibility Enforcement Demonstration Programs in Connecticut and New York Reduce Hand-Held Phone Use

By Linda Cosgrove, Neil Chaudhary, and Scott Roberts

Driving while distracted increases the likelihood of a crash (NHTSA, 2010), and recent well-publicized events have brought this unsafe driving behavior to the forefront of the public eye. According to CTIA-The Wireless Association (2009) about 285 million Americans (91% of all Americans) now own cell phones, compared to only 1 million in 1987. The National Health Interview Survey (Blumberg & Luke, 2010) found that nearly one in four households were wireless only (no land line), up nearly 2 percentage points from the year before. The popularity of text messaging is increasing, and videotaped footage of drivers who were texting immediately before a crash has circulated widely on television and the Internet.

The National Highway Traffic Safety Administration estimates that 6% of drivers nationwide were using an electronic device at any given time in 2008 (Pickrell & Ye, 2009. A meta-analysis (Horrey & Wickens, 2006) of 23 experiments that measured the effects of cell phone use on driving performance found that, across all studies, reaction times were consistently slower when using a cell phone than when not using a phone.

To address this problem, NHTSA initiated distracted driving demonstration programs in two communities to test whether a high visibility enforcement (HVE) model could reduce two specific instances of distracted driving -- talking or texting using a hand-held cell phone. The HVE model combines dedicated law enforcement during a specific period, paid and earned media emphasizing an enforcement-based message, and evaluation before and after. *Click It or Ticket*, NHTSA's best known and most successful HVE campaign for seat belt use, has also been effective in areas of aggressive driving and impaired driving. This report summarizes results from the first two of four waves of enforcement and media for distracted driving high visibility enforcement campaigns in two communities.

Background

Over the past several years legislatures have introduced laws banning hand-held cell phone use and texting in a number of States. New York and Connecticut passed laws banning hand-held cell phone while driving in 2001 and 2005 respectively. At the time of this report, 8 States and the District of Columbia have banned hand-held cell phone use for all drivers, and 30 States and the District have banned texting for all drivers (GHSA, 2010). Many States also ban any use of a cell phone (even with a hands-free device) for novice teen drivers. The demonstration projects were aimed to test whether HVE would be effective in persuading drivers not to use hand-held phones to talk or text, whether law enforcement would be able to observe violations, and whether an HVE campaign would increase drivers' perceived risk of receiving a citation for violating the law.

***Hand-held cell phone use while driving dropped 56% in Hartford** (from 6.8% to 3.1%) **and 38% in Syracuse** (from 3.7% to 2.3%).*

***Texting while driving declined 68% in Hartford** (from 3.9% to 1.4%) **and 42% in Syracuse** (from 2.8% to 1.6%).*

Under the leadership of the U.S. Department of Transportation Secretary Ray LaHood, NHTSA awarded cooperative agreements to Connecticut and New York to implement and evaluate demonstration programs that apply the high visibility enforcement model to distracted driving at the community level. Syracuse, New York, and Hartford, Connecticut, (a combination of three contiguous cities -- East Hartford, Hartford, and West Hartford) conducted the demonstrations.

Program Description

NHTSA worked with the Connecticut Department of Transportation and the New York Department of Motor Vehicles' (DMV) Governor's Traffic Safety Committee to conduct model high visibility enforcement programs in the two selected communities. In Connecticut, the participating law enforcement agencies were the Connecticut State Police and the Hartford, West Hartford, and East Hartford Police Departments. In New York, the New York State Police, the Syracuse Police Department, and the Onondaga County Sheriff's Office participated. Both communities planned to conduct four waves of enforcement over the course of one year.

Under separate contracts, NHTSA provided evaluation and communications support to both sites. Preusser Research Group was the evaluation firm and the Tombras Group was the communications firm.

Table 1
Demonstration Program and Evaluation Schedule

	Wave 1		Wave 2	
	CT	NY	CT	NY
Pre Wave Observations	March 18-22	March 25-27	July 8-12	July 8-10
Pre Wave Awareness	March 23-27	March 15-19	July 6-10	July 5-9
Media Flight	April 4-16	April 4-16	July 22-28	July 20-26
Enforcement Dates	April 10-16	April 8-17	July 24-30	July 22-31
Post Wave Observations	April 15-19	April 15-17	July 29-August 2	July 29-31
Post Wave Awareness	April 15-20	April 19-22	July 29-August 3	August 2-6

The first two waves of focused enforcement took place in April and July 2010. Table 1 shows the timeline for pre and post evaluation data collection, media flights, and enforcement in test and control sites.

Development of the Creative Material

In September 2009 NHTSA explored a variety of project themes and held focus groups in Syracuse and Hartford (four in each city). Six potential taglines were selected for assessment. The line "A phone in one hand leads to a ticket in the other" received the highest marks. Based on additional comments, the line for the demonstration project was shortened to *Phone in One Hand, Ticket in the Other.*

The creative material was designed to generate high awareness of stepped-up enforcement efforts regarding local cell phone laws and convince drivers to adhere to those laws. In December 2009, eight more focus groups were held in Hartford and Syracuse to test four TV commercial ideas. The "BAM!" concept received the highest marks, and became the ad for the demo project.

Earned Media

Secretary LaHood and NHTSA Administrator David Strickland launched the campaign with press events (U.S. DOT, 2010) in each State on April 8, 2010. These events generated considerable coverage from local and national media outlets including a feature on ABC-TV's *Good Morning America* (Clarke, 2010) and a feature on ABC News (San Miguel, 2010).

Each of the demonstration sites received sample earned media templates so that they could develop localized press releases, fact sheets and post wave press releases. Outreach with the news media and various partners during each wave resulted in scores of articles and events in both States. In Connecticut and New York, more than 100 news organizations developed news stories about the demonstration projects. Syracuse and Hartford actively generated opportunities to earn additional media for the program. For instance, New York initiated a media tour and the Connecticut DMV joined with Traveler's Insurance Company to sponsor a teen driving video contest.

Paid Media

NHTSA's Office of Communications and Consumer Information purchased air time to promote the program activity and emphasize the enforcement component among the target audience of men and women 18 to 45 years old. The television spots are available online at distraction.gov/hartford and distraction.gov/syracuse. Figure 1 shows a still shot from one of the animated Internet ads also located on the Web site.

Advertisers use "gross rating points" (GRPs) to determine how much of their target audience is reached by a specific advertisement multiplied by the number of times the target audience sees it. For the first wave in April 2010, NHTSA purchased two weeks of advertising in each demonstration location at a level of about 535 GRPs for television/cable, 400 GRPs for radio, and an additional 2 million online impressions on Web sites like USAToday.com. This was considered a strong buy that would reach the target audience enough times that the ad's message would resonate with them. For the second wave in July 2010, NHTSA purchased one week of advertising in each demonstration location at a level of about 300 GRPs for television/cable, approximately 240 GRPs for radio, and an additional 1.5 million online impressions. The media expenditures were $219,290 in Hartford and $88,904 in Syracuse for both waves combine (see Table 2).

The Connecticut Highway Safety Office also ran the *Phone in One Hand, Ticket in the Other* slogan on variable message boards in and around the pilot area and purchased digital billboards on major Hartford Interstate Highways I-84 and I-91. The billboard message also ran at the XL Center, a sports and concert venue in downtown Hartford. This message ran on the XL Center digital billboard and outdoor marquee.

Enforcement

Hartford and Syracuse chose enforcement strategies tailored to their communities. Hartford preferred a spotter technique, where an officer, usually standing on the side of the road, radioed ahead to another officer whenever a passing motorist using a hand-held cell phone was observed. The second officer made the stop and wrote the ticket. The Connecticut Highway Safety Office prepared citation holders, short brochures that officers used to hold the tickets to provide specific information about Connecticut's cell phone law, the fine amount, and the risks associated with distraction.

Syracuse preferred roving patrols where officers drove though their jurisdiction actively seeking out distracted drivers using cell phones or texting. Officers reported that higher vantage points, SUVs, and unmarked vehicles were particularly effective in identifying violators. Both States found that having the flexibility to schedule overtime shifts as needed was critical to the successful implementation of the enforcement mobilizations.

Figure 1
Scene From Animated Internet Banner Ad

Table 2
Media Buy

	Wave 1 (2 weeks)		Wave 2 (1 week)	
	Hartford	Syracuse	Hartford	Syracuse
TV Cost	$108,651	$36,898	$57,098	$21,517
Radio Cost	$108,651	$36,898	$57,098	$21,517
Online Cost	$5,000	$5,000	$3,750	$3,750
Total Cost	$140,855	$54,159	$78,435	$34,745

Table 3
Enforcement Hours and Citations Issued

	Wave 1		Wave 2	
	Hartford	Syracuse	Hartford	Syracuse
Dedicated Hours	1,345	1,370	1,856	1,337
Hand-Held Phone Use	2,329	2,185	2,327	1,977
Text/E-mail/ Distraction	279	115	21	169
Citations/10k Population	107	167	100	156

Both Hartford and Syracuse dedicated officers to vigorously enforce the hand-held cell phone ban during the two waves, exceeding benchmarks based on previous high visibility enforcement campaigns. Table 3 shows the number of enforcement hours and phone and texting citations issued in each site, along with the rate of citations per 10,000 of each city's population.

Evaluation Methodology

Before and after each enforcement wave, NHTSA conducted observations of driver cell phone use and collected public awareness surveys at driver licensing offices in each test and comparison site.

Albany, New York, served as the comparison area for Syracuse. Bridgeport and Stamford, Connecticut, were noncontiguous control areas to match the demographics of the three Hartford area cities. Control sites allow evaluators to separate the effect of the demonstration program from extraneous influences that may be going on in the State. None of the control sites received the paid media advertising and law enforcement officers continued their usual enforcement activities without special emphasis on cell phone laws.

Cell Phone Observations

Cell phone observations were taken at 15 sites in each intervention area, plus 15 sites in Albany, 15 in Stamford, and 7 sites in Bridgeport. Sites were selected from road segments based on traffic volume estimates. Three of the sites in each area were highway off-ramps. The rest of the sites were identified from the highest volume segments, assuring that they were geographically dispersed throughout the areas. The main goal of site selection was to capture the bulk of the traffic streams in the given area.

Observation protocols were based on NHTSA's National Occupant Protection Use Survey (NOPUS) observation protocols, adapted to increase sample size. An earlier formulation of the method, consistent with NOPUS observation protocols, had observers sampling from traffic stopped at red lights. Therefore all selected sites were at traffic light controlled intersections. Pilot testing of this method resulted in few observations and NHTSA modified its method to observe moving traffic only. Observations were made from

street corners observing one direction of traffic (the vehicles traveling in the lanes nearest the observer) for one hour at each site. When traffic signals turned red, observers pivoted and sampled vehicles from the moving traffic on the cross street. Observers coded vehicle type, sex, estimated age (16-24, 25-59, 60+) and whether the driver was holding a hand-held phone to her or his ear, manipulating a cell phone (other than by holding to one's ear) and if the driver had a hands-free headset (e.g., Bluetooth) in the visible ear.

The main analyses were the average percentage of each of the three cell phone use categories separately for each test and control area. Weighting of data occurred prior to analysis so that each site held equal weight. That is, for a 15-site survey in which the number of observed drivers varied between sites, the percentage use recorded in each site contributed an equal 1/15 of the total use rate for that area. Binary logistic regressions analyses evaluated the significance of differences and chi squares were conducted for raw data for subsets of the data (e.g., age). Over 121,000 vehicles were observed for the first two waves of the demonstration program.

Self-Reported Use and Awareness Surveys

Motorists who visited driver licensing offices in the test and comparison sites completed a single page questionnaire asking whether they had seen or heard of the distracted driving program, enforcement, or messaging. They were asked about their cell phone use while driving and whether they had changed their cell phone use in the past 30 days, among other topics. Surveyors collected more surveys for the first (pre Wave 1) administration and will do the same for the final (post Wave 4) administration to increase the power of analyses for both baseline and final data. Over 11,000 self-report surveys were collected for the first two waves of the demonstration program.

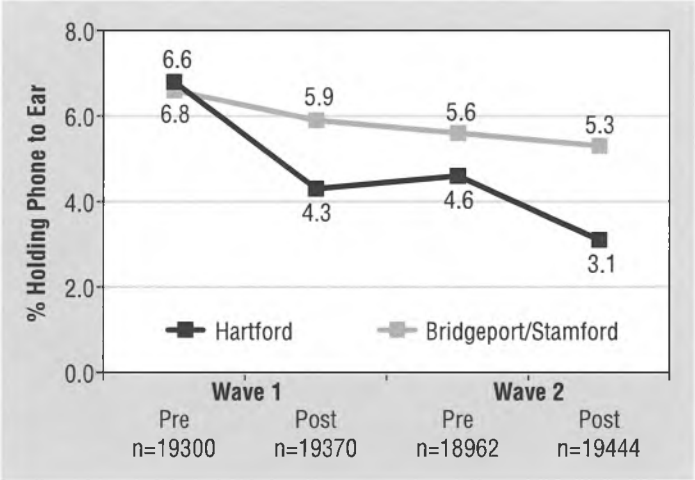
Researchers collected some data a bit later than originally planned (Table 1). In Syracuse there was a clerical error on the final question about slogan recognition. For this question, the analyses report data from another survey administered two weeks later in both Syracuse and Albany. There were inexplicable fluctuations in the Wave 2 results (pre and post) in the Albany surveys compared to Wave 1. For example there were 14% (pre) and 11% (post) of the respondents who reported having gotten a ticket for using a hand-held phone in the past month for Wave 2. This value was only 1% in both pre and post Wave 1 surveys. The data collected two weeks later were more comparable to Wave 1 results. For this reason the researchers deemed the original data from Albany Wave 2 unreliable. The analyses report only the re-sampled post wave data for Albany.

Results

Observed Phone Use in Connecticut

The results of Wave 1 showed a significant decrease ($p < .01$) in hand-held cell phone use in the Hartford areas from 6.8% before the program to 4.3. afterwards (see Figure 2). The control areas also showed a slight decrease in hand-held cell phone use, but this was not statistically significant (6.6% to 5.9%, $p > .05$).

Figure 2
Observed Hand-Held Phone Use in Connecticut



There were further reductions in observed hand-held cell phone use in the second wave in the Hartford intervention area. In between waves, there was minimal increase in hand-held cell phone use in the Hartford areas, when the program was silent. Observed use was 4.6% at the pre measurement of the second wave, dropping to 3.1% in the post measurement ($p < .01$). Use in the control areas continued a slight, although not statistically significant, downward trend, starting at 5.6% and dropping to 5.3% ($p > .05$).

From the baseline (pre Wave 1) to the end of the second wave (post Wave 2) hand-held cell phone use dropped 56% (from 6.8% to 3.1% in the Hartford areas compared to 20% (6.6% to 5.3%) in the control areas.

Most of the decrease in cell phone use was attributed to drivers age 25 to 59 in the Hartford area. Young drivers 16 to 24 dropped 5.3 percentage points (from a pre of 9.0% to a post of 3.7%) following enforcement during Wave 1. However, relatively small sample sizes for this group made this drop only marginally significant ($p < .06$). There was no change for the second wave for the young drivers and there was also no change in use among this group for control areas in either wave. For the 25- to 59-year-old age group, there were significant pre to post drops for both waves in the Hartford area. The changes in the control areas were not significant for either wave and there were no significant effects for the oldest drivers in either wave in either area.

There were significant drops in observed phone use for men and women in both waves in the Hartford area. Surprisingly, there were significant (p's $< .05$) pre to post decreases among female drivers in the control area for both waves but no change for male drivers.

For Wave 1, headset use significantly decreased from pre to post in both the Hartford area (3.5% to 2.8%) and in the control area (4.1% to 2.7%). For Wave 2, none of the pre to post differences were significant in either the test or control sites.

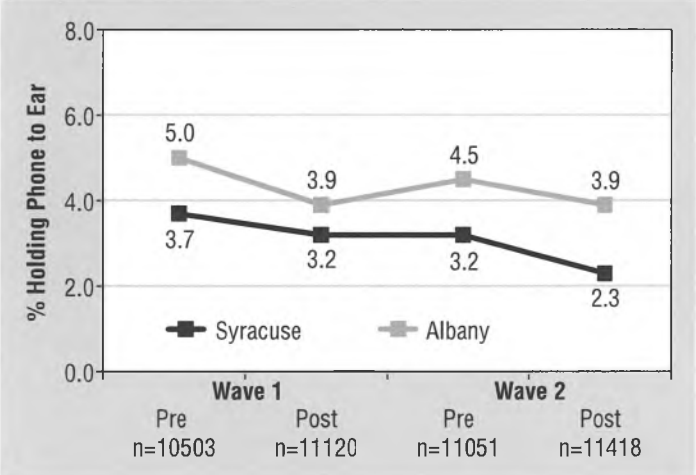
The percentage of people observed manipulating their phones decreased significantly in Wave 1 from pre to post. There was a larger decrease in the Hartford area (3.9% to 2.7%) than in the control area (2.8% to 2.1%). For Wave 2 there was another significant pre to post decrease without much of an increase between waves in the Hartford area (2.6% to 1.4%). There was no change in the control area for the second wave (2.6% to 2.6%).

Observed Phone Use in New York

The results of Wave 1 showed a non-significant decrease in hand-held cell phone use in Syracuse going from 3.7% to 3.2% ($p > .05$) (see Figure 3). There was an unexpected decrease in use in the control area that did reach significance. In Albany use started at 5.0% and dropped to 3.9%.

Wave 2 results were more in line with expectations. Between waves there was no increase in hand-held cell phone in Syracuse and use remained at 3.2%. After the second wave there was a significant drop in use to 2.3% ($p < .01$). Use in Albany rebounded between waves and was 4.5% prior to Wave 2. There was a drop in hand-held cell phone use in Albany (to 3.9%) but this decrease was not significant.

Figure 3
Observed Hand-Held Phone Use in New York



From the baseline (pre Wave 1) to the end of the second wave (post Wave 2) hand-held cell phone use dropped 38% (from 3.7% to 2.3%) in Syracuse compared to a 22% decline (from 5.0% to 3.9%) in Albany.

Drivers 25 to 59 accounted for most of the decrease in cell phone use in Syracuse in Wave 1, but not enough to influence the overall observation rate. None of the other age categories in Syracuse showed a decrease for this wave. The same age group was also the only significant decrease for the Albany drivers in Wave 1. For Wave 2, this group was again the only age group showing a significant decrease in Syracuse. In Albany, despite no overall significant drop, the drivers under 25 showed a significant decrease in driving while using a hand-held phone.

During Wave 1, male drivers showed a significant decrease in driving while on a hand-held phone in Syracuse while women did not. This effect for men was also the only significant drop in Albany. In the second wave men again significantly reduced their use in Syracuse while women did not. Conversely, there was a small but significant decrease in use by women in Albany but not men.

Observations of phone manipulation (e.g., texting, dialing) significantly decreased ($p < .05$) in Syracuse in Wave 1 (2.8% to 2.2%). There was also a decrease in Wave 2 (2.2% to 1.6%), but this decrease was not significant. The observed rate of manipulating a phone while driving was much higher in Albany than Syracuse. In both waves there was a significant pre to post decrease in observed phone manipulation in Albany (Wave 1: 6.3% to 5.3%; Wave 2: 5.7% to 3.0%). Both cities showed an overall decrease of 43% in observed phone manipulation from the baseline to the end of the second wave, with an absolute change of 1.2 percentage points in Syracuse and 3.3 points in Albany.

There were no significant changes in Syracuse in the percentage of drivers observed with hands-free headset. In both waves (pre and post) the rate was about 2% (ranging from 1.7% to 2.3%). Albany's rate of hands-free use was more variable ranging from 4.4% to 2.6%. There was a significant decrease between pre and post use rates during Wave 1 (4.4% to 2.8%).

Self-Reported Cell Phone Use and Program Awareness in Connecticut

Respondents in Connecticut were aware of and knowledgeable about the program and enforcement. From pre to post in Wave 1, Hartford area respondents reported increased chances of getting tickets while there was no effect in the control area. In both Syracuse and the control site, Albany, respondents also reported hearing more general distracted driving information after Wave 1 than before. In Wave 1 there was a decrease in the percentage reporting that it is important for police to enforce the hand-held cell law in both Hartford and control areas, but much of the decrease was restored by Wave 2. There was a pre to post increase in the Hartford area in Wave 1 for reports of having ever gotten a cell phone ticket. Similarly there was a pre to post (Wave 1 only) increase in reports of getting a ticket in the past month (for the control area also).

During Wave 2 there was an increase in the percentage of respondents in the Hartford area who heard about enhanced police enforcement. There was no such increase during Wave 1, but there was an overall gain between the waves. There were no significant effects for the control area.

During Wave 1 there was actually a decrease in the percentage of people having heard about distracted driving in general (both areas) but in Wave 2 there was a large increase (pre to post) in recognition for the Hartford area (but not the control area).

Awareness of the *Phone in One Hand, Ticket in the Other* slogan started at 5% in the pre of Wave 1. Following the first wave, recognition rose significantly to 32%. There was also a significant increase in the control area but not of the same magnitude (5% to 11%). Wave 2 led to further increases in recognition in the Hartford areas (27% to 47%). There was no increase in the control areas (8% to 10%).

Recognition of other slogans was not as high. The other most recognized slogan in the Hartford area following Wave 2 was *I-Promise Not to Drive Distracted* which was recognized by 15% of respondents. A local TV station (WFSB) has been running messages with this slogan between enforcement waves. Ten percent of the respondents recognized *Hang Up or Pay Up*, an enforcement type distracter slogan not in use in the area. Recognition of Oprah Winfrey's *No Phone Zone* was at 8%.

There was an increase in Wave 1 for judgments of frequency of cell phone use while driving, with no effect for the control group. The effect dissipated by Wave 2 -- the Wave 2 pre and post measures were much lower than the post of Wave 1. There was also a significant increase in self-reported texting during the first wave in the Hartford area. During the second wave there was a significant decrease in reported use by the control area respondents.

Self-Reported Cell Phone Use and Program Awareness in New York

Overall, Syracuse respondents knew about the enforcement and messaging campaign. Drivers in Syracuse reported having heard about the cell phone enforcement with significant pre to post increases for each wave. They also reported hearing about distracted driving (in general) more in the post of Wave 1 than in the pre of Wave 1 and this was also true in Albany. There was also an increase in self-reported tickets within the last month for Wave 1 in Syracuse. There was an increase in both waves for perceived strictness of police enforcement in Syracuse while there was a significant decrease during Wave 1 in Albany, the control site.

Unexpectedly, self-reported hand-held cell phone use increased from pre to post in Wave 1 in Syracuse. Albany's rates stayed the same. There were no changes in self-reported texting while driving.

Recognition of the main message, *Phone in One Hand, Ticket in the Other,* increased 32 percentage points in Syracuse (5% to 37%). The rates were flat in Albany, going from 4% to 5%.

Slogan recognition for Syracuse went from 5% to 21%. It is likely that recognition would have been even higher immediately following the campaign. Indeed, the recognition was at 37% following Wave 1. Rates in Albany, the control site, stayed the same going from 4% to 5%.

Recognition of other slogans was considerably lower at the end of Wave 2 in Syracuse. For example *Hang Up or Pay Up,* (not in use in the area) was 11%. Eight percent of the respondents recognized Oprah Winfrey's *No Phone Zone.*

There was an unexpected increase from pre to post in the first wave in Syracuse respondents' judgment of how frequently they use a hand-held phone while driving, similar to the findings in Hartford. This increase was not present in Albany, and was not present in the second wave in either area. Self-reported cell phone use rates for both pre and post in the second wave were lower than the post in the first wave for Syracuse. Figures 4 through 8 show public awareness findings for Syracuse, Hartford, and the control sites over both waves.

Figure 4
In the Past Month, Have You Seen or Heard About Distracted Driving in [Connecticut/New York]?

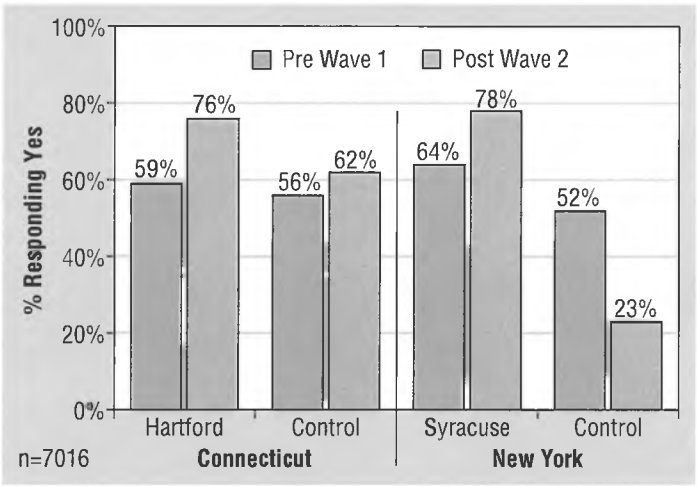


Figure 5
Awareness of "*Phone in One Hand, Ticket in the Other*" Slogan in Connecticut and New York

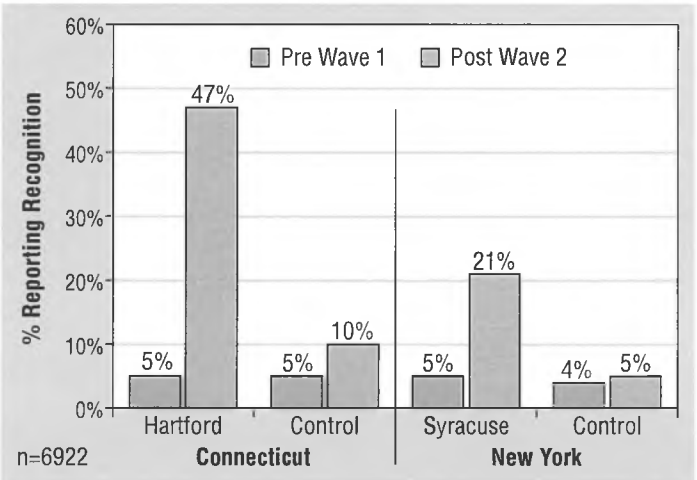


Figure 6
What do you think the chances are of getting a ticket if you use a hand-held cellular phone while driving?

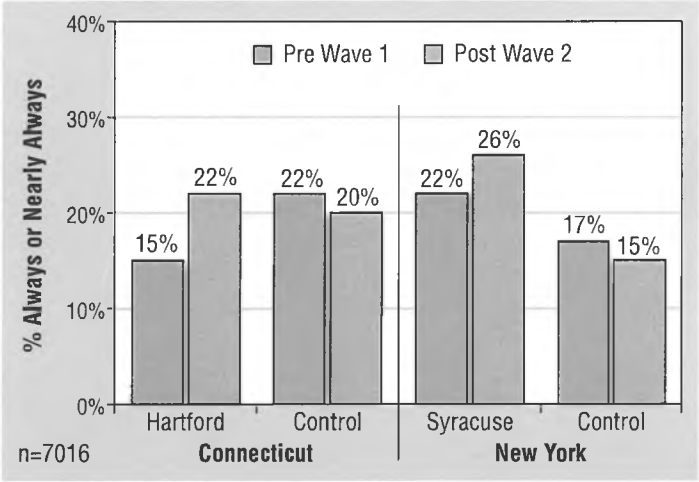


Figure 7
Strictness of Enforcement of Hand-Held Phone Law

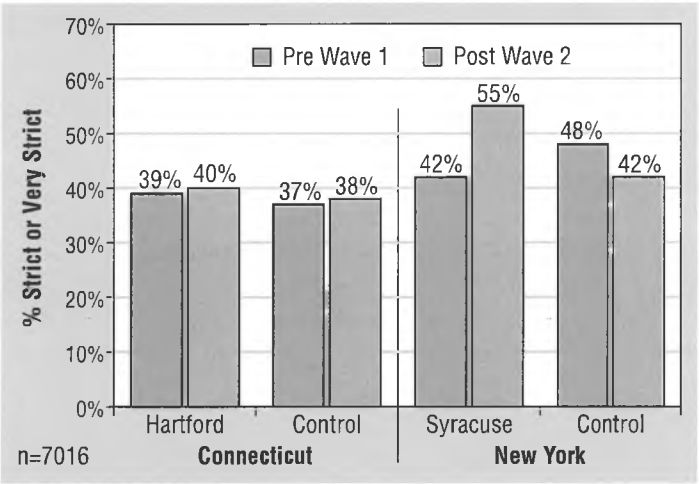
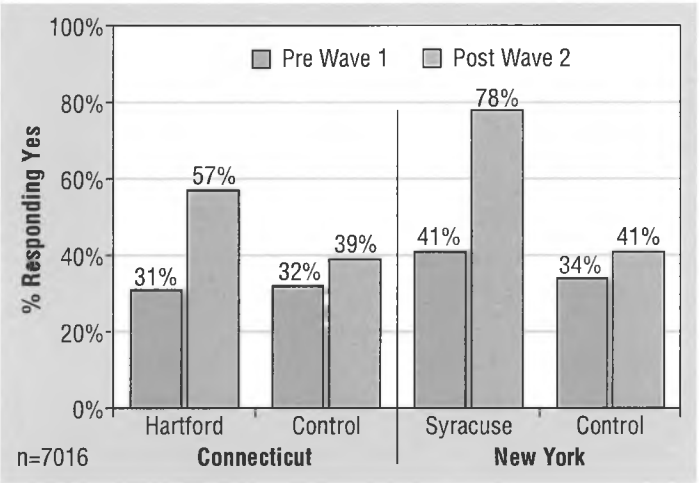


Figure 8
In the past month, have you seen or heard about police enforcement focused on hand-held cellular phone use?



Discussion

The most apparent finding from the first two waves of NHTSA's distracted driving demonstration programs in Syracuse and Hartford is that awareness about cell phone use and texting is remarkably high. About 6 in 10 in both communities had heard something about distracted driving, even before the new *Phone in One Hand, Ticket in the Other* advertisements aired. This most likely reflects the influx in media discussing the issue. Insurance companies, mobile phone providers, and safety organizations have been addressing the dangers of using a cell phone and texting while driving, especially for teens, and have sponsored advertisements on national television. State legislatures have passed texting and cell phone bans. The U.S. Department of Transportation held a summit in Washington, DC, in September 2009 bringing together over 250 researchers, government agencies, industry representatives, public advocates, and elected officials to discuss what could be done to reduce the preventable deaths and injuries that distracted driving is causing in America. The President issued an Executive order advising Federal workers to "put it down." In January 2010 Oprah started the *No Phone Zone* and on April 30, the Oprah Winfrey Show launched a "No Phone Zone Day" with a live TV broadcast, rallies in six cities – Atlanta, Boston, Detroit, Chicago, Los Angeles, and Washington – and a national public service announcement campaign.

Despite the national attention and motorists' beliefs that distracted driving by others is a dangerous activity, surveys show that motorists are willing to engage in the behavior themselves. Changing driver behavior presents a challenge, but high visibility enforcement campaigns are a proven countermeasure in a variety of traffic safety areas. The intent of a high visibility enforcement campaign is not to issue tickets. Rather, the intent is to deter drivers from engaging in that particular behavior in the first place. In order words, if drivers violate a particular law, there should be a high certainty that they will receive a ticket. While issuing one citation to a motorist may persuade that person to avoid that offense in the future (known as specific deterrence), highly visible enforcement seeks to have 100 or 1,000 other drivers know about that one citation so they choose to avoid that behavior (general deterrence).

The new slogan, *Phone in One Hand, Ticket in the Other*, proved effective in conveying the message of increased cell phone enforcement to the public. Nearly 50% of respondents in Hartford and 20% in Syracuse reported that they had seen and heard about the program after just the first wave of the program. People reported having heard about the enforcement, recognized the increased strictness of the police, and thought that their chance of getting a ticket if they used a hand-held cell phone increased. An interesting anomaly in the public awareness data is that self-reported use of a hand-held cell phone actually increased during the first wave, before finally decreasing at the end of the second wave. One

explanation is that drivers were becoming more aware of their cell phone use while driving because of the increased media. There was strong public support for the program, with 8 out of 10 drivers believing that it is important for the police to enforce the hand-held cell phone law.

Observed cell phone use decreased in both sites by the end of the second wave of the *Phone in One Hand, Ticket in the Other* demonstration program. Before the distracted driving programs began, observed cell phone use in Syracuse was about half that of the rest of the Nation and Connecticut was close to average. Both States have had hand-held cell phone bans while driving for some time – 2001 for New York and 2005 for Connecticut. After the second wave of the high visibility enforcement campaign, hand-held cell phone use decreased 38% in Syracuse (from 3.7% to 2.3%) and 58% in Hartford (from 6.8% to 3.1%). The laws alone may have served to keep these States at or below the national average, but the addition of high visibility enforcement and media emphasizing the enforcement drove the rates down even lower. High levels of national media and celebrity attention to distracted driving, such as by the *Oprah Winfrey Show*, may account for some of the high public awareness of the issue and for the steady declines in observed hand-held cell phone use in the control sites and among women in three of the five sites overall.

Unlike other periodic traffic safety campaigns, there was no rebound or ratcheting effect during the period between waves where the observed behavior reverted close to previous levels. It remains to be seen whether this trend will continue throughout the remaining two waves, but it is promising and suggests that social norms towards phone use and texting are shifting towards finding it as unacceptable as driving while impaired by alcohol.

The law enforcement agencies in both sites exceeded program expectations. Ticketing rates of about 20 citations per 10,000 population are common benchmarks for effective belt enforcement programs, a rate deemed sufficient to change motorists' behaviors. Enforcement rates for the distracted driving demonstration programs in Syracuse and Hartford were more than five times that benchmark. Officers reported that they were enthusiastic about the dedicated advertising that focused on their increased enforcement. They reported that coordinated enforcement activities with neighboring law enforcement agencies expanded the visibility of their enforcement efforts. They reported positive public reactions -- the general theme was that "it was about time."

There are challenges to enforcing hand-held cell phone and texting bans. The most obvious challenge is the difficulty in observing the offense. Syracuse law enforcement officers preferred roving patrols and found higher observation locations or taller vehicles like SUVs useful in seeing down into a passenger vehicle to observe texting offenses. Hartford officers found the spotter, or stationary, strategy effective but both chose strategies that suited their community and resources and both used other strategies as well. Because this was a demonstration program, additional reporting paperwork was required. The Hartford officers felt that their post ticketing paper work was more time consuming than a seat belt ticket but they are working to improve the process in time for the third wave.

There are two additional waves of enforcement planned in Hartford and Syracuse. The third wave will begin in October 2010; the fourth and final wave will occur in the spring of 2011. At the conclusion of the fourth wave, NHTSA's Office of Behavioral Safety Research will prepare a final report detailing all four waves.

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U.S. Department of Transportation

National Highway Traffic Safety Administration

Alaska 2010 Highway Safety Phone Survey

- **An Alaskan View of:**
  - Drivers' attitudes,
  - Awareness of enforcement and media and
  - Self-reported driving behavior

Prepared for the Alaska Highway Safety Office
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August, 2010

Executive Summary:
As reported by Alaskan Drivers:

- **One in four** have driven within two hours of drinking an alcoholic drink in the past 60 days.
- Nearly **70%** believe that **the court system is somewhat to very tough on enforcing drunk driving laws.**
- Almost **half** believe that chances of **getting arrested for drinking and driving** are at least **very likely.**
- **91% always buckle up.**
- **41%** think it is **unlikely** they'll get a **ticket for not wearing a seatbelt.**
- **49% rarely or never** drive over **35mph in a 30 mph** zone.
- **81% rarely or never** drive over **70 mph in a 65** mph zone.
- **79%** of 4-8 years olds **always use booster seats.**
- **61% talk** on their **cell phone** while driving.
- **86% never text** while driving.
- **72%** usually **use headlights** when driving **in daylight.**

Introduction:
The Alaska Injury Prevention Center (AIPC) designed and implemented a phone survey, in compliance with the National Highway Traffic Safety Administration guidelines. A randomly selected representative sample of Alaska licensed drivers was asked a series of questions in the five-minute phone survey. The questions addressed driver attitudes, awareness of highway safety enforcement and communication activities and self-reported driving behavior. The questions addressed the following topics: seatbelt use, drinking and driving, headlight use, talking and texting while driving, speeding and booster seat use.

Methodology:
A five-minute telephone survey, was conducted in August, 2010. The survey included 40 questions, mostly closed-ended, introduction, screener, and demographics questions. Craciun Research Group (CRG) was contracted with to conduct the survey. AIPC provided CRG with questions, conducted analysis and wrote the report of survey findings. CRG reviewed the survey and made suggestions for changes; programmed the approved survey; prepared the four sample frames from CRG's database of Alaska residents, with quotas for age categories; conducted the survey, and provided the data to the client.

Total sample size for the survey was four hundred (n=400) Anchorage, Kenai/Soldotna, Mat-Su and Fairbanks and Juneau residents for a total margin of error of +/-5% with 95% confidence.

Analysis:

The analysis section is broken out into 6 sections. Each section addresses behaviors and potential motivational variables and demographic variables which might affect the behavior choices. Motivational variables include awareness of enforcement efforts and perceived likelihood of getting caught engaging in an illegal and unsafe behavior. Analysis was done utilizing PASW 18 (formerly know as SPSS.) Frequencies and crosstabs were the primary analytical tests used for this preliminary review of the data. Additional analysis will be conducted in the next few months to provide a broader vision of highway issues.

Drinking and Driving

Just over one in four (27%) persons of driving age reported driving a motor vehicle within 2 hours of consuming an alcoholic drink in the past sixty days. These persons are referred to as "drinking- drivers" throughout this report. Thirty-two percent of males and 21% of females reported at least one drinking-driving trip in the past 60 days. Within these groups, 8% of men and 4% of women have taken 4 or more drink-driving trips in the past 60 days. [1]

When examined by education, the percentage of the driving-age public who reported driving a motor vehicle within 2 hours of drinking any alcoholic beverages ranged from 22% - 26% for respondents with a GED to those with a 4-year degree. The percent jumped to 42% for those with a postgraduate degree.

Looking at type of vehicle driven revealed that drivers of cars, SUV's and trucks all had about a 30% chance of drinking and driving. Only 4% of van drivers reported having made at least one trip after drinking alcohol.

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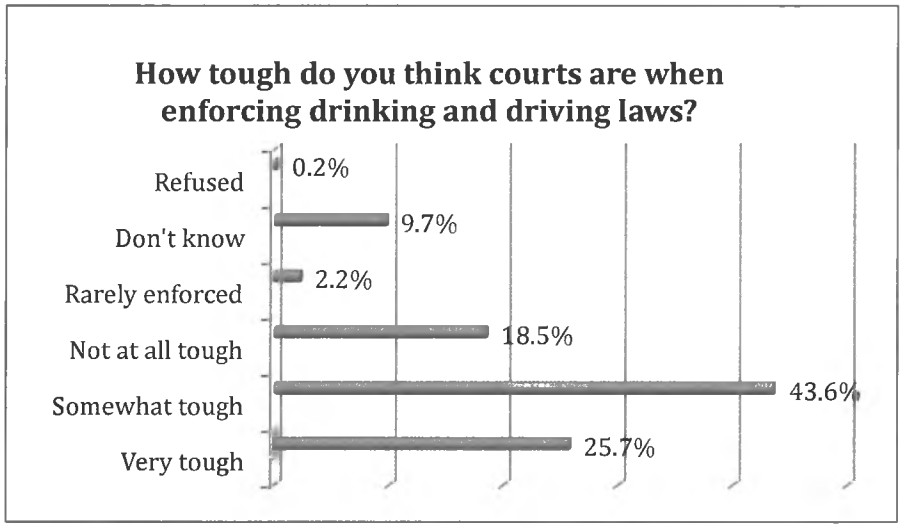
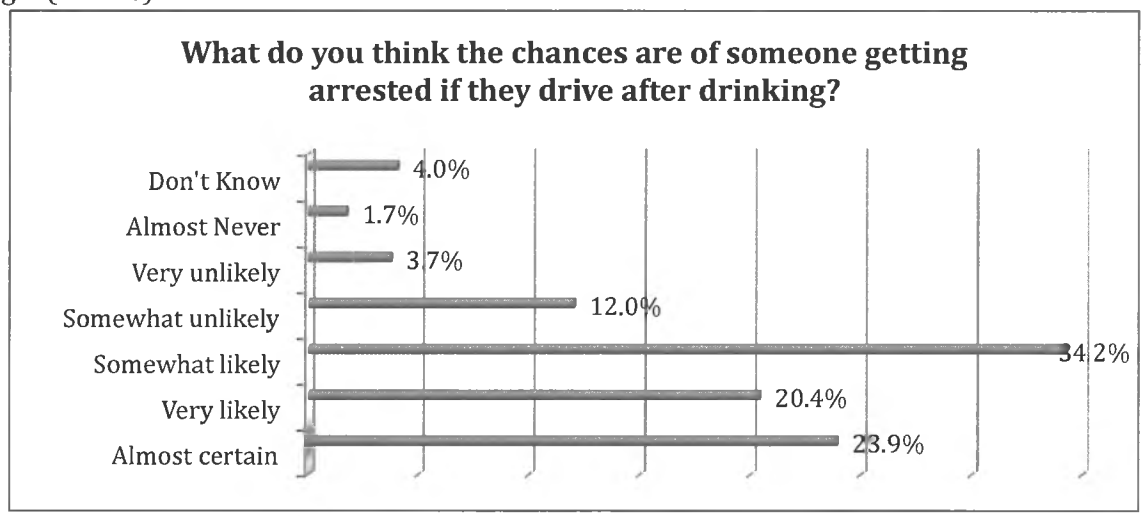
[1] Q.22 In the past 60 days, how many times have you driven a motor vehicle within 2 hours after drinking an alcoholic beverage? Never, Once, Two or three times, Four or five times, Many times, Some. I don't know how many, Refused



Participants were also asked how tough they thought courts were in enforcing drinking and driving laws.[2] Most answered that they thought courts were somewhat to very tough. (69.3%)



Participants were also asked how tough they thought courts were in enforcing drinking and driving laws.[3]

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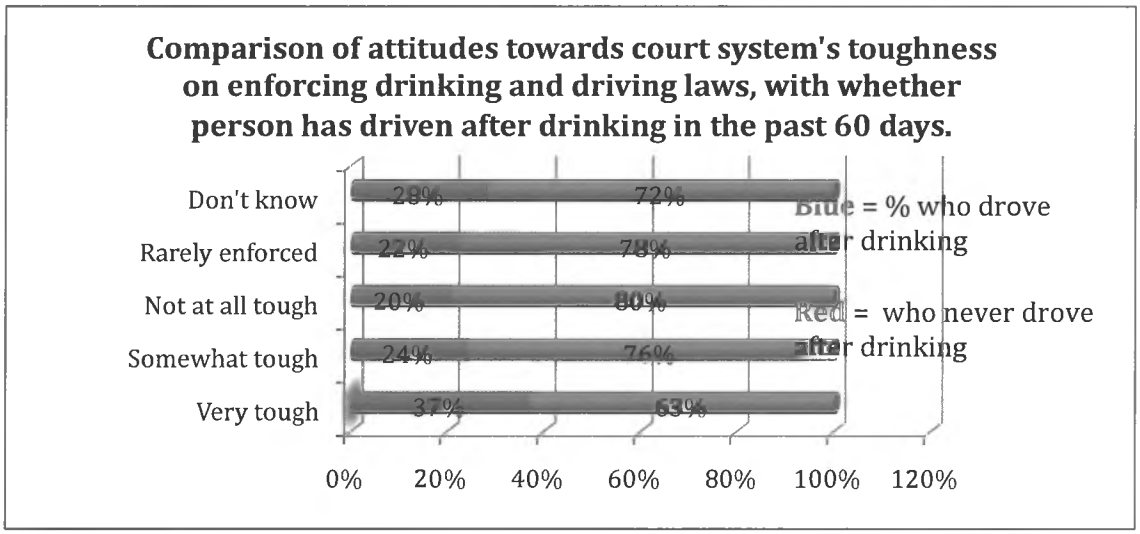
[2] Q.15 In your opinion, how tough do you think the courts are when enforcing drinking-and-driving laws?
Very tough, Somewhat tough, Not at all tough, Rarely enforced, Don't know/ Unsure, Refused

[3] Q.15 In your opinion, how tough do you think the courts are when enforcing drinking-and-driving laws?
Very tough, Somewhat tough, Not at all tough, Rarely enforced, Don't know/ Unsure, Refused

Twenty-three percent of the driving-age public believed that a driver who had too much to drink to drive safely was "almost certain" to be arrested by the police. Seventy-eight percent believe a person's chances are "Somewhat likely" or more that they will get arrested if they drive after drinking. Twenty-six percent believed that the courts are very tough when enforcing drinking and driving laws. While 70% believe that the courts are somewhat to very tough with enforcing these laws.



Of those who believe that the courts are very tough enforcing drinking and driving laws, 37% had driven after drinking in the last 60 days. Participants were asked whether they had "read, seen or heard anything about drunk-driving enforcement in Alaska."[4] Sixty-seven percent answered yes. Of those who self reported making many trips after drinking in the last 60 days, 82% were aware of drunk driving enforcement.

Seatbelt Use

In the 2010 seatbelt observation survey for Alaska, 86.7% or drivers and passengers were observed wearing a seatbelt. When asked: "How often do you use a seatbelt when you drive or ride in your personal vehicle" 91% answered "always" and 5% said "almost always."[5] Only 1.2% said never. Fifty-five percent said they had read, seen or heard about seatbelt enforcement in the past 60 days.[6] And 29% believed that a person would always or nearly always get a ticket for not using a seatbelt.[7] Forty-two percent answered that the chance was never or seldom.

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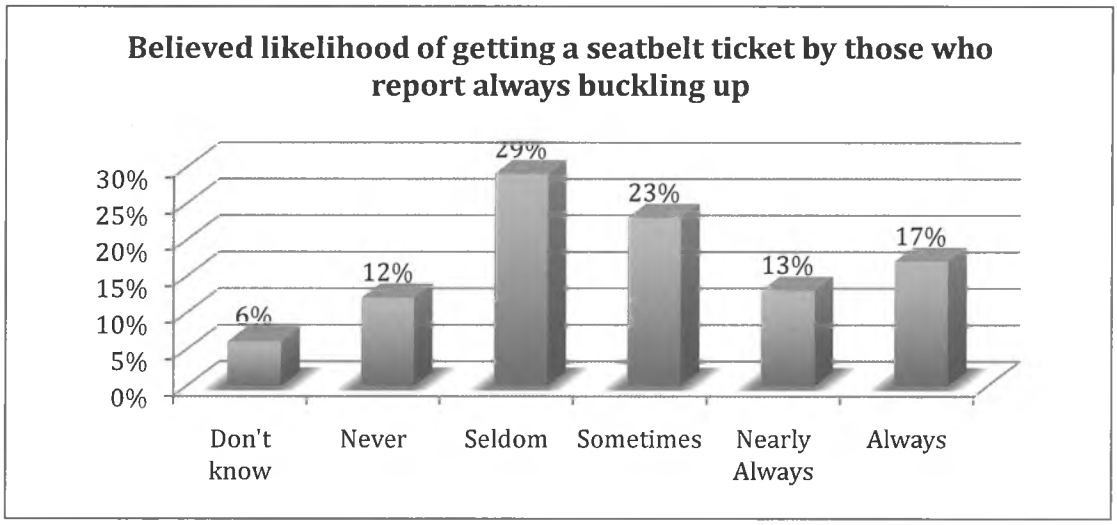
[4] Q.21 In the past 60 days, have you read, seen or heard anything about drunk-driving enforcement in Alaska? Yes, No, Don't know/ Unsure, Refused

[5] Q.11 How often do you use a seatbelt when you drive or ride in your personal vehicle? Always, Nearly always, Sometimes, Seldom, Never, Unsure, Refused

[6] Q.12 In the past 60 days, have you read, seen or heard anything about seat belt enforcement in Alaska? Yes, No, Don't know/ Unsure, Refused

[7] Q.13 What do you think the chance is for you to get a ticket if you do not wear your seat belt? Would you get one: Always, Nearly always, Sometimes, Seldom, Never, Don't know/ Unsure,Refused

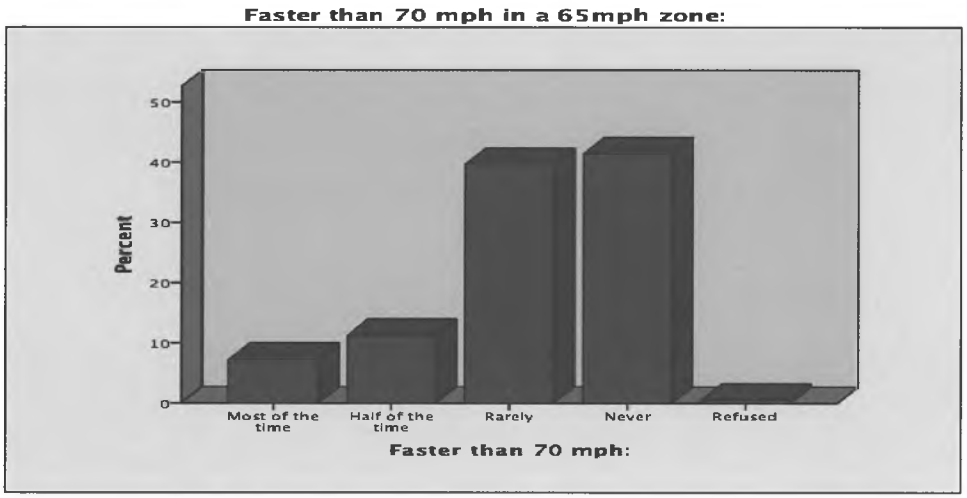
The degree of certainty of which a person would get a seatbelt ticket did not seem to be effected by awareness of seatbelt use enforcement. Sixty-four percent of those who thought they had no chance of getting a seatbelt ticket had heard about seatbelt enforcement in the last 60 days. Sixty percent of those who thought they would always get a ticket had also heard of the enforcement efforts.



For those who always wear a seatbelt, 12% felt that they would never get a ticket for not buckling up and 17 percent felt they would always get a ticket. Forty-one percent thought they would never or seldom get a ticket. While 30% thought they would always or nearly always get a ticket.

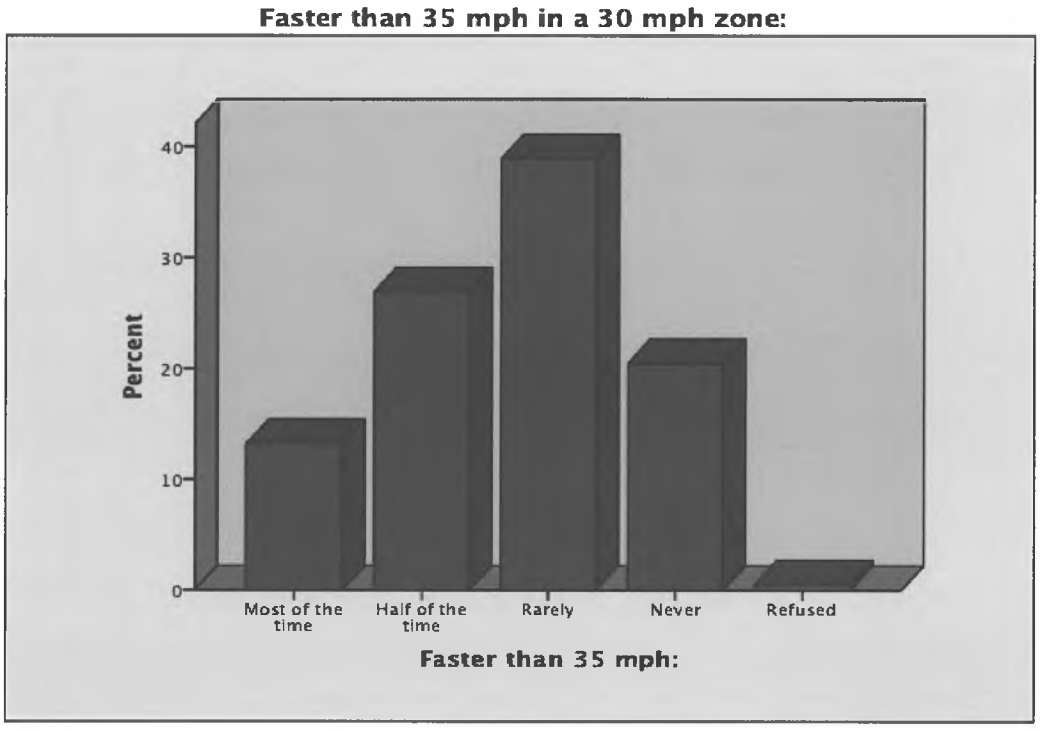
Speeding

Two scenarios were presented concerning speeding. The first was how often a driver goes more than 70 mph in a 65 mph zone.[8] And the second how often the driver goes



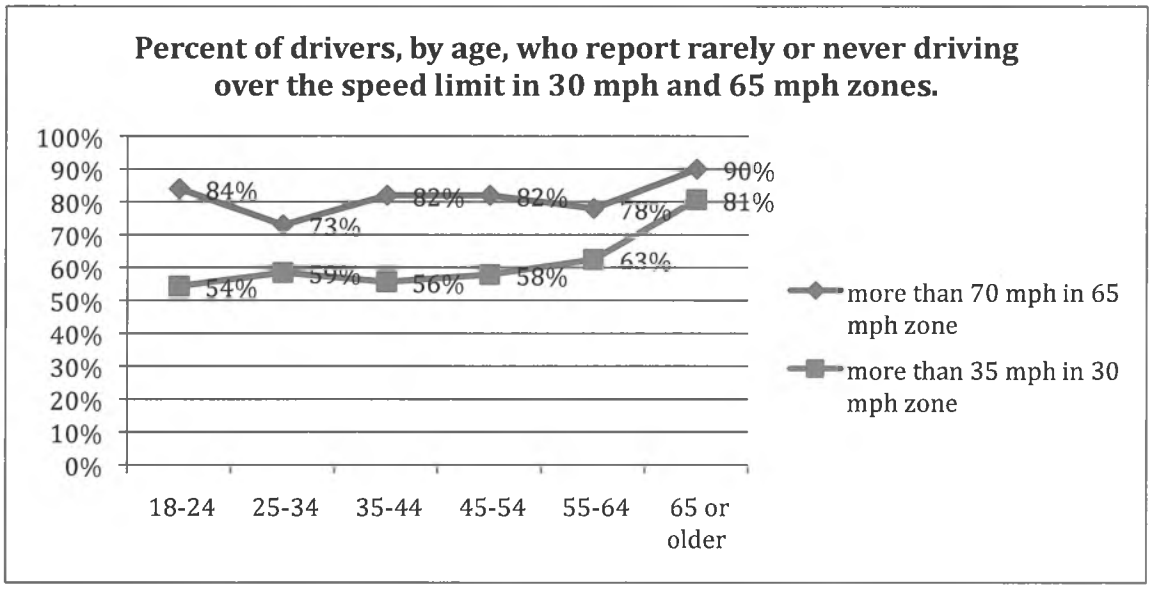
[8] Q.18 On a road with a speed limit of 65 mph, how often do you find yourself driving faster than 70 mph: Most of the time, Half of the time, Rarely, Never, Refused

faster than 35 mph in a 30 mph zone.[9] People report being more likely to speed in 30 mph areas than 65 mph areas. Eighty-one percent say they rarely or never go over 70 in a 65 area. However, 59% say they rarely or never drive more than 35 mph in a 30 mph zone.



Considering this further, gender makes a difference. Eighty percent of men and 82% of women report never or rarely driving over 70 in a 65 zone. While Sixty-three percent of men and 56% of women report rarely or never driving faster than 35 in a 30 mph zone.

[9] Q.17 On a local road with a speed limit of 30 mph, how often do you find yourself driving faster than 35 mph: Most of the time, Half of the time, Rarely, Never, Refused



Looking at the data by age group shows that there is an increase in the percent of drivers who drive close to the speed limit with an increase in age. But this doesn't really show until the 65-year and older group of drivers.

Cell Phones:

Ninety-three percent of respondents said that there is at least one cell phone in their households. Cell phones have become commonplace in and out of cars. This is the first time cell phone use and ownership questions were asked in an Alaska Highway Safety phone survey. The answers here will serve as baseline data.

Multiple questions were asked concerning cell phone use in cars. Questions included how often the driver talks on the phone, reads of sends texts, makes or answers calls, whether these happen more often on city or rural roads, and whether hands-free devices are used while driving.[10] Additionally, the 2010 Alaska NOPUS observational surveys collected data about observed cell phone usage rate for drivers. The statewide observed cell phone use rate was 5.1%. The observed usage rates by borough were:

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[10] Q.25 How often do you talk on a cell phone while driving your car? Almost every time you drive, Every two or three times, Sometimes, not often, Never, Don't know/ Unsure, Refused

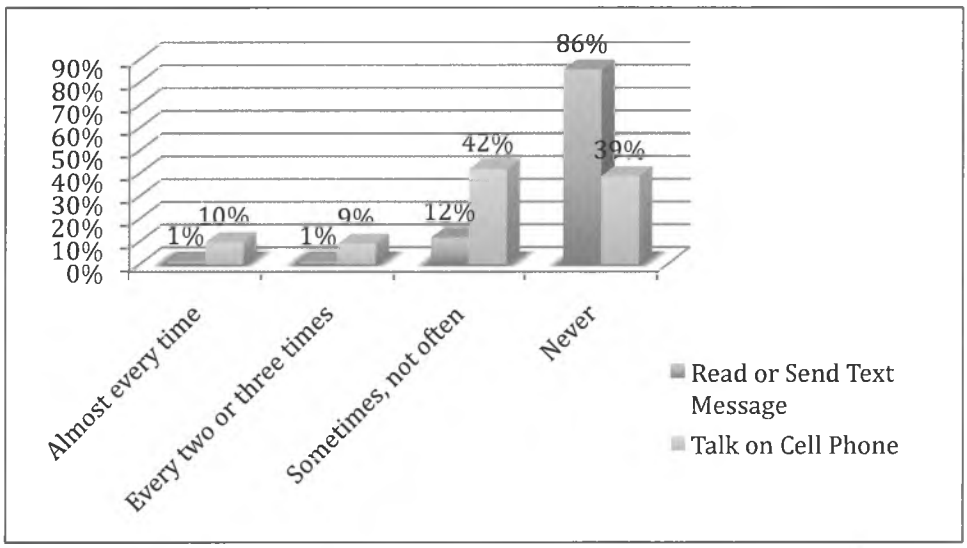
Q.26 How often do you read or send text messages while driving your car? Almost every time you drive, Every two or three times, Sometimes, not often, Never, Don't know/ Unsure, Refused

Q.27 Do you make calls from your car, answer them or both? Make calls, Answer them, Both, Refused

Q.28 Do you take or make calls when you are driving in a city or town or only on rural roads? In cities or towns, in rural areas, Both, Neither, Refused

Q.29 Do you have a "hands-free" cell phone arrangement in your vehicles? Yes, No, Not in every car I drive, Refused

MatSu 8.0%, Kenai/Soldotna 6.0%, Anchorage 5.0%, Fairbanks 4.9%, and Juneau 2.0%. These numbers do not include use where a hands-free device was in use.



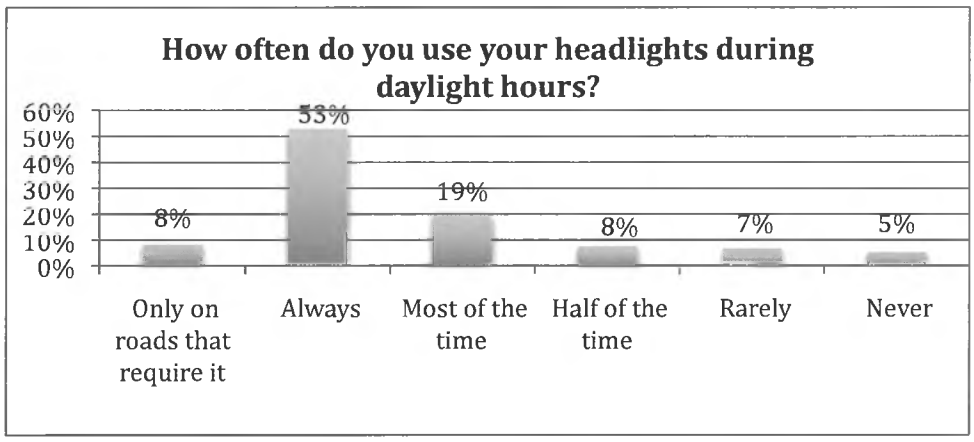
Most people (86%) report that they never read or send texts while driving. Two percent say they text at least every two or three times that they drive. While 19% of drivers talk on their cell phones at least every two or three times that they drive. And 42% say they talk on their phone some times but not often. Thirty-nine percent of drivers say they never talk on a cell phone while driving.

The next three questions were only asked of those who have used a cell phone while driving. Just over a third (36%) of cell phone using drivers have a hands-free device. Seventy-six percent of users have both made and received phone calls. Twenty-one percent have only answered calls. Sixty percent use cell phones in both rural and urban areas. Twelve percent use them only is urban areas, and 9% in only rural areas.

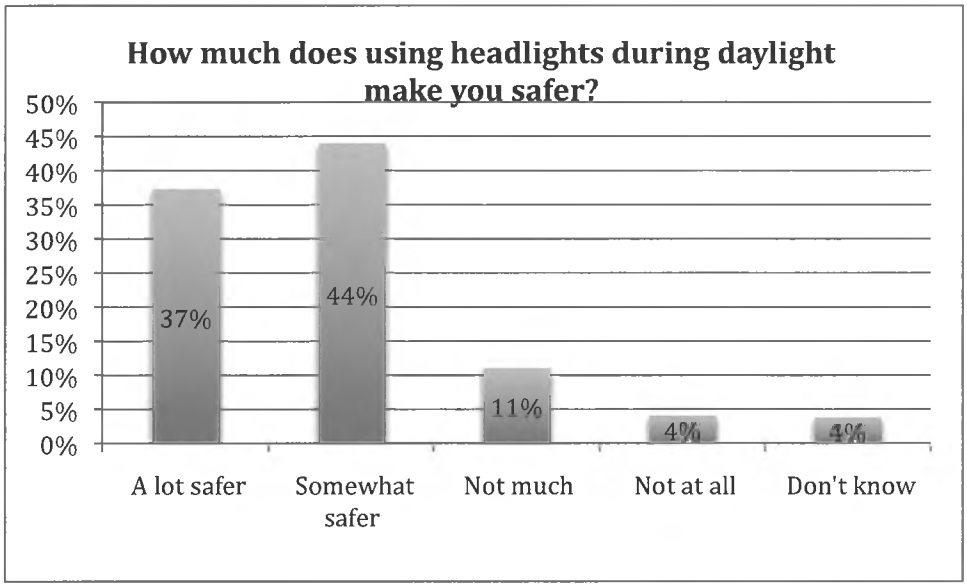
Headlights:

Headlight use was defined as a crash prevention strategy in the Alaska Strategic Highway Safety Plan. The survey asked two questions concerning headlight use in order to determine baseline behavior and attitudes.[11]

[11] Q.23 During daylight hours, would you say you use your headlights: Only on roads that require it, Always, Most of the time, Half of the time, Rarely, Never, Don't know/ Unsure, Refused
Q.24 Do you think using headlights during daylight makes you a lot safer, somewhat safer, not much safer or not at all? A lot safer, Somewhat safer, Not much, Not at all, Don't know/ Unsure, Refused



Drivers were asked how often they use their headlights during daylight hours, and how much they think doing so makes them safer. Fifty-three percent said they use their lights all of the time and 72% said always or most of the time. This is slightly higher than the NOPUS observations of headlight use, in which observers determined that headlight use was 45.5% in Anchorage, 45.3% in Fairbanks, 22.9% in Juneau, 29.3% in Kenai/Soldotna, and 30.3% in MatSu 30.3%. Statewide, 42.5% of cars observed had their headlights on during daylight hours.



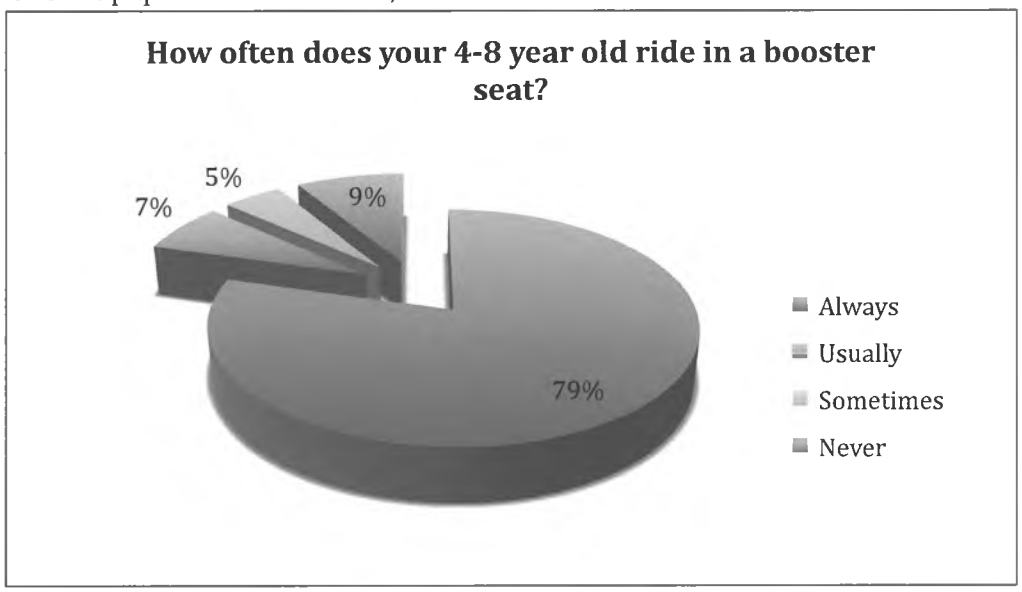
There was a statistically significant correlation between those who felt that using headlights makes a person safer, and people who use headlights.

Booster Seats

The Alaska Injury Prevention Center conducted 3 booster seat use observations studies. The first took place in June 2009, prior to implementation of new booster seat legislation. Fifty-two percent of observed children were using appropriate child passenger safety devices. The second took place in October, 2009 after the legislation,

mandating booster seat use for most children between 4 and 8 years old was signed into law, and a major public awareness campaign was implemented. At that point, 74% of children were using appropriate child passenger safety devices. In July, one-year follow-up observations were made, with a finding that 80% of children were properly restrained.

This phone survey also asked about booster seat use. It first asked whether the driver being interviewed ever drove in a car with a 4-8 year old. [12] If the answer was yes, a follow-up question was asked, how often that child rode in a booster seat.[13]



Drivers' self reported answers mimicked observed use at 79%. This is a dramatic increase from the 52% use observed prior to the media campaign and implementation of the law.

Conclusions:

Results from the 2010 phone survey addressing highway safety issues in Alaska provide useful information for future safety interventions.

- Addressing speeding in low speed limit areas is important, especially since these areas usually involve multiple modes of transportation including bikes and pedestrians.
- Most people wear seatbelts, and at the same time, most people do not think that it is likely that they will get a ticket for being unbuckled. It would be helpful to

[12] Q.30 Do you ever drive with a child between the ages of four and eight? Yes, No, Refused

[13] Q.31 How often is the child riding in a booster seat? Always, Usually, Sometimes, Never, Refused

better understand the motivators for wearing seatbelts, and possibly build them into campaigns for other desired behavior changes.

- Only 16% of people report texting while driving. Tracking changes in this statistic will be important for prioritization of highway safety efforts. It is currently a small number of those who say they text and drive, and texting is reportedly not being done very often. The risk created by texting and driving may be minimal.
- There is a majority belief (70%) that the courts are tough when enforcing drinking and driving laws. Understanding how this perception grew would be helpful for future behavior change and perception creating campaigns.

Conducting phone surveys with Alaskan drivers has created an opportunity to gain insights into behaviors, levels of awareness and motivators for behaviors. This information will be useful to assist with developing future initiatives as well as monitoring success with current one.

National Highway Traffic Safety Administration
(http://www.nhtsa.gov/)

Research on distracted driving reveals some surprising facts:

- 20 percent of injury crashes in 2009 involved reports of distracted driving. (NHTSA).
- Of those killed in distracted-driving-related crashed, 995 involved reports of a cell phone as a distraction (18% of fatalities in distraction-related crashes). (NHTSA)
- In 2009, 5,474 people were killed in U.S. roadways and an estimated additional 448,000 were injured in motor vehicle crashes that were reported to have involved distracted driving. (FARS and GES)
- The age group with the greatest proportion of distracted drivers was the under-20 age group – 16 percent of all drivers younger than 20 involved in fatal crashes were reported to have been distracted while driving. (NHTSA)
- Using a cell phone use while driving, whether it's hand-held or hands-free, delays a driver's reactions as much as having a blood alcohol concentration at the legal limit of .08 percent. (Source: University of Utah)

Highlights

Police-reported data from the Fatality Analysis Reporting System (FARS) and the National Automotive Sampling show that:

- In 2009, there were 30,797 fatal crashes in the United States, which involved 45,230 drivers. In those crashes 33,808 people died.
- In 2009, 5,474 people were killed in crashes involving driver distraction (16% of total fatalities).
- The proportion of fatalities reportedly associated with driver distraction increased from 10 percent in 2005 to 16 percent in 2009. During that time, fatal crashes with reported driver distraction also increased from 10 percent to 16 percent.
- The under-20 age group had the highest proportion of distracted drivers involved in fatal crashes (16%). The age group with the next greatest proportion of distracted drivers was the 20- to-29-year-old age group – 13 percent of all 20-to-29-year-old drivers in fatal crashes were reported to have been distracted.
- Of those drivers reportedly distracted during a fatal crash, the 30-to-39-year-old drivers were the group with the greatest proportion distracted by cell phones. Cell phone distraction was reported for 24 percent of the 30-to-39-year-old distracted drivers in fatal crashes.
- An estimated 20 percent of 1,517,000 injury crashes were reported to have involved distracted driving in 2009.

The National Motor Vehicle Crash Causation Survey (NMVCCS) is a nationally representative survey specifically focused toward documenting events and conditions leading up to crashes.

- NMVCCS captures distraction as an associated factor to the crash and/or as the critical reason that made the crash imminent. Driver distraction was coded as the critical reason in 18 percent of the crashes. Data describing the specifics of the distraction — for example adjusting the radio or eating — are included in this data set.

Data Sources
The following NHTSA data sources were used in the research:

- Fatality Analysis Reporting System (FARS)
- National Automotive Sampling System (NASS) General Estimates System (GES)
- National Motor Vehicle Crash Causation Survey (NMVCCS)
- The 100-Car Naturalistic Driving Study
- National Occupant Protection Use Survey (NOPUS) of Driver Electronic Use
- Motor Vehicle Occupant Safety Survey (MVOSS)

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Representative Cathy Muñoz
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Muñoz:

On behalf of our respective organizations, we would like to thank you for introducing HB 22, an Act prohibiting the use of a cellular telephone when driving a motor vehicle; and providing for an effective date.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

cc: Bob Herron

January 28, 2011

Representative Munoz
State Capitol Room 403
Juneau, AK 99801

Re: HB35 and HB68

Dear Honorable Representative Munoz-

Thank you for your support of both of these bills. I think that even hands-free use should be banned except in the event of an emergency. Talking on any cell phone is really dangerous because it creates a distraction from the primary function of driving. And for those who say that hands-free is not a distraction because one's hands are not involved, it's simply not true. Drivers talking on a cell phone are not fully engaged in the act of driving and are less likely to respond to events. I used to talk on my cell phone frequently, but have reduced that dramatically after almost being involved in two accidents.

Please support a total ban on driving while using a cell phone.

Sincerely,

Michele Foley
1097 Willow Grouse Road
Fairbanks, AK 99712
907.479.0684

February 20, 2011

Gary & Kathy Miller
20135 Cohen Dr
Juneau, AK 99801-8211

Representative Cathy Munoz
State Capitol Room 403
Juneau AK, 99801

Subject: HB 22, 35, 68 & 128.

Dear Representative Munoz,

We support legislation that prohibits the use of cell phones and devices for texting while people are driving. We believe that the police should be allowed to pull offenders over and ticket them if they violate this.

Thank you.
Gary Miller
Kathleen Miller

Gary & Kathleen Miller

Kendra Kloster

'om: RDeising@aol.com
Sent: Monday, January 31, 2011 3:43 PM
To: Rep. Cathy Munoz
Subject: Cell Phone Bill HB 22

Greetings Representative Munoz, I write to you in support of HB 22 that you have worked so hard to get on the floor of the Session going on. My name is Ricky Deising 58 year old male who has lived here in Juneau the past 32 years and I ride a Harley Davidson Motorcycle, The reason I support this bill are several but what took place last summer to comes to mind firstly, I was riding down the road by the Juneau Empire when out of the DOT parking area a car pulled out in front of me with the driver on her cell phone in her left hand which was blocking her view of the road, I had to react fast by locking up my brakes and sliding sideways to avoid being run over, when the driver did hear me yelling and I came to a stop with my foot hitting her door she realized what had just happened, after yelling at her for being on her cell phone and almost ending my life, she said very casually sorry and drove away while still talking on her phone, Being a grown adult is one thing, but kids never would have had a chance and probably could or would have been seriously injured or killed because of this action by a cell phone user while driving, and not paying attention to the task of being a safe and responsible person behind the wheel of a moving vehicle, there have been several other near misses by drivers on their phones just pulling over into the next lane without even looking because their view is blocked by the phone in their hand, lucky again for me that I am a skilled rider and have been able to avoid a crash while going 55 mph on a motorcycle. I ask that each and everyone of our Elected Officials please support HB 22 and pass it into law. With the passing of this HB 22 I can guarantee many lives will be saved that other wise will be lost to someone using a cell phone driving down the road.

Praise Life & Namast'e Ricky Deising 4500 Glacier Hwy Juneau Alaska.

Kendra Kloster

`ubject: Please outlaw cell phone use when driving

Dear Members of the Alaska State Legislature:

I respectfully request that you create a law prohibiting motor vehicle drivers from talking on cells phones - including hands free models - when they are driving, except in the event of an emergency.

There is sufficient evidence that distractions are a significant cause of accidents. And talking on a cell phone including a hands free cell phone takes attention from the most important job at hand, driving. (Please see the websites below.)

I recognize that many people think they are skilled multi-taskers; and they like

the convenience of being able to keep in touch with friends and family while driving. However, the benefits don't outweigh the costs in terms of potential danger and harm that may eventuate by inattentiveness at the wheel. If it is truly important for a driver to be in contact with friends and family while motoring, the driver can pull off the road and return or place a call.

'hile I understand there is a movement afoot to prohibit the use of hand held ell phones, this approach does not adequately take into consideration the danger involved in simply talking on a cell phone, whether hand held or not.

Your consideration will be most appreciated.

Thank you.

Andrea Veach
PO Box 90534
Anchorage, Alaska 99509

http://pubsindex.trb.org/DOCs/Publications%20from%20TRIS%20on%20Distracted%20Driving.pdf

http://www.bmj.com/content/331/7514/428.abstract

http://www.nhtsa.gov/About+NHTSA/Press+Releases/2010/ci.Consumer+Advisory:+Make+Safety+Your+Constant+Companion+This+Summer+Driving+Season.print

ttp://www.distraction.gov/stats-and-facts/#electronic

http://www.ehow.com/about_5188398_accidents-caused-cell-phone-use.html

Kendra Kloster

ubject: FW: Support Cell Phone Ban

Please note my support for legislation (three bills) that would ban cell phone use while driving. I would ban "all" cell phone use, including "hands-free" which I understand causes some drivers to become distracted and to cause a crash, injury or death. I experienced almost getting run over on three separate occasions (all in a cross walk) due to cell phone use. I subscribe to the idea of "do no harm," by which I mean people should not have the "freedom" to run over me due to their distracted driving habits.

Sincerely,

Gene Miller

3261 Foster Avenue
Juneau, AK 99801-1924

907-463-6720 or 907-723-5537 (cell)
gmiller03@live.com

Kendra Kloster

ubject: Drive Safe Alaska Coalition

Dear Rep. Munoz,

I share your concern with cellphone usage while driving and am pleased you have introduced HB-22. My public relations firm is in the process of forming the Drive Safe Alaska Coalition, a public awareness campaign to educate Alaskans on the dangers of texting while driving. MSI Communications has spearheaded several public awareness campaigns, including one for the AK Men's Run to raise funds for cancer research as well as political campaigns such as Alaskans Standing Together that helped re-elect Senator Lisa Murkowski.

Educating Alaska drivers on the dangers of texting while driving is our way of giving back. Many of us here at MSI are parents of teenagers and well aware of the impact texting has on their lives. We believe educating them on safe driving could only enhance our communities. I've attached a summary and hope you will support this effort by including it in the capital budget.

Please call me with any questions.

Regards,

ngrid Parish

Account Manager

MSI Communications
3501 Denali Street, Suite 202
Anchorage, Alaska 99503
Phone 907.569.7070

Cell 907.230.0415
Fax 907.569.7090

msicommunications
marketing • strategy • interactive

Kendra Kloster

From: Rep. Cathy Munoz
Sent: Tuesday, March 08, 2011 9:05 AM
To: Kendra Kloster
Subject: FW: HB 22

From: Stan and Heather [mailto:haustin@chugach.net]
Sent: Monday, March 07, 2011 7:00 PM
To: Sen. John Coghill; Sen. Cathy Giessel; Senator_Fred_Dyson@legis.state.ak.us-gmail.com; Rep. Mike Doogan; Rep. Mia Costello; Rep. Beth Kerttula
Cc: Rep. Cathy Munoz
Subject: HB 22

Dear Senators Coghill, Giessel, and Dyson, and
Representatives Doogan, Costello, and Kerttula,

Please support HB 22. National statistics show that motor vehicle and pedestrian accidents have risen precipitously since the wide-spread use of cell phones. Some studies see rates of cell phone distraction as similar to the impairment caused by drug or alcohol use.

- Drivers using cell phones have the same reaction time as drunk drivers - they are 9% slower to brake and 19% slower to return to normal driving speeds.
- Drivers using cell phones are four times as likely to get into an auto accident.
- While some states have imposed laws requiring the use of hands-free devices while driving, statistics do not demonstrate that these devices significantly reduce the risk of an accident. 1

I concur that use of any cell phone (including hands-free) while driving should be illegal. Telephone conversations involve complex mental activity, including the perceptive processes also required for driving or even walking; and the mechanism of, and reflexes associated with operation of a motor vehicle are altered when engaged in telephone conversation.

(That does not seem to be the case if conversing with someone in your car or if one is listening to any type of music.)

I have experienced a "near miss" by another car because the driver was using a cell phone and I have observed such gross inattentiveness of a cell-phone-using pedestrian that she nearly walked into a car.

Such misdirected perception that people fail to see something that is directly in front of them is referred to by cognitive researchers as "inattentional blindness." 2,3.

Finally, I do not think that the argument many might posit, "they'll still drive and talk" has any merit. People do break laws; but most abide by them. If, in this instance, just one life is saved, or catastrophic injury averted, by enacting a "no cell phone use while driving" law, would it not be worth it?

Please let me know your thoughts on this matter. I urge you to support and vote in favor of HB 22. We need a law with stiff fines for those who use any electronic device while driving.

1. http://www.robbinslaw.com/cell-phone-auto-accidents.html
2. http://www.nytimes.com/2010/01/17/technology/17distracted.html
3. http://news.rutgers.edu/medrel/news-releases/2009/03/cell-phone-studies-w-20090304

Sincerely,
Heather J. Austin,

My husband, Stanley Austin, M.D., also supports HB 22.
2412 W. Marston Dr. 99517

Kendra Kloster

Subject: FW: Cell Phone bill (House #68)

From: Kevin M Stowell [mailto:buffalotheory@gci.net]
Sent: Sunday, March 06, 2011 10:29 PM
To: Rep. Tammie Wilson
Cc: Rep. Cathy Munoz
Subject: Cell Phone bill (House #68)

Dear Ms. Wilson,

I'm writing to express my views of the cell phone bill(s) that are in the House. I'm a big supporter of individual rights, and would rather not have the government regulate most personal choices. BUT, talking on a cell phone while driving doesn't only affect the person driving & talking, it puts others at danger. Talking on a cell phone and driving has statistics that compare it to drunk driving, it's a hazard to the general public.

My person story: numerous times I've had to take actions to avoid people that were distracted by talking while driving. When I lived in Anchorage, I was almost killed numerous times while riding my Harley... all because people think their petty phone calls are more important than other's lives. A couple of years ago I was driving on the Parks going to Fairbanks when a truck was speeding down the hill towards me... it was a four lane road in that spot and I had to pull off to the shoulder because the guy talking on his phone was coming down the slow lane of the opposite (MY) lane! This past Thursday, I had a lady put out in front of me and I almost lost control trying to slow down and not hit her... guess what, she was on her cell phone. A couple of minutes later I had to wait for someone going way to slow to make a turn, because they were distracted by talking and trying to one hand turn a big truck.

My thoughts: I think the "except for emergencies" provision is weak. If I was talking while driving, I'd hit 911 on my phone and have a story made up... if I can think how to defeat this section of the bill, I'm sure others can (I wouldn't do that, because I don't talk and drive, and don't even have a cell phone). Also, the "hands free" provision is weak as most statistics I've seen show that hands free is just as distracting. Do you know the reason this was put in, because in my view, it should be removed.

Thank you for your time,
Kevin M Stowell
North Pole, AK

Kendra Kloster

ıbject: H.B. 22

From: BrettnRose [mailto:brettnrose@gci.net]
Sent: Monday, February 07, 2011 11:52 AM
To: Rep. Cathy Munoz; BrettnRose
Subject: H.B. 22

Dear Rep Cathy Munoz

Please reconsider H.B. 22

As one person has said you are creating the "PHONE POLICE".
As a police offlcer is talking on the phone/radio he will be stopping a citizen for talking on the phone !
Does this make sense ?

So add another voter to the NO on H.B.22 list.

Brett Freyder
Juneau
723-5456

Kendra Kloster

Subject: FW: Cell Phone Ban

From: Bryan Hickok [mailto:hickokcl@gmail.com]
Sent: Wednesday, March 09, 2011 12:38 PM
To: Rep. Cathy Munoz; Rep. Dan Saddler; Rep. Chris Tuck
Subject: Cell Phone Ban

Here are two things not often brought up when talking about the cell phone ban legislation - Potential to distract and level of distraction.

One would be hard pressed to argue cell phone use when driving doesn't have the potential to distract. Yet when taking a step back and looking at the big picture, we see there are countless actions and activities which can and do distract drivers. Something as simple as changing the radio, dealing with kids in the back seat, eating fast food drive-thru, reading a map or directions, pets in the car, putting in a new CD, looking at a GPS device, and so forth. All of these examples have the potential to distract the driver, yet our state is focused solely on only one activity? That being a cell phone in your ear while driving? Why the lack of consistency when it comes to possible driver distractions if one's motivation for passing this new law is safety on Alaskan roads?

The second part is level of distraction. There's no question everything I've mentioned thus far has the potential to distract. But the level of possible distraction is not static or set for all drivers in all conditions. My ability to talk to my wife while driving down Northern Lights is far different then a 16 year old's ability to talk to his buddy while driving down C Street at midnight with 4 other friends in the car and the music blaring.

What this bill fails to address is that the activity is not what makes a driver potentially distracted and therefore dangerous, but rather what's dangerous is a driver allowing themselves to be distracted. They are the source of the danger, not the activity. And here's the kicker - This law will not compel irresponsible drivers to drive more safely. We can rationalize in our own minds how nanny state laws will be better for all of us, but at the end of the day there has to be a line in the sand where each of us takes personal responsibility for our own actions.

And where are the state statistics to warrant such a law? A person being frustrated at what they perceive as distracted drivers due to cell phone use is not cause for enacting a new law. Correct me if I'm wrong, but I'm not under the impression Alaska is facing an epidemic of automotive related deaths due to cell phone drivers being distracted on our roads. Where are all the deaths in Anchorage that can be directly tied to drivers talking on cell phones and therefore justifying this law?

Protecting us from ourselves is foolhardy and never addresses the underlining issues. Not to mention this law is taking up valuable time in the limited 90 day session of the legislature. Why are our elected busybodies attempting to mandate behavior instead of focusing on the real issues facing our state? With a gas line nowhere in site, oil production concerns, and a pipeline that may run dry in the near future, why are we focused on such trivial matters as preventing citizens from driving with a phone up to their ear? It's mind numbing insanity.

Bryan Hickok of Anchorage

For Immediate Release,
1/12/2010

Contact:
Amy Williams
Communications Director
(630) 775-2307
amy.williams@nsc.org

National Safety Council Estimates that At Least 1.6 Million Crashes are Caused Each Year by Drivers Using Cell Phones and Texting

Washington, DC – The National Safety Council announced today that it estimates at least 28% of all traffic crashes – or at least 1.6 million crashes each year – are caused by drivers using cell phones and texting. NSC estimates that 1.4 million crashes each year are caused by drivers using cell phones and a minimum of 200,000 additional crashes each year are caused by drivers who are texting. The announcement came on the one-year anniversary of NSC's call for a ban on all cell phone use and texting while driving.

"We now know that at least 1.6 million crashes are caused by drivers using cell phones and texting," said Janet Froetscher, president & CEO of the National Safety Council. "We know that cell phone use is a very risky distraction and texting is even higher risk. We now know that cell phone use causes many more crashes than texting. The main reason is that millions more drivers use cell phones than text," she said. "That is why we need to address both texting and cell phone use on our roads."

"This new estimate provides critical data for legislators, business leaders and individuals to evaluate the threat and need for legislation, business policies and personal actions to prevent cell phone use and texting while driving," Froetscher said. "There was great progress made in 2009, particularly regarding a broad recognition that texting is dangerous. We now need the same broad consensus that recognizes cell phone use while driving causes even more crashes."

Froetscher said public support for laws banning cell phone use while driving is gaining momentum.

"Public opinion research conducted in 2009 by the AAA Foundation for Traffic Safety and Nationwide Insurance show public support for total bans on cell phones at 43 and 57 percent respectively," Froetscher said. "With public support now around 50 percent, we will continue to educate people about the risks of cell phone use while driving and the value of effectively-enforced laws in changing behavior and reducing crashes."

In constructing its estimates, NSC used widely-accepted statistical methods and analysis based on data of driver cell phone use from the National Highway Traffic Safety Administration (NHTSA) and from peer-reviewed research that quantifies the risk of using a cell phone and texting while driving. NSC's statistical model and estimates were peer-reviewed by academic researchers in traffic safety and biostatistics.

The estimate of 25% of all crashes -- or 1.4 million crashes -- caused by cell phone use was derived from NHTSA data showing 11% of drivers at any one time are using cell phones and from peer-reviewed research reporting cell phone use increases crash risk by four times. The estimate of an additional minimum 3% of crashes -- or 200,000 crashes -- caused by texting was derived by NHTSA data showing 1% of drivers at any one time are manipulating their device in ways that

include texting and from research reporting texting increases crash risk by 8 times. Using the highest risk for texting reported by research of 23 times results in a maximum of 1 million crashes due to texting; still less than the 1.4 million crashes caused by other cell phone use.

The National Safety Council (www.nsc.org) saves lives by preventing injuries and deaths at work, in homes and communities, and on the roads, through leadership, research, education and advocacy.

NSC Press Kit

Cell Phone Fact Sheet

Public Opinion Fact Sheet

Attributable Risk Estimate (Cell Phones & Texting)
Risk Estimate Model (Full Study)
Risk Estimate Summary
Risk Estimate Table

NSC Bios

NSC Media Coverage

NSC received significant media coverage on Jan. 12 when it announced that 28 percent of crashes are caused by drivers using their cell phones. NSC also announced the launch of FocusDriven - Advocates for Cell-Free Driving. Below are some highlights of this coverage.

ABC News

CBS News

CBS News "The Early Show"

FOX News

MSNBC

Oprah Winfrey Show

New York Times Series on Distracted Driving

DOT's Distracted Driving Site

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PRESS IMAGES

A student talks on a hands-free cell phone while operating a high-tech driving simulator. The simulator was used during a University of Utah study that found motorists who talk on cell phones while driving are as impaired as drunken drivers with blood-alcohol levels at the legal limit of 0.08 percent.

Photo Credit: Jim Moulin

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DRIVERS ON CELL PHONES ARE AS BAD AS DRUNKS

UTAH PSYCHOLOGISTS WARN AGAINST CELL PHONE USE WHILE DRIVING

6

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June 29, 2006 -- Three years after the preliminary results first were presented at a scientific meeting and drew wide attention, University of Utah psychologists have published a study showing that motorists who talk on handheld or hands-free cellular phones are as impaired as drunken drivers.

"We found that people are as impaired when they drive and talk on a cell phone as they are when they drive intoxicated at the legal blood-alcohol limit" of 0.08 percent, which is the minimum level that defines illegal drunken driving in most U.S. states, says study co-author Frank Drews, an assistant professor of psychology. "If legislators really want to address driver distraction, then they should consider outlawing cell phone use while driving."

Psychology Professor David Strayer, the study's lead author, adds: "Just like you put yourself and other people at risk when you drive drunk, you put yourself and others at risk when you use a cell phone and drive. The level of impairment is very similar."

"Clearly the safest course of action is to not use a cell phone while driving," concludes the study by Strayer, Drews and Dennis Crouch, a research associate professor of pharmacology and toxicology. The study was set for publication June 29 in the summer 2006 issue of *Human Factors: The Journal of the Human Factors and Ergonomics Society*.

The study reinforced earlier research by Strayer and Drews showing that hands-free cell phones are just as distracting as handheld cell phones because the conversation itself – not just manipulation of a handheld phone – distracts drivers from road conditions.

Human Factors Editor Nancy J. Cooke praised the study: "Although we all have our suspicions about the dangers of cell phone use while driving, human factors research on driver safety helps us move beyond mere suspicions to scientific observations of driver behavior."

The study first gained public notice after Strayer presented preliminary results in July 2003 in Park City, Utah, during the Second International Driving Symposium on Human Factors in Driver Assessment, Training and Vehicle Design. It took until now for the study to be completed, undergo review by other researchers and finally be published.

Key Findings: Different Driving Styles, Similar Impairment

Each of the study"s 40 participants "drove" a PatrolSim driving simulator four times: once each while undistracted, using a handheld cell phone, using a hands-free cell phone and while intoxicated to the 0.08 percent blood-alcohol level after drinking vodka and orange juice. Participants followed a simulated pace car that braked intermittently.

Both handheld and hands-free cell phones impaired driving, with no significant difference in the degree of impairment. That "calls into question driving regulations that prohibited handheld cell phones and permit hands-free cell phones," the researchers write.

The study found that compared with undistracted drivers:

- Motorists who talked on either handheld or hands-free cell phones drove slightly slower, were 9 percent slower to hit the brakes, displayed 24 percent more variation in following distance as their attention switched between driving and conversing, were 19 percent slower to resume normal speed after braking and were more likely to crash. Three study participants rear-ended the pace car. All were talking on cell phones. None were drunk.

- Drivers drunk at the 0.08 percent blood-alcohol level drove a bit more slowly than both undistracted drivers and drivers using cell phones, yet more aggressively. They followed the pace car more closely, were twice as likely to brake only four seconds before a collision would have occurred, and hit their brakes with 23 percent more force. "Neither accident rates, nor reaction times to vehicles braking in front of the participant, nor recovery of lost speed following braking differed significantly" from undistracted drivers, the researchers write.

"Impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk," they conclude.

Are Drunken Drivers Really Less Accident-Prone than Cell Phone Users?

Drews says the lack of accidents among the study's drunken drivers was surprising. He and Strayer speculate that because simulated drives were conducted during mornings, participants who got drunk were well-rested and in the "up" phase of intoxication. In reality, 80 percent of all fatal alcohol-related accidents occur between 6 p.m. and 6 a.m. when drunken drivers tend to be fatigued. Average blood-alcohol levels in those accidents are twice 0.08 percent. Forty percent of the roughly 42,000 annual U.S. traffic fatalities involve alcohol.

While none of the study's intoxicated drivers crashed, their hard, late braking is "predictive of increased accident rates over the long run," the researchers wrote.

One statistical analysis of the new and previous Utah studies showed cell phone users were 5.36 times more likely to get in an accident than undistracted drivers. Other studies have shown the risk is about the same as for drivers with a 0.08 blood-alcohol level.

Strayer says he expects criticism "suggesting that we are trivializing drunken-driving impairment, but it is anything but the case. We don't think people should drive while drunk, nor should they talk on their cell phone while driving."

Drews says he and Strayer compared the impairment of motorists using cell phones to drivers with a 0.08 percent blood-alcohol level because they wanted to determine if the risk of driving while phoning was comparable to the drunken driving risk considered unacceptable.

"This study does not mean people should start driving drunk," says Drews. "It means that driving while talking on a cell phone is as bad as or maybe worse than driving drunk, which is completely unacceptable and cannot be tolerated by society."

University of Utah Cell Phone Research

Previous research by Strayer, Drews and colleagues include:

- A 2001 study showing that hands-free cell phones are just as distracting as handheld cell phones.
- A 2003 study showing that the reason is "inattention blindness," in which motorists look directly at road conditions but don't really see them because they are distracted by a cell phone conversation. And such drivers aren't aware they are impaired.
- A 2005 study suggesting that when teenagers and young adults talk on cell phones while driving, their reaction times are as slow as those of elderly drivers.

The University of Utah psychologists conducted the alcohol study because a 1997 study by other researchers evaluated the cell phone records of 699 people involved in motor vehicle accidents and found one-fourth of them had used their phone in the 10 minutes before their accident – a four-fold increase in accidents compared with undistracted motorists.

Those researchers speculated there was a comparable risk from drunken driving and cell phone use while driving. So Strayer and Drews conducted a controlled laboratory study.

The study included 25 men and 15 women ages 22 to 34 who were social drinkers (three to five drinks per week) recruited via newspaper advertisements. Two-thirds used a cell phone while driving. Each participant was paid $100 for 10 hours in the study.

The driving simulator has a steering wheel, dashboard instruments and brake and gas pedals from a Ford Crown Victoria sedan. The driver is surrounded by three screens showing freeway scenes. Each simulated daylight freeway drive lasted 15 minutes. The pace car intermittently braked to mimic stop-and-go traffic. Drivers who fail to hit their brakes eventually rear-end the pace car. Other simulated vehicles occasionally passed in the left lane, giving the impression of steady traffic flow.

Each study participant drove the simulator during three sessions – undistracted, drunk or talking to a research assistant on a cell phone – each on a different day.

The simulator recorded driving speed, following distance, braking time and how long it would take to collide with the pace car if brakes were not used.

The study was funded by a $25,000 grant from the Federal Aviation Administration – which is interested in impaired attention among pilots – and by Strayer's and Drews' salaries. The Utah Highway Patrol loaned the researchers a device to measure blood-alcohol levels.

Driving while Distracted: A Growing Problem

The researchers cited figures from the Cellular Telecommunications Industry Association indicating that more than 100 million U.S. motorists use cell phones while driving. The National Highway Transportation Safety Administration estimates that at any given moment during daylight hours, 8 percent of all drivers are talking on a cell phone.

"Fortunately, the percentage of drunk drivers at any time is much lower," Drews says. "So it means the risk of talking on a cell phone and driving is probably much higher than driving intoxicated because more people are talking on cell phones while driving than are driving drunk." The main reason there are not more accidents is that "92 percent of drivers are not on a cell phone and are compensating for drivers on cell phones," he adds.

Cell phone use is far from the only distraction for motorists. The researchers cite talking to passengers, eating, drinking, lighting cigarettes, applying makeup and listening to the radio as the "old standards" of driver distraction.

"However, over the last decade many new electronic devices have been developed, and they are making their way into the vehicle," the researchers write. "Drivers can now surf the Internet, send and receive e-mail or faxes, communicate via a cellular device and even watch television. There is good reason to believe that some of these new multitasking activities may be substantially more distracting than the old standards because they are more cognitively engaging and because they are performed over longer periods of time."

News media may obtain a copy of the study by emailing leesiegel@ucomm.utah.edu or, starting June 29, by going to http://hfes.org and clicking on "What's New"

Other studies by Strayer and colleagues on cell phones and driving may be downloaded from: http://www.psych.utah.edu/AppliedCognitionLab/

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WTAE.com

Woman Gets Jail For Cell Phone Car Crash That Killed H.S. Girl

'Just Let It Ring' Is Britnee Moore's Message To Others

POSTED: 10:59 am EDT
July 30, 2009
UPDATED: 1:17 pm EDT
July 31, 2009

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Driver In Car Crash Apologizes To Family

POSTED: 4:32 pm EST July 30, 2009
UPDATED: 4:50 pm EST July 30, 2009

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Britnee Moore expresses remorse as a judge sends her to jail for causing a car crash that killed 16-year-old Hope Maley.

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WAYNESBURG, Pa. -- A young Waynesburg woman expressed remorse Thursday as a judge ordered her to serve jail time for causing a car crash that killed a 16-year-old high school student.

Britnee Moore, 20, was found guilty in June of homicide by vehicle. Judge William Nalitz sentenced her to no less than five months and no more than 36 months in the Greene County Jail.

"The judge did say during the sentencing that no sentence would help the family, but I disagree. I was hoping she would be mandated to a state prison," said Hope Maley's mother, Darlene. "Hope's life matters, and I just have not seen any remorse. The defendant has never apologized in over 2 1/2 years."

Maley's family said Moore never apologized to them. Outside the courtroom on Thursday, Moore did tell Channel 4 Action News that she was sorry.

"I'm just real sorry for my actions and I hope a lot of other people learn from this," said Moore, who told reporters, "I take full responsibility for this."

More: Read Britnee Moore's Letter To Victim's Family (PDF)

State police said Moore was going too fast in a 45 mph zone and reaching for a cell phone when her car collided head-on with Hope Maley's car in Franklin Township in March 2007.

Maley, who attended Waynesburg High School, was pronounced dead at the scene of the wreck on a curvy section of Route 218 near Randy Hoge Road.

Asked if she had a message for the Maley family, Moore said, "I'm very sorry for your loss. My prayers go out to you."

More: Read Hope Maley's Mother's Letter To Judge

Police estimated that Maley was driving somewhere between 25 mph and 47 mph when the collision happened.

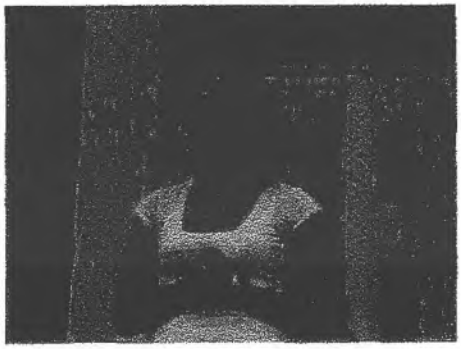
In addition to the homicide by vehicle charge, Moore was convicted of involuntary manslaughter and reckless endangerment.

Moore hopes her example will teach people "not to pick up their cell phone when they're driving. Just let it ring, no matter how important your call is, and don't rush."

Hope Maley

Previous Stories:

- June 29, 2009: 'Run For Hope' Remembers Greene Co. Teen Crash Victim
- June 4, 2009: Woman, 20, Guilty In Car Collision That Killed High School Girl



Britnee Moore

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WSOCTV.com

Stanley Teen Killed In Crash Using Cell Phone While Driving

Posted: 5:34 pm EDT September 7, 2009Updated: 8:43 am EDT September 8, 2009

GASTON COUNTY, N.C. -- A 16-year-old Stanley girl crashed while using a cell phone and died Sunday night, witnesses and investigators said.

Brittany Johnson, an East Gaston High School student, was driving on Mauney Road toward Stanley when she wrecked at about 6:30 p.m. Troopers said she ran off the right side of the road, struck an embankment, went airborne and then hit a utility pole.

Rescue crews found the teen's Chevrolet Lumina on its side, and it appeared the top of the car hit the utility pole just above the teen's head before the car spun around. Johnson was pronounced dead at the scene.

Neighbors who heard the crash ran out to help. Greg Burch said the car was wrapped like a horseshoe around the pole.

"We tried to help her out, but we couldn't do nothing for her," Burch said.

Burch said he found Johnson's cell phone on the ground nearby, and it had an unfinished text message to her mother on the screen.

He said he used the number marked "Mom" to make a heartbreaking phone call.

"I asked her if her daughter drove a green Lumina," Burch said.

He said he told her to come to the scene quickly, but she asked the question he didn't want to answer.

"It was tough. She asked me how she was, and I said, 'I don't know,'" Burch said.

He said he suspected the worst, but he didn't want to say it.

On Monday, Johnson's grandmother hugged Burch and thanked him for making the call.

She whispered a little goodbye as she stared down at the growing memorial of flowers, stuffed animals and notes placed at the scene by friends and supporters.

"It hurts, Brit. It hurts, but I know you are with God now so you'll be OK," Helen Anderson said.

Anderson said Johnson was her first grandchild. She said she hopes other teens will learn from the tragedy.

"I hope they learn their lesson and don't put their families what we are going through now. Don't text and drive. It's not that important," she said.

Classmates and friends cried together at the pole Monday. Johnson's boyfriend put her picture on the pole, and together they silently said goodbye.

"I'll always love her," Anderson said.

Family members said they are still working on funeral plans. A memorial service for Johnson was held at the First Baptist Church in Stanley on Monday evening.

North Carolina is one of nine states that bans texting for certain groups. In some cases, they restrict drivers younger than 18, and in others, the ban has to do with restrictions on the license, not the driver.

On Dec. 1, North Carolina will join a group of 18 states that have total bans, which restrict all drivers from texting while driving.

South Carolina does not have any sort of cell phone ban, but it could be forced to adopt one if Congress goes ahead with a nationwide ban.

Several studies have indicated how dangerous texting while driving can be. A study from Car And Driver magazine found texting is more dangerous than driving drunk. A study out of Virginia Tech found text messaging could take the driver's eyes off the road for 4.6 seconds. That's equal to driving the length of a football field at 55 mph

- **LINK:** Virginia Tech Study On Cell Phone Use And Driving Distraction
- **LINK:** Car And Driver: Texting While Driving Feature

Previous Stories:

- June 10, 2009: N.C. Lawmakers Vote to Ban Texting While Driving
- February 10, 2009: Text-Messaging Ban For N.C. Drivers Sought In House
- November 16, 2007: Texting Drivers Put Others At Risk

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PITTSBURGH
TRIBUNE-REVIEW

Crash survivor urges cell-phone ban

By Brad Bumsted
STATE CAPITOL REPORTER
Thursday, March 12, 2009

HARRISBURG — Jacy Good lost her parents in a May vehicle crash she says could have been avoided if the driver at fault had not been talking on a hand-held cell phone.

The Goods were returning to their Lancaster County home on the day that Jacy, 22, graduated from Muhlenberg College in Allentown. Jay and Jean Good, both 57, died in the crash on Route 222 when their station wagon, stuffed with Jacy's belongings, was hit by a tractor-trailer that swerved to avoid a minivan that ran a red light, police say.

Jacy Good suffered a shattered pelvis, several broken bones and a brain injury.

Now she is the "face" of a state House effort to ban hand-held cell phone use by drivers and to make text messaging while driving illegal.

"I will not stop until this bill becomes law," Good said Wednesday after a news conference. Enacting the law would honor her parents, she said.

"Paramedics and the doctors were giving her a less than 10 percent chance" of living, said Northern Berks Regional Police Chief Scott Eaken. He confirmed the 18-year-old minivan driver was talking on a cell phone when the crash happened and was cited for traffic violations.

Berks County District Attorney John Adams said he decided against filing charges of homicide by vehicle or involuntary manslaughter because his office could not establish that the driver ran the light because he was on the phone. It did not rise to the level of "reckless or gross negligence" as it might have if the driver were intoxicated or speeding 30 miles above the limit, Adams said.

"The guy was on the phone with somebody from Bible camp or Bible school," he said, but added, "An inexperienced driver should not be on a cell phone."

Rep. Josh Shapiro, a Montgomery County Democrat, cited Good's story, other crash statistics and the bill's 70 co-sponsors as reasons he believes lawmakers will pass the legislation. He began pushing the idea four years ago without much data. His bill failed to gain traction last session.

"We've got the technology available today to save lives in Pennsylvania," Shapiro said.

But Matthew Brouillette, president of the Commonwealth Foundation, a conservative policy group, said he isn't convinced the bill would make the highways safer.

"There is no way to adequately regulate and punish activities that distract drivers," Brouillette said. "Whether it is eating, putting on makeup or talking on the phone, the issue is more about personal responsibility and paying the consequences for bad decisions than trying to come up with another law that has not proven to make our roads safer."

Under the bill, violators would be charged with a summary offense carrying a $50 fine. Motorists could use speaker phones or cell phones with earpieces.

About 1,200 crashes involving drivers with hand-held phones occur in Pennsylvania each year, according to PennDOT figures. Fifty-six crashes in 2007 involved drivers using hands-free cell phones, Shapiro said.

Six states, including New York and New Jersey, have enacted bans, as has the District of Columbia.

"My friends from New York and New Jersey don't understand why Pennsylvania is having trouble passing this bill," Good said.

Pollster Mike Young, a former political science professor at Penn State University, said the average Pennsylvanian probably places the issue far down a growing list of things to worry about.

"Pennsylvania is not an 'early adopter' of most reforms, nor an enthusiastic advocate of state restrictions on social behavior," he said.

Senate Transportation Chairman Rob Wonderling, a Republican from Montgomery County, said the Senate's priority is "to put Pennsylvanians back to work."

Wonderling said a cell phone ban likely won't be debated early this session, but he wouldn't rule it out. He said he would take a "deliberative approach" with any such bill, weighing others' views.

Verizon Wireless supports statewide legislation to ban hand-held cell phones while driving but questions municipal regulations that drivers can find confusing, said Laura Merritt, a Dublin, Ohio-based spokeswoman for the company.

"We will certainly not oppose anything of that nature. We strongly encourage our drivers to focus on driving," Merritt said.

Brad Bumsted can be reached at bbumsted@tribweb.com or 717-787-1405.

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(13) "highway" means the entire width between the boundary lines of every way that is publicly maintained when a part of it is open to the public for purposes of vehicular travel, including but not limited to every street and the Alaska state marine highway system but not vehicular ways or areas;

(14) "highway work zone" means an area identified by advance signing where road construction, repair, or maintenance work is being done on or adjacent to a highway, whether or not work is actually being done at that time;

(15) "low-speed vehicle" means a motor vehicle that has four wheels, that was manufactured to be capable of propelling itself and achieving a minimum speed of 20 miles an hour and a maximum speed of 25 miles an hour, that has not been modified to have a maximum speed greater than 25 miles an hour, and that meets weight, equipment, and safety standards set by the department by regulation; weight, equipment, and safety standards shall be consistent with, and may not exceed, federal standards;

(16) "motor vehicle" means a vehicle which is self-propelled except a vehicle moved by human or animal power;

(17) "motorcycle" means a vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground; the term does not include a tractor;

(18) "motor-driven cycle" means a motorcycle, motor scooter, motorized bicycle, or similar conveyance with a motor attached and having an engine with 50 or less cubic centimeters of displacement;

(19) "official traffic-control device" means a sign, signal, marking, or other device not inconsistent with this title, placed or erected by authority of a state or municipal agency or official having jurisdiction, for the purpose of traffic regulating, warning, and guiding;

(20) "owner" means a person, other than a lienholder, having the property in or title to a vehicle, including but not limited to a person entitled to the use and possession of a vehicle subject to a security interest in another person, but exclusive of a lessee under a lease not intended as security;

(21) "physical injury" has the meaning given in AS 11.81.900;

(22) "revoke" means the termination, by formal action of the Department of Public Safety or the Department of Administration or by formal action of a court, of a certification, registration, license, permit, or privilege issued or allowed under this title or regulations adopted under this title; the certification, registration, license, permit, or privilege may not be reissued, renewed, or restored during the time for which revoked; however, after that time, an application for a new certificate, registration, license, permit, or privilege may be made;

(23) "roadway" means that portion of a highway designed or ordinarily used for vehicular travel, exclusive of the sidewalk, berm, or shoulder, even though the sidewalk, berm, or shoulder is used by persons riding bicycles or other human powered vehicles; and in the event that a highway includes two or more separate roadways, the term refers to each roadway separately but not to all such roadways collectively;

(24) "serious physical injury" has the meaning given in AS 11.81.900(b);

(25) "suspend" means the temporary withdrawal, by formal action of the Department of Public Safety or the Department of Administration or by formal action of a court, of a certificate, registration, license, permit, or privilege issued or allowed under this title or regulations adopted under this title, effective for a period of time which must be specifically designated by the appropriate department or by the court;

(26) "traffic" means pedestrians, ridden or herded animals, vehicles, and other conveyances either singly or together while using a highway or vehicular way or area that is open to public use for purposes of travel;

(27) "traffic safety corridor" means a portion of a highway on which signs have been erected designating that portion as a traffic safety corridor under AS 19.10.075;

(28) "underinsured motor vehicle" means a motor vehicle licensed for highway use with respect to ownership, operation, maintenance, or use for which there is a bodily injury or property damage insurance policy or a bond applicable at the time of an accident and the amount of insurance or bond is less than the amount the covered person is legally entitled to recover for bodily injury or property damage from the owner or operator of the underinsured motor vehicle;

(29) "vehicle" means a device in, upon, or by which a person or property may be transported or drawn upon or immediately over a highway or vehicular way or area; "vehicle" does not include

(A) devices used exclusively upon stationary rails or tracks;

(B) mobile homes;

(30) "vehicular way or area" means a way, path, or area, other than a highway or private property, that is designated by official traffic control devices or customary usage and that is open to the public for purposes of pedestrian or vehicular travel, and which way or area may be restricted in use to pedestrians, bicycles, or other specific types of vehicles as determined by the Department of Public Safety or other agency having jurisdiction over the way, path, or area.

(b) The commissioner of public safety or the commissioner of administration, as appropriate, shall adopt regulations to define other terms that are used in this title and in regulations adopted under this title. (§ 50-1-1 ACLA 1949; am § 3 ch 81 SLA 1973; am §§ 13, 14 ch 241 SLA 1976; am § 1 ch 135 SLA 1977; am § 14 ch 70 SLA 1984; am § 1 ch 13 SLA 1985; am § 88 ch 74 SLA 1985; am § 2 ch 130 SLA 1988; am § 4 ch 53 SLA 1990; am § 33 ch 119 SLA 1990; am § 9 ch 168 SLA 1990; am § 5 ch 8 SLA 1993; am § 63 ch 63 SLA 1993; am § 16 ch 55 SLA 1994; am §§ 27, 28 ch 6 FSSLA 1996; am § 114 ch 81 SLA 1997; am E.O. No. 99 §§ 65 — 70 (1997; am § 3 ch 64 SLA 1998; am § 11 ch 93 SLA 1998; am § 18 ch 33 SLA 1999; am § 4 ch 142 SLA 2002; am § 7 ch 45 SLA 2006; am § 5 ch 95 SLA 2006; am § 30 ch 23 SLA 2007; am § 2 ch 99 SLA 2008)

Revisor's notes. — Formerly AS 28.35.260. Renumbered in 1984 as AS 28.40.100 and renumbered again in 2006. Subsection (a) was reorganized in 1984, 1989, 1990, 1993, 1994, 1998, 2002, 2006, 2007, and 2008 to retain alphabetical order.

Effect of amendments. — The 2002 amendment, effective October 3, 2002, added paragraph (a)(9).

The first 2006 amendment, effective May 27, 2006, added the definition of "traffic safety corridor" in subsection (a).

The second 2006 amendment, effective October 28, 2006, added the definition of "low-speed vehicle" in subsection (a).

The 2007 amendment, effective July 1, 2007, added paragraph (a)(29) [now (a)(5)], defining "criminal justice information".

The 2008 amendment, effective September 1, 2008, added paragraph (a)(30) [now (a)(21)].

Editor's notes. — Section 87, ch. 63, SLA 1993 provides "[i]f any section of this bill is found to violate the single subject rule it is severed from the rest of the bill."

NOTES TO DECISIONS

Steering a towed vehicle. — Despite the failure of paragraph (a)(7) to specifically mention towed vehicles, a person who steers a towed vehicle is "driving" within the meaning of that paragraph and AS 28.35.030(a). Williams v. State, 884 P.2d 167 (Alaska Ct. App. 1994).

A motor vehicle does not cease to be a motor vehicle whenever it cannot be started within the meaning of paragraph (a)(12) (now (a)(14)). Williams v. State, 884 P.2d 167 (Alaska Ct. App. 1994).

A towed snowmobile is a motor vehicle because steering such a vehicle, even if only partially, involves exercising control over the vehicle, and it amounts to operating the vehicle; where a motorist was operating a towed snowmobile while intoxicated, and refused to submit to a chemical breath test under the implied consent law, his driver's license was properly revoked. Conkey v. Dep't of Admin., 113 P.3d 1235 (Alaska 2005).

An all terrain three-wheeler is a motor vehicle for which a driver's license is required. State v. Benolken, 838 P.2d 280 (Alaska Ct. App. 1992).

Applied in Conner v. State, 696 P.2d 680 (Alaska Ct. App. 1985); Caulkins v. State, Dep't of Pub. Safety, 743 P.2d 366 (Alaska 1987).

Quoted in Burton v. State Farm Fire & Cas. Co., 796 P.2d 1361 (Alaska 1990); Fielding v. State, 842 P.2d 614 (Alaska Ct. App. 1992); Mezak v. State, 877 P.2d 1307 (Alaska Ct. App. 1994); State v. Simpson, 53 P.3d 165 (Alaska Ct. App. 2002).

Stated in Kingsley v. State, 11 P.3d 1001 (Alaska Ct. App. 2000).

Cited in Francis v. Municipality of Anchorage, 641 P.2d 226 (Alaska Ct. App. 1982); Uhde v. State, 654 P.2d 1323 (Alaska Ct. App. 1982); State v. Robertson, 749 P.2d 902 (Alaska Ct. App. 1988); State v. Straetz, 758 P.2d 133 (Alaska Ct. App. 1988); Progressive Ins.

HB

23

<TARGET><BILL>HB 23</BILL><SUBJECT>HB
23</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

State Capitol, Suite 422
Juneau, AK 99801-1182
Phone: 465-4939
Fax: 465-2418
Toll Free: (800) 465-4939
Representative_Pete_Petersen@legis.state.ak.us

716 W. 4th Ave, Suite 380
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Representative Pete Petersen

Serving Northeast Anchorage and Muldoon

MEMORANDUM

DATE: January 25, 2011

TO: Rep. Carl Gatto, Chair
House Judiciary Committee

FROM: Rep. Pete Petersen

RE: Hearing Request for House Bill 23, Computer Privacy

I respectfully request that House Bill 23, relating to computer privacy, be scheduled for a hearing in the House Judiciary Committee. Please feel free to contact me, or my aide David Bremer, with questions or thoughts at 465-4939.

Attached you will find a background packet for House Bill 23. This includes the current version of the bill, a sponsor's statement, a sectional analysis, and backup materials.

Thank you for your consideration.

Alaska State Legislature

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Toll Free: (800) 465-4939
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Representative Pete Petersen
Serving Northeast Anchorage and Muldoon

Sponsor Statement
HB 23: Computer Privacy

The State of Alaska has a long tradition of protecting citizens' privacy rights, and this bill would protect the privacy rights of Alaskan computer users by closing a loophole in existing law. Current law addresses what is commonly known as "hacking", that is surreptitiously accessing a computer or network, but does not address intercepting data as it is being entered. A keystroke logger is a device that is used to record keystrokes as they are being entered into a computer. Emerging technology can even record keystrokes remotely from up to 100 yards away. This bill would ban the installation or use of keystroke loggers or other devices that intercept data being entered on a computer without the consent of the computer's owner.

It should not matter whether information is stolen out of a computer, or as it is being typed into it. The victims' privacy is just as violated, and the law should recognize it.

Keystroke logger manufacturers specifically advertise that their products cannot be detected or disabled by anti-virus or anti-spyware software or firewalls, and the devices are designed so computer users would not notice them unless they carefully inspected their computers every time they use their computers.

While some specific information like social security numbers or credit card information are protected by federal or other law, it is often difficult to prove that someone used or stole such information. Under this bill, all that would need to be proved is that someone installed a keystroke logger or enabled the ability to log keystrokes wirelessly or by other nonwired means on a computer they had no right to access. Keystroke loggers can also be used by stalkers to monitor their victims.

This bill would not affect people using keystroke loggers on their own computers, parents monitoring their children's computer use, or law enforcement operating with a search warrant.

Alaska State Legislature

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Sectional Analysis

HB 23: Computer Privacy

Section 1 establishes that the crime of "criminal use of a computer" is committed when a person, without having a right to do so, installs on a computer a keystroke logger or other device that can record data being entered into the computer, or enables a device that can wirelessly record keystrokes or other data entered.

Section 2 establishes an affirmative defense for the offense created above that the person installing or enabling the device owns the computer on which it is installed.

Sec. **11.46.740**. Criminal use of computer.

(a) A person commits the offense of criminal use of a computer if, having no right to do so or any reasonable ground to believe the person has such a right, the person knowingly accesses, causes to be accessed, or exceeds the person's authorized access to a computer, computer system, computer program, computer network, or any part of a computer system or network, and, as a result of or in the course of that access,

(1) obtains information concerning a person;

(2) introduces false information into a computer, computer system, computer program, or computer network with the intent to damage or enhance the data record or the financial reputation of a person;

(3) introduces false information into a computer, computer system, computer program, or computer network and, with criminal negligence, damages or enhances the data record or the financial reputation of a person;

(4) obtains proprietary information of another person;

(5) obtains information that is only available to the public for a fee;

(6) introduces instructions, a computer program, or other information that tampers with, disrupts, disables, or destroys a computer, computer system, computer program, computer network, or any part of a computer system or network; or

(7) encrypts or decrypts data.

(b) In this section, "proprietary information" means scientific, technical, or commercial information, including a design, process, procedure, customer list, supplier list, or customer records that the holder of the information has not made available to the public.

(c) Criminal use of a computer is a class C felony.

History -

(Sec. 3 ch 79 SLA 1984; am Sec. 11, 12 ch 65 SLA 2000)

Revisors Notes -

Subsection (b) was enacted as (c). Relettered in 2000, at which time former subsection (b) was relettered as (c).

Amendment Notes -

The 2000 amendment, effective May 23, 2000, in subsection (a) inserted ", or exceeds the person's authorized access to" and "or in the course of" in the introductory language, inserted "computer program" and "or the financial reputation" in paragraph (2), and added paragraphs (3)-(7); and added subsection (c).

Collateral Refs -

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 ALR4th 1046.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version HB023 \B
() Publish Date

Identifier (file name): HB023-LAW-CRIM-03-18-11
Title An Act relating to criminal use of a computer.

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation

Sponsor REPRESENTATIVE(S) PETERSEN, HOLMES
Requester (H) JUD

OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by John J. Burns, Attorney General
Department of Law

Phone 465-5427
Date/Time 3/18/11 4:45 PM
Date 3/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB023 \B

Analysis

HB 23 amends the crime of criminal use of a computer, a class C felony, by adding the prohibition of installing a keystroke logger or other device that can track another person's entries or keystrokes.

This is a new crime and a felony, and would have an indeterminate fiscal impact to the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB023**
() Publish Date 1/18/2011

Identifier (file name) HB023-DOC-OC-03-19-11
Title "An Act relating to criminal use of a computer."
Sponsor Representative Petersen and Holmes
Requester House Judiciary Committee

Dept. Affected DOC
Appropriation Administration & Support
Allocation Office of the Commissioner
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by Leslie Houston, Director
Division Dept. of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone 465-3339
Date/Time 3/19/11 12:00 PM
Date 3/19/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB023

Analysis

HB 23 adds a section to statute that would make installation of computer keystroke loggers or devices or programs that have the ability to record another person's keystrokes or entries or enables on a computer a program to record keystrokes wirelessly or by nonwired means a class C felony.

The average sentence for a class C felony is 122 days. This legislation, if passed, would result in an increase in arrests and an increase in the number of offenders being housed at Department of Corrections facilities.

However, the Department of Corrections is unable to determine the fiscal impact of this legislation, as we cannot estimate the total number of violations of this law that will occur.

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Representative Pete Peterson
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Peterson:

On behalf of our respective organizations, we would like to thank you for introducing HB 23, an Act relating to criminal use of a computer.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

cc: Lindsey Holmes

Alaska Cabaret, Hotel,
Restaurant & Retailers Association

CHARR
STRENGTH THROUGH UNITY

1503 W. 31st Ave., Suite 202 • Anchorage, Alaska 99503
(907) 274-8133 • Fax: (907) 274-8640
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The Honorable Pete Petersen
House of Representatives
Alaska State Capitol
Juneau, AK 99801-1182

January 18, 2010

Dear Representative Petersen,

Thank you for the updated information on House Bill 23, an act relating to criminal use of a computer.

Last session the Alaska CHARR Government Affairs Committee considered this bill and unanimously agreed that an effort such as this to protect our members and their patrons deserved our full support. As you renew efforts to pass this bill, we are happy to continue to offer our support.

With identity theft and credit card fraud becoming more prevalent in our automated society, and our bar and restaurant members some of the prime targets, we are glad that you are looking ahead and trying to close loopholes that technology like keystroke loggers are leaving open.

Please let me know if I can be of additional assistance.

Dale G. Fox, CAE
President & CEO, Alaska CHARR

Compromising Electromagnetic Emanations of Wired and Wireless Keyboards

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Abstract

Computer keyboards are often used to transmit confidential data such as passwords. Since they contain electronic components, keyboards eventually emit electromagnetic waves. These emanations could reveal sensitive information such as keystrokes. The technique generally used to detect compromising emanations is based on a wide-band receiver, tuned on a specific frequency. However, this method may not be optimal since a significant amount of information is lost during the signal acquisition. Our approach is to acquire the raw signal directly from the antenna and to process the entire captured electromagnetic spectrum. Thanks to this method, we detected four different kinds of compromising electromagnetic emanations generated by wired and wireless keyboards. These emissions lead to a full or a partial recovery of the keystrokes. We implemented these side-channel attacks and our best practical attack fully recovered 95% of the keystrokes of a PS/2 keyboard at a distance up to 20 meters, even through walls. We tested 12 different keyboard models bought between 2001 and 2008 (PS/2, USB, wireless and laptop). They are all vulnerable to at least one of the four attacks. We conclude that most of modern computer keyboards generate compromising emanations (mainly because of the manufacturer cost pressures in the design). Hence, they are not safe to transmit confidential information.

1 Introduction

Today, most of the practical attacks on computers exploit software vulnerabilities. New security weaknesses are disclosed every day, but patches are commonly delivered within a few days. When a vulnerability is based on hardware, there is generally no software update to avoid the exposure: the device must be changed.

Computer keyboards are often used to transmit sensitive information such as passwords, e.g. to log into computers, to do e-banking money transfer, etc. A weakness in these hardware devices will jeopardize the security of any password-based authentication system.

Compromising electromagnetic emanation problems appeared already at the end of the 19^{th} century. Because of the extensive use of telephones, wire networks became extremely dense. People could sometimes hear other conversations on their phone line due to undesired coupling between parallel wires. This unattended phenomenon, called *crosstalk*, may be easily canceled by twisting the cables.

A description of some early exploitations of compromising emanations has been recently declassified by the National Security Agency [26]. During World War II, the American Army used teletypewriter communications encrypted with Bell 131-B2 mixing devices. In a Bell laboratory, a researcher noticed, quite by accident, that each time the machine stepped, a spike appeared on an oscilloscope in a distant part of the lab. To prove the vulnerability of the device, Bell engineers captured the compromising emanations emitted by a Bell 131-B2, placed in a building across the street and about 25 meters away. They were able to recover 75% of the plaintext.

During the Vietnam war, a sensor called *Black Crow* carried aboard C-130 gunships was able to detect the electromagnetic emanations produced by the ignition system of trucks on the Ho Chi Minh trail, from a distance up to 10 miles [25, 11].

1.1 Related Work

Academic research on compromising electromagnetic emanations started in the mid 1980's and there has been significant recent progresses [28, 1]. The threat related to compromising emanations has been constantly confirmed by practical attacks such as Cathode Ray Tubes (CRT) displays image recovery [34], Liquid Crystal Display (LCD) image recovery [20], secret key disclosure [16], video displays risks [18, 33] or radiations from

FPGAs [24].

Compromising electromagnetic emanations of serial-port cables have been already discussed by Smulders [30] in 1990. PS/2 keyboards still use bi-directional serial communication to transmit the pressed key code to the computer. Hence, some direct compromising electromagnetic emanations might appear. However, the characteristics of the serial line changed since the 90's. The voltage is not 15 volts anymore and the transition times of the signals are much longer (from picoseconds to microseconds).

Since keyboards are often the first input device of a computer system, they have been intensively studied. For instance, the exploitation of visual compromising information leaks such as optical reflections [5] which could be applied to keyboards, the analysis of surveillance video sequences [6] which can be used by an attacker to recover the keystrokes (even with a simple webcam) or the use of the blinking LEDs of the keyboard as a covert channel [21]. Acoustic compromising emanations from keyboards have been studied as well. Asonov and Agrawal [4] discovered that each keystroke produces a unique sound when it is pressed or released and they presented a method to recover typed keystrokes with a microphone. This attack was later improved, see [38, 7]. Even passive timing analysis may be used to recover keystrokes. Song et al. highlighted that the keystroke timing data measured in older SSH implementations [32] may be used to recover encrypted passwords. A risk of compromising emission from keyboards has been postulated by Kuhn and Anderson [20, 17, 2]. They also proposed countermeasures (see US patent [3]). Some unofficial documents on *TEMPEST* [37] often designate keyboards as potential information leaking devices. However, we did not find any experiment or evidence proving or refuting the practical feasibility to remotely eavesdrop keystrokes, especially on modern keyboards.

1.2 Our Contribution

This paper makes the following main contributions:

A Full Spectrum Acquisition Method. To detect compromising electromagnetic emanations a receiver tuned on a specific frequency is generally used. It brings the signal in base band with a limited bandwidth. Therefore, the signal can be demodulated in amplitude (AM) or frequency (FM). This method might not be optimal. Indeed, the signal does not contain the maximal entropy since a significant amount of information is lost. We propose another approach. We acquire the raw signal directly from the antenna and analyze the entire captured electromagnetic spectrum with Short Time Fourier Transform (also known as *Waterfall*) to distill potential compromising emanations.

The Study of Four Different Sources of Information Leakage from Keyboards. To determine if keyboards generate compromising emanations, we measured the electromagnetic radiations emitted when a key is pressed. Due to our improved acquisition method, we discovered several direct and indirect compromising emanations which leak information on the keystrokes. The first technique looks at the emanations of the falling edges (i.e. the transition from a high logic state to a low logic state) from the bi-directional serial cable used in the PS/2 protocol. It can be used to reveal keystrokes with about 1 bit of uncertainty. The second approach uses the same source, but consider the rising and the falling edges of the signal to recover the keystrokes with 0 bits of uncertainty. The third approach is focused on the harmonics emitted by the keyboard to recover the keystrokes with 0 bits of uncertainty. The last approach considers the emanations emitted from the matrix scan routine (used by PS/2, USB and Wireless keyboards) and yields about 2.5 bits of uncertainty per keystroke. This compromising emanation has been previously posited by Kuhn and Anderson [3], although that work provided no detailed analysis.

The Implementation and the Analysis of Four Keystroke Recovery Techniques in Four Different Scenarios. We tested 12 different keyboard models, with PS/2, USB connectors and wireless communication in different setups: a semi-anechoic chamber, a small office, an adjacent office and a flat in a building. We demonstrate that these keyboards are all vulnerable to at least one of the four keystroke recovery techniques in all scenarios. The best attack successfully recovers 95% of the keystrokes at a distance up to 20 meters, even through walls. Because each keyboard has a specific *fingerprint* based on the clock frequency inconsistencies, we can determine the source keyboard of a compromising emanation, even if multiple keyboards from the same model are used at the same time. First, we did the measurements in a semi-anechoic electromagnetic chamber to isolate the device from external noise. Then we confirmed that these compromising emanations are exploitable in real situations.

We conclude that most of modern computer keyboards generate compromising emanations (mainly because of the manufacturer cost pressures in the design). Hence they are not safe to transmit confidential information.

1.3 Structure of the Paper

Section 2 describes some basics on compromising electromagnetic emanations. In Section 3 we present our acquisition method based on Short Time Fourier Transform. In Section 4 we present four different setups used for the measurements, from a semi-anechoic chamber to

real environments. In Section 5 we give the complete procedure used to detect the compromising electromagnetic emanations. Then, we detail the four different techniques. In Section 6, we give the results of our measurements in different setups. In Section 7, we describe some countermeasures to avoid these attacks. In Section 8, we give some extensions and improvements. Finally we conclude.

2 Electromagnetic Emanations

Electromagnetic compatibility (EMC) is the analysis of electromagnetic interferences (EMI) or Radio Frequency Interferences (RFI) related to electric devices. EMC aims at reducing unintentional generation, propagation and reception of electromagnetic energy in electric systems. EMC defines two kinds of unwanted emissions: conductive coupling and radiative coupling. Conductive coupling requires physical support such as electric wires to transmit interferences through the system. Radiative coupling occurs when a part of the internal circuit acts as an antenna and transmits undesired electromagnetic waves. EMC generally distinguishes two types of electromagnetic emissions depending on the kind of the radiation source: differential-mode and common-mode.

Differential-mode radiation is generated by loops formed by components, printed circuit traces, ribbon cables, etc. These loops act as small circular antennas and eventually radiate. These radiations are generally low and do not disturb the whole system. Differential-mode signals are not easily influenced by external radiations. Moreover they can be easily avoided by shielding the system.

Common-mode radiation is the result of undesired internal voltage drops in the circuit which usually appear in the ground loop. Indeed, ground loop currents are due to the unbalanced nature of ordinary transmitting and receiving circuits. Thus, external cables included in the ground loop act as antennas excited by some internal voltages. Because these voltage drops are not intentionally created by the system, it is generally harder to detect and control common-mode radiations than differential-mode radiations.

From the attacker's point of view there are two types of compromising emanations: direct and indirect emanations.

Direct Emanations. In digital devices, data is encoded with logic states, generally described by short burst of square waves with sharp rising and falling edges. During the transition time between two states, electromagnetic waves are eventually emitted at a maximum frequency related to the duration of the rise/fall time. Because these compromising radiations are provided straight by the wire transmitting sensitive data, they are called direct emanations.

Indirect Emanations. Electromagnetic emanations may interact with active electronic components which induce new types of radiations. These unintended emanations manifest themselves as modulations or inter-modulations (phase, amplitude or frequency) or as carrier signals e.g. clock and its harmonics. Non-linear coupling between carrier signals and sensitive data signals, crosstalk, ground pollution or power supply DC pollution may generate compromising modulated signals. These indirect emanations may have better propagation than direct emanations. Hence, they may be captured at a larger range. The prediction of these emanations is extremely difficult. They are generally discovered during compliance tests such as FCC [15], CISPR [10], MIL-STD-461 [22], NACSIM-5000 [37], etc.

3 Electromagnetic Signal Acquisition

Two techniques are generally used to discover compromising electromagnetic emanations.

3.1 Standard Techniques

A method consists in using a spectral analyzer to detect signal carriers. Such a signal can be caught only if the duration of the carrier is significant. This makes compromising emanations composed of peaks difficult to detect with spectral analyzers.

Another method is based on a wide-band receiver tuned on a specific frequency. Signal detection process consists in scanning the whole frequency range of the receiver and to demodulate the signal according to its amplitude modulation (AM) or frequency modulation (FM). When an interesting frequency is discovered, narrow-band antennas and some filters are used to improve the Signal-to-Noise Ratio (SNR) of the compromising emanations. In practice, wide-band receivers such as R-1250 [19] and R-1550 [12] from Dynamic Sciences International, Inc. are used, see [17, 1]. Indeed, these receivers are compliant with secret requirements for the NACSIM-5000 [37] also known as *TEMPEST*. These devices are quite expensive and unfortunately not owned by our lab. Hence, we used a cheaper and open-source solution based on the USRP (Universal Software Radio Peripheral) [14] and the GNU Radio project [35]. The USRP is a device which allows you to create a software radio using any computer with USB port. With different daughterboards, the USRP is able to scan from DC to 2.9 GHz with a sample rate of 64 MS/s at a resolution of 12 bits. The full range on the ADC is 2 volts peak to peak and the input is 50 ohms differential. The GNU

Radio project is a powerful software library used by the USRP to process various modulations (AM, FM, PSK, FSK, etc.) and signal processing constructs (optimized filters, FFT, etc.). Thus, the USRP and the GNU Radio project may act as a wide-band receiver and a spectral analyzer with software-based FFT computation.

3.2 Novel Techniques

Some direct and indirect electromagnetic emanations may stay undetected with standard techniques, especially if the signal is composed of irregular peaks or erratic frequency carriers. Indeed, spectral analyzers need significantly static carrier signals. Similarly, the scanning process of wide-band receivers is not instantaneous and needs a lot of time to cover the whole frequency range. Moreover the demodulation process may hide some interesting compromising emanations.

In this paper, we use a different method to detect compromising electromagnetic emanations of keyboards. First, we obtain the raw signal directly from the antenna instead of a filtered and demodulated signal with limited bandwidth. Then, we compute the Short Time Fourier Transform (STFT), which gives a 3D signal with time, frequency and amplitude.

Modern analog-to-digital converters (ADC) provide very high sampling rates (Giga samples per second). If we connect an ADC directly to a wide-band antenna, we can import the raw sampled signal to a computer and we can use software radio libraries to instantly highlight potentially compromising emanations. The STFT computation of the raw signal reveals the carriers and the peaks even if they are present only for a short time.

Unfortunately there is no solution to transfer the high amount of data to a computer in real time. The data rate is too high for USB 2.0, IEEE 1394, Gigabit Ethernet or Serial ATA (SATA) interfaces. However, with some smart triggers, we can sample only the (small) interesting part of the signal and we store it in a fast access memory. Oscilloscopes provide triggered analog-to-digital converters with fast memory. We used a Tektronix TDS5104 with 1 Mpt memory and a sample rate of 5 GS/s. It can acquire electromagnetic emanations up to 2.5 GHz according to the Nyquist theorem. Moreover, this oscilloscope has antialiasing filters and supports IEEE 488 General Purpose Interface Bus (GPIB) communications. We developed a tool to define some specific triggers (essentially peak detectors) and to export the acquired data to a computer under GNU/Linux over Ethernet. Thus the signal can be processed with the GNU Radio software library and some powerful tools such as Baudline [29] or the GNU project Octave [13]. The advantage of this method is to process the raw signal, which is directly sampled from the antenna without any demodulation. Moreover, all compromising electromagnetic emanations up to a frequency of 2.5 GHz are captured. Thus, with this technique, we are able to highlight compromising emanations quickly and easily. This solution is ideal for very short data burst transmissions used by computer keyboards.

4 Experimental Setup

The objective of this experiment is to observe the existence of compromising emanations of computer keyboards when a key is pressed. Obviously electromagnetic emanations depend on the environment. We defined four different setups.

Setup 1: The Semi-Anechoic Chamber. We used a professional semi-anechoic chamber (7×7 meters). Our aim was not to cancel signal echos but to avoid external electromagnetic pollution (Faraday cage). The antenna was placed up to 5 meters from the keyboard connected to a computer (the maximum distance according to the echo isolation of the room). The tested keyboard was on a one meter high table and the computer (PC tower) was on the ground.

Setup 2: The Office. To give evidence of the feasibility of the attacks with background noise, we measured the compromising emanations of the keyboards in a small office (3×5 meters) with two powered computers and three LCD displays. The electromagnetic background noise was quite important with a cluster of 40 computers 10 meters away from the office, more than 60 powered computers on the same floor and a 802.11n wireless router at less than 3 meters away from the office. The antenna was in the office and moved back through the opened door up to 10 meters away from the keyboard in order to determine the maximum range.

Setup 3: The Adjacent Office. This setup is similar to the office setup but we measured the compromising emanations of the keyboards from an adjacent office through a wall of 15 cm composed of wood and plaster.

Setup 4: The Building. This setup takes place in a flat which is in a building of five floors in the center of a mid-size city. The keyboard was in the fifth floor. We performed measurements with the antenna placed on the same floor first. Then, we moved the antenna as far as the basement (up to 20 meter from the keyboard).

Antennas. Since the compromising emanations were found on frequency bands between 25 MHz and 300 MHz, we used a biconical antenna (50 Ohms VHA 9103 Dipol Balun) to improve the Signal-to-Noise Ratio (SNR). We also tested if these compromising emanations can be captured with a smaller antenna such as a simple loop made of a wire of copper (one meter long).

Keyboards. We picked 12 different keyboard models present in our lab: 7 PS/2 keyboards (Keyboard A1-A7), 2 USB keyboards (Keyboard B1-B2), 2 Laptop keyboards (Keyboard C1-C2) and 1 wireless keyboard (Keyboard D1). They were all bought between 2001 and 2008. We also collected measurements with the keyboard connected to a laptop with battery to avoid possible conductive coupling through the power supply. For obvious security reasons, we do not give the brand name and the model of the tested keyboards.

5 Discovering and Exploiting Emanations

To discover compromising emanations, we placed Keyboard A1 in the semi-anechoic chamber and we used the biconical antenna. A diagram of the experiment is depicted in Figure 1. We acquired the raw signal with the oscilloscope as explained above. Since the memory of the oscilloscope is limited, we have to precisely trigger data acquisition. First, we used the earliest falling edge of the data signal sent when a key is pressed . We physically connected a probe on the data wire of the cable between the keyboard and the computer.

Figure 2 gives the STFT of the captured raw signal when the key E is pressed on an American keyboard. With only one capture we are able to represent the entire spectrum along the full acquisition time. In addition, we have a visual description of all electromagnetic emanations. In particular we clearly see some carriers (vertical lines) and broadband impulses (horizontal lines). The three first techniques are based on these compromising emanations and are detailed in the following sections.

Our objective is to use an electromagnetic trigger, since we normally do not have access to the data wire. The discovered broadband impulses (horizontal lines) can be used as a trigger. Thus, with only an antenna, we are able to trigger the acquisition of the compromising electromagnetic emanations. More details are given below.

Some keyboards do not emit electromagnetic emanations when a key is pressed. But with a different trigger model, based on peak detector as well, we discovered another kind of emission, continuously generated (even if no key is pressed). This is the last technique, detailed in Section 5.4.

5.1 The Falling Edge Transition Technique

To understand how direct compromising emanations may be generated by keyboards, we need to briefly describe the PS/2 communication protocol. According to [9], when a key is pressed, released or held down, the keyboard sends a packet of information known as a *scan code* to the computer. In the default scan code set[1], most of the keys are one-byte long encoded. Some extended keys are two or more bytes long. These codes can be identified by the fact that their first byte is 0xE0. The protocol used to transmit these scan codes is a bi-directional serial communication, based on four wires: Vcc (5 volts), ground, data and clock. For each byte of the scan code, the keyboard pulls down the clock signal at a frequency between 10 KHz and 16.7 KHz for 11 clock cycles. When the clock is low, the state of the signal data is read by the computer. The 11 bits sent correspond to a start bit (0), 8 bits for the scan code of the pressed key (least significant bit first), an odd parity check bit on the byte of the scan code (the bit is set if there is an even number of 1's), and finally a stop bit (1). Figure 3 represents both data and clock signals when the key E is pressed. Note that the scan code is binded to

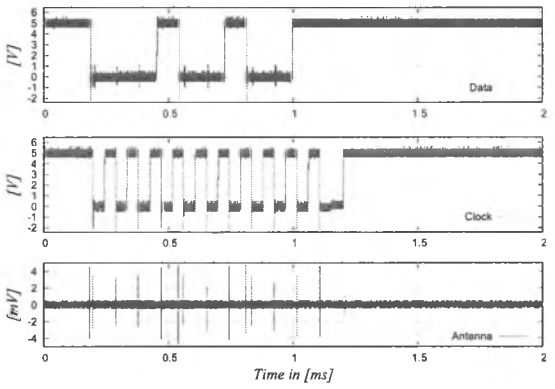

Figure 3: Data, clock and the compromising emanation captured (semi-anechoic chamber, Keyboard A1) with the loop antenna at 5 meters (a wire of copper, one meter long) when the key E (0x24) is pressed. Data signal sends the message: 0 00100100 1 1.

a physical button on the keyboard, it does not represent the character printed on that key. For instance, the scan code of E is 0x24 if we consider the American layout keyboard.

Logic states given by data and clock signals in the keyboard are usually generated by an open collector coupled to a pull-up resistor. The particularity of this system is that the duration of the rising edge is significantly longer (2 μs) than the duration of the falling edge (200 ns). Thus, the compromising emanation of a falling edge should be much more powerful (and with a higher maximum frequency) than the rising edge. This property is known and has been already noticed by Kuhn [17, p.35]. Clock and data signals are identically generated. Hence,

[1] There are three different scan code sets, but the second one is commonly used by default.

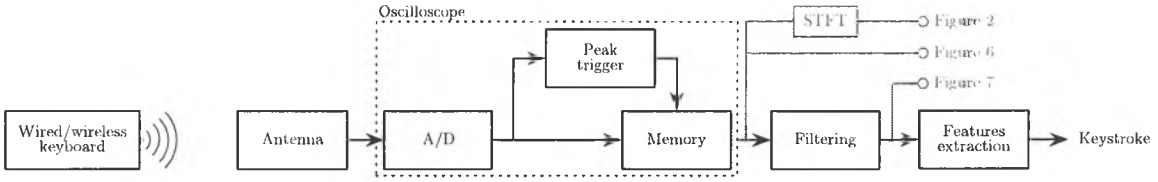

Figure 1: Diagram of our equipment for the experiments.

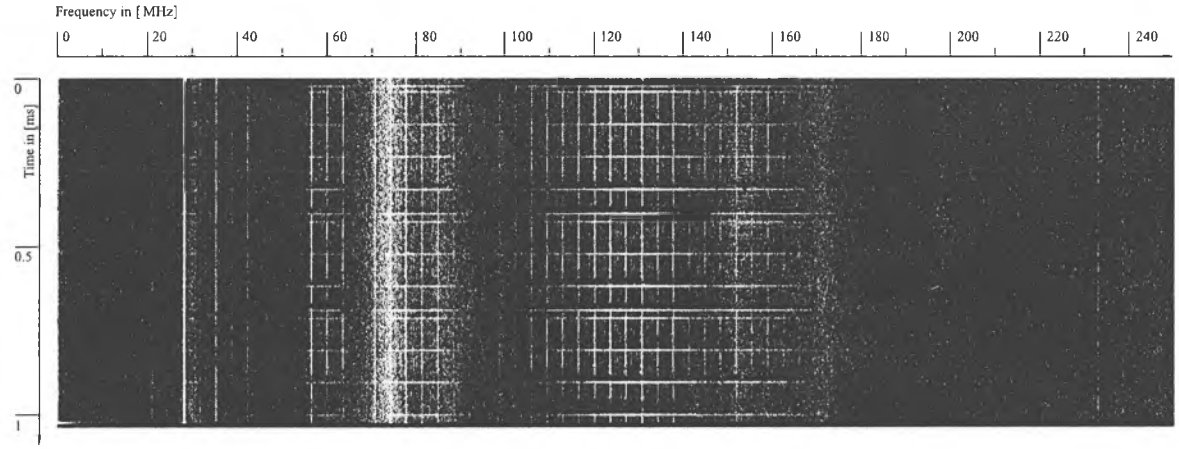

Figure 2: Short Time Fourier Transform (STFT) of the raw signal depicted in Figure 6 (Kaiser windowing of 40, 65536 points)

the compromising emanation detected is the combination of both signals. However (see Figure 3), the edges of the data and the clock lines are not superposed. Thus, they can be easily separated to obtain independent signals.

Since the falling edges of clock signal will always be at the same place, contrary to the falling edges of data signal, we can use them to improve our trigger model. Indeed we consider the detection of a signal based on 11 equidistant falling edges.

Indirect Emanations. If we compare the data signal and the compromising emanation (see Figure 4) we clearly see that the electromagnetic signal is not directly related to the falling edge, as described by Smulders. Indeed, the durations are not equivalent. Thus, the peaks acquired by our antenna seem to be indirectly generated by the falling edges of the combination of clock and data signals. They are probably generated by a peak of current when the transistor is switched. Nevertheless, these emanations, represented by 14 peaks, 11 for the clock signal and 3 for the data signal (see the horizontal lines in Figure 2 or the peaks in Figure 3) partially describe the logic state of the data signal and can be exploited.

Collisions. Because only the falling edges are detected, eventually collisions occur during the keystroke recovery process. For instance, both E (0x24) and G (0x34)

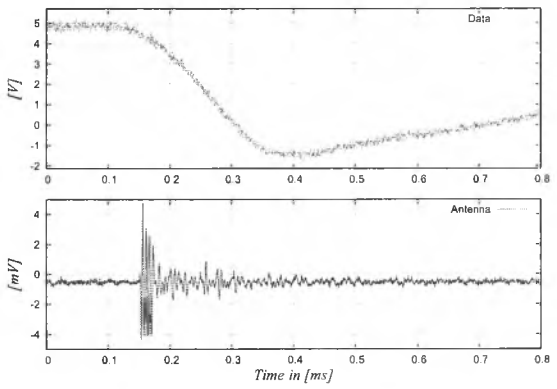

Figure 4: A falling edge of the data signal (upper graph) and the electromagnetic emanation of the keyboard (lower graph). The compromising emission is not directly generated by the data signal such as described by Smulders in [30].

share the same trace if we consider only falling edges. We define the falling edge trace as '2' when both data and clock peaks are detected and '1' when only a clock peak is captured. The letters E (see lower graph in Figure 3) and G may be described by the string `21112112111`.

In Figure 5 we grouped every one byte-long scan code, according to their shared falling edge-based traces.

Trace	Possible Keys
21111111111	<non-US-1>
21111111121	<Release key>
21111111211	F11 KP KP0 SL
21111112111	8 u
21111121111	2 a
21111121211	Caps_Lock
21111211111	F4 `
21111211211	- ; KP7
21111212111	5 t
21112111111	F12 F2 F3
21112111121	Alt+SysRq
21112111211	9 Bksp Esc KP6 NL o
21112112111	3 6 e g
21112121111	1 CTRL_L
21112121211	[
21121111111	F5 F7
21121111211	KP- KP2 KP3 KP5 i k
21121112111	b d h j m x
21121121111	SHIFT_L s y
21121121211	' ENTER]
21121211111	F6 F8
21121211211	/ KP4 l
21121212111	f v
21211111111	F9
21211111211	, KP+ KP. KP9
21211112111	7 c n
21211121111	Alt_L w
21211121211	SHIFT_R \
21211211111	F10 Tab
21211211211	. KP1 p
21211212111	Space r
21212111111	F1
21212111211	0 KP8
21212112111	4 y
21212121111	q
21212121211	=

Figure 5: The one byte-long scan codes classification, according to the falling edges trace for an American keyboard layout.

Even if collisions appear, falling edge traces may be used to reduce the subset of possible transmitted scan codes. Indeed, the average number of potential characters for a falling edge trace is 2.4222 (2.0556 if we consider only alpha-numeric characters and a uniform distribution). For example, an attacker who captured the falling edge-based trace of the word `password` obtains a subset of $3 \cdot 2 \cdot 3 \cdot 3 \cdot 2 \cdot 6 \cdot 2 \cdot 6 = 7776$ potential words, according to Figure 5. Thus, if the objective of the attacker is to recover a secret password, he has significantly reduced the test space (the initial set of $36^8 \approx 2^{41}$ is lowered to 2^{13}). Moreover, if the eavesdropped information concerns an e-mail or a text in English, the plaintext recovery process can be improved by selecting only words contained in a dictionary.

Feature Extraction. The recovery procedure is firstly based on a trigger model, able to detect 11 equidistant peaks transmitted in less than 1 ms. Then, we compute the number of peaks, using a peak-detection algorithm and the GNU Radio library. The feature extraction is based on the number of peaks correlated to the most probable value of the table depicted in Figure 5. The main limitation of the recovery procedure is the ability to trigger this kind of signal.

5.2 The Generalized Transition Technique

The previously described attack is limited to a partial recovery of the keystrokes. This is a significant limitation. We know that between two '2' traces, there is exactly one data rising edge. If we are able to detect this transition we can fully recover the keystrokes.

To highlight potential compromising emanations on the data rising edge, we use a software band-pass filter to isolate the frequencies of the broadband impulses (e.g. 105 MHz to 165 MHz of the raw signal in Figure 2). Figure 7 corresponds to the filtered version of the raw time-domain signal represented in Figure 6. We remark

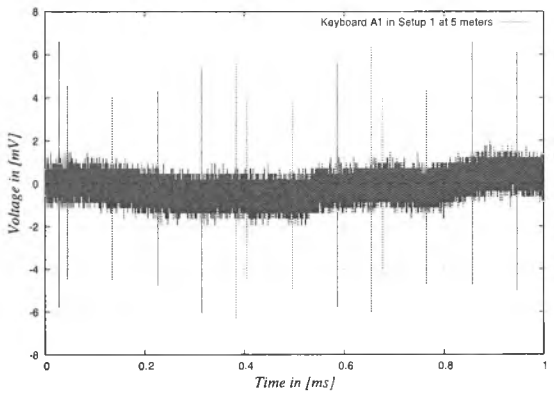

Figure 6: Raw signal (Keyboard A1, Setup 1 at 5 meters with the biconical antenna) when the key E is pressed.

that the filtering process significantly improves the SNR. Thus, the peak detection algorithm is much more efficient.

Furthermore, we notice that the energy of the peaks of the clock falling edges is not constant. Empirically, clock peaks have more energy when the state of data signal is high. Indeed, the data signal pull-up resistor is open. When the clock signal is pulled down, the surplus of energy creates a stronger peak. Hence, the peaks generated by the falling edge of the clock signal intrinsically encode the logic state of the data signal. Because

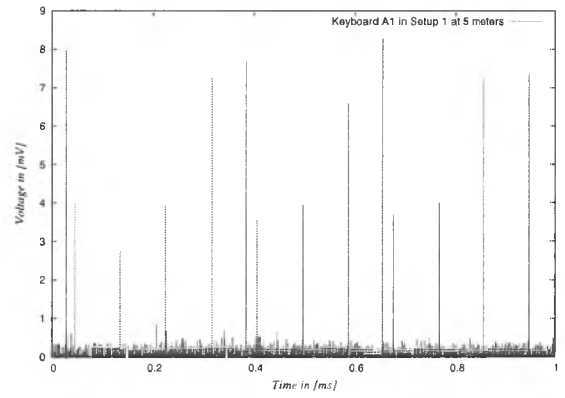

Figure 7: Band-pass (105-165MHz) filtered signal of Figure 6.

there is exactly one rising edge between two falling edge traces of '2', we simply consider the highest clock peak as the rising edge data transition. For example in Figure 7, the rising edge data transitions are respectively at peaks 5 and 9. Thus, the complete data signal is 0010 0100 which corresponds to 0x24 (E). Thus, we manage to completely recover the keystrokes. Note that the band-pass filter improves the previous attack as well. However, the computation cost prevents real time keystroke recovery without hardware accelerated filters.

Feature Extraction. The recovery procedure is firstly based on the same trigger model described previously (11 equidistant peaks detected in less than 1 ms). Then, we filter the signal to consider only the frequency bands containing the peak impulses. The feature extraction is based on the detected peaks. First, we define the threshold between a high peak and a low peak thanks to the two first peaks. Indeed, because we know that data and clock are pulled down, the first one corresponds to a state where clock is high and data is low and the second one describes the state where both signals are low. Then, we determine the potential (and colliding) keystrokes with Figure 5. In our example, it corresponds to the keys 3,6,E,G. Then, we select some bits which differentiate these keys. According to their scan code 3=0x26, 6=0x36, E=0x24, G=0x34 we check the state of the peaks 4 and 8 in Figure 7, which correspond to respectively the second and the fifth bit of the scan codes. Because they are both low, we conclude that the transmitted key is E.

5.3 The Modulation Technique

Figure 2 highlights some carriers with harmonics (vertical lines between 116 MHz and 147 MHz). These compromising electromagnetic emissions come from unintentional emanations such as radiations emitted by the clock, non-linear elements, crosstalk, ground pollution, etc. Determining theoretically the reasons of these compromising radiations is a very complex task. Thus, we can only sketch some probable causes. The source of these harmonics corresponds to a carrier of approximately 4 MHz which is very likely the internal clock of the microcontroller inside the keyboard. Interestingly, if we correlate these harmonics with both clock and data signals, we clearly see modulated signals (in amplitude and frequency) which fully describe the state of both clock and data signals, see Figure 8. This means that the scan code can be completely recovered from these harmonics.

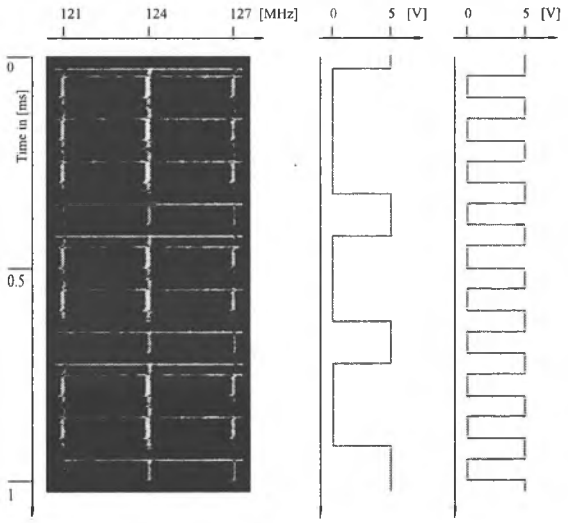

Figure 8: The amplitude and frequency modulations of the harmonic at 124 MHz correlated to both data and clock signals (Keyboard A1, semi-anechoic chamber at 5 meters).

Note that even if some strong electromagnetic interferences emerge, the attacker may choose non-jammed harmonics to obtain a clear signal. It is even possible to superpose them to improve the SNR. Compared to the previous techniques, the carrier-based modulation is much more interesting for distant reception. Indeed, AM and FM transmissions are generally less disrupted by noise and obstacles such as walls, floors, etc. Moreover this technique is able to fully recover the keystrokes. These indirect emanations – which have no formal explanation, but are probably based on crosstalk with the ground, the internal clock of the microcontroller, data and clock signals – let the attacker recover the keystrokes of a keyboard.

This experiment shows that cheap devices such as keyboards may radiate indirect emanations, which are much

more compromising than direct emanations. Even if the SNR is smaller, the use of a frequency modulation significantly improves the eavesdropping range. Moreover, the attacker may avoid some noisy frequency bands by selecting only the clearest harmonics. Furthermore, indirect emanations completely describe both clock and data signals.

Feature Extraction. The feature extraction is based on the demodulation in frequency and amplitude of the captured signal centered on the strongest harmonic. In our example and according to Figure 8 the carrier corresponds to 124 MHz. We used the GNU Radio library to demodulate the signal. However, we still need to use the trigger model based on peak detector since the memory of the oscilloscope is limited. Another option is to directly capture the signal with the USRP. Indeed, the lower but continuous sampling rate of the USRP is sufficient to recover the keystrokes. Unfortunately, the sensitivity of the USRP is weaker than the oscilloscope and the eavesdropping range is limited to less than 2 meters in the semi-anechoic chamber.

5.4 The Matrix Scan Technique

The techniques described above are related to the use of PS/2 and some laptop keyboards. However, new keyboards tend to use USB or wireless communication. In this section, we present another compromising emanation which concerns all keyboard types: PS/2, USB, Notebooks and even wireless keyboards. This attack was previously postulated by Kuhn and Anderson [20] but no practical data has appeared so far in the open literature.

Almost all keyboards share the same pressed key detection routine. A major technical constraint is to consider a key as pressed if the button is pushed for 10 ms, see US Patent [31]. Thus every pressed key should be detected within this time delay. From the manufacturer's point of view, there is another main constraint: the cost of the device. A naive solution to detect pressed keys is to poll each key in a row. This solution is clearly not optimal since it requires a large scan loop routine and thus longer delays. Moreover important leads (i.e. one circuit for each key) increase the cost of the device.

A smart solution [31] is to arrange the keys in a *matrix*. The keyboard controller, often a 8-bit processor, parses columns one-by-one and recovers the state of 8 keys at once. This *matrix scan* process can be described as 192 keys (some keys may not be used, for instance modern keyboards use 104/105 keys) arranged in 24 columns and 8 rows. Columns are connected to a driver chip while rows are connected to a detector chip. Keys are placed at the intersection of columns and rows. Each key is an analog switch between a column and a row. The keyboard controller pulses each column through the driver (using the address bus and the strobe signal). The detector measures the states of the 8 rows. Note that a row is connected to 24 keys, but only one may be active, the one selected by the driver. Suppose we pressed the key corresponding to column 3 and row 5. The controller pulses columns . . ., 22, 23, 24, 1, 2 with no key event. Now, the controller pulses column 3. Row 5, which corresponds to the pressed key, is detected. The keyboard starts a subroutine to transmit the scan code of the key to the computer. This subroutine takes some time. Thus, the next column pulse sent by the scan routine is delayed.

Columns in the matrix are long leads since they connect generally 8 keys. According to [31], these columns are continuously pulsed one-by-one for at least $3\mu s$. Thus, these leads may act as an antenna and generate electromagnetic emanations. If an attacker is able to capture these emanations, he can easily recover the column of the pressed key. Indeed, the following pulse will be delayed.

To figure out if these emanations can be captured, we picked Keyboard A6 and acquired the signal being one meter from the keyboard in the semi-anechoic chamber with a simple one meter long wire of copper as antenna. Figure 9 gives the repeated peak burst continuously emitted by the keyboard. Figure 10 shows the zoomed compromising emanations when the key C resp. key H is pressed.

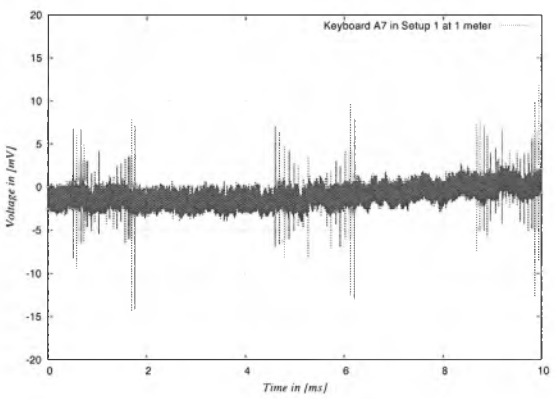

Figure 9: A large view of compromising emanations exploited by the Matrix Scan Technique, (Keyboard A7, semi-anechoic chamber at 1 meter).

The key matrix arrangement may vary, depending on the manufacturer and the keyboard model. We dismantled a keyboard and analyzed the key circuit layout to retrieve the matrix key specifications. The right part of the keyboard layout is depicted on Figure 11. We clearly identify a column (black) and fours rows.

Figure 12 represents the groups of alphanumeric scan codes according to their indirect compromising emana-

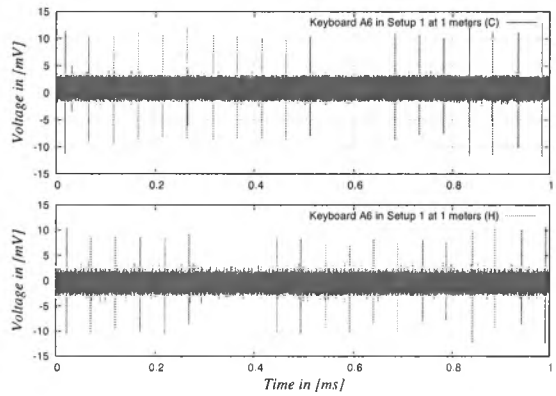

Figure 10: The matrix scan emanations for the letters C and H (Keyboard A6, Setup 1 at 1 meter).

tions (or column number) for Keyboard A6. We describe each electromagnetic signal as a number corresponding to the delayed peak. For example, in Figure 10, the key C is described as 12 and the key H as 7.

Even if this signal does not fully describe the pressed key, it still gives partial information on the transmitted scan code, i.e. the column number. So, as described in the Falling Edge Transition Technique, collisions occurs between key codes. Note that this attack is less efficient than the first one since it has (for this specific keyboard) in average 5.14286 potential key codes for a keystroke (alpha-numeric only). However, an exhaustive search on the subset is still a major improvement.

Note that the matrix scan routine loops continuously. When no key is pressed, we still have a signal composed of multiple equidistant peaks. These emanations may be used to remotely detect the presence of powered computers.

Concerning wireless keyboards, the wireless data burst transmission can be used as an electromagnetic trigger to detect exactly when a key is pressed, while the matrix scan emanations are used to determine the column it belongs to. Moreover the ground between the keyboard and the computer is obviously not shared, thus the compromising electromagnetic emanations are stronger than those emitted by wired keyboards. Note that we do not consider the security of the wireless communication protocol. Some wireless keyboards use a weakly or not encrypted channel to communicate with the computer, see [8, 23].

Feature Extraction. To partially recover keystrokes, we continuously monitor the compromising emanations of the matrix scan routine with a specific trigger model. According to Figure 12 the six first peaks are always present, as well as the last three peaks. Indeed, these peaks are never missing (or delayed). Thus, we use this

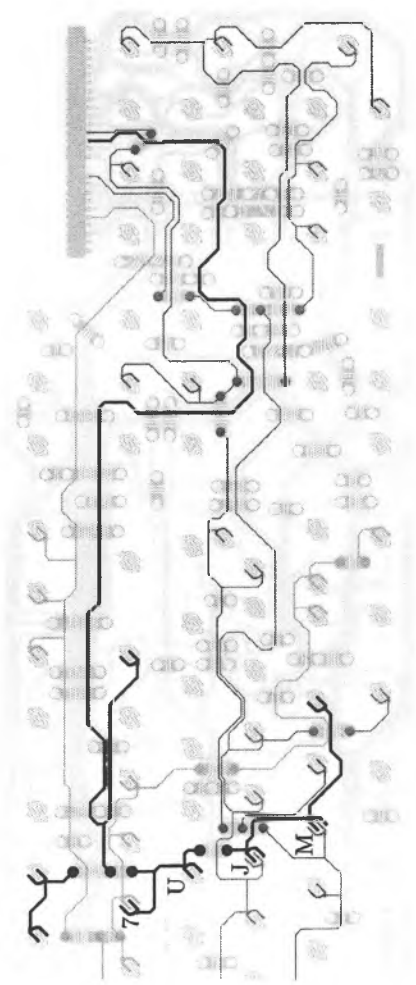

Figure 11: Scan matrix polls columns one-by-one. We are able to deduce on which column the pressed key belongs to. On this keyboard, there will be a collision between keystrokes 7, U, J, M, and others non alpha-numeric keys such as F6, F7, ^, and the dot.

Peak trace	Possible Keys
7	6 7 h J M N U Y
8	4 5 B F G R T V
9	Backspace ENTER
10	9 L O
11	0 P
12	3 8 C D E I K
13	1 2 S W X Z
14	SPACE A Q

Figure 12: The alpha-numeric key classification according to the key scanning routing compromising emanations (Keyboard A6 with American layout).

fixed pattern to define a trigger model. Moreover, the matrix scan continuously radiates compromising emanations since the key is pressed. When a keystroke subset is detected, we acquire multiple samples until another pattern is detected. Therefore, we pick the most often captured pattern.

5.5 Distinguishing Keystrokes from Multiple Keyboards

The falling edge-based traces are distinguishable depending on the keyboard model. Indeed, according to the frequency of the peaks, the clock frequency inconsistencies, the duration between clock and data falling edges, we are able to deduce a specific *fingerprint* for every keyboard. When multiple keyboards are radiating at the same time, we are able to identify and differentiate them. For example, we measured a clock frequency of 12.751 KHz when a key was pressed on a keyboard and the clock frequency was 13.752 KHz when a key was pressed on another keyboard. Thus, when an emanation is captured, we measure the time between two falling edges of the clock and then we deduce if the scan code comes from first or the second keyboard. In practice, we were able to differentiate all the keyboards we tested, even if the brand and the model were equivalent.

This method can be applied to the Falling Edge Transition Technique, the Generalized Transition Technique and the Modulation Technique since they rely on the same kind of signal. The distinguishing process for the Modulation Technique can even be improved by using the clock frequency inconsistencies of the microcontroller as another identifier. For the Matrix Scan Technique, the compromising electromagnetic emanation burst emitted every 2.5 ms (see Figure 9) can be used as a synchronization signal to identify a specific keyboard emission among multiple keyboards. Additionally, the duration between the scan peaks is different, depending on the keyboard model. Thus, it may be used to identify the source keyboard. However, the continuous emission significantly deteriorates the identification process.

Another physical element can be used to distinguish keystrokes from multiple keyboards. For the three first techniques, the broadband impulse range is determined by the length of the keyboard cable, which forms a resonant dipole. Thus, we can use this particularity to identify the source of a compromising emanation. An interesting remark is that the length of the wire connecting the computer to the keyboard is shorter in notebooks. The frequency band of the compromising emanation is higher and the SNR smaller. The Matrix Scan Technique emanates at a higher frequency since the leads of the keyboard layout, acting as an antenna, are shorter.

6 Evaluation in Different Environments

While we have demonstrated techniques that should be able to extract information from keyboard emanations, we have not studied how they are affected by different environments. In this section we study the accuracy of our approaches in all the environments described. Our analysis indicates that keyboard emanations are indeed problematic in practical scenarios.

Evaluating the emission risks of these attacks is not an easy task. Indeed, these results highly depend on the antenna, the trigger model, pass-band filters, peak detection, etc. Moreover, we used trivial filtering processes and basic signal processing techniques. These methods could be significantly improved using beamforming, smart antennas, better filters and complex triggers. In addition, measurements in real environments but the semi-anechoic chamber were subject to massive change, depending on the electromagnetic interferences. Figure 13 gives the list of vulnerable keyboards in all setups, according to the four techniques previously described. Note that all the tested keyboards (PS/2, USB, wireless and laptop) are vulnerable to at least one of these attacks. First, we present the measurements in Setup 1 (semi-anechoic chamber) to guarantee some stable results.

Keyboard	Type	FETT	GTT	MT	MST
A1	PS/2	✓	✓	✓	✓
A2	PS/2	✓	✓		✓
A3	PS/2	✓	✓	✓	✓
A4	PS/2	✓	✓	✓	
A5	PS/2	✓	✓	✓	
A6	PS/2	✓	✓		✓
A7	PS/2	✓			✓
B1	USB				✓
B2	USB				✓
C1	LT	✓	✓		✓
C2	LT				✓
D1	Wi				✓

Figure 13: The vulnerability of the tested keyboards according to the Falling Edge Transition Technique (FETT), the Generalized Transition Technique (GTT), the Modulation Technique (MT) and the Matrix Scan Technique (MST).

6.1 Results in the Semi-Anechoic Chamber

We consider an attack as successful when we are able to correctly recover more than 95% of more than 500 keystrokes. The Falling Edge Transition Technique, the Generalized Transition Technique and the Modulation Technique are successful in the semi-anechoic chamber

for all vulnerable keyboards. This means that we can recover the keystrokes (fully or partially) to at least 5 meters (the maximum distance inside the semi-anechoic chamber). However, the Matrix Scan Technique is limited to a range of 2 to 5 meters, depending on the keyboard. Figure 14 represents the probability of success of the Matrix Scan Technique according to the distance between the tested keyboard and the antenna.

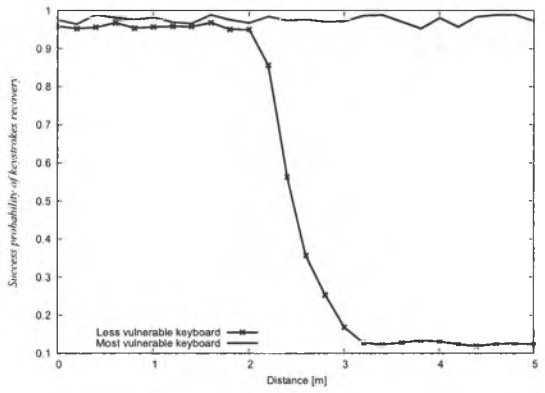

Figure 14: The success probability of the Matrix Scan Technique in the semi-anechoic chamber according to the distance.

We notice that the transition between a successful and a missed attack is fast. Indeed, The correctness of the recovery process is based on the trigger of the oscilloscope. If a peak is not detected, the captured signal is incomplete and the recovered keystroke is wrong. Thus, under a SNR of 6 dB there is nearly no chance to successfully detect the peaks. The SNR is computed according to the average value of the peaks in volts divided by the RMS of the noise in volts.

Considering 6 dB of SNR as a minimum, we are able to estimate the theoretical maximum distance to successfully recover the keystrokes for all techniques in the semi-anechoic chamber. Figure 15 gives the estimated maximum distance range according to the weakest and the strongest keyboard.

In Figure 16 the upper graph gives the SNR of the Falling Edge Transition Technique and the Generalized Transition Technique on Keyboard A1 from 1 meter to 5 meters. The middle graph details the SNR (in dB) of the strongest frequency carrier of the Modulation Technique for the same keyboard. Thus, we can estimate the maximum range of these attacks according to their SNR. The lower graph gives the SNR of the Matrix Scan Technique for the same keyboard. All the measurements were collected in the semi-anechoic chamber.

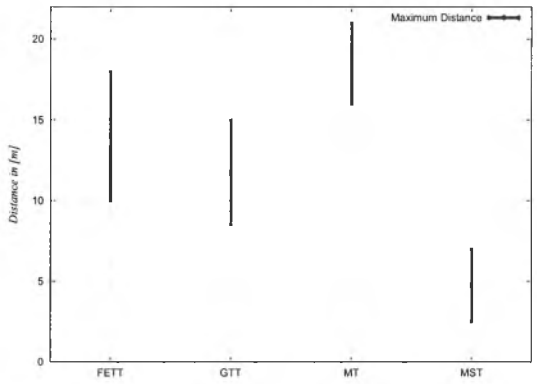

Figure 15: The theoretically estimated maximum distance range to successfully recover 95% of the keystroke according the four techniques in the semi-anechoic chamber, from the less vulnerable to the most vulnerable keyboard.

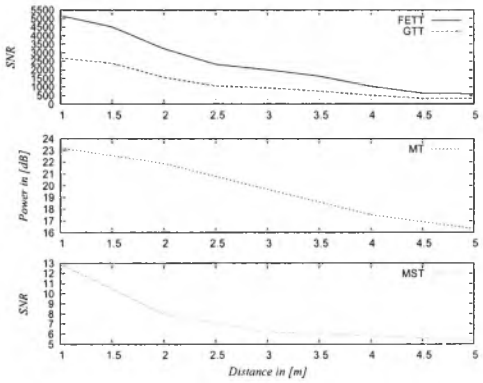

Figure 16: Signal-to-Noise ratio of the peaks [V] / RMS of the noise [V] for the Falling Edge Transition Technique and the Generalized Transition Technique (upper graph). SNR [dB] of the compromising carrier of the Modulation Technique (middle graph). SNR of the peaks [V] / RMS of the noise [V] for Matrix Scan Technique (lower graph).

6.2 Results in Practical Environments

The second phase is to test these techniques in some practical environments. The main difference is the presence of a strong electromagnetic background noise. However, all the techniques remain applicable.

Setup 2: The Office. Figure 17 gives the probability of success of the Generalized Transition Technique on Keyboard A1 measured in the office according to the distance between the antenna and the keyboard. We notice that the sharp transition is present as well when the SNR of the peaks falls under 6 dB. The maximum range of this at-

tack is between 3 and 7.5 meters depending on the tested keyboard. Note that these values were unstable due to a changing background noise. They correspond to an average on multiple measurements.

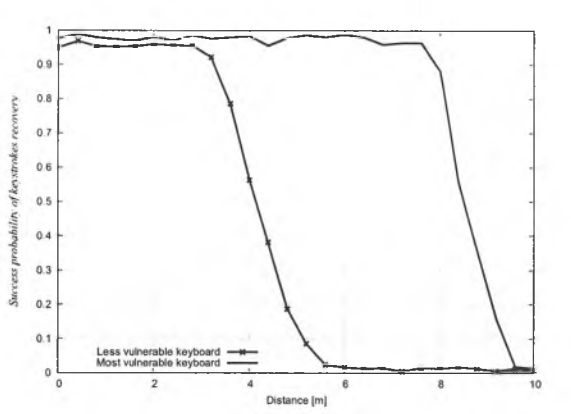

Figure 17: The success probability of the Generalized Transition Technique in the office, according to the distance between the keyboard and the antenna (biconical).

The Modulation Technique is based on a signal carrier. The SNR of this carrier should determine the range of the attack. However, we obtained better results with the same trigger model used in the Falling Edge Transition Technique and the Generalized Transition Technique than one based on the carrier signal only.

Because the Matrix Scan Technique is related to the detection of the peaks, we noticed the same attenuation when the SNR falls under 6 dB. Figure 18 gives the maximum range for the four techniques measured in the office.

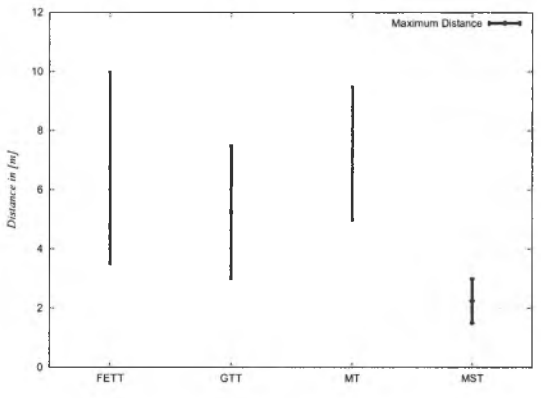

Figure 18: Maximum distance ranges, from the least vulnerable keyboard to the most vulnerable keyboard, to successfully recover 95% of the keystroke according to the techniques (in the office with the biconical antenna).

Setup 3: The Adjacent Office. Results on this setup are basically the same as the previous setup (the office), except that the wall made of plaster and wood removes 3 dB to the SNR.

Setup 4: The Building. We notice some unexpected results in this setup. Indeed, we are able to capture the signal and successfully recover the keystroke with a probability higher than 95% 20 meters away from the keyboard (i.e. the largest distance inside the building). Sometimes the environment can be extremely favorable to the eavesdropping process. For example, metallic structures such as pipes or electric wires may act as antennas and significantly improve the eavesdropping range. In this case, the compromising emanations are carried by the shared ground of the electric line. Thus, the range is defined by the distance between the keyboard and the shared ground and the distance between the shared ground and the antenna. Note that the Matrix Scan Technique is easily disrupted by a noisy shared ground, since the trigger model is more complicated and the emanations weaker. For this technique, we were only able to successfully capture compromising emanations when the keyboard is at less than one meter away from the shared ground. This setup is interesting because it corresponds to a practical scenario where the eavesdropper is placed in the basement of a building and tries to recover the keystrokes of a keyboard at the fifth floor. Unfortunately, it was impossible to provide stable measurements since they highly depend on the environment. We noticed that the main (metallic) water pipe of the building acts as an antenna as well and can be used in place of the shared ground. Furthermore, this *antenna* is less polluted by electronic devices.

Perfect Trigger. We tried the same experiment in the office, but the background noise was too strong. Indeed, we were not able to successfully detect the compromising emissions. However, with a probe physically connected to the data wire, we correctly triggered the emanations. Indeed, the electromagnetic compromising emissions are present in the shared ground. The limitation concerns only the trigger. All the techniques were applicable on the whole floor (about 20 meters) with the keyboard one meter away from the shared ground.

Obviously, you can directly connect the oscilloscope to the shared ground of the building to eavesdrop the keystrokes. Note that an old PC tower used to supply tested keyboards carries the compromising emanations directly through the shared ground. But, this is out of the scope of this paper since we focused our research on electromagnetic emanations only. To avoid such conductive coupling through power supply, we performed our measurements with the keyboards connected to a battery powered laptop.

7 Countermeasures

In this Section, we suggest some possible countermeasures to protect keyboards against the four attacks.

The first solution to avoid the compromising emanations seems trivial. We should shield the keyboard to significantly reduce all electromagnetic radiations. Many elements inside the keyboard may generate emanations: the internal electronic components of the keyboard, the communication cable, and the components of the motherboard inside the computer. Thus, to eliminate these emanations, we have to shield the whole keyboard, the cable, and a part of the motherboard of the computer. We discussed with a manufacturer and he pointed out that the price to shield the entire keyboard will at least double the price of the device. This solution may not be applicable for cost reasons. One can find on the market some keyboards which respect the NATO SDIP-27 standard. All these documents remain classified and no information is available on the actual emission limit or detailed measurement procedures. Another solution is to protect the room where vulnerable keyboards are used. For example, the room can be shielded or a secure physical perimeter can be defined around the room, for instance 100 meters. Attacks 1, 2 and 3 are directly related to the PS/2 protocol. One solution to avoid unintended information leaks is to encrypt the bi-directional serial communication, see [3]. In modern keyboards, one chip contains the controller, the driver, the detector, and the communication interface. So, the encryption may be computed in this chip and no direct compromising emanations related to the serial communication will appear. Attack 4 is related to the scan matrix loop. A solution could be to design a new scanning process algorithm. Even if keyboards still use scan matrix loop routine, there exists some applicable solutions. As described by Anderson and Kuhn [3], the loop routine can be randomized. Actually columns are scanned in the incremental order 1, 2, 3, . . ., 23, 24, but it seems possible to change the order randomly. Moreover, we can add some random delays during the scanning loop process to obfuscate the execution of the subroutine. Both solutions do not avoid electromagnetic emanations, but makes the keystrokes recovery process theoretically impossible. Paavilainen [27] also proposed a solution. It consists in high-frequency filtering matrix signals before they are fed into the keyboard. This will significantly limits compromising electromagnetic emanations.

8 Extensions

Our study has shown that electromagnetic emanations of modern wired and wireless keyboards may be exploited from a distance to passively recover keystrokes. In this section, we detail some extensions and remarks.

The main limitation of these attacks concerns the trigger of the data acquisition. This can be improved with an independent process, using specific filters between the antenna and the ADC. Additionally, other compromising emanations such as the sound of the pressed key could be used as trigger. Furthermore, modern techniques such as beamforming could significantly improve the noise filtering.

Another improvement would be to simultaneously leverage multiple techniques. For keyboards that are vulnerable to more than one technique, we could correlate the results of the different techniques to reduce uncertainty in our guesses.

Another extension would be to accelerate these attacks with dedicated hardware. Indeed, the acquisition time (i.e. the transfer of the data to a computer), the filtering and decoding processes take time (about two seconds per keystroke). With dedicated system and hardware-based computation such as FPGAs, the acquisition, filtering and decoding processes can obviously be instantaneous (e.g. less than the minimum time between two keystrokes). However, the keystrokes distinguishing process when multiple keyboards are radiating is still difficult to implement especially for the Matrix Scan Technique, since the acquisition process should be continuous.

We spend time experimenting with different types of antennas and analog-to-digital converters. In particular, we used the USRP and the GNU Radio library to avoid the need of an oscilloscope and to obtain a portable version of the Modulation Technique. Indeed, we can hide the USRP with battery and a laptop in a bag, the antenna can be replaced by a simple wire of copper (one meter long) which is taped on the attacker's body hidden under his clothes. With this transportable setup, we are able to recover keystrokes from vulnerable keyboards stealthily. However the eavesdropping range is less than two meters.

9 Conclusion

We have provided evidence that modern keyboards radiate compromising electromagnetic emanations. The four techniques presented in this paper prove that these inexpensive devices are generally not sufficiently protected against compromising emanations. Additionally, we show that these emanations can be captured with relatively inexpensive equipment and keystrokes are recovered not only in the semi-anechoic chamber but in some practical environments as well.

The consequences of these attacks is that compromising electromagnetic emanations of keyboards still represent a security risk. PS/2, USB laptop and wireless

keyboards are vulnerable. Moreover, there is no software patch to avoid these attacks. We have to replace the hardware to obtain safe devices. Due to cost pressure in the design, manufacturers may not systematically protect keyboards. However, some (expensive) secure keyboards already exist but they are mainly bought by military organizations or governments.

The discovery of these attacks was directly related to our method based on the analysis of the entire spectrum and the computation of Short Time Fourier Transform. This technique has some pros such as the human-based visual detection of compromising emanations, the large spectrum bandwidth, the use of the raw signal without RF front-ends and the post-demodulation using software libraries. The cons are the limited memory and the difficulty to obtain efficient triggers. However, for short data bursts, this solution seems relevant.

Future works should consider similar devices, such as keypads used in cash dispensers (ATM), mobile phone keypads, digicodes, printers, wireless routers etc. Another major point is to avoid the use of a peak detection algorithm since it is the main limitation of these attacks. The algorithms of the feature extractions could be improved as well. The correlation of these attacks with non-electromagnetic compromising emanation attacks such as optical, acoustic or time attacks could significantly improve the keystroke recovery process.

We discussed with a few agencies interested by our videos [36]. They confirmed that this kind of attack has been practically done since the 1980's on old computer keyboards, with sharp transitions and high voltages. However, they were not aware on the feasibility of these attacks on modern keyboards. Some of these attacks were not known to them.

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Aug 15

Hardware Keystroke Logging

Say you work in a company and are up for a promotion. You want to negotiate your salary effectively, but to do this, you need to know what others in that position are making. How do you get into the Human Resource records?

Bob, who has a cube across the hall, is the DBA. He could get in there, but how do you get his password? Your network is monitored and audited pretty closely. You can't do anything to steal his password "on the network" which might get logged and would be traceable to you.

Enter this little device:

This USB keyboard logger has a huge 2MB or 4MB memory capacity, organized into an advanced flash file system. Super fast data retrieve is achieved by switching into pendrive mode for download. Completely invisible for computer operation…

It comes in USB and PS/2 models and costs less than $100. (No link, lest I be accused of encouraging this. You can find these things easily enough if you want to.)

One night, you work late, then you unplug his keyboard, plug this device into his computer, then plug his keyboard into the device. His computer is way under his desk, so he'll never see it. You retrieve the device the next evening and download all his keyboard input for the entire day from the internal Flash memory. It wouldn't be hard to pick out his password, and now you're him.

This is unlike a software keyboard logger because there's no evidence left behind. No process that runs in the background, no need to install anything on his machine, etc. It's like stabbing someone with an icicle — no evidence gets left behind.

All you security types out there — how do you defend against this? Do they sell encrypting keyboards, which encrypt data sent down the keyboard cable and decrypt it on the machine?

by Deane August 15, 2006 1:44 PM Follow Gadgetopia on Twitter

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What Links Here

Defeating Keystroke Logging

We've talked a bit about keyloggers before, which can be a brutally effective way to capture passwords (see this post, this post, or this post). But there's a completely simple way to defeat them, based on the fact that a keylogger doesn't know where on the page the focus is when…

Keystroke Logging in Action

Lessons Learned from Biggest Bank Heist in History: In the comments on yesterday's post about hardware keystroke loggers, someone posted a link to this story about a near-heist at the Japanese bank, Sumitomo Mitsui. Would-be robbers used this exact attack. By installing software keystroke loggers on the PCs…

Comments

by Michael. August 15, 2006 2:36 PM

On modern computers, keyboards tend to not work anymore when unplugged and replugged when the PC still runs. So if you leave your PC on all time, and someone hooks such a device to

your PC, you come in in the morning and the keyboard is not working. Or if the eavesdropper is a bit smarter, your PC has rebooted. Both would be a signal for me to check what had happened.

---

by Deane, August 15, 2006 2:38 PM

On modern computers, keyboards tend to not work anymore when unplugged and replugged when the PC still runs.

Really? I haven't found this to be the case with my machines.

---

by Anthony Mills, August 15, 2006 2:58 PM

Keystroke logger :)

It would be very difficult to guard against this. After all, if you don't have physical security, you don't have security.

---

by Michael, August 15, 2006 3:01 PM

Works for me all the time - and I hate it. Maybe it's with USB stuff only. Hadn't had a PS/2 keyboard for ages.

If it doesn't work for your PC then you must refer to "plan B" and "booby trap" your PC. A motion sensor comes to mind, triggering when the (tightly stacked towards the back) PC gets moved in order to make way for the plug.

---

by Deane, August 15, 2006 3:27 PM

It would be very difficult to guard against this. After all, if you don?t have physical security, you don?t have security.

I've been in a lot of a IT shops, and I haven't seen one yet that physical secures all the desktop machines. You?

---

by Anthony Mills, August 15, 2006 3:59 PM

I've been in a lot of a IT shops, and I haven't seen one yet that physical secures all the desktop machines. You?

Nope. And the headaches that would entail would be far more costly than not taking the measures.

Remember, security is a series of tradeoffs. You can't ensure someone won't do something boneheaded like that, so you put something in the company policy manual about it and generally forget it. And if someone does that, you fire them and sue for damages. And you try not to hire someone like that in future.

Employees will always be able to do stuff like that. If it's not a keystroke logger, it could be a wireless mini-cam. Or it could be a replacement keyboard (slightly modified of course). Or it could be a Trojan. Or it could be getting Bob drunk and asking him the password...

---

by Dave, August 15, 2006 4:16 PM

Let's say you stuck this doodad on Bob's computer and weren't able to get back to it for a week? Would this thing max out and cause an interruption that would result in a service call? Or would it just happily pass along the bits that it can't hold?

If one were devious enough to do this, you could also pick up a few blackmail-worthy tidbits about Bob, which could be used to enhance your earning potential.

---

by Bob, August 15, 2006 4:33 PM

Go ahead and try it! I dare you!.....No, wait...I double dog dare you....!!!!!

---

by Dave, August 15, 2006 5:07 PM

Uh-oh; Bob's on to your game, Deane.

---

by Peter Harkins, August 15, 2006 7:15 PM

Shameless self-promo: I wrote about this a few months ago, hit the link on my name.

---

by Jon Mark Allen, August 16, 2006 3:32 PM

The Sumitomo Mitsui Banking Corporation in Tokyo decided the answer to this question was Super Glue!

Could be a bit of overkill, but...

---

by Deane, August 16, 2006 3:59 PM

The Sumitomo Mitsui Banking Corporation in Tokyo decided the answer to this question was Super Glue!

Not a bad idea, actually. More manageable would be a desktop where the keyboard attached inside the case, which would be locked.

When you really think about it, keyboards are a pretty stunning security hole. A *lot* of very sensitive data travels through a keyboard into the machine, and it can be intercepted pretty easily. The network cable too -- I'm sure there are physical capture devices for them that you can attached to a machine for a day or two.

---

by NoBodyYouKnow, December 31, 2007 9:54 AM

Ok, ready for a great little trick to bypass your would-be co-worker spy? This is a great but little know way to get around the key logger attached to the back of your PC. The beauty of it is, you keep letting the spy think he's undetected, ie he thinks he knows your password when in reality you're using the real one and letting him think it's something else. Ok, here goes. Pay attention.....

Click on Start, then All Programs, then Accessories, then Accessibility, then On-Screen Keyboard.

The rest should be self explainitory, if not, then you shouldn't be in the corporate possition you're in. Just use the on screen keyboard to input your password at the appropriate point and access your secure files. Since the keystrock logger on the back of your PC only records keys actually pressed on the hard-keyboard itself, the spy will never see your Real Password and will continue to think the one he has is ginuine. If you want to really confound him, reset the Fake Password daily by the conventional means and continue to access your files by the method above. While he'll never be able to access your system, he'll start thinking he's one step behind you password wise since each new password he receives won't let him in. Watch him get more and more flustered daily as he's tries unsuccessfully to catch up with your resetting the latest Fake Password. Of course it's not necessary to reset what he sees but the process keeps him thinking there must be a really good reason you're resetting your password every day. He's just a fumbling would-be James Bond who's too stupid to realize every single one of the new passwords are worthless and for your amusement only. Good Luck and have fun. PS...Remember however, what ever you type on the hard-keyboard will be seen by the logger device.

---

by JOEL SHAW, July 2, 2009 10:47 PM

WIRELESS KEYLOGGER PLUG

$199.99

Add to Cart

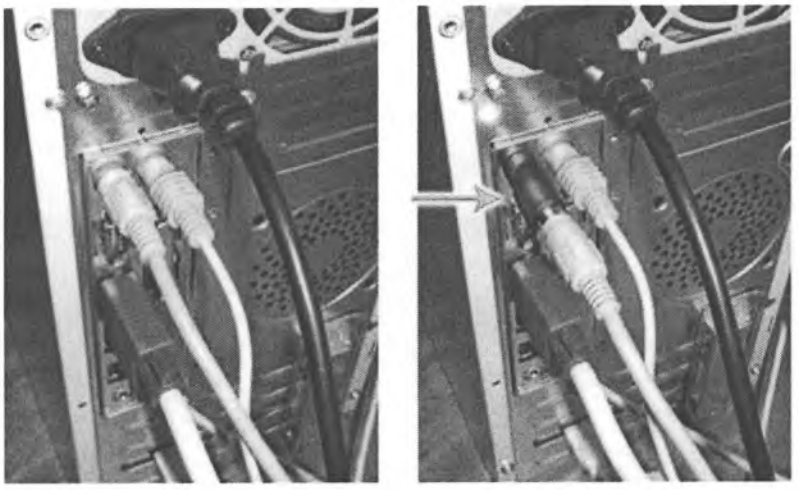
Home » Wireless Keylogger Plug

The WIRELESS KEYLOGGER plug is designed to resemble a ps/2 adapter. Plug this unit into your keyboard port and the setup is complete. This is the most popular product we carry and its success is mainly due to the ease of use and it's flexibility to be transferred from one computer to another computer in just a few seconds.

- Plug & Record Wireless Keylogger installs in seconds.
- Will record every keystroke, independent of the systems access level.
- Record on one PC & retrieve data on another PC / Laptop or Phone from a remote location.
- No software needs to be installed on the target PC.
- Operating system independent - works on any desktop computer.
- Can't be detected or disabled by any anti-spyware or anti-virus programs.

- Not effected by firewalls
- Uses no system or network resources.
- Will not interfere with any software application.
- Will not be detected as a new device by the Operating system. (No popup message)
- Stored data is password protected.

WIRELESS KEYLOGGER INSTALLED ON A PC



Before After

Specifications:

- Internal Memory:
  The WIRELESS KEYLOGGER has 4 MB storage. (It can store 4,000,000 keystrokes, which is approximately 2 years of data on an active computer).

- Distance of Wireless Transmitting:
  Up to 300 feet (100 meters) the length of a football field.
  It is capable of transmitting through walls and other physical structures.

Advantages over other models of the WIRELESS KEYLOGGER:

- Easy and quick setup. (just a few seconds)
- Transferable to different computers and keyboards.

Disadvantages of this model against other models of the WIRELESS KEYLOGGER:

- Is detectable to visual inspection.

Add to Cart

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INFORMA

Privacy Watch: More Criminals Use Keystroke Loggers

By Andrew Brandt, PCW Print Nov 23, 2005 4:00 PM

Keystroke loggers--programs that secretly record every character you type--are getting much more common, security analysts say, as criminals use them to steal user names and passwords for financial and other accounts.

Websense, a computer security firm, reports that for stealing passwords many cyberpickpockets prefer keystroke loggers (keyloggers for short) to phishing. Unlike phishers, bad guys who use keyloggers don't have to create elaborate fake Web sites to trick people into divulging their bank passwords, for instance. Instead, the crooks just wait until the unsuspecting victim visits the real site. The keylogger records the keys the person types to log in and then it uploads the data to the criminals.

Websense says that the number of unique keylogger programs in use by criminals more than doubled between April 2005, when there were 77 of them, and July 2005, when the company saw 179.

Early in 2005 criminals used a keylogger to discover the password for accessing a computer that performs electronic

money transfers at the Sumitomo Mitsui bank in London. Police learned of the plot to steal $420 million just before the bad guys could execute the transfer. Arcot Systems, which develops software used to thwart keylogging and phishing, says crimes involving stolen passwords result in $2.75 billion in losses each year.

To combat the threat, many online banks have started using software keyboards on their Web site log-in pages. Because you enter your password or PIN by clicking on-screen buttons rather than by typing the numbers or letters on your keyboard, this arrangement can defeat a simple keylogger. And because the Arcot software keyboard constantly changes the labels on its virtual keys, the bad guys can't tell what number you're clicking by recording the mouse pointer's location on screen every time you click.

Of course, crooks always counterattack. Some aim keyloggers at sites of financial institutions that don't use software PIN pads or other advanced security features. Others are beefing up their malware arsenal with software that can capture an image of your screen every time you click a number on an on-screen PIN pad.

Still, if you use a software firewall, keep your antivirus software up-to-date, and avoid running programs that you receive via e-mail or instant messaging, your chances of stopping a keylogger before it can harm you are good. The best way to determine whether a keylogger is running on your PC is to scan the system

regularly with a good antispyware tool, such as Webroot Software's Spy Sweeper.

Andrew Brandt

Andrew Brandt is a senior associate editor for PC World. E-mail him at privacywatch@pcworld.com. To read previously published Privacy Watch columns, click here.

- See more like this:
- Privacy Watch,
- January 2006,
- January,
- keystroke logger,
- keystroke loggers,
- keystroke,
- logger,
- loggers,
- keyboard,
- character

Super-Glue: Best practice for countering key stroke loggers

By Richard Stiennon | April 21, 2006, 11:28am PDT

Summary

This wonderful little gadget is for sale over at Thinkgeek. It is colored an innocuous IBM grey so no one will notice when you attach it to their keyboard. It fits between the back of the PC and the keyboard cable. It needs no power and it can record 130,000 keystrokes. It works like a [...]

A former ZDNet blogger, Richard Stiennon is an industry consultant. Most recently he was Chief Marketing Officer for Fortinet, Inc., the largest privately held security vendor. prior to that he was Chief Research Analyst at IT-Harvest. And before creating IT-Harvest, he was VP of threat research for Webroot Software, Inc. the leading commercial anti-spyware solution.

Previously, Richard was VP Research at Gartner, Inc. where he covered security topics including firewalls, intrusion detection, intrusion prevention, security consulting and managed security services for the Security and Privacy group. He is a holder of Gartner's Thought Leadership award for 2003 and was named "One of the 50 most powerful people in Networking" by NetworkWorld magazine. His speaking engagements have included conferences and meetings throughout North and South America, Hawaii, Tokyo, Tel Aviv, Istanbul, Milan, Munich, Hannover, Madrid, London, and Cannes.

This wonderful little gadget is for sale over at Thinkgeek. It is colored an innocuous IBM grey so no one will notice when you attach it to their keyboard. It fits between the back of the PC and the keyboard cable. It needs no power and it can record 130,000 keystrokes. It works like a software keystroke logger. Once it is installed it just captures anything that is typed: usernames, passwords, URLs, email, banking info, everything. To access the data the owner of the device just types the password into any word processor and then you start to communicate with the device. It is very slick. Of course the primary difference between this and a software keystroke logger is that there is NO WAY to detect it and remove it.

Of course this is exactly how the greatest attempted bank heist in history was pulled off. The bank robbers installed these devices on machines inside the bank and eventually got access to Sumitomo Bank's wire transfer capability. They then proceeded to transfer more that $440 million to various accounts in other countries. Read all the gory details in this article I just published.

The one thing I do not mention in the article is that it is reported that Sumitomo Bank's best practice for avoiding a repeat attack is that they now super-glue the keyboard connections into the backs of their PCs.

> At some point or other, a password will leak. Besting thing to do is use a physical smartcard cryptographic token. You can't key log that.
>
> 04/21/2006 03:36 PM
>
> *At some point or other, a password will leak. Besting thing to do is use a physical smartcard cryptographic token. You can't key log that.*
>
> I completely agree. Passwords are now at least a decade out of date and have become almost useless as a security device. Smart cards or some similar system can talk in two directions with the computer that is asking for authentication of the user. This allows two crucial changes in the security protocol:
>
> 1) True end-to-end strong encryption can be built into the communication system, so that evesdropping and related attacks are effectively impossible.
>
> 2) The server can authenticate itself to the smart card, as well as the smart card to the server, using several steps which use computation instead of direct transmission of secret data. You obviously do not want to provide any information to an adversary posing as a well-known vendor!
>
> Without some such system, our data security will continue its relentless decline, dropping to effectively zero protection in the near future.
>
> rd@...
>
> 04/22/2006 12:19 AM
>
> You can't key log a smartcard, but you can duplicate one. You can also piggy-back commands from your keyboard to any destinations after whichever authentication methods you choose, may it be smartcard or any other variations in the future.
>
> Also at some point all that encrypted materials have to be reverted into human-readable format, so your "secured" communication is only as secured as your video cable, or any programs that can tap into the video rendering of your terminal. How would you know what you view on your computer screen is ACTUALLY generated by your computer?
>
> There is no solution. Smartcard will make money for a lot of people, and I'm all for that, but it's

not a solution to end the problem. Heck, it doesn't even solve the problem. It only patches a tiny crack in a huge hole.

too_much green_tea

04/22/2006 02:21 PM

Instead of plugging something in between the keybboard and computer you could do exactly the same with whatever input device. You have to securely connect whatever device you are using to the computer so that noone can put something in the middle. Of course a really determined person could cut the cable and fit something but that would be hard to do unnoticed.

quantumstate

05/04/2006 11:57 AM

Now I know what to look for on my hardware before I use my computers. Hopefully, I won't need to use super-glue, but I don't have any reason to believe that someone at work or home would stoop to putting hardware-sh**warez on my systems.

If I do find one, I'll pull it off and run it over several times with my car. Or toss it into the middle of a busy street and watch the traffic do the dirty work. Or... maybe... if I can find a powerfull enough electromagnet...

Mr. Roboto

04/21/2006 07:26 PM

Super glue remover is a wonderful thing, and it doesn't even smell that bad.
Super glue does not replace paying attention.

indrax

04/21/2006 10:29 PM

How about looking behind your computer and unplugging it?

anythingbutmine0

04/22/2006 09:19 PM

When was the last time the seriously non-techie types at your workplace looked at the back of their PC? And, even if they did, would any of them even realise that, in that rat's nest of wires, there was something that didn't belong?

I didn't think so ....

Steve G.

aureolin

04/23/2006 10:23 PM

The article says it is impossible to detect or remove. That's the only thing I'm disputing. Don't put words in my mouth.

But since you brought it up, when was the last time the seriously non-techie types at your workplace ran utilities to check for software keyloggers?

anythingbutmine0

04/26/2006 06:07 PM

When was the last time you looked at the back of your computer? Most corporate computer users don't even acknowledge that they even have a computer...it's always "some box that has the hard drive that sits under my desk". It sits there, innocous until tech support gets a service call that someone's "hard drive" has failed and they come out to replace the box....that happens less often than the 3-5 year PC refresh does...
so, yeah...crawl on your hands and knees in your business suit, amoungst the dirt, dust bunnies, old french fries and corn chips, pull out the CPU and using your flashlight, get your head behind the box and see if you can identify everything that is plugged into your computer? Likely not...and if you can, congratulations...now your pants are dirty and the CEO wants to see you in the conference room now to meet with a new multi-million dollar customer...good luck on that first impression!
Ed
web/gadget guru

tech_ed@...

05/04/2006 02:31 PM

Why not put a "keyboard unplugged" detection device on the keyboard plug? It would be like the chassis intrusion function on a PC and would alert the user that the keyboard had been unplugged (with a message on the screen during POST). The user could be informed during the warning to check the keyboard plug for tampering (and extra hardware). Alternatively, do away with PS2 ports and switch to all USB mice and keyboards!!

Carrion

05/04/2006 11:20 AM

Yes but the USB port is much cheeper to attack. This device costs 99.99 USD. Fo that I can get a 1 gig USB plug-in device and use free software k/b logger.
Its cheaper than TEMPEST or Optical tempest by a factor of 10.
What about hidden partitions on your HD?
Extra PCI cards inside?
Many m/b have unused ports for further USB sockets that could be internal.

It only goes to show that in the real world "IT Security" is a myth.
Either /or your equipment or your staff are always open to compromise, so long as you have something worth getting and an enemy can devote the time, effort and cash to doing it!

michael_orton@...

05/04/2006 11:35 AM

I can detect them 100% of the time. Just look behind the computer and check the keyboard connector.

I can remove them 100% of the time too, even if superglued. I have a skill level of 256+ in computer disassembly and discombobulation.

Dr_Zinj

05/04/2006 11:24 AM

I have had several dealings with super glue ---It really holds well for app. 2 weeks ----after that it seldom or never holds at all

so if you super glued your keyboard in , check it to see if it is still holding

1pie1

05/04/2006 02:50 PM

take one of these keyloggers and glue it in place with shoe goo put your own password on it I doubt they will work 2 deep, you can check up on the crew and it takes an act of GOD to bust shoe goo

Note you can get these keyloggers to imbed inside the keyboard itself think about it all the precautions and for naught 10 minutes and some vandal has a chip in your keyboard watching every keystroke

27-LS0172\I
Luckhaupt
3/23/11

CS FOR HOUSE BILL NO. 23( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PETERSEN AND HOLMES, Gruenberg

A BILL

FOR AN ACT ENTITLED

"An Act making the installation, enabling, or use of keystroke loggers or other devices criminal use of a computer."

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

*** Section 1.** AS 11.46.740(a) is amended to read:

(a) A person commits the offense of criminal use of a computer if, having no right to do so or any reasonable ground to believe the person has such a right, the person knowingly

(1) accesses, causes to be accessed, or exceeds the person's authorized access to a computer, computer system, computer program, computer network, or any part of a computer system or network, and, as a result of or in the course of that access,

(A) [(1)] obtains information concerning a person;

(B) [(2)] introduces false information into a computer, computer system, computer program, or computer network with the intent to

damage or enhance the data record or the financial reputation of a person;

(C) [(3)] introduces false information into a computer, computer system, computer program, or computer network and, with criminal negligence, damages or enhances the data record or the financial reputation of a person;

(D) [(4)] obtains proprietary information of another person;

(E) [(5)] obtains information that is only available to the public for a fee;

(F) [(6)] introduces instructions, a computer program, or other information that tampers with, disrupts, disables, or destroys a computer, computer system, computer program, computer network, or any part of a computer system or network; or

(G) [(7)] encrypts or decrypts data**; or**

(2) uses or enables on a computer a keystroke logger or other device or program that has the ability to record another person's keystrokes or entries; or

(3) uses a keystroke logger or other device or program to intercept or record another person's keystrokes or entries on a computer when those entries are transmitted wirelessly or by other non-wired means.

27-LS0172\D
Luckhaupt
3/24/11

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Alaska State Legislature

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Fax: 269-0264

Representative Pete Petersen

Serving Northeast Anchorage and Muldoon

MEMORANDUM

DATE: March, 23, 2011

TO: Rep. Carl Gatto, Chair
House Judiciary Committee

FROM: Rep. Pete Petersen

RE: Changes in CS for HB23

There are four changes between HB23 and the CS (version E) for HB23:

1. Title was narrowed significantly
2. New language starting on Page 2, Line 14, has been broken into 2 subsections
3. Section 2, dealing with an affirmative defense, has been removed
4. Incorporated conceptual amendment by Rep. Keller to add "uses" on page 2, Line 14

27-LS0172\E
Luckhaupt
3/24/11

CS FOR HOUSE BILL NO. 23( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PETERSEN AND HOLMES, Gruenberg

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HB

50

<TARGET><BILL>HB 50</BILL><SUBJECT>HB
50</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]OUSE COMMITTEE REPOR[redacted]

(7)
Date Referred to Committee: April 5, 2011 **FURTHER REFERRALS:**

Date of Committee Action: 3/16/12

The JUDICIARY Committee considered: **HB 50**

HOUSE BILL NO. 50
"An Act relating to the purchase of alcoholic beverages at a club and to access by certain persons under 21 years of age to a club's licensed premises when alcoholic beverages are present."

HB 50-ACCESS TO LICENSED PREMISES

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB50 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] **Same Title [ ] New Titl**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	JUDCMT.			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Greenberg	-			
	Keller	X			
	Pruitt	X			
	Thompson	X			
Chair:	Gatto	X			
Chair:					

ALASKA STATE LEGISLATURE

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REPRESENTATIVE DAN SADDLER

SPONSOR STATEMENT

HB 50

An Act relating to the purchase of alcoholic beverages at a club and to access by certain persons under 21 years of age to a club's licensed premises when alcoholic beverages are present.

House Bill 50 is an effort to support the young men and women serving in the armed services in Alaska, by clarifying language to make it easier for them to enjoy companionship in the clubhouses of service and patriotic organizations.

The young soldiers, airmen, sailors, marines and coast guard personnel stationed in Alaska face special challenges. Separation from loved ones, the rigors of barracks life and the monotony of three mess hall meals a day can take their toll on morale. Patriotic clubs – such as those operated by the American Legion, Veterans of Foreign Wars, Disabled American Veterans and others – are places to relax with buddies and enjoy the special understanding and support from others who have "been there" and understand the rigors of military life.

The Legislature recognized this value, and in 2006 passed SB 209 to allow these young men and women access to such clubs using their military ID cards. However, some language remains in statute that creates confusion as to when such access is permitted. HB 50 will eliminate that confusion by making it clear that such access is not limited solely to special events.

It is important to note that HB 50 makes no change in law that would allow service members under the age of 21 to purchase or consume alcohol in service clubs.

Your support of HB 50 will be a clear demonstration that Alaska understands and works to address the special needs of those who defend our freedom.

27-LS0254\A.1
Gardner
3/15/12

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 50

Page 1, line 9:

Following "duty":

Insert "**, and their accompanying spouses,**"

27-LS0254\A.2
Gardner
3/16/12

#2

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 50

Page 2, line 5, following "**club**":

Insert "**or the spouse of a guest or member of the club**"

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 31, 2011

SUBJECT: Sectional Summary for HB 50 (Work Order No. 27-LS0254\A)

TO: Representative Dan Saddler
Attn: Lynne Smith

FROM: Doug Gardner
Director

You requested a sectional summary of HB 50, a bill relating to purchase of alcoholic beverages at a club, and to access by certain persons under 21 to the club's licensed premises when alcoholic beverages are present. This summary is current as of the date of this memorandum and the "A" version of the bill. As a preliminary matter, a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 removes the phrase "upon special occasions" from AS 04.11.110(d). The effect of this deletion would allow military personnel on active duty, who are extended club privileges by patriotic organizations, to purchase alcoholic beverages in the portion of the club that is a part of the club's licensed premises at times beyond just "special occasions."

Section 2 adds the phrase "is a guest or member of the club" to AS 04.11.110(g). The addition of this phrase would allow a person under 21 years of age to enter or remain on the premises of a patriotic organization that is licensed as a club under AS 04.11.110, when alcoholic beverages are present, if the person under 21 years of age is a guest or a member of the club, and has proper military identification on their person. The amendments to this section add the requirement that for a person under 21 years of age to remain in the licensed premises portion of a patriotic club, the person must be either a guest or a member of the club.

Section 3 conforms AS 04.16.049 (Access of persons under 21 years of age to licensed premises), to the amendment set out in section 2 of the bill. This section adds a subsection to AS 04.16.049(a), which allows a person under 21 to enter or remain on a licensed premises under Title 4, if "the person is permitted on the premises under AS 04.11.110(g)."

If you have further questions, please advise.

DDG:plm
11-205.plm

HOUSE BILL NO. 50

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES SADDLER, Hawker, Thompson

Introduced: 1/18/11
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to the purchase of alcoholic beverages at a club and to access by certain persons under 21 years of age to a club's licensed premises when alcoholic beverages are present."

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

*** Section 1.** AS 04.11.110(d) is amended to read:

(d) Alcoholic beverages sold under a club license may be purchased only by (1) members of the club and their families, (2) widows or widowers of deceased members who have been accorded club privileges, and (3) military personnel on active duty who are extended the privilege by patriotic organizations [UPON SPECIAL OCCASIONS]. Alcoholic beverages may be purchased only in the portion of the club rooms that are part of the licensed premises.

*** Sec. 2.** AS 04.11.110(g) is amended to read:

(g) **Access** [NOTWITHSTANDING AS 04.16.049, ACCESS] by persons under 21 years of age to

(1) a club's licensed premises is permitted when alcoholic beverages are not present; and

(2) the premises of a patriotic organization licensed as a club under this section is permitted when alcoholic beverages are present if the person **is a guest or member of the club and** possesses a valid active duty military or armed forces identification card issued by the United States Department of Defense or the United States Department of Homeland Security.

*** Sec. 3.** AS 04.16.049(a) is amended to read:

(a) A person under the age of 21 years may not knowingly enter or remain in premises licensed under this title unless

(1) accompanied by a parent, guardian, or spouse who has attained the age of 21 years;

(2) the person is at least 16 years of age, the premises are designated by the board as a restaurant for the purposes of this section, and the person enters and remains only for dining; [OR]

(3) the person is under the age of 16 years, is accompanied by a person over the age of 21 years, the parent or guardian of the underaged person consents, the premises are designated by the board as a restaurant for the purposes of this section, and the person enters and remains only for dining**; or**

(4) the person is permitted on the premises under AS 04.11.110(g).

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 50**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB 50
Title: Access to Premises
Sponsor: Representative Saddler
Requester: House Judiciary Committee

Dept. Affected: All
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated fiscal note form for FY 13.

Prepared by: Melanie Lesh, Legislative Aide — Phone: 907-465-4990
Division: House Judiciary Committee — Date/Time: 3/14/12 12:00 AM
Approved by: Representative Carl Gatto, Chair — Date: 3/14/2012
House Judiciary Committee

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 50

Analysis

There is no additional cost resulting from the passage of House Bill 50.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 50
(H) Publish Date: 4/5/11

Identifier (file name): HB 50
Title: Access to Premises
Sponsor: Representative Saddler
Requester: House Labor & Commerce Committee

Dept. Affected:
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the initial fiscal note to HB 50

(New FY 13 f.n.)

Prepared by: Konrad Jackson, Committee Aide — Phone: 907-465-4954
Division: House Labor & Commerce Committee — Date/Time: 4/4/11 5:00 PM
Approved by: Representative Kurt Olson, Chair, Laobr & Commerce Committee — Date: 4/4/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 50

Analysis

Konrad Jackson

From: Lynne Smith
Sent: Wednesday, March 30, 2011 8:57 AM
To: Konrad Jackson
Subject: FW: House Bill 50 support

-----Original Message-----
From: Lemelin, David Mr CIV US USA IMCOM [mailto:David.Lemelin1@us.army.mil]
Sent: Monday, March 07, 2011 9:34 AM
To: Rep. Dan Saddler
Subject: House Bill 50 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

As the Commander of Veterans of Foreign Wars (VFW) Post 10029, North Pole Alaska. I give my support to House Bill 50 and Representative Dan Saddler.
If you have any questions or concerns, I can be reached at (907) 378-1256.

Respectfully,

Dave

David A. Lemelin
Commander
VFW Post 10029

Classification: UNCLASSIFIED
Caveats: FOUO

Mattison, John W CTR USAF PACAF 673 LRS/LGRM

From: Mattison, John W CTR USAF PACAF 673 LRS/LGRM
Sent: Monday, April 04, 2011 1:59 PM
To: 'Representative_Dan_Saddler@legis.state.ak.us'
Subject: HB 50 support

Gentlemen and Ladies,

I write this email in support of House Bill 50. This bill has been long in coming and I believe it will provide our younger heroes a better and more conducive venue to shed the pressures of military life. All too often, younger veterans are limited to on-base attractions. This allows them to congregate with their peers, but doesn't offer the mentorship opportunities that Patriotic Organizations such as the Veterans of Foreign Wars or the American Legion do. It should be noted that there is no age restriction for membership in the VFW, only that they be an American citizen, honorable service in the Armed Forces, and be the recipient of a qualifying campaign medal. As such, young (under 21) veterans may return from their deployment fresh from combat and be eligible for immediate membership, only to be told they can enter their club only during a special event. This is wrong and must be changed. I believe the verbiage in HB 50 will remove the confusion and correct this wrong.

John W. Mattison

Past Department of Alaska Commander (2008-2009)

27-LS0254\A.1
Gardner
3/15/12

AMENDMENT

#1

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 50

Obj. Rep. Pruitt
removed.
OK

Page 1, line 9:

Following "duty":

Insert "**, and their accompanying spouses.**"

FAX
2029

27-LS0254\A.2
Gardner
3/16/12

AMENDMENT #2

OFFERED IN THE HOUSE m BY REPRESENTATIVE GRUENBERG

TO: HB 50

Page 2, line 5, following "**club**":

Insert "**or the spouse of a guest or member of the club**"

discuss w/ Leg. legal

spouse coming in on their own?

clear message who has

DS: as long as effect is not to require spouse to have i.d.

Sec. 04.11.110. Club license.

(a) A club license authorizes a club or organization to sell alcoholic beverages for consumption only on the licensed premises.

(b) A club license may only be issued to a club, fraternal organization, patriotic organization, or social organization that has been (1) chartered by a state or national organization for a period of two consecutive years before application for a license under this section; or (2) chartered by a national organization and the national organization has maintained a chartered club or organization within the state for a period of at least 20 years. The organization licensed under this section must be operated for social, recreational, political, benevolent, or athletic purposes and not for profit. A club license may only be issued to an organization if none of the income from the sale of alcoholic beverages is distributed to its members, directors, or officers. Soliciting of public patronage of the club premises except as approved by the board is a violation of this section.

(c) The biennial club license fee is $1,200.

(d) Alcoholic beverages sold under a club license may be purchased only by (1) members of the club and their families, (2) widows or widowers of deceased members who have been accorded club privileges, and (3) military personnel on active duty and their accompanying spouses who are extended the privilege by patriotic organizations [upon special occasions]. Alcoholic beverages may be purchased only in the portion of the club rooms that are part of the licensed premises.

(e) Guests who enter the club premises on the invitation of a member and in the company of the member may be served but not sold alcoholic beverages. A guest must leave the premises immediately upon the departure of the member who extended the invitation to enter.

(f) Alcoholic beverages purchased by a club or organization licensed under this section may not be used or consumed off the licensed premises of the club or organization by any person, including club members and employees unless used or consumed at social, recreational, benevolent, or athletic functions of the club or organization and the use or consumption is approved by the board.

(g) [Notwithstanding AS 04.16.049], Access by persons under 21 years of age to

(1) a club's licensed premises is permitted when alcoholic beverages are not present; and

(2) the premises of a patriotic organization licensed as a club under this section is permitted when alcoholic beverages are present if the person is a guest or member of the club or the spouse of a guest or member of the club and possesses a valid active duty military or armed forces identification card issued by the United States Department of Defense or the United States Department of Homeland Security.

(h) In this section, "member" means a holder of paid-up membership entitling the holder to all voting rights and privileges of membership under the constitution or bylaws of the club or organization.

History -

(Sec. 2 ch 131 SLA 1980; am Sec. 2 ch 109 SLA 1983; am Sec. 1, 2 ch 17 SLA 1988; am Sec. 4 ch 63 SLA 1993; am Sec. 1 ch 22 SLA 1994; am Sec. 1 ch 69 SLA 2006)

Cross References -

For penalties for violation of this title, see AS 04.16.180.

Amendment Notes -

The 2006 amendment, effective September 13, 2006, rewrote subsection (g), in part by adding paragraph (g)(2).

AG Opinions -

The Central Council of the Tlingit and Haida Indian Tribes of Alaska qualifies for a "club license" under this section, but licensure is conditioned on the receipt of an express, written waiver of the council's sovereignty in regard to the enforcement of this title and local laws pertaining to alcoholic beverages, which waiver should be reviewed by the Attorney General's office before the license is issued. December 18, 1985 Op. Att'y Gen.

Decisions -

Editor's notes. - The cases cited in the note below were decided under earlier statutes.

A national charter is one which is derived from the nation by act of Congress. In re Capper, 11 Alaska 480 (D. Alaska 1948).

Use of part of club premises for public dining room. - While the use of a part of the club premises for a public dining room might have been in some degree inconsistent with its restricted and private use as part of the club premises, nothing in the law forbade such duplicate use. There was no legal reason why members of the club should not purchase and be served with intoxicating liquor in that room under the club license, although persons not members of the club and not beneficiaries of the bounty of the members of the club could not lawfully purchase any liquor there. In re Alaska Labor Trades Ass'n, 10 Alaska 472 (D. Alaska 1945). This section now provides that "soliciting of public patronage of the club premises except as approved by the board is a violation of this section." - Ed. note.

Sales are limited to members of club. - The legislature considered disposal of liquor in clubs as sales, and limited such sales to the members of the club. In re Alaska Labor Trades Ass'n, 10 Alaska 472 (D. Alaska 1945).

But there is nothing in the law forbidding the serving of liquor to guests. In re Alaska Labor Trades Ass'n, 10 Alaska 472 (D. Alaska 1945).

So long as they do not pay for liquor consumed. - Where evidence given at the hearing disclosed that persons other than members of the club had been served with liquor on the club's

premises, but there was no testimony that any of the nonclub members so served paid for the liquor consumed, the only proper presumption in which the court can indulge is that the liquor so served was sold to and paid for by members of the club and, therefore, the sales were lawful. In re Alaska Labor Trades Ass'n, 10 Alaska 472 (D. Alaska 1945).

Interest of manager in business of club. - Where the business affairs of a club, including the purchase and keeping and sale to members of liquor, are so inextricably intermingled with those of the manager of the club, the manager has an interest in the business and a license may not be lawfully issued. In re Alaska Labor Trades Ass'n, 10 Alaska 472 (D. Alaska 1945).

Collateral Refs -

48 C.J.S., Intoxicating Liquors, Sec. 141.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon. 98 ALR3d 694.

27-LS0254\A.1
Gardner
3/15/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 50

Page 1, line 9:

Following "duty":

Insert "**, and their accompanying spouses,**"

27-LS0254\A.2
Gardner
3/16/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 50

Page 2, line 5, following "**club**":

Insert "**or the spouse of a guest or member of the club**"

Melanie Lesh

From: Noah Hanson
Sent: Wednesday, March 14, 2012 12:33 PM
To: Melanie Lesh
Subject: Heads up

Hey Melanie,

Rep Gardner will be in resources committee until HB 128 is ready to be up. I will be in Judiciary and give her the word when HB 50 is done. Maybe a brief at ease during the transition btwn bills?

Thanks,

Noah Hanson
Staff to Representative Berta Gardner
State Capitol Building, Room 424
Juneau, AK 99801
Ph: (907) 465-4068
Fax: (907) 465-3834
http://www.RepBertaGardner.com
http://www.Facebook.com/BertaGardner

HJUD

3/14 HB50 Shirley ABC - difficult to enforce.
ABC Board issued a card to get in to club to observe.
Carl - bartenders at bases know their customers.
Base commander - underage eg.
penalties severe -
Rep. Lynn - Dvc. members already exposed to danger,
max - not limited to patriotic club
M Conceptual amdt. include spouses accompanying military personnel?
(spouse offered same privilege) hold for amdt.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 50
(H) Publish Date: 4/5/11

Identifier (file name): HB 50
Title: Access to Premises
Sponsor: Representative Saddler
Requester: House Labor & Commerce Committee

Dept. Affected:
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the initial fiscal note to HB 50

Prepared by: Konrad Jackson, Committee Aide — Phone: 907-465-4954
Division: House Labor & Commerce Committee — Date/Time: 4/4/11 5:00 PM
Approved by: Representative Kurt Olson — Date: 4/4/2011
Chair, Laobr & Commerce Committee

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 50

Analysis

Konrad Jackson

From: Lynne Smith
Sent: Wednesday, March 30, 2011 8:57 AM
To: Konrad Jackson
Subject: FW: House Bill 50 support

-----Original Message-----
From: Lemelin, David Mr CIV US USA IMCOM [mailto:David.Lemelin1@us.army.mil]
Sent: Monday, March 07, 2011 9:34 AM
To: Rep. Dan Saddler
Subject: House Bill 50 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

As the Commander of Veterans of Foreign Wars (VFW) Post 10029, North Pole Alaska. I give my support to House Bill 50 and Representative Dan Saddler.
If you have any questions or concerns, I can be reached at (907) 378-1256.

Respectfully,

Dave

David A. Lemelin
Commander
VFW Post 10029

Classification: UNCLASSIFIED
Caveats: FOUO

Mattison, John W CTR USAF PACAF 673 LRS/LGRM

From: Mattison, John W CTR USAF PACAF 673 LRS/LGRM
Sent: Monday, April 04, 2011 1:59 PM
To: 'Representative_Dan_Saddler@legis.state.ak.us'
Subject: HB 50 support

Gentlemen and Ladies,

I write this email in support of House Bill 50. This bill has been long in coming and I believe it will provide our younger heroes a better and more conducive venue to shed the pressures of military life. All too often, younger veterans are limited to on-base attractions. This allows them to congregate with their peers, but doesn't offer the mentorship opportunities that Patriotic Organizations such as the Veterans of Foreign Wars or the American Legion do. It should be noted that there is no age restriction for membership in the VFW, only that they be an American citizen, honorable service in the Armed Forces, and be the recipient of a qualifying campaign medal. As such, young (under 21) veterans may return from their deployment fresh from combat and be eligible for immediate membership, only to be told they can enter their club only during a special event. This is wrong and must be changed. I believe the verbiage in HB 50 will remove the confusion and correct this wrong.

John W. Mattison

Past Department of Alaska Commander (2008-2009)

And if the bill passes, the state
nds to lose at least $17 mil-
n in federal highway funding,
te transportation officials say,
:ause Alaska would be in viola-
n of the national minimum
nking age statute. In a state
ere alcohol abuse is blamed for
ny social and financial ills, a
ver drinking age is a distinction
v want.

"It sends a mixed message.
r some it's OK, for others it's
t," said Royal Bidwell, business
nager of the Forget Me Not
undation, an anti-drunken
ving group based in Wasilla.

The law could set a prece-
nt, said Rep. Alan Austerman,
Kodiak, where any young per-
n whose profession puts them
risk of losing their life, such
police or firefighters, could be
owed to drink.

Kentucky, South Carolina and
isconsin have all considered
Kingston, R-Georgia, proposed a similar measure last year that ultimately died in committee.

About 2,000 soldiers under age 21 serve in the Army in Alaska, said Maj. Bill Coppernoll, public affairs officer for U.S. Army Alaska. Federal law prohibits them from drinking on base.

Alcohol is involved in a third of misconduct incidents on Alaska's military installation, three generals said in a letter to Rep. Dan Saddler, co-chairman of the House Special Committee on Military & Veterans' Affairs. Saddler is sponsoring a separate bill that would establish more access to private clubs for members of the military younger than 21, but not allow them to drink (See accompanying sidebar)

Lowering the drinking age could further increase drunken driving arrests of young soldiers who would drive back from off-

men and women deploy, they understand even those of drinking age may not be allowed to consume alcohol while deployed," said the letter from Lt. Gen. Dana T. Atkins, commander of the Alaska Command, and Maj. Gen. Raymond P. Palumbo, commanding general of U.S. Army Alaska. "It is just part of the sacrifice military members make."

The legislation may linger before lawmakers decide any-

Army ROTC cadet at University of Alaska Fairbanks, said the measure sounded fair, as long as soldiers of all ages ensure they don't drink and drive.

Cody Short, a cadet in the Army ROTC at the University of Alaska Anchorage, said he was unsure why a special law should be created just for young soldiers.

"We follow the laws applied to the U.S," said Short, 20. "I can wait till I'm 21."

VFW asks Saddler to get under-21 military into club

Bill wouldn't let them drink

BY ZAZ HOLLANDER
Alaska Star 4-14-11

Officers at Eagle River's Veterans of Foreign Wars club enlisted Eagle River's Representative Dan Saddler in their mission to open the doors to active-duty service men and women – even those who aren't quite 21 yet.

House Bill 50 sponsored by Saddler would let soldiers under 21 enter licensed premises of patriotic clubs if they are members or guests of a member. It would not allow them to drink alcohol.

The bill also has a section that expands access to service and patriotic organizations for active-duty service men and women over 21. Some language in statute limits such access to "special occasions" only, Saddler wrote in an e-mail. HB 50 deletes this language.

Saddler called the bill "simply an access bill" and said he wanted to emphasize that the bill would not allow underage persons to drink.

"It simply clarifies that soldiers over 21 don't have to wait for a 'special occasion' to visit patriotic clubs, and that soldiers under 21 can visit if they are club members, or guests," he wrote.

Eagle River's VFW Post 9785 asked for Saddler's help several months ago while the legislator was at the post, according to John Mattison, the post quartermaster and himself a Vietnam-era veteran who retired as a U.S. Army major. Mattison talked to Saddler again by phone in late March.

"A young troop can enlist when he's 17, go through his training, go to Afghanistan, come back when he's 19," Mattison said. "He's eligible for the VFW but he can't come in. I wanted to untangle that mess."

But once inside, wouldn't it be pretty easy for an underage soldier to wander up to the bar and order a beer? Or get a friend to do the buying for him?

Mattison said the VFW doesn't go through a lot of bartenders, and the staff gets to know patrons.

"I don't see that as being a problem at all," he said. "We've talked to our bartenders. They said, 'No, it won't be a problem.' They card everybody they don't know."

In terms of someone buying for an underage member, Mattison said that could theoretically happen the way laws are written now – somebody can bring in an underage soldier as a guest, sit them at a table and buy the table a pitcher of beer.

The larger problem is that right now, an Afghanistan veteran can't come in the door of the VFW unless there's a special occasion, Mattison said. If the bill passes, the soldier could become a dues-paying member.

"Any time we get an Afghanistan or Iraqi vet in there, it's a special occasion, that's how we treat it," he said. "But we've got to sign them in as guests."

The bill remained in the House Judiciary Committee as of Tuesday.

MENT OF DEFENSE

TY OF AN ENVIRONMENTAL ASSESSMENT
VEN ADDITIONAL F-22 AIRCRAFT AT JOINT
NDORF-RICHARDSON, ALASKA

e, Joint Base Elmendorf-Richardson (JBER), Alaska

ir Force (Air Force) is issuing this notice to advise the public
ic review and comment an Environmental Assessment (EA)
nt Impact (FONSI) for the proposed addition (plus-up) of
se Elmendorf-Richardson (JBER) current inventory of 40
ıft would train in existing Alaska airspace and would not
ıcilities.

to the National Environmental Policy Act (NEPA) of 1969,
le 4321, et. seq.), the Council on Environmental Quality
cedural provisions of NEPA (40 Code of Federal Regulation
/e Orders (EOs) 11514 and 11991, the Environmental Qual-
ımended (42 United States Code [USC] 4371 et seq.); and 32
ıental Impact Analysis Process (EIAP). A copy of the EA and
review beginning April 12, 2011, at the Alaska Resources
, Anchorage; Alaska State Court Law Library, Anchorage;
ta Community Library, Delta Junction; Eagle Public Library;
ınt Base Elmendorf-Richardson Library; Lime Village School
l Library, Naknek; Tanana Community and School Library;
brary; and the Wasilla Public Library. The EA and Draft
http://www.jber.af.mil/library/environmental/index.asp,

and interested groups and persons are invited to provide
by mail, postmarked no later than May 12, 2011, to ensure
ration of the EA. Please send any comments to:

chardson AK 99506-3240

e Air Force will be considered in the preparation of the EA
ministrative record. Thank you for your participation.

direct any written comments or requests for information

HB

55

<TARGET><BILL>HB 55</BILL><SUBJECT>HB
55</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-2679
Fax: (907) 465-4822
Toll Free (800) 505-2678

Interim:
600 E. Railroad Ave
Wasilla, AK 99654
Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman

Rep.Mark.Neuman@legis.state.ak.us

February 1, 2012

Dear Representative Gatto

Subject: HB 55 ***"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."***

Please consider scheduling this legislation for a hearing at your earliest convenience. Providing my office with some lead time will be greatly appreciated as I plan to have a leading national advocate available to answer any questions the committee may have. Attached is a committee package.

Included are the following:

- Letter of Request
- Current version of the bill.
- Sponsor statement.
- 2012 Fiscal Notes
- Names of persons expected to testify (will depend on hearing date).

Please feel free to contact myself or my aide Rex Shattuck (465-2696) with any questions.

Thank you for your consideration.

Sincerely,

Representative Mark Neuman

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-2679
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Toll Free (800) 505-2678

Interim:
600 E. Railroad Ave
Wasilla, AK 99654
Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman

Rep.Mark.Neuman@legis.state.ak.us

Sponsor Statement HB 55 Knife Rights Act

"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."

In Alaska, spring loaded knives are an important tool used by hunters, anglers, and craftsmen. According to the American Knife and Tool Institute, there are over 35.6 million Americans who carry and use some type of utilitarian knife which opens with one hand. In the United States, assisted-opening and one-hand-opening knives now make up 80 percent of all knives sold.

In recent years some jurisdictions have acted to restrict the type of knives individuals may carry. In a number of instances this has been done by attempting to define common pocketknives as switchblades, gravity knives, or other knives.

Frequently that switchblade definition is assigned to a knife capable of being opened with one hand and having a "bias towards closure". A "bias toward closure" simply means it has a spring, detent, or other mechanism, which maintains the knife in a closed position until the bias is overcome with applied pressure.

A knife of this configuration falls short of the definition of switchblade used in other states and by the federal government: "*...any knife having a blade which opens automatically (1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by operation of inertia, gravity, or both."*

Presently Alaskan's are able to purchases these knives in Alaska and online. They are used in the work environment and in recreation. This bill simply clarifies that one handed hunting and utility knives do not qualify as a switchblade and as such are legally owned.

I would appreciate your support

27-LS0298\A

HOUSE BILL NO. 55

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES NEUMAN AND LYNN, Costello, Thompson, Peggy Wilson, Millett

Introduced: 1/18/11
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."

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

*** Section 1.** AS 11.81.900(b) is amended by adding new paragraphs to read:

(65) "gravity knife" means any knife that has a blade that opens or releases a blade from its handle or sheath by the force of gravity or by the application of centrifugal force; "gravity knife" does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires a person to apply exertion to the blade by hand, wrist, or arm to overcome the bias toward closure and open or release the ~~blade;~~

(66) "switchblade" means any knife that has a blade that folds, closes, or retracts into the handle or sheath that opens automatically by pressure applied to a button or other device located on the handle or sheath; "switchblade" does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the blade.

27-LS0298\A.1
Gardner
2/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE NEUMAN

TO: HB 55

Page 1, line 1, following "**law**":

Insert "**; and relating to reserving the authority to regulate knives to the state with limited exceptions for municipalities to regulate knives.**"

Page 1, following line 15:

Insert new bill sections to read:

"*** Sec. 2.** AS 29.10.200(40) is amended to read:

(40) AS 29.35.145 (regulation of firearms **and knives**);

*** Sec. 3.** AS 29.35.145(a) is amended to read:

(a) The authority to regulate firearms **and knives** is reserved to the state, and, except as specifically provided by statute, a municipality may not enact or enforce an ordinance regulating the possession, ownership, sale, transfer, use, carrying, transportation, licensing, taxation, or registration of firearms **or knives**.

*** Sec. 4.** AS 29.35.145(b) is amended to read:

(b) Municipalities may enact and enforce ordinances

(1) that are identical to state law and that have the same penalty as provided for by state law;

(2) restricting the discharge of firearms in any portion of their respective jurisdictions where there is a reasonable likelihood that people, domestic animals, or property will be jeopardized; ordinances enacted or enforced under this paragraph may not abridge the right of the individual guaranteed by art. I, sec. 19, Constitution of the State of Alaska, to bear arms in defense of self or others;

(3) restricting the areas in their respective jurisdictions in which

firearms **or knives** may be sold; a business selling firearms **or knives** may not be treated more restrictively than other businesses located within the same zone; and

(4) prohibiting the possession of firearms **or knives** in the restricted access area of municipal government buildings; the municipal assembly shall post notice of the prohibition against possession of firearms **or knives** at each entrance to the restricted access area."

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 55**
Fiscal Note Number
() Publish Date

Identifier (file name) HB055-LAW-CRIM-02-10-12
Title An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law
Sponsor REPRESENTATIVE (s) NEUMAN, LYNN
Requester (H) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/10/12 4:30 PM
Approved by Michael C. Geraghty, Attorney General
Department of Law
Date 2/10/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 55

Analysis

HB 55 proposes two new definitions for Title 11. Gravity knife is defined as is switchblade.

Fiscal impact to the Department is zero.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM December 17, 2010

SUBJECT: Draft definitions of "switchblade" and "gravity knife" (Work Order No. 27-LS0298\A)

TO: Representative Mark Neuman
Attn: Rex Shattuck

FROM: Dan Wayne
Legislative Counsel

I've prepared the enclosed draft bill, based on language from Texas, as asked. The draft defines "gravity knife" separately in order to distinguish gravity knives from switchblades and because "gravity knife" is in the same sentence as "switchblade" in the only two places (AS 11.61.210 and 11.61.220) where "switchblade" appears in the Alaska Statutes. I also modified the language you provided, slightly, for reasons of drafting style.

In two Alaska cases, the Alaska Supreme Court has considered how to define "gravity knife" and "switchblade" in the absence of a statutory definition. The court upheld a weapons crime conviction in one case, finding that the term "gravity knife" is not improperly vague but has a readily ascertainable and consistent definition. According to the Court, in that case, a gravity knife is one in which the blade opens, falls into place, or is ejected into position by the force of gravity or by centrifugal force. *State v. Weaver*, 736 P.2d 781 (Alaska Ct. App. 1987). A few years later, the Court affirmed a lower court's dismissal of a weapons charge, reasoning that butterfly knives and balisong knives do not fit within the common definition of "gravity knife." *State v. Strange*, 785 P.2d 563 (Alaska Ct. App. 1990). I've enclosed a copy of *State v. Strange* to this memo because the court's discussion of various knives and their definitions might be of use.

If I may be of further assistance, please advise.

DCW:ljw
10-461.ljw

Enclosures

Knife Definitions

Introduction

In an effort to limit the type of knives that can be legally imported into the United States, the Department of Homeland Secretary proposed revocation of the admissibility of certain knives with spring assisted opening mechanisms. This proposal would establish a new definition for qualifying switchblade knives.

Under the Switchblade Knife Act of 1958, a switchblade is defined as any knife with a blade which opens automatically by hand pressure applied to a button or other device in the handle of the knife, or by operation of inertia, gravity, or both. The proposed regulation would designate one-hand and assisted opening knives as being switchblades, even though the federal law does not declare these knives as switchblades.

Issue

Spring loaded knives are an important tool for hunters and anglers. According to the American Knife and Tool Institute, there are over 35.6 million Americans, including many who are hunters and anglers, who carry and use some type of utilitarian knife which opens with one hand. In the United States, assisted-opening and one-hand-opening knives are 80 percent of all knives sold. Spring loaded hunting knives should not qualify as switchblade knives.

Language

The Texas State Legislature passed H.B. No. 4456. This bill provided the state definition for qualifying switchblade knives.

1. "Switchblade knife" means any knife that has a blade that folds, closes, or retracts into the handle or sheath that opens automatically by pressure applied to a button or other device located on the handle, or opens or releases a blade from the handle or sheath by the force of gravity or by the application of centrifugal force.
2. The term (Switchblade) does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the knife.

Points of Interest

- Court cases in several states such as California, Illinois, Michigan, and Texas, have all ruled in favor of assisted-opening and one-hand opening knives. These knives are not considered switchblades because they do not possess the activating button or device on the handle of the knife.

Contact

For more information regarding this issue, please contact: Jennifer Lundy or Bethany O' Donovan (202) 543-6850; Jennifer@sportsmenslink.org or Bethany@sportsmenlink.org

Apprentice Hunting License

Introduction

The apprentice hunting license is an idea in which hunters may hunt prior to having passed a hunter education course. The idea of "try before you buy" is the driving force behind this new recruitment tool. These laws provide novice hunters, who have yet to pass the education course, the chance to purchase an apprentice hunting license and hunt under the direct supervision of a licensed hunter. The apprentice hunter receives hands-on experience and additional incentive to complete hunter education. In some states the apprentice hunting license is also called the mentored hunter program.

Language

By incorporating the views of our partners and other state legislators who have passed this legislation, we present the following language:

> The state may issue to a person a temporary firearm and/or hunter education deferral license which shall exempt the person from the requirement for successful completion of a firearm and hunter education course prior to obtaining a hunting license.
>
> The fee for such deferral license shall be ($ or free). For residents, the deferral license shall be valid for (variable time period depending on the state) from the date of issuance and shall be issued in lieu of basic hunting, big game, bow, muzzleloader, and state waterfowl licenses, turkey hunting stamps, and WMA hunting permits. For nonresidents, the deferral license shall be valid for (variable time period depending on the state) and shall be purchased in addition to nonresident basic hunting, big game, bow, muzzleloader, and state waterfowl licenses, turkey hunting stamps, or WMA hunting permits.
>
> The recipient of a deferral license shall carry the deferral license on him while hunting and shall be accompanied by and under the direct supervision of a person who is eighteen years of age or older and has a valid hunting license."

Points of Interest

It is the duty of each caucus leadership team to determine the best means of action in your respective state and modify the above language as necessary. If the language must be modified, please keep in mind the following:

- Laws such as minimum age requirements and coursework mandates can be relaxed without compromising safety.
- The time period for which the apprentice licenses are valid is different state to state, as is the minimum age requirement.
- Apprentice opportunities should be available to each person for a minimum of three years because the process of recruiting a new hunter may take several years due to limited opportunity. For this reason, many states allow multiple year extensions.

History

The issue was introduced to NASC at the 2005 NASC Annual Meeting and issued as a NASC issue brief during the 2006 legislative session. In 2010 Vermont became the 30th state to pass the apprentice hunting license.

Contact

For more information regarding this issue, please contact:
Jennifer Lundy or Bethany O' Donovan (202) 543-6907; Jennifer@sportsmenslink.org or Bethany@sportsmenslink.org

2/15/2012

Dear Representative,

The possession of a knife in Alaska is not just a common practice, as it may be in other states, but in many cases the possession of a knife in Alaska is a necessity, which can determine the difference between life and death, between surviving and perishing.

Alaska currently has a prohibition on the possession of gravity knives and switchblade knives. Unfortunately, in many states the standard definition of these knives as used in Alaska's current statute, has resulted in the prosecution and jailing of people in possession of knives which are not, in fact, gravity knives or switchblade knives. Rather, these are folding pocket knives that are commonly used for hunting, fishing, camping, hiking, on worksites and other outdoor and everyday activities, and represent some 80% of the knives sold in the U.S. today.

In many states this definition has led to thousands of dollars in fines and court costs, for both the defendants and the jurisdictions prosecuting them. HB55 would clarify the definition of gravity knives and switchblade knives so it clearly does not include average, everyday knives that are commonly in possession by the public. HB55 protects honest law abiding Alaskans from potential legal jeopardy.

Knife Law Preemption Amendment:

Because knives are so prevalent in Alaska and possession is so common, knife laws around the state should be consistent. What is legal in Juneau should be legal in Barrow. Alaskans should be able to know that the law is consistent statewide. Alaskans already benefit from state firearms preemption, which makes the gun laws of Alaska consistent throughout the state. The same should hold true for knives.

Preemption would assure that if you change the definition of switchblades and gravity knives with HB55 ,it will apply statewide.

As we have seen in recent U.S. Supreme Court rulings, the Second Amendment is an individual right and that right has been incorporated to apply in the states. For this reason alone, all states should have knife preemption laws to assure that citizens are protected from onerous local laws, which infringe on their rights.

Beyond that argument, knife preemption laws make sense. Preemption allows law enforcement as well as citizens to know that what is legal in Anchorage is legal everywhere in Alaska.

It is for these reasons, as well as others, that Knife Rights strongly urges you to vote YES on HB55 and YES on the preemption amendment.

Todd Rathner
Knife Rights, Director of Legislative Affairs

Knife Rights, Inc.
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April 6, 2011

A letter in regards to HB 55 (2 pages)

DEAR REP. NEUMAN

AND CO-SPONSORSHIP

As a lifelong Alaskan, I would like to express my appreciation for your support of HB55: "An Act adding definitions of 'gravity knife' and 'switchblade' to the Criminal Law". I presume it was motivated by the recent attempt by US Customs to redefine "switchblade" in Federal law to include common one-handed opening pocket knives, the same pocket knives owned and carried by thousands of law-abiding Alaskans. That something so obvious need be formalized in law is disheartening and seemingly unnecessary.

My purpose in writing, however, is to address another seemingly unnecessary bit of law; the restriction on the purchase and transfer of those gravity knives and switchblades in Alaska state statute and the existence of differing restrictions on their possession and carry at the Municipal level. As you may or may not be aware, over half the states in the US currently allow the purchase, transfer, and possession of automatic knives by law-abiding citizens. Most of those allow the public carry of those knives as well. There is no evidence that those states have a higher incidence of "knife crime" or suffer any degradation in public safety.

I realize on first reflection automatic knives may seem worthy of heightened regulation but, when looked at more closely, the fact we need a HB 55 at all supports the fact that today there is little to no practical functional or public safety difference between a knife that opens almost instantaneously with the flick of a thumb and one that does so by the same thumb pressing a button; as far as their potential misuse as a weapon goes, once opened a blade is a blade.

The current exceptions in the law for law enforcement and active military personnel also appear to support this interpretation. As far as I can tell the exceptions do not exist because members of those groups prefer to use automatic knives as weapons but rather that a quality automatic knife is easier and more reliable to use as a safety tool in certain emergency situations (cutting oneself or others free of seatbelts, entangling ropes or various types of harnesses, etc) than one that requires even a modicum more effort. Given that many "civilian" Alaskans participate in the same type of "extreme" activities and can thus find themselves in the same emergency situations as average military and law enforcement members, the exceptions seem arbitrary.

Looking at the laws themselves, like most gun possession and carry ordinances nationwide "switchblade" laws almost uniformly were enacted as a result of fear and prejudices, not any facts or public safety issues. In the case of "switchblades" the fear was of dangerous "knife culture" minorities, fears promulgated by exploitive movies and the yellow journalism of the day. Rather than looking backward to criticize such laws though, we should instead look at what other states who share Alaska's strong Constitutional RKBA are doing today.

Arizona, Utah, and New Hampshire have recently included automatic knives in their state RKBA preemptions, there is no reason Alaska shouldn't do the same. After all, if we are prepared to allow law-abiding Alaskans to carry loaded firearms in public with only a few limitations, to restrict those same Alaskan's ability to own and carry a knife, a tool by design, merely because of how it opens is ludicrous.

In the spirit of the Right to Keep and Bear all personal Arms enshrined in the Alaska Constitution, I ask that you consider amending HB 55 or introduce additional legislation to treat all non-firearm weapons, as defined in statute as either "deadly weapons" (primarily bladed and impact) or "defensive weapons" (whether chemical (pepper spray/Mace) or electrical (TASERs/ stun guns)), as lawful for purchase, possession and carry statewide, openly or concealed, by law-abiding, non-prohibited Alaskans, preempted from the existing patchwork of additional local and Municipal regulations.

Just as with firearms, this would still allow the restriction of ownership and carry by those deemed underage, by prohibited persons, and in areas currently off limits such as courthouses and other statutorily-restricted locations. K-12 schools could still restrict weapons possession by students and visitors and private businesses would remain free to refuse entry and service to people so armed. Those who actually misused any weapon would still be subject to existing criminal and civil sanctions.

I thank you for your thoughtful consideration and hope that you take this opportunity to bring additional reason and consistency to Alaska's weapons laws.

Respectfully,

Matthew Carberry

matthewacarberry@gmail.com

(907)229-5915

House District 30

PS: On a side note, the only other weapons specifically restricted in state statute are "metal knuckles", which perhaps unsurprisingly share the same racist and media-contrived regulatory history of automatic knives. While there may not be any real "need" for the law-abiding to possess and carry them, the same argument could apply to many other common arms. In any event, the state RKBA doesn't involve "needs", merely freedoms. If people misuse weapons, of whatever type, they should be held accountable for their actions; the law-abiding should not simply be restricted from owning or carrying them outright.

*785 P.2d 563, *; 1990 Alas. App. LEXIS 5, **

STATE of Alaska, Appellant, v. John E. **STRANGE,** and Rudy Kempen, Appellees. **STATE** of Alaska, Appellant, v. John E. **STRANGE,** Christopher A. Stading, and Troy Gonzales, Appellees

Nos. 1004, Court of Appeals Nos. A-2637, A-2638, A-2711, A-2783, A-2839

Court of Appeals of Alaska

785 P.2d 563; 1990 Alas. App. LEXIS 5

January 19, 1990

PRIOR HISTORY: [1]** Appeal in File Nos. A-2637/2638 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Trial Court Nos. 4FA-S88-0639CR & 4FA-S88-0374CR, Jay Hodges, Judge. Appeal in File Nos. A-2711/2783/2839 from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Trial Court Nos. 3AN-S88-1686CR, 3AN-S88-3460CR & 3AN-S88-2661CR, Mark C. Rowland, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: The state sought review of orders from two Superior Courts (Alaska), which dismissed the charges against defendants for first-degree misconduct involving weapons, a class C felony, in violation of Alaska Stat. § 11.61.200(a)(3).

OVERVIEW: All defendants were indicted by a grand jury for first-degree misconduct involving weapons. Defendants possessed a "butterfly knife" which is also known as a "balisong knife." The trial courts concluded that a butterfly or balisong knife was not a prohibited switchblade or gravity knife and dismissed the charges against defendants. The court affirmed the decision of the trial courts. The court found that the applicable statutes were ambiguous, and given that criminal statutes were to be strictly construed against the government, the court concluded that butterfly knives and balisong knives were not gravity knives and not a prohibited weapon. The court based its decision on the fact that butterfly knives were not switchblade knives nor were they sprung by a downward snap of the wrist. In fact, the court found that a number of motions, albeit quickly performed, were necessary to bring the knives to bear. These knives also do not fit the definition of automatic or semi-automatic. Finally, these knives did not appear to fit the common understanding of the term gravity knife or the way that the term was used in common usage.

OUTCOME: The court affirmed the judgments of the trial court that dismissed the charges against defendants for first-degree misconduct involving weapons.

CORE TERMS: knives, knife, gravity, butterfly, switchblade, blade, balisong, weapon, switchblade knife, concealed, handle, evidentiary hearings, sheath, button, wrist, automatically, dictionary, paralleled, videotape, spring, latch, common usage, force of gravity, centrifugal force, expert testimony, pocketknife, downward, felony, seized, locked

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements

HN1 Alaska Stat. § 11.61.200(a)(3) makes it a felony to possess a "prohibited weapon." "Prohibited weapon" is defined in Alaska Stat. § 11.61.200(e)(1)(D) to include a "switchblade or gravity knife." Neither "switchblade" nor "gravity knife" is specifically defined in the statutes.

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview

HN2 The term "gravity knife" is a readily ascertainable and consistent definition. As commonly understood, a gravity knife is one in which the blade opens, falls into place, or is ejected into position by the force of gravity or by centrifugal force. Furthermore, in the Alaska Statute on prohibited weapons, the term "gravity knife" is used in conjunction with "switchblade knife." Alaska Stat. § 11.61.200(e)(1)(D).

Governments > Legislation > Interpretation

HN3 Criminal statutes should be strictly construed against the government.

COUNSEL: Robert D. Bacon, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Grace Berg Schaible and Douglas B. Baily, Attorneys General, Juneau, for Appellants.

Marcia E. Holland, Assistant Public Defender, Fairbanks, and John B. Salem, Acting Public Defender, Anchorage, for Appellees Strange and Kempen.

Nancy J. Nolan, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellees Strange, Stading, and Gonzales.

JUDGES: Bryner, Chief Judge, Coats and Singleton, Judges.

OPINION BY: SINGLETON

OPINION

[*564] Each of these defendants was indicted by a grand jury for first-degree misconduct involving weapons, a class C felony, in violation of AS 11.61.200(a)(3). HN1 This statute makes it a felony to possess a "prohibited weapon." "Prohibited weapon" **[**2]** is defined in AS 11.61.200(e)(1)(D) to include a "switchblade or gravity knife." Neither "switchblade" nor "gravity knife" is specifically defined in the statutes. *See State v. Weaver,* 736 P.2d 781, 782 (Alaska App. 1987). Each of these defendants possessed a "butterfly knife" which is also known as a "balisong knife." The sole question presented by these appeals is whether a butterfly or balisong knife is a prohibited switchblade or gravity knife.

Two evidentiary hearings were held: the first, in Fairbanks before Judge Jay Hodges involved John E. Strange and Rudy Kempen; the second, in Anchorage before Judge Mark C. Rowland involved Strange, again, Christopher A. Stading, and Troy Gonzales. Judge Hodges and Judge Rowland independently determined that a butterfly knife is not a prohibited weapon and therefore dismissed the charges against the defendants and the state appeals. We affirm.

Because neither gravity knife nor switchblade knife are defined in Alaska statutes, we must look to general usage for their meaning. AS 01.10.040. In determining the meaning of words in common usage, we generally look to the dictionary. *See Walker v. State,* 742 P.2d 790,

791 (Alaska App. 1987). **[**3]** The dictionary defines a switchblade knife or switchblade "as a pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." *Webster's Third New International Dictionary of the English Language* Unabridged, 2314 (1966) (hereinafter *Webster's).* The butterfly or balisong knives which were seized in this case are identical to those described in *People v. Quattrone,* 211 Cal. App. 3d 1389, 260 Cal. Rptr. 44, 45 (Cal. App. 1 Dist. 1989) as follows:

> The butterfly knife sold by defendant has a fixed blade over two inches long. When not in use, a two-part handle is folded around the blade as a sheath and is secured by a latch at the base of the knife. To open, the latch is released, allowing the two halves of the sheath to swing down on pivots to form a handle exposing the blade. The handle may be **[*565]** secured manually or closed with the latch.

The knives introduced in evidence and demonstrated in the videotapes prepared at the evidentiary hearing satisfy this definition. It is not seriously contended that the butterfly or balisong knives are switchblade knives as we have defined that term. Rather, the contention is that they are gravity knives. In *Weaver,* we **[**4]** addressed the definition of gravity knives. We said:

> HN2↑The term [gravity knife] has a readily ascertainable and consistent definition. As commonly understood, a gravity knife is one in which the blade opens, falls into place, or is ejected into position by the force of gravity or by centrifugal force . . . .
>
> Furthermore, in the Alaska Statute on prohibited weapons, the term "gravity knife" is used in conjunction with "switchblade knife." AS 11.61.200(e)(1)(D). The ordinary person is therefore put on notice that a "gravity knife" must be similar to a switchblade in operating automatically or semi-automatically. The pertinent characteristics which a switchblade and a gravity knife have in common are that they are easily concealed and quickly brought to bear. These characteristics are indicative of knives which are used as weapons rather than tools. Some utility knives are quickly brought to bear, such as a fishing knife or hunting knife in a sheath, but are not easily concealed. Indeed, it is only when these utility knives are concealed that their possession is unlawful. AS 11.61.220(a)(1). An ordinary pocket knife may be concealed upon the person. AS 11.61.220(a)(1). However, an ordinary **[**5]** pocketknife is incapable of being quickly brought to bear.

Weaver, 736 P.2d at 782-83 (footnote omitted).

The two evidentiary hearings produced essentially the same evidence. At the first hearing in Fairbanks, the defendants called Wayne Ross, a local attorney, as a weapons expert to testify that the terms switchblade and gravity knife have a commonly accepted meaning in the weapons trade and that balisong or butterfly knives do not fall within either meaning. He testified that gravity knives, like switchblade knives are released by a button, but differ from switchblade knives in that they do not have a spring. Ross testified that gravity knives were developed by German paratroopers in World War II as a utility knife to cut parachute shrouds.

The state called Alaska State Trooper Jeffrey Hall at the first hearing in Fairbanks to show how easily butterfly knives could be brought to bear. He testified that butterfly knives were primarily used in the martial arts and in combat. He also testified that a butterfly knife was not within his understanding of the term switchblade knife or gravity knife. The defense also

put on a number of witnesses to testify that butterfly knives were **[**6]** readily available in commercial stores in Anchorage and Fairbanks.

Testimony before Judge Rowland at the second hearing in Anchorage paralleled testimony before Judge Hodges with one exception. Trooper Hall who had been called as a prosecution witness in Fairbanks was called as a defense witness in Anchorage. The state introduced a videotape of Alaska State Trooper John Johnston demonstrating the use of three of the butterfly knives which had been seized from defendant Strange. Trooper Johnston showed that the knives could be easily concealed on the body and could quickly be rbought to bear by a series of wrist movements utilizing centrifugal or inertial force. He indicated that he had only had about ten minutes experience with butterfly knives before making the videotape. He was able to bring the knives to bear quickly even though he took them as he found them without oiling them or working them to make them loose and easier to open.

Trooper Johnston's demonstration paralleled one given in *Quattrone,* where the officer was also able to rapidly open and lock the butterfly knife with one hand using three wrist movements. In that case, the officer testified that he needed only half **[**7]** an hour to perfect his technique. *Quattrone,* 260 Cal. Rptr. at 45.

[*566] A number of courts have considered whether butterfly or balisong knives qualify as prohibited switchblade or gravity knives. *See, e.g., Taylor v. United States,* 848 F.2d 715 (6th Cir. 1988); *Precise Imports Corporation v. Kelly,* 378 F.2d 1014 (2d Cir. 1967), *cert. denied,* 389 U.S. 973, 19 L. Ed. 2d 465, 88 S. Ct. 472 (1967); *Quattrone,* 211 Cal. App. 3d 1389, 260 Cal. Rptr. 44; *People v. Dolson,* 142 Misc. 2d 779, 538 N.Y.S.2d 393 (N.Y. Co. Ct. 1989); *People v. Mott,* 137 Misc. 2d 757, 522 N.Y.S.2d 429 (N.Y. Co. Ct. 1987). The courts, which disagree on whether butterfly knives are switchblades or gravity knives, have not been particularly helpful because of differences in statutory language. In *Quattrone,* the court dealt with California Penal Code § 653k which "defines an illegal switchblade as 'a spring-blade knife, snap-blade knife, gravity knife or any other similar type knife, [having a blade or blades] which can be released automatically . . . . by any type of mechanism whatsoever.'" *Quattrone,* 260 Cal. Rptr. at 46. In *Taylor,* the court dealt with the Switchblade Knife Act which defines a switchblade knife at 15 U.S.C. § 1241(b) as follows:

> The term "switchblade knife" means **[**8]** any knife having a blade which opens automatically --
>
> (1) by hand pressure applied to a button or other device in the handle of the knife, or
>
> (2) by operation of inertia, gravity or both.

Taylor, 848 F.2d at 716 n.1. Both of these definitions are broader than the definitions in our statute which simply uses the terms without further defining them. *Taylor* is also distinguishable because the court there relied heavily on an administrative interpretation of the Act in determining that balisong or butterfly knives were covered.

The New York cases dealt with New York Penal Code § 265.00(5) which stated that:

> "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

The New York cases held balisong or butterfly knives not to be gravity knives because they were not locked in place by means of a button, spring, lever or other device when released. *Dolson,* 538 N.Y.S.2d 393; *Mott,* 137 Misc. 2d 757, 522 N.Y.S.2d 429. Our statute does not

have similar language.

Having carefully reviewed the statutes and **[**9]** the knives introduced into evidence and bearing in mind that HN3 criminal statutes should be strictly construed against the government, *see State v. Andrews,* 707 P.2d 900, 907 (Alaska App. 1985), *aff'd,* 723 P.2d 85 (Alaska 1986), we conclude that butterfly knives and balisong knives are not gravity knives.

A number of considerations lead us to this conclusion. First, butterfly knives are not "switchblade knives in which the blade is sprung by a downward snap of the wrist." *Webster's* at 993. As we have seen, these knives do not meet the definition of switchblade knives. Nor are they sprung by a downward snap of the wrist. In fact, a number of motions, albeit quickly performed, are necessary to bring the knives to bear. These knives also do not fit the definition of automatic or semi-automatic. Finally, these knives do not appear to fit the common understanding of the term gravity knife or the way that the term is used in common usage. *See, e.g., Quattrone,* 260 Cal. Rptr. at 47-48. It is instructive that the expert testimony in *Quattrone* apparently paralleled the expert testimony given at the two evidentiary hearings in this case regarding the meaning of the term "gravity **[**10]** knife."

The judgment of the superior court is AFFIRMED.

Source: **Legal > / . . . / > AK State Cases, Combined**
Terms: **name(state and strange)** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Friday, December 17, 2010 - 8:19 PM EST

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

In

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HOUSE BILL NO. 55

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES NEUMAN AND LYNN, Costello, Thompson, Peggy Wilson, Millett

Introduced: 1/18/11
Referred: Judiciary

1/17/12
Sent email to
Sponsor re: intent

A BILL

FOR AN ACT ENTITLED

"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."

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

Criminal Law, Classification of Offenses, Use of deadly force...

*** Section 1.** AS 11.81.900(b) is amended by adding new paragraphs to read:

(65) "gravity knife" means any knife that has a blade that opens or releases a blade from its handle or sheath by the force of gravity or by the application of centrifugal force; "gravity knife" does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires a person to apply exertion to the blade by hand, wrist, or arm to overcome the bias toward closure and open or release the blade;

(66) "switchblade" means any knife that has a blade that folds, closes, or retracts into the handle or sheath that opens automatically by pressure applied to a button or other device located on the handle or sheath; "switchblade" does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the blade.

Melanie Lesh

From: Rex Shattuck
Sent: Tuesday, January 17, 2012 3:06 PM
To: Melanie Lesh
Subject: RE: HB 55

Melanie,

We will be carrying it in this office. Presently we have a request to consider additional language from a national organization, once we work that out we will contact you.

Thank you

Rex

From: Melanie Lesh
Sent: Tuesday, January 17, 2012 2:39 PM
To: Rex Shattuck
Cc: Beth Schneider
Subject: HB 55

Dear Team Neuman,
Regarding HB 55, 'Adding definitions of 'gravity knife' and 'switchblade' to the criminal law'
Status: House Judiciary Committee
I notice that there is no hearing request memo on file for this bill and wonder if you can inform me whether you wish to have the bill heard in House Judiciary Committee this session. I also note that Rep Lynn is a co-prime sponsor, so would like to know if possible his office is lead on the bill.
Thanks for your help and direction!

Melanie

Melanie Lesh
House Judiciary Committee Aide
Office of Representative Carl Gatto, House Judiciary Committee Chair
Capitol Building, Room 118
(907)465-4990
Melanie.Lesh@legis.state.ak.us

Melanie Lesh

From: Beth Schneider
Sent: Tuesday, January 17, 2012 5:02 PM
To: Melanie Lesh
Subject: RE: HB 55

YAY! Could you let me know if you don't receive it by the end of the week?

From: Melanie Lesh
Sent: Tuesday, January 17, 2012 5:01 PM
To: Beth Schneider
Subject: RE: HB 55

Thanks Beth,
I just had a very nice phone call from your boss, and I told him I'd let Carl know the backup would be forthcoming!
Melanie

From: Beth Schneider
Sent: Tuesday, January 17, 2012 4:55 PM
To: Melanie Lesh
Subject: RE: HB 55

Hi Melanie,

I just spoke with Rep Neuman and he would like to have this bill heard in H Judiciary this session. He stated that Rex should be getting you a request within the next day or two.

Beth

From: Melanie Lesh
Sent: Tuesday, January 17, 2012 2:39 PM
To: Rex Shattuck
Cc: Beth Schneider
Subject: HB 55

Dear Team Neuman,
Regarding HB 55, 'Adding definitions of 'gravity knife' and 'switchblade' to the criminal law'
Status: House Judiciary Committee
I notice that there is no hearing request memo on file for this bill and wonder if you can inform me whether you wish to have the bill heard in House Judiciary Committee this session. I also note that Rep Lynn is a co-prime sponsor, so would like to know if possible his office is lead on the bill.
Thanks for your help and direction!

Melanie

Melanie Lesh
House Judiciary Committee Aide
Office of Representative Carl Gatto, House Judiciary Committee Chair
Capitol Building, Room 118
(907)465-4990
Melanie.Lesh@legis.state.ak.us

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-2679
Fax: (907) 465-4822
Toll Free (800) 505-2678

Interim:
600 E. Railroad Ave
Wasilla, AK 99654
Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman
Rep.Mark.Neuman@legis.state.ak.us

Representative Carl Gatto

I would like the following individual to be able to call in for the hearing on Wednesday, February 15, 2012. I hope to have an additional name and will keep you updated.

1) Todd Rathner of Knife Rights.

Please provide us the number you would like him to call.

Sincerely,

Mark Neuman

Representative Mark Neuman

[redacted]OUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: January 18, 2011 **FURTHER REFERRAL**

Date of Committee Action: 2/15/12

The JUDICIARY Committee considered: **HB**

HOUSE BILL NO. 55
"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."
HB 55 DEFINITIONS: GRAVITY KNIFE & SWITCHBLAD

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB55 (JUD
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New T**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LAW			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Greenberg	-			
	Keller	x			
	Thompson	X			
	Holmes	X			
Chair: Carl Gatto	GATTO	✓			
Chair:					

HOUSE BILL NO. 55

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES NEUMAN AND LYNN, Costello, Thompson, Peggy Wilson, Millett

Introduced: 1/18/11
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law."

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

*** Section 1.** AS 11.81.900(b) is amended by adding new paragraphs to read:

(65) "gravity knife" means any knife that has a blade that opens or releases a blade from its handle or sheath by the force of gravity or by the application of centrifugal force; "gravity knife" does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires a person to apply exertion to the blade by hand, wrist, or arm to overcome the bias toward closure and open or release the blade;

(66) "switchblade" means any knife that has a blade that folds, closes, or retracts into the handle or sheath that opens automatically by pressure applied to a button or other device located on the handle or sheath; "switchblade" does not include a knife that has a spring, detent, or other mechanism designed to create a bias toward closure that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the blade.

Called in 2/15/12

OK. 2/15/12 moved

27-LS0298\A.1
Gardner
2/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE NEUMAN

TO: HB 55

Page 1, line 1, following "**law**":

Insert "**; and relating to reserving the authority to regulate knives to the state with limited exceptions for municipalities to regulate knives.**"

Page 1, following line 15:

Insert new bill sections to read:

"*** Sec. 2.** AS 29.10.200(40) is amended to read:

(40) AS 29.35.145 (regulation of firearms **and knives**);

*** Sec. 3.** AS 29.35.145(a) is amended to read:

(a) The authority to regulate firearms **and knives** is reserved to the state, and, except as specifically provided by statute, a municipality may not enact or enforce an ordinance regulating the possession, ownership, sale, transfer, use, carrying, transportation, licensing, taxation, or registration of firearms **or knives**.

*** Sec. 4.** AS 29.35.145(b) is amended to read:

(b) Municipalities may enact and enforce ordinances

(1) that are identical to state law and that have the same penalty as provided for by state law;

(2) restricting the discharge of firearms in any portion of their respective jurisdictions where there is a reasonable likelihood that people, domestic animals, or property will be jeopardized; ordinances enacted or enforced under this paragraph may not abridge the right of the individual guaranteed by art. I, sec. 19, Constitution of the State of Alaska, to bear arms in defense of self or others;

(3) restricting the areas in their respective jurisdictions in which

firearms **or knives** may be sold; a business selling firearms **or knives** may not be treated more restrictively than other businesses located within the same zone; and

(4) prohibiting the possession of firearms **or knives** in the restricted access area of municipal government buildings; the municipal assembly shall post notice of the prohibition against possession of firearms **or knives** at each entrance to the restricted access area."

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 55**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB055-LAW-CRIM-02-10-12
Title: An Act adding definitions of 'gravity knife' and 'switchblade' to the criminal law
Sponsor: REPRESENTATIVE (s) NEUMAN, LYNN
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/10/12 4:30 PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/10/2012
Department of Law

(Revised 1/17/2012 OMB)

HB

76

<TARGET><BILL>HB 76</BILL><SUBJECT>HB
76</SUBJECT><COMM>HJUD27</COMM></TARGET>

Representative
Lindsey Holmes

Capitol Room 405
465-4919
465-2137 fax

MEMORANDUM

received
02/16/11 11:00am SM

Date: 16 February 2011

To: Representative Carl Gatto,
Chair of the House Judiciary Committee

From: Representative Lindsey Holmes

RE: Hearing Request for House Bill 76

Mr. Chair, I would like to request a hearing for House Bill 76, "An act relating to costs and fees for stalking and sexual assault protective orders," in the House Judiciary Committee. HB 76 is a bill designed to increase protection for victims of sexual assault and stalking. I expect that the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA), the Council on Domestic Violence and Sexual Assault (CDVSA) and other organizations concerned with sexual assault and stalking will testify in favor of this bill. Attached you will find a copy of the bill, the sponsor statement, a sectional prepared by legislative legal and a letter from the ANDVSA. James R. Waldo from my staff is carrying this bill. He can be reached by email at james.waldo@legis.state.ak.us or his direct line at 465.6597. Please contact myself or James if you have any questions regarding this legislation. Thank you very much for your consideration.

Representative Lindsey Holmes

House Bill 76 Sponsor Statement
"An Act relating to costs and fees for stalking and sexual assault protective orders."

House Bill 76 changes the law so that when a victim of stalking or sexual assault gets a protective order, the judge may order the perpetrator to pay any fees associated with the order. Obtaining a protective order can be a very difficult and confusing task. Adding fees or other costs in addition to the other difficulties involved seems inappropriate for a victim seeking safety from a perpetrator of sexual assault or stalking. HB 76 will ensure that the perpetrators of these crimes, and not the victims, will bear the cost of court protection.

There are two types of restraining orders a person can file for: domestic violence protective orders, or stalking and sexual assault protective orders. Right now, when a person petitions for a domestic violence restraining order, the court can require the perpetrator to pay fees associated with obtaining the protective order. However, this cannot currently be done with sexual assault and stalking protective orders that do not involve domestic violence. Victims of stalking and sexual assault should have the same protection as victims of domestic violence. HB 76 would close this gap, bringing parity to the protective order statutes.

The legislature recognized the difficulties in obtaining a protective order for victims of domestic violence when it included this fee provision in the domestic violence protective order statute. Unfortunately, this remedy was left out when the sexual assault and stalking protective order statute was adopted. Please join me in supporting HB 76, so we can extend this protection to the victims of sexual assault and stalking.

State Capitol, Juneau, Alaska 99801 · (907) 465-4919 · Fax: (907) 465-2137
Rep.Lindsey.Holmes@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 15, 2011

SUBJECT: Sectional Summary -- HB 76 (Work Order No. 27-LS0067\A)

TO: Representative Lindsey Holmes
Attn: James Waldo

FROM: Gerald P. Luckhaupt
Assistant Revisor

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

Section 1 of the bill amends AS 18.65.850(c) to allow a court, when issuing a stalking or sexual assault protective order, to require the respondent to pay the costs and fees incurred by the petitioner in bringing the action.

Section 2 of the bill amends AS 18.65.855 to clarify that a court, when issuing an exparte or emergency stalking or sexual assault protective order, may order any of the relief available in AS 18.65.850(c) other than the award of costs and fees.

GPL:ljw
11-111.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB076 \A**
() Publish Date

Identifier (file name): HB076-LAW-CRIM-03-04-11
Dept. Affected Law
Title An Act relating to costs and fees for stalking and sexual assault protective orders.
Appropriation Criminal
Allocation Criminal Justice Litigation
Sponsor Representative(s) HOLMES
Requester (H) Judiciary
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Phone 465-5427
Date/Time 3/4/11 2:00 PM
Approved by John J. Burns, Attorney General
Department of Law
Date 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 076

Analysis

HB 76 allows the court to order the respondent to pay the costs and fees incurred by a petitioner in bringing a petition for a sexual assault or stalking protective order. An order to pay costs under the bill would only be allowed if the respondent had notice and an opportunity to be heard on the petition.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

Main Office
130 Seward St #209
Juneau, Alaska 99801
Phone: (907) 586-3650
Fax: (907) 463-4493
www.andvsa.org

ANDVSA
Alaska Network on Domestic Violence & Sexual Assault

Pro Bono Office
PO Box 6631
Sitka, Alaska 99835
Phone: (907) 747-7545
Fax: (907)747-7547

February 7, 2011

Representative Lindsey Holmes
State Capitol – Room 405
Juneau, AK 99801

RE: Letter of Support for HB 76

Dear Representative Holmes:

On behalf of the Alaska Network on Domestic Violence & Sexual Assault member programs, and the victims of domestic violence, sexual assault and stalking that we serve, thank you for sponsoring HB 76.

HB 76 will bring parity to the statutes regarding remedies available to domestic violence, sexual assault and stalking victims. HB 76 will insure that abusers, and not victims, bear the costs when a victim must seek safety for herself and her children. Under current law, a judge, in their discretion, may order an abuser to pay the costs incurred by a domestic violence victim who obtains a protective order. No similar remedy exists for sexual assault and stalking victims.

Obtaining a protective order for safety can often be a confusing matter, especially for those who have never experienced the criminal or civil justice systems. Attorneys can assist victims with successfully getting this safety measure, but the costs of obtaining a lawyer can preclude victims from seeking such assistance. Further, victims can face an additional hurdle when they need an interpreter to translate their story to the judge or magistrate and relay back the questions asked, when English is not their first language.

The legislature realized these obstacles victims of domestic violence experience in obtaining safety and included this remedy in the domestic violence statute. Unfortunately, when the sexual assault and stalking protective order statute was adopted, this remedy was left out. HB 76 will correct this disparity by providing the same remedies to victims of sexual assault and stalking, that victims of domestic violence already have and insure that victims of domestic violence, sexual assault and stalking are treated equally under the law.

Sincerely,

Peggy Brown, Executive Director

cc: Lisa Mariotti, Policy Director

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 10, 2011

SUBJECT: HB 76 -- Stalking and Sexual Assault Protective Orders Costs and Fees (Work Order No. 27-LS0067\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Sarah Munson

FROM: Gerald P. Luckhaupt
Assistant Revisor

You have asked if sec. 1 of the bill amends a court rule (specifically Civil Rule 79) and if so should a court rule change be noticed in the title and in the bill. In my opinion HB 76 does not amend a court rule and notice of a court rule change is not necessary. HB 76 merely provides that the court when issuing a stalking and sexual assault protective order may order the respondent to pay the costs and fees incurred by the petitioner. This provision does not change the costs and fees that may be awarded under the civil rules nor, for that matter, does it change the way costs and fees may be awarded.

I would also direct your attention to AS 18.66.100(c)(14) upon which this bill is based. AS 18.66.100(c)(14) provides for the awarding of costs and fees in a domestic violence protective order and was enacted as § 33, ch. 64, SLA 1996. Numerous court rule changes were noticed and contained in ch. 64, SLA 1996 although none related to AS 18.66.100(c)(14) and the inclusion of a requirement that the respondent pay the costs and fees of the petitioner. I have not heard of a case where this provision has been questioned as improperly amending a court rule.[1]

GPL:plm
11-134.plm

[1] Rarely will costs and fees ever be awarded as most of the costs and fees that are normally awarded in civil actions (such as filing fees and service fees) are not charged to a petitioner for a protective order.

HB

80

<TARGET><BILL>HB 80</BILL><SUBJECT>HB
80</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

Session:
Alaska State Capitol
Juneau, AK 99801-1182
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Toll Free (800) 505-2678

Interim:
600 E. Railroad Ave
Wasilla, AK 99654
Phone: (907) 376-2679
Fax: (907) 373-4745

Representative Mark Neuman

Rep.Mark.Neuman@legis.state.ak.us

received
02/02/11 12:30pm SM

January 31, 2011

Dear Representatives Gatto

Subject: HB 80 An Act relating to self defense in any place where a person has a right to be.

Attached is a committee package for House Bill 80. I would appreciate if you could schedule this legislation to be heard on February 8th, 2011. Per our previous conversations, this is a particularly opportune time, as we will have a national expert in town to testify on this legislation. West coast NRA representative Brian Judy will be here to meet with the Committee Chair and the Governor on this and other legislation.

Included are the following:

- Letter of Request
- Current version of the bill.
- Sponsor statement.
- Names of people expected to testify with note of off-net lines needed.

Please feel free to contact me or my aide Rex Shattuck (465-2696) with any questions.

Thank you for your consideration.

Sincerely,

Representative Mark Neuman

ALASKA STATE LEGISLATURE

Member:
House Finance Committee
Legislative Budget & Audit Committee

Chair:
House Budget Sub Committees on:
- Department of Administration
- Department of Labor and Workforce Development

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Representative Mark Neuman
Rep.Mark.Neuman@legis.state.ak.us

Sponsor Statement

HB 80 recognizes that Alaskan residents have a right to use deadly force to protect their family and person, whether they are at home, work, or in any place they have a right to be present. It does this by expanding your right to stand your ground when threatened and by making statutes clear that deadly force is justified not only in the case of burglary, the kidnapping of household members, but also in the case of a carjacking of an occupied vehicle and any other place a person has a right to be.

By expanding the rights of Alaskans to stand their ground in any place they are rightfully present, we tell our residents that their decision to use deadly force to defend themselves and their families will not be questioned, and make it clear that it is the **criminal** who has the duty to retreat.

House Bill 80 strengthens the legal recognition of the basic human right to defend oneself.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB080**
() Publish Date

Identifier (file name) HB080-DPS-AST-02-07-11
Title "An Act relating to self defense in any place where a person has a right to be."
Sponsor Neuman, Feige, Lynn and Costello
Requester House Judiciary

Dept. Affected Public Safety
Appropriation Alaska State Troopers
Allocation AST Detachments
OMB Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Lt. Rodney Dial
Division Alaska State Troopers
Approved by Joseph Masters
Commissioner

Phone 907-247-4480
Date/Time 2/7/11 5:00 PM
Date 2/7/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB080
2011 LEGISLATIVE SESSION

Analysis

This bill amends AS 11.81.335 (justification for the use of deadly force) by adding areas (exceptions) a person is not required to leave prior to the application of deadly force.

Passage of this legislation will have no fiscal impact on the department.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB080**
() Publish Date

Identifier (file name): HB080-LAW-CRIM-02-09-11
Dept. Affected: Law
Title: An Act relating to self defense in any place where a person has a right to be.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: REPRESENTATIVE(s) NEUMAN, FEIGE, LYNN, COSTELLO
Requester: (H) JUDICIARY
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	384.6		384.6	384.6	384.6	384.6	384.6
Travel	2.2		2.2	2.2	2.2	2.2	2.2
Services	53.4		53.4	53.4	53.4	53.4	53.4
Commodities	8.0		8.0	8.0	8.0	8.0	8.0
Capital Outlay	1.8		1.8	1.8	1.8	1.8	1.8
Grants							
Miscellaneous							
TOTAL OPERATING	**450.0**	**0.0**	**450.0**	**450.0**	**450.0**	**450.0**	**450.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	450.0		450.0	450.0	450.0	450.0	450.0
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**450.0**	**0.0**	**450.0**	**450.0**	**450.0**	**450.0**	**450.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time	**2.0**		2	2	2	2	2
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/9/11 11:30 AM
Approved by: John J. Burns, Attorney General — Date: 2/9/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 080

Analysis

House Bill 80 expands the places from which a person need not retreat before using deadly force in self defense to any place the person has a right to be. The Criminal Division anticipates it would need 2 new FTE attorney positions to handle the increased cases, to both screen referrals and prosecute those that are accepted. This number is based upon the referral of 1,155 cases in 2010 in which self defense was a potential justification.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL, GOVERNOR

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March 15, 2010

Hon. Jay Ramras
Chair, House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, Alaska 99801

Re: House Bill 381

Dear Chairman Ramras:

I am writing to express my serious concern over the current language in House Bill 381. Every experienced prosecutor with whom I have spoken about this bill uniformly agrees that it would promote violence and be a bad idea for our state. We believe that as drafted this bill will ***encourage*** unnecessary violence in our state. Whatever source one thinks our laws should be drawn from – the ten commandments which say "thou shall not kill," simple morality, utilitarianism principles of the greater good, or simply the concept that life is sacred –this bill would encourage the needless taking of human life.

AS 11.81.335(b) as currently written sets forth the duty to retreat before resorting to deadly force. It requires that if "with complete personal safety and with complete safety to others being defended, the person can avoid the necessity of using deadly force by leaving the area" then the person must do so. This avoids the ***unnecessary*** loss of life and encourages our citizens to seek ways other than violence to resolve disputes. The addition of subsections 5 and 6 to this statute eradicates the duty to retreat - in fact should they be enacted, there would no longer be a duty to retreat in Alaska. That is to say if person A could avoid killing person B by walking away, he/she would no longer be required to do so, but instead would be authorized ***by law*** to kill person B. This does not promote the protection of our citizens or suggest that Alaska as a state places a high value on life itself. While this is highly unlikely to have been the goal of the bill's sponsors, it is nevertheless the result of what has been proposed. This is best explained by closely examing the language of the proposed changes and additions.

Section 1 of the bill proposes amending AS 11.81.335(b) by adding a subsection (5) that would say there would be no duty to retreat when the person is "in a vehicle" owned, leased, used, or even just occupied with the owner's consent. Here are but just three examples of how this would encourage violence:

First example:

A person picks up a hitchhiker, or offers a ride to someone, and, for whatever reason, a confrontation arises while in the vehicle such that deadly force could be used, but for the duty to retreat. Under the current law the hitchhiker must leave your vehicle if he knows he can do so safely. Under the proposed amendment, that hitchhiker would be authorized to kill the driver instead -- even if he could have simply walked away. These facts are similar of a recent murder trial in Anchorage, but they are close. The defendant was convicted of and sentenced for second-degree murder. The case is now on appeal. Why would we want to say killing another person is okay when it could be avoided? Why would we want to authorize the taking of a life when one could walk away in complete safety?

Second Example:

Joe Smith drives to a party. At the party he gets into an altercation and is thrown out of the party. He goes to his car and gets inside to leave. Before leaving, Mr. Smith sees the person with whom he got into the altercation. Though Mr. Smith is in his car, behind the wheel and ready to leave, he fears the other guy may come after him. Instead of driving off – which he could do with complete personal safety, he gets out of his car and grabs a shotgun from the trunk and kills the other man. Again, these are facts similar to a recent murder trial in Anchorage. The defendant was convicted of and sentenced for manslaughter. The case is now on appeal. This is yet another situation in which our current law requires our citizens to walk away if they can do so with safety, but this proposed change in the law would authorize killing another human being instead.

Third Example:

An occupant in car A points a gun at the occupant in car B. If the occupant in car B can drive away with complete safety, then under the current law he must do so. Under the proposed change, the driver in car B would be authorized by this bill to open fire instead of driving away. The law of self-defense in Alaska requires the state to prove beyond a reasonable doubt a defendant's claim of self-defense is not true. It is difficult to prove a negative. If the state cannot prove the negative beyond a reasonable doubt, then at least the state can try to prove that the driver of car B had a duty to retreat and could have done so. This law would eliminate that duty. That is a recipe for inviting gang violence on our streets. These facts are in fact very similar to another case prosecuted by our department. In 2006 there was a shooting at Reka and Bragaw in Anchorage. Two vehicles with young men exchanging gunfire. One young man was killed and the two men in the other vehicle were convicted of murder. One of those cases is on appeal. This loss of life occurred for one of the participants. What about the innocent bystander? For example, there was the election day shooting in Anchorage when a campaign worker for former Gov. Murkowski was hit by a stray bullet at campaign HQ in Anchorage across from the Sears mall. That case involved two vehicles with young men – not in gangs, but still rivals – who opened fire on one another. While we did prosecute the shooters in that case, do so would have been impossible under this law.

This bill would unintentionally encourage such conduct by making it legal or at least offering a defense – which even if not true – could not be disproved. In each of the four examples the defendants were convicted, but this proposed change would make such prosecutions much harder, if even possible.

The proposed subsection (6) in AS 11.81.330(b) would almost completely eliminate the duty to retreat. That subsection says there is no such duty when a person is "in any place where the person has a right to be." That means in the Diamond Mall, Sears Mall, McDonalds, or any other public location a person is no longer required to walk away from a confrontation, but instead may kill another citizen even if they could have walked away with complete safety. This does not express a value for human life. This does not encourage finding a resolution for disputes other than violence. The only time there would be a duty to retreat is if the person is some place they have no right to be – they must be trespassing, or committing a burglary in order to have such a duty. With this change you might as well simply eliminate the duty to retreat completely from our statutes.

The bill also proposes adding a new section that whittles away some of the other protections put in place to prevent unnecessary taking of human life. Our current self- defense law is set up with both a subjective and objective test to determine when deadly force is authorized. The subjective test means the person using the force believes he/she needs to do so. The objective tests means the "reasonable person" would have concluded the same thing. The added section proposes to eliminate the objective test in several circumstances: burglary, carjacking, and kidnapping. That is it takes away from the jury the question of whether a reasonable person would view a particular event as unlawful force against a person that required a response of deadly force. At first blush this seems reasonable. However, when you examine what is proposed more closely, it becomes very disturbing. To understand why, you must first understand each of the three crimes it references.

Burglary is found in AS 11.46 and not AS 11.41 because it is a crime against property, not a person. Burglary requires a person to enter a building with the intent to commit a crime – theft, vandalism, and assault are all examples. What must be noted though is that no person needs to be in the building in order for this to be a crime. If a person breaks into a home or business to steal something, this is a burglary. If a student breaks into a school to vandalize it, this is a burglary. If a person breaks into a home to assault another person – even if no one is home, this is still a burglary because burglary only addresses the entry of premises with the intent to commit a crime (called a target crime) whether that (target) crime is committed or not. This is why burglary is classified as a crime against property and not against a person.

Under current law ***non***-deadly force may be used to protect property, and deadly force is ***only*** authorized when terminating an arson or attempted arson on a dwelling or occupied building (*See* AS 11.81.350(b)), or when terminating a burglary upon an occupied building or dwelling if the person using the force is in possession or control of that premises, or is a guest. *See* AS 11.81.350(c)).

The current bill would now authorize deadly force against a person who burgles a dwelling whether anyone was home or not. Thus deadly force may be used even when no human life is at risk.

The proposed bill would also authorize ***any*** person to use deadly force as compared to only a person who is in possession or control of or is an invited guest in the dwelling. This means the guy driving down the street may kill a person he thinks is breaking into a home. The state must disprove defense of property, so the state must disprove that a victim was committing burglary. While this new section is fraught with the potential for misunderstandings to lead to the unnecessary loss of human life, there is another more serious problem with this section. This new section authorizes deadly force against a person who is currently committing or ***had committed*** a burglary. This language authorizes vigilantism. It authorizes deadly force against any person whom the person using the force "had reason to believe" ***had*** – past tense – had committed a burglary. This new section says such force ***is*** reasonable. The only question left is if the person using the force also thought it was "reasonable."

The section on carjacking does the same thing. It authorizes the use of deadly force against someone who ***had*** -- past tense -- taken a car by force. Even if no human life was at risk in the taking, this law would say it is okay to kill to keep your car from being taken from you or afterwards. That sounds like retaliation and vigilantism, not like a legislature enacting laws to protect our citizens and improve our lives.

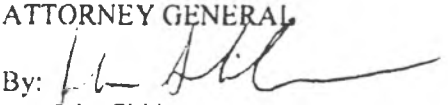
The kidnapping subsection has the same issue with past tense. In each and every section this bill would legalize and authorize vigilantism.

Finally the bill also says no arrest may be made "unless the agency" determines that there is probable cause that the force that used was unlawful. This puts the police in a difficult position especially when confronting gang related violence. It is also unclear to whom "the agency" refers. This could potentially require magistrates and grand juries to start deciding if self-defense has been disproven. This in turn would require the state to act as defense counsel for the defendant to present such a defense only to have to then disprove it. This may sound confusing, and that is because this bill could cause serious problems in the criminal justice system with regard to self-defense law.

Thank you for your consideration of this letter.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: 
John Skidmore
Assistant Attorney General

DSS:JS: sf

cc: House Judiciary Committee Members

the general provision's own terms, since the criminal mischief law would be a "statute defining the offense" in a manner that "provides exemptions or defenses dealing with the justification." McGee v. State, 162 P.3d 1251 (Alaska 2007).

Defense for illegally taking game. — Because a regulation (5 AAC 81.375) outlining the defense of necessity for illegally taking game was properly enacted in accordance with the legislative grant of authority to the Board of Game, it established the only circumstances under which the defense could be interposed to a claim that game was illegally taken. Jordan v. State, 681 P.2d 346 (Alaska Ct. App. 1984).

Evidence of necessity. — Before a person is entitled to an instruction on "necessity" there must be "some evidence" in the record that the action which the person took was necessary, i.e., that he had no other alternative, to avoid an irreparable injury which, under the circumstances, outweighed any injury likely to result from the action taken. Schnabel v. State, 663 P.2d 960 (Alaska Ct. App. 1983).

Trial judge erred in precluding defendant from presenting a necessity defense because the judge concluded that defendant had had an adequate, reasonably available alternative to his action; the adequacy of available alternatives is only a matter of law in cases where the defendant knew or reasonably should have known of the availability and reasonableness of the alternatives, and defendant's evidence was held to have created a jury question sufficient to warrant a necessity instruction. Allen v. State, 123 P.3d 1106 (Alaska Ct. App. 2005).

A defendant relying on necessity to justify an escape must present some evidence justifying his continued absence from custody as well as his initial departure because escape under state law is a continuing offense. Wells v. State, 687 P.2d 346 (Alaska Ct. App. 1984).

In a prosecution for driving with a suspended license in violation of AS 28.15.291, evidence of the defendant's two prior convictions for driving while intoxicated was not properly admitted to contest the defense of necessity because the jury might have been prejudiced. Nelson v. State, 691 P.2d 1056 (Alaska Ct. App. 1984).

In order to satisfy the "some evidence" test, a person claiming necessity in justification of a "continuing offense" must offer some evidence that the continued violation of the law—as well as the initial violation— [illegible] Reeve v. State, 764 P.2d 324 (Alaska Ct.

; testimony. — In a prosecution of irst degree custodial interference, the plied Gerlach v. State, 699 P.2d 358 985), too broadly when it barred defen- y: defendant, who disclaimed any reli- ffirmative defense of necessity, was ify that he did not have the conscious hhold his child for a protracted period, fered testimony did not appear plausi- tate, 66 P.3d 21 (Alaska Ct. App. 2003).

hreatened harm emanates from a e, an actor who violates the law in can defend only on the grounds of e of others, or crime prevention. Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981).

Defense unavailable. — Defense of necessity was unavailable to defendants charged with criminal trespass in an abortion clinic. Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Bird v. Municipality of Anchorage, 787 P.2d 119 (Alaska Ct. App. 1990).

Defense of necessity was inapplicable where appellant had failed to pursue adequate alternatives in judicial and administrative remedies that were available to him. Schnabel v. State, 663 P.2d 960 (Alaska Ct. App. 1983).

The trial court did not err in denying defendant the right to rely on a necessity defense in prosecution for custodial intervention in the first degree. Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Under the provisions of AS 11.81.320(a) and 11.81.900(b)(2)(A) and (b)(18)(A) (now (b)(19)(A)), appellant failed to establish the defense of necessity to the crime of escape because he failed to seek administrative relief from prison officials and he failed to offer a legitimate justification for his decision to remain a fugitive for 13 months. Lacey v. State, 54 P.3d 304 (Alaska Ct. App. 2002).

Defense of necessity was unavailable to defendant who argued need for marijuana for medical purposes, because defendant should have argued the separate medical marijuana defense available in Alaska. Noy v. State, 83 P.3d 538 (Alaska Ct. App. 2003), rehearing denied, 83 P.3d 545 (Alaska Ct. App. 2003).

Facts sufficient to place justification defense in issue. — Defendant's conviction of criminal mischief was reversed where defendant presented some evidence placing the justification defense under AS 11.81.320(a) at issue by testifying that the victim had threatened to run over him, he was frightened, and he broke the windows of the victim's truck to prevent the victim from carrying out his threat, and because the trial court erroneously instructed the jury that defendant bore the burden of proving the defense by a preponderance of the evidence. McGee v. State, 162 P.3d 1251 (Alaska 2007).

Jury instruction. — In prosecution for third-degree criminal mischief for damaging a truck owned by defendant's mother's lover following an altercation, the trial court properly instructed the jury that defendant's actions were potentially justifiable under the defense of necessity.

Jury instruction unwarranted. — In the absence of any evidence explaining that an escaped convict's continued absence resulted from duress, or otherwise justifying his continuing absence, the trial court's refusal to instruct the jury on the defense of necessity was not error. Wells v. State, 687 P.2d 346 (Alaska Ct. App. 1984).

Trial court properly declined to instruct on the necessity defense at defendant's trial for driving while intoxicated, where defendant failed to produce "some evidence" that she brought her conduct into compliance with the law as soon as the necessity ended. Reeve v. State, 764 P.2d 324 (Alaska Ct. App. 1988).

Quoted in McCracken v. State, 743 P.2d 382 (Alaska Ct. App. 1987).

Cited in Gudmundson v. State, 763 P.2d 1360 (Alaska Ct. App. 1988); Clucas v. State, 815 P.2d 384 (Alaska Ct. App. 1991).

Sec. 11.81.330. Justification: Use of nondeadly force in defense of self. (a) A person is justified in using nondeadly force upon another when and to the extent the

person reasonably believ
reasonably believes to be
(1) the person used the
(2) the person claiming
physical injury to the othe
(3) the person claiming
(4) the force used was th
person claiming self-defens
(A) acting alone or with
one or more other persons;
(B) a participant in a fe
flight from a felony transac
(C) acting alone or with
perceived conduct by a riva
rival group, if the person us
acting, has a history or repu
(b) A person who is not j
listed in (a)(1) — (3) of this s
has withdrawn from the enc
other person, but the other
unlawful force. (§ 10 ch 166
2006)

Effect of amendments. — The 2
effective July 1, 2004, added paragr
The 2006 amendment, effective
2006, rewrote the section.

Elements of defense of necessity
and AS 11.81.340 contemplate a situ
force is used by one who reasonably be
is necessary to prevent the use of
against a third person. Thus, the defer
of an objective element, i.e., a reason
force is necessary and a subjective el
actual belief that force is necessary.
698 P.2d 1233 (Alaska Ct. App. 1985).

Requirement of imminency. — S
this section, does not specifically menti
ment of imminency but this section ca
this point because the legislature place
ment of imminency in the statutory
"force" contained in AS 11.81.900(b)(23)
Xi Van Ha v. State, 892 P.2d 184 (Al
1995).

A defendant claiming self-defense a
or the use of force must prove that they
that was reasonably perceived to be
imminent harm. A defendant's reasonal
harm will come at some future time is n
support a claim of self-defense or defens
Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct
Inevitable harm is not the same a
harm. Xi Van Ha v. State, 892 P.2d 184
App. 1995).

Reasonable fear of attack. — Wher
defendant asserts that he or she acted in
the law does not require the defendant t
or she actually faced imminent deadly
the defendant's fear turns out to hav
even, the defense still may be establi

Section 11.81.330

person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person, unless

(1) the person used the force in mutual combat not authorized by law;

(2) the person claiming self-defense provoked the other's conduct with intent to cause physical injury to the other;

(3) the person claiming self-defense was the initial aggressor; or

(4) the force used was the result of using a deadly weapon or dangerous instrument the person claiming self-defense possessed while

(A) acting alone or with others to further a felony criminal objective of the person or one or more other persons;

(B) a participant in a felony transaction or purported transaction or in immediate flight from a felony transaction or purported transaction in violation of AS 11.71; or

(C) acting alone or with others in revenge for, retaliation for, or response to actual or perceived conduct by a rival or perceived rival, or a member or perceived member of a rival group, if the person using deadly force, or the group on whose behalf the person is acting, has a history or reputation for violence among civilians.

(b) A person who is not justified in using force in self-defense in the circumstances listed in (a)(1) — (3) of this section is justified in using force in self-defense if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but the other person persists in continuing the incident by the use of unlawful force. (§ 10 ch 166 SLA 1978; am § 17 ch 124 SLA 2004; am § 2 ch 68 SLA 2006)

Effect of amendments. — The 2004 amendment, effective July 1, 2004, added paragraph (a)(4).

The 2006 amendment, effective September 13, 2006, rewrote the section.

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

NOTES TO DECISIONS

Elements of defense of necessity. — This section and AS 11.81.340 contemplate a situation in which force is used by one who reasonably believes that force is necessary to prevent the use of unlawful force against a third person. Thus, the defense is composed of an objective element, i.e., a reasonable belief that force is necessary and a subjective element, i.e., an actual belief that force is necessary. David v. State, 698 P.2d 1233 (Alaska Ct. App. 1985).

Requirement of imminency. — Subsection (a) of this section, does not specifically mention the requirement of imminency but this section can be silent on this point because the legislature placed the requirement of imminency in the statutory definition of "force" contained in AS 11.81.900(b)(23) (now (b)(27)). Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995).

A defendant claiming self-defense as justification for the use of force must prove that they acted to avoid what was reasonably perceived to be a threat of imminent harm. A defendant's reasonable belief that harm will come at some future time is not sufficient to support a claim of self-defense or defense of others. Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995).

Inevitable harm is not the same as imminent harm. Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995).

Reasonable fear of attack. — When a homicide defendant asserts that he or she acted in self-defense, the law does not require the defendant to prove that he or she actually faced imminent deadly attack. Even if the defendant's fear turns out to have been mistaken, the defense still may be established if the defendant proves that, under the circumstances, he or she reasonably feared imminent deadly attack at the hand of the victim. McCracken v. State, 914 P.2d 893 (Alaska Ct. App. 1996).

Evidence of victim's character for violence. — When a homicide defendant raises the defense of self-defense, evidence concerning the victim's character for violence is potentially admissible for two reasons: First, it may tend to demonstrate who was the initial aggressor in the confrontation; second, it may tend to demonstrate that the defendant's fear for imminent deadly force at the victim's hand was reasonable. McCracken v. State, 914 P.2d 893 (Alaska Ct. App. 1996).

Evidence of victim's conduct. — In assault case, evidence of specific instances of the victim's violent conduct was necessary to enable the jury to determine how much force a reasonable person with defendant's knowledge of the victim's propensity for violence would have felt compelled to use in self-defense. Amarok v. State, 671 P.2d 882 (Alaska Ct. App. 1983).

Jury properly rejected defendant's theory of self-defense where there was ample evidence from which reasonable jurors could have concluded that the victim was not threatening defendant with deadly force at the time defendant stabbed the victim. Morrell v. State, 216 P.3d 574 (Alaska Ct. App. 2009).

Mental dysfunction not a consideration. — The reasonableness of a defendant's perceptions and actions must be evaluated from the point of view of a reasonable person in the defendant's situation, not a person suffering mental dysfunction. Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995).

Instructions. — Burden is on defendant to produce some evidence in support of claim of self-defense before he is entitled to jury instruction on that de- r v. State, 648 P.2d 111 (Alaska Ct. App.

rectly declined to instruct the jury on where there was no imminent danger and as shot from behind. Xi Van Ha v. State, 4 (Alaska Ct. App. 1995).

estion. — Even a weak or implausible claim is a question for the jury. Folger v. 2d 111 (Alaska Ct. App. 1982).

instruction. — In prosecution for first- ult while it was only defendant's own hich supported his theory that he entered use in a non-aggressive manner with the n of conversing with the victim, there was ce that defendant did not provoke a dis- victim under circumstances that he knew or should have known would result in mortal combat, and therefore defendant was entitled to have his self-defense claim, weak as it may have been, properly determined by the jury. Brown v. State, 698 P.2d 671 (Alaska Ct. App. 1985).

Giving instruction misallocating the burden of proof on self-defense amounted to plain error. Brown v. State, 698 P.2d 671 (Alaska Ct. App. 1985).

Applied in Kirby v. State, 649 P.2d 963 (Alaska Ct. App. 1982).

Quoted in Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Carson v. State, 736 P.2d 356 (Alaska Ct. App. 1987); Walsh v. State, 758 P.2d 124 (Alaska Ct. App. 1988).

Cited in Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983); State v. Walker, 887 P.2d 971 (Alaska Ct. App. 1994); Lamont v. State, 934 P.2d 774 (Alaska Ct. App. 1997).

Sec. 11.81.335. Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person who is justified in using nondeadly force in self-defense under AS 11.81.330 may use deadly force in self-defense upon another person when and to the extent the person reasonably believes the use of deadly force is necessary for self-defense against

(1) death;

(2) serious physical injury;

(3) kidnapping, except for what is described as custodial interference in the first degree in AS 11.41.320;

(4) sexual assault in the first degree;

(5) sexual assault in the second degree;

(6) sexual abuse of a minor in the first degree; or

(7) robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others being defended, the person can avoid the necessity of using deadly force by leaving the area of the encounter, except there is no duty to leave the area if the person is

(1) on premises

(A) that the person owns or leases;

(B) where the person resides, temporarily or permanently; or

(C) as a guest or express or implied agent of the owner, lessor, or resident;

(2) a peace officer acting within the scope and authority of the officer's employment or a person assisting a peace officer under AS 11.81.380;

(3) in a building where the person works in the ordinary course of the person's employment; or

(4) protecting a child or a member of the person's household. (§ 10 ch 166 SLA 1978; am § 10 ch 4 SLA 1990; am § 3 ch 68 SLA 2006)

Cross references. — For defense to murder, see AS 11.41.115.

Effect of amendments. — The 2006 amendment, effective September 13, 2006, rewrote the section.

NOTES TO DECISIONS

Annotator's notes. — Many of the cases cited in the notes below were decided under former AS 11.15.190.

A finding of necessity is required before the homicide can be justifiable. Gray v. State, 463 P.2d 897 (Alaska 1970).

Defendant failed to make showing of necessity required to present defense of justifiable homicide. — See Des Jardins v. State, 551 P.2d 181 (Alaska 1976).

Standards by which party attacked may act. — Where one is attacked by another with a deadly weapon, the party attacked may, if he does so honestly and in good faith, safely act in the light of his

surroundings, and on the time. Owens v. United S 1904).

To employ self-defense both an objective and sul have actually believed de protect himself, and his reasonable person would h stances. Weston v. State, 6

Focus on circumstar reasonable person. — Th a prosecution for mansl circumstances be such that believe that she was in im great bodily injury, thus t stances as they would appe and the intoxication of the that question since an ac ained regardless of wh Nygren v. State, 616 P.2d

Unreasonable subject An unreasonable subjectiv for use of deadly force ma reduce murder to manslau P.2d 1186 (Alaska Ct. Ap grounds, 682 P.2d 1119 (Al

Trial court did not err i jury on self-defense in an theory of self-defense was v. State, — P.3d — (Alask memorandum opinion).

A person who provoke right to self-defense. Th tended to preclude a pers from claiming self-defense victim of the felony, but al vening in an attempt either apprehend the criminal. G Alaska 1970).

Where the defendant co cinde an immediate threat a situation so fraught with claim of self-defense to an therefrom. This holding is where the armed robbery where there is grave danger of life because a weapon is b the felony. Gray v. State, 46

A person who commits an right to claim as a defense himself against the use of ex attended victim of the rob intervening to prevent the c criminal, absent a factual s violence occurred, the da the armed robbery no lon Rptr. 897 (Alaska 1970).

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which party attacked may act. attacked by another with a deadly attacked may, if he does so honestly h, safely act in the light of his circumstances, and on the appearances to him at the time. Owens v. United States, 130 F. 279 (9th Cir. 1904).

To employ self-defense a defendant must satisfy both an objective and subjective standard: he must have actually believed deadly force was necessary to protect himself, and his belief must be one that a reasonable person would have held under the circumstances. Weston v. State, 682 P.2d 1119 (Alaska 1984).

Focus on circumstances as they appear to reasonable person. — The defense of self-defense in a prosecution for manslaughter requires that the circumstances be such that a reasonable person would believe that she was in imminent danger of death or great bodily injury, thus the focus is on the circumstances as they would appear to a reasonable person, and the intoxication of the appellant is not germane to that question since an actual belief may be entertained regardless of whether one is intoxicated. Nygren v. State, 616 P.2d 20 (Alaska 1980).

Unreasonable subjective belief as defense. — An unreasonable subjective belief as to justification for use of deadly force may be used as a defense to reduce murder to manslaughter. Weston v. State, 656 P.2d 1186 (Alaska Ct. App. 1982), rev'd on other grounds, 682 P.2d 1119 (Alaska 1984).

Trial court did not err in refusing to instruct the jury on self-defense in an assault case because any theory of self-defense was purely speculative. Clarke v. State, — P.3d — (Alaska Ct. App. Nov. 4, 2009), (memorandum opinion).

A person who provokes a difficulty forfeits his right to self-defense. This doctrine has been extended to preclude a person who commits a felony from claiming self-defense not only to the intended victim of the felony, but also as to any person intervening in an attempt either to prevent the crime or to apprehend the criminal. Gray v. State, 463 P.2d 897 (Alaska 1970).

Where the defendant commits a felony which includes an immediate threat of violence, he has created a situation so fraught with peril as to preclude his claim of self-defense to any act of violence arising therefrom. This holding is limited to the situation where the armed robbery is still in progress and where there is grave danger of violence, injury, or loss of life because a weapon is being used to consummate the felony. Gray v. State, 463 P.2d 897 (Alaska 1970).

A person who commits an armed robbery forfeits his right to claim as a defense the necessity to protect himself against the use of excessive force by either the intended victim of the robbery or by any person intervening to prevent the crime or to apprehend the criminal, absent a factual showing that at the time the violence occurred, the dangerous situation created by the armed robbery no longer existed. Gray v. State, 463 P.2d 897 (Alaska 1970).

Exceptions to forfeiture by aggressor. — An aggressor forfeits the right to claim self-defense except in two situations: (1) where an aggressor using nondeadly force (i.e., one who begins an encounter, using only his fists or some nondeadly weapon) is met with deadly force, the initial aggressor may justifiably defend himself against the deadly attack; (2) when an aggressor withdraws from the altercation that he has started, he may then defend himself from further attack. Castillo v. State, 614 P.2d 756 (Alaska 1980).

Use of unnecessary force by officer. — If an officer uses unnecessary force in making a lawful arrest and the person sought to be arrested believes, and has reason to believe, that he is in danger of being killed or of receiving great bodily harm, he may defend himself, even to the point of taking the life of the officer. The rule of self-defense applies to the case of an officer attempting to make an arrest, who abuses his authority and transcends the bounds thereof by the use of unnecessary force and violence as well as to the case of a private individual who unlawfully uses such force and violence. Gray v. State, 463 P.2d 897 (Alaska 1970).

When possibility of retirement by defendant in issue. — The possibility of retirement by a defendant fearful of his life is not in issue unless at the time of the affray he was an intruder upon the ground where the killing occurred. De Groot v. United States, 78 F.2d 244 (9th Cir. 1935).

Mere threats insufficient to justify homicide. — Threats unaccompanied at the time of the killing with any attempt to carry them into execution are insufficient to justify homicide. Ball v. United States, 147 F. 32 (9th Cir. 1906).

Threat of deadly force not supported by evidence. — Although evidence did show that victim, having learned about common-law wife's affair with another man, was at times angry and threatening in the days before his death, these pre-event occurrences suggested nothing more than motive and a possible willingness on victim's part to use deadly force at some future time; none of the evidence concerning the circumstances surrounding the shooting itself supported the conclusion that victim's prior expressions of anger culminated in an actual use or threat of deadly force by victim, or that his killer acted in the reasonable belief that the use of deadly force in self-defense was necessary to protect against victim. Hilbish v. State, 891 P.2d 841 (Alaska Ct. App. 1995).

Evidence as to the character or reputation of the deceased for turbulence or violence is not admissible unless the defendant is relying on self-defense or justification for his act. Marrone v. State, 359 P.2d 969 (Alaska 1961).

Defense too speculative. — Although the State offered no motive for defendant's attack on the victim and defendant was bleeding from a wound to his thigh when the police stopped his car, under all of the evidence, any argument that defendant acted in self-defense or as a result of serious provocation by the victim would have been based on pure speculation and defendant's request for jury instructions on self-defense and heat of passion were properly denied. Hamilton v. State, 59 P.3d 760 (Alaska Ct. App. 2002).

Jury question. — Whether or not under all the circumstances the accused pleading self-defense had the right to stand his ground depends upon a conclusion of fact, which conclusion is one for the jury. Frank v. United States, 42 F.2d 623 (9th Cir. 1930).

Even a weak or implausible self-defense claim is a question for the jury. Folger v. State, 648 P.2d 111 (Alaska Ct. App. 1982).

The burden of establishing self-defense is upon the defendant. Frank v. United States, 42 F.2d 623 (9th Cir. 1930).

Burden is on defendant to produce some evidence in support of claim of self-defense before he is entitled to jury instruction. Folger v. State, 648 P.2d 111 (Alaska Ct. App. 1982).

When burden sustained. — The burden of establishing self-defense is sustained when, as a result of the whole evidence, a reasonable doubt has been created in the minds of the jury as to whether or not the homicide was in self-defense. If, from a consideration of the whole evidence, the jury entertains a

reasonable doubt upon that question, that doubt is to be determined, like all other doubts in the case, in favor of the defendant. Frank v. United States, 42 F.2d 623 (9th Cir. 1930).

On the issue of self-defense, where the prosecution rests with bare proof of the homicide, the burden of going forward with the evidence is on the defendant, and he must offer proof of facts upon that issue. It is not enough for him to say, "I did it in self-defense," whereupon the prosecution must establish the negative. The proofs of the accused are not required to establish self-defense by preponderance of the evidence. The evidence adduced, however, must be sufficient to require the consideration of a reasonable doubt as to the justification for the homicide. To that extent there is a burden of proof on the defendant. De Groot v. United States, 78 F.2d 244 (9th Cir. 1935).

Distinction between burden on prosecution and burden upon defendant. — Logically there is a possible distinction between the burden on the prosecution to prove the absence of self-defense beyond a reasonable doubt and the burden upon the defendant to prove affirmatively enough to create a reasonable doubt that he so acted. The burdens seem different if any value to the accused is to be given to the word "beyond" in the historic phrase "beyond a reasonable doubt." Proof beyond a reasonable doubt suggests something less than such a doubt; that the jury's minds must travel a less distance from the presumed innocence of the accused. It suggests that something more may be required of the defendant to bring the minds of the jury to the full possession of a reasonable doubt than into the lesser area of belief beyond a reasonable doubt; an area between that beyond reasonable doubt and affirmative belief in the defendant's innocence. De Groot v. United States, 78 F.2d 244 (9th Cir. 1935).

Tests for self-defense instruction. — Before a self-defense instruction will be required, two evidentiary tests must be met. First there must be some evidence that excessive force was used to effect an arrest or stop the commission of a felony. Second, there must be some evidence from which a jury could conclude that the dangerous situation created by the felony no longer existed. Gray v. State, 463 P.2d 897 (Alaska 1970).

A self-defense instruction must be given if there is evidence from which a reasonable juror could entertain a reasonable doubt as to the defendant's guilt. Weston v. State, 682 P.2d 1119 (Alaska 1984).

Right to instruction. — In prosecution for first-degree assault while it was only defendant's own testimony which supported his theory that he entered the party house in a non-aggressive manner with the sole intention of conversing with the victim, there was some evidence that defendant did not provoke a dispute with victim under circumstances that he knew or should have known would result in mortal combat, and therefore defendant was entitled to have his self-defense claim, weak as it may have been, properly determined by the jury. Brown v. State, 698 P.2d 671 (Alaska Ct. App. 1985).

In a prosecution for third-degree assault, defendant was not required to show that a robbery was actually imminent, but merely that he reasonably believed one to be imminent, and, having presented some evidence supporting all necessary elements of his claim of self-defense, it was error to refuse to instruct the jury on such claim and to preclude him from presenting evidence to support the claim. Lamont v. State, 934 P.2d 774 (Alaska Ct. App. 1997).

Sufficiency of evidence for instruction on self-defense. — See Paul v. State, 655 P.2d 772 (Alaska Ct. App. 1982); Weston v. State, 682 P.2d 1119 (Alaska 1984).

Error in specific instruction not cured by later general statements. — A specific instruction, based upon the choice of a few of the facts testified, but omitting the paramount facts as to the state of the defendant's mind, emotions, and inferable impulses is final in its declaration as to the absence of self-defense in the case, and the error in such a specific instruction is not cured by later general statements concerning the right of the jury to take into consideration the deceased victim's threats. De Groot v. United States, 78 F.2d 244 (9th Cir. 1935).

When instruction on no duty to retreat properly rejected. — Where a defendant who was a long-time hotel resident used deadly force against the hotel desk clerk in the hotel office, the trial court did not err in rejecting the defendant's proposed instruction that there is no duty to retreat before using deadly force if a person is attacked on premises which are leased or rented to him and he is not the initial aggressor. Stapleton v. State, 696 P.2d 180 (Alaska Ct. App. 1985).

When instructions on self-defense properly refused. — Instructions on self-defense are properly refused where there is nothing in the evidence to which they are applicable. Itow v. United States, 228 F. 25 (9th Cir. 1915).

Refusal to instruct held error. — Refusal to grant defendant's request for a fury instruction on the issue of self-defense was error where defendant satisfied the burden of producing "some evidence" that he had acted in self-defense. Paul v. State, 655 P.2d 772 (Alaska Ct. App. 1982).

Failure to instruct on self-defense was not harmless although the jury had rejected the affirmative defense of imperfect self-defense, since the burden of establishing imperfect self-defense rests on the defendant, and the standard of proof is a preponderance of the evidence, while the burden of disproving self-defense rests on the state and the standard of proof is beyond a reasonable doubt. Weston v. State, 682 P.2d 1119 (Alaska 1984).

Proper instruction. — An instruction was proper which expressly authorized the jury to acquit the defendant if they found that it appeared to his apprehension that he was actually in danger, and which authorized the jury to consider apparent actual danger, and the court immediately thereafter properly charged the jury on the subject of the appearance of danger to the defendant. Ball v. United States, 147 F. 32 (9th Cir. 1906).

The trial court did not err in instructing the jury on the matter of self-defense. Nielsen v. State, 623 P.2d 304 (Alaska 1981).

Improper instruction. — There is no ground for instructing the jury that the threats of a man of vicious character are to give any greater right to a defendant to kill in self-defense than would the threats of a virtuous man. Ball v. United States, 147 F. 32 (9th Cir. 1906).

Giving instruction misallocating burden of proof on self-defense amounted to plain error. Brown v. State, 698 P.2d 671 (Alaska Ct. App. 1985).

Instruction on mutual combat held misleading without qualification, see Huber v. United States, 258 F. 766 (9th Cir. 1919).

Applied in Kirby v. State, 649 P.2d 963 (Alaska Ct. App. 1982); Blackhurst v. State, 721 P.2d 645 (Alaska Ct. App. 1986); State v. Walker, 887 P.2d Ct. App. 1994); Rhames v. State, 907 P.2 Ct. App. 1995).

Quoted in Williamson v. State, 69 (Alaska Ct. App. 1984); Carson v. State, (Alaska Ct. App. 1987).

Collateral references. — Pleading se other justification in civil assault and ba 67 ALR2d 405.

Duty to retreat as condition of self-de one is attacked at his office, or place of employment, 41 ALR3d 584.

Sec. 11.81.340. Justification: is justified in using force upon ar believes it is necessary to defend person claiming defense of anoth would be justified under AS 11.8 self-defense. (§ 10 ch 166 SLA 19

Effect of amendments. — The 2006 an effective September 13, 2006, substituted "j in using" for "may use," "defense of anothe

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Harm must be unlawful. — The tw defenses of defense of others and crime p require that the harm avoided by the charg unlawful. Cleveland v. Municipality of Ancho P.2d 1073 (Alaska 1981).

When the threatened harm emanates human source, an actor who violates th response to it can defend only on the gr duress, defense of others, or crime preventio land v. Municipality of Anchorage, 631 P. (Alaska 1981).

Reasonable belief that force is neces. Alaska Statutes 11.81.330 and this section plate a situation in which force is used by reasonably believes that force is necessary to the use of unlawful force against a third perso

Sec. 11.81.350. Justification: Us

(a) A person may use nondeadly forc reasonably believes it is necessary to the commission or attempted commis of property or services.

(b) A person may use deadly force reasonably believes it necessary to te the commission or attempted commis

(c) A person in possession or cont implied agent of that person, may us

(1) nondeadly force upon another believes it is necessary to terminate commission or attempted commission upon the premises;

Ct. App. 1986); State v. Walker, 887 P.2d 971 (Alaska Ct. App. 1994); Rhames v. State, 907 P.2d 21 (Alaska Ct. App. 1995).

Quoted in Williamson v. State, 692 P.2d 965 (Alaska Ct. App. 1984); Carson v. State, 736 P.2d 356 (Alaska Ct. App. 1987).

Stated in Houston v. State, 602 P.2d 784 (Alaska 1979).

Cited in Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983); David v. State, 698 P.2d 1233 (Alaska Ct. App. 1985); Palmer v. State, 770 P.2d 296 (Alaska Ct. App. 1989); Cameron v. State, 171 P.3d 1154 (Alaska 2007).

Collateral references. — Pleading self-defense or other justification in civil assault and battery action, 67 ALR2d 405.

Duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 ALR3d 584.

Modern status of rules as to burden and quantum of proof to show self-defense in homicide, 43 ALR3d 221.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Withdrawal, after provocation of conflict, as reviving right of self-defense, 55 ALR3d 1000.

Sec. 11.81.340. Justification: Use of force in defense of a third person. A person is justified in using force upon another when and to the extent the person reasonably believes it is necessary to defend a third person when, under the circumstances as the person claiming defense of another reasonably believes them to be, the third person would be justified under AS 11.81.330 or 11.81.335 in using that degree of force for self-defense. (§ 10 ch 166 SLA 1978; am § 4 ch 68 SLA 2006)

Effect of amendments. — The 2006 amendment, effective September 13, 2006, substituted "is justified in using" for "may use," "defense of another" for "the defense of justification," and "self-defense" for "self defense."

NOTES TO DECISIONS

Harm must be unlawful. — The two related defenses of defense of others and crime prevention require that the harm avoided by the charged act be unlawful. Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981).

When the threatened harm emanates from a human source, an actor who violates the law in response to it can defend only on the grounds of duress, defense of others, or crime prevention. Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981).

Reasonable belief that force is necessary. — Alaska Statutes 11.81.330 and this section contemplate a situation in which force is used by one who reasonably believes that force is necessary to prevent the use of unlawful force against a third person. Thus, the defense is composed of an objective element, i.e., a reasonable belief that force is necessary and a subjective element, i.e., an actual belief that force is necessary. David v. State, 698 P.2d 1233 (Alaska Ct. App. 1985).

Right to instruction on defense. — In prosecution for fourth-degree assault, since there was evidence from which the jury could infer that defendant believed he had to kick his uncle to prevent harm to his daughter, and that this belief was reasonable, he was entitled to an instruction on defense of a third person as justification for his conduct. David v. State, 698 P.2d 1233 (Alaska Ct. App. 1985).

Cited in Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983).

Sec. 11.81.350. Justification: Use of force in defense of property and premises. (a) A person may use nondeadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be the commission or attempted commission by the other of an unlawful taking or damaging of property or services.

(b) A person may use deadly force upon another when and to the extent the person reasonably believes it necessary to terminate what the person reasonably believes to be the commission or attempted commission of arson upon a dwelling or occupied building.

(c) A person in possession or control of any premises, or a guest or an express or implied agent of that person, may use

(1) nondeadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be the commission or attempted commission by the other of criminal trespass in any degree upon the premises:

(2) has escaped or is attempting to escape from custody while in possession of a firearm on or about the person; or

(3) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

(b) The use of force in making an arrest or stop is not justified under this section unless the peace officer reasonably believes the arrest or stop is lawful.

(c) Nothing in this section prohibits or restricts a peace officer in preparing to use or threatening to use a dangerous instrument. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Subjecting felon to possibility of summary execution. — It is only in situations articulated in this section that a felon should be subjected to the possibility of summary execution. State v. Sundberg, 611 P.2d 44 (Alaska 1980).

Level of force must be objectively reasonable. — Regardless of whether the individual officer actually believed that his use of force was reasonable, and regardless of the reasonableness of that belief, the officer is not privileged to use an objectively unreasonable level of force in making an arrest. Samaniego v. City of Kodiak, 2 P.3d 78 (Alaska 2000).

This section and AS 12.25.070 are only general statutes which set out when deadly force is appropriate, with the latter indicating only that a police officer making an arrest may not use any restraint that is not necessary and proper for the arrest or detention of a person; however, such statutes cannot purport to give notice to officers that specific actions taken in specific circumstances may or may not be reasonable for immunity purposes. Sheldon v. City of Ambler, 178 P.3d 459 (Alaska 2008).

On a claim of excessive force, the court erred in applying an immunity analysis, driven by the officers' subjective beliefs as to the reasonableness of the force used. Samaniego v. City of Kodiak, 2 P.3d 78 (Alaska 2000).

Criteria for resolving issues under former law. — The criteria embodied in this section should be looked to as the relevant standards to be applied by Alaska's courts in resolving issues which might still arise under the "necessary and proper means" phraseology of former AS 12.25.080, which provided that "[i]f a person being arrested either flees or forcibly resists after notice of intention to make the arrest, the peace officer may use all the necessary and proper means to effect the arrest." State v. Sundberg, 611 P.2d 44 (Alaska 1980).

Lawful stops and custodial arrest distinguished. — See Howard v. State, 664 P.2d 603 (Alaska Ct. App. 1983).

Drawn guns and handcuffing do not necessarily turn a stop into an arrest. Howard v. State, 664 P.2d 603 (Alaska Ct. App. 1983).

Threats with nightstick. — Where the evidence establishes, at best, that the officer threatened defendant with the nightstick but never struck him with it and he consistently characterized the officer's conduct with the stick as menacing, and never intimated that the officer actually attempted to strike him there was insufficient evidence that the officer's threats with the nightstick amounted to a prohibited use of "deadly force." Carson v. State, 736 P.2d 356 (Alaska Ct. App. 1987).

Immunity standard for police officers clarified. — After clarifying the standard for qualified immunity to emphasize that the question was whether an officer reasonably believed that his actions were lawful, the court found that a police officer was not on notice under this section, AS 12.25.070, or through case law or regulation, that a bear hug and a take down were excessive uses of force when applied to an intoxicated and assaultive arrestee, and the officer was entitled to immunity. Sheldon v. City of Ambler, 178 P.3d 459 (Alaska 2008).

Unresolved factual questions prevented dismissal of excessive force claim. — Dismissal of arrestee's excessive force claim could not have been affirmed based subdivision (a)(2) because there were unresolved factual questions that prevented an appellate court from concluding that use of deadly force was reasonably necessary to accomplish the stated objectives because issue preclusive effect could not have been given to a federal district court's factual findings at a sentencing hearing for illegal possession of a firearm. Maness v. Daily, 184 P.3d 1 (Alaska 2008).

Applied in Brown v. Anchorage, 680 P.2d 100 (Alaska Ct. App. 1984).

Quoted in Sun v. State, 830 P.2d 772 (Alaska 1992).

Cited in Samaniego v. City of Kodiak, 2 P.3d 78 (Alaska 2000).

Collateral references. — Right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 ALR3d 174.

Peace officer's civil liability for death or personal injuries caused by intentional force in arresting misdemeanant, 83 ALR3d 238.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983), 60 ALR Fed. 204.

Sec. 11.81.380. Justification: Use of force by private person assisting an arrest or terminating an escape. (a) Except as provided in (b) of this section, a person who has been directed by another who that person reasonably believes to be a peace officer to assist in making an arrest or terminating or preventing an escape may use

nondeadly force when and to the extent the person reasonably believes it necessary to carry out the peace officer's direction. A person may use deadly force under this section only when the person reasonably believes it necessary to carry out the peace officer's direction to use deadly force.

(b) The use of force under (a) of this section is not justified if the person believes that the peace officer is not justified in using that degree of force under the circumstances. (§ 10 ch 166 SLA 1978)

Sec. 11.81.390. Use of force by a private person in making arrest or terminating an escape. In addition to using force justified under other sections of this chapter, a person, acting as a private person, may use nondeadly force to make the arrest or terminate the escape or attempted escape from custody of a person who the private person reasonably believes has committed a misdemeanor in the private person's presence or a felony when and to the extent the private person reasonably believes it necessary to make that arrest or terminate that escape or attempted escape from custody. A private person may use deadly force under this section only when and to the extent the private person reasonably believes the use of deadly force is necessary to make the arrest or terminate the escape or attempted escape from custody of another who the private person reasonably believes

(1) has committed or attempted to commit a felony which involved the use of force against a person; or

(2) has escaped or is attempting to escape from custody while in possession of a firearm on or about the person. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Instructions. — A jury should have been instructed that a private person may use such means as may be necessary and proper to effect the arrest of an actual felon, including deadly force in a charge stemming from a shooting of one believed by a private citizen to have committed a crime. Grant v. State, 631 P.2d 1338 (Alaska 1981).

Cited in Walsh v. State, 758 P.2d 124 (Alaska Ct. App. 1988).

Collateral references. — Private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 ALR3d 1078.

Sec. 11.81.400. Justification: Use of force in resisting or interfering with arrest. (a) A person may not use force to resist personal arrest or interfere with the arrest of another by a peace officer who is known by the person, or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful, unless

(1) the force used by the peace officer exceeds that allowed under AS 11.81.370;

(2) *[Repealed, § 1 ch 63 SLA 1982.]*

(b) The use of force justified under this section in resisting arrest or interfering with the arrest of another may not exceed the use of force justified under AS 11.81.330 or 11.81.335.

(c) *[Repealed, § 1 ch 63 SLA 1982.]*

(d) *[Repealed, § 1 ch 63 SLA 1982.]* (§ 10 ch 166 SLA 1978; am § 26 ch 102 SLA 1980; am § 1 ch 63 SLA 1982)

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, [illegible] 1980.

As to when person sought to be defend himself against the arrest notes to AS 11.81.335, Notes to Decisi

Investigatory stops. — AS 11.8 restricts the right to use non-deadly f unlawful arrest, also applies to inves therefore, defendant was not permitte officer who had reasonable suspicio question him about an assault at H

Collateral references. — What c structing or resisting an officer, in t actual force, 44 ALR3d 1018.

Sec. 11.81.410. Justificatio force justified under other sectio correctional facility may, if aut Corrections, use nondeadly force necessary and appropriate to m

(b) Except as provided in (c) correctional facility or a peace off the time of an escape from the f guard or peace officer reasonal attempted escape of a prisoner f

(c) The use of deadly force und officer knows that the prisoner w a charge of a misdemeanor and do in which event only nondeadly fo

Revisor's notes. — Under § 48, E.O. ment of Corrections" was substituted for "

Applied in LeFever v. State, 877 P.2d 1 Ct. App. 1994).

Sec. 11.81.420. Justification: tent with AS 11.81.320 — 11.81.41 is justified when it is required or a order.

(b) The justification afforded by

(1) the person reasonably believe judgment, or order of a court of com process, notwithstanding lack of ju

(2) the person reasonably believe peace officer in the performance of exceeded the officer's authority. (§

N

Forcibly resisting court order to sei ers. — A person is not entitled to use force the taking of property by law enforcement pursuant to a court order. Jurco v. State, 825 Alaska Ct. App. 1992).

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

Committee on HB 80, dated 2-9-11
bill # / subject — public hearing date

This bill is a common sense response to someone who is threatening you or your family's life. Why should a lawful gun owner who is carrying a firearm have a duty to retreat? It makes no sense to run and hide (when you are carrying a firearm) if your life is being threatened.

Please support this common sense bill.

Regards,
Cliff

Signed: Cliff Stone
Testifier

self
Representing (optional)

319 Rogers Rd Kenai, AK 99611
Address

(907) 283-7020
Phone number

Sarah Munson

From: Karen [ksak51@yahoo.com]
Sent: Tuesday, February 08, 2011 5:12 PM
To: Carl Gatto; Sarah Munson; Beth Schneider
Subject: Fwd: Alaska: House Judiciary Committee to Hear No-Duty-to-Retreat Legislation

~~#8~~ e-mails.
22

Begin forwarded message:

From: "NRA ILA Alerts" <admin@nramedia.org>
Date: February 8, 2011 3:01:57 PM AKST
To: KSAK51@yahoo.com
Subject: Alaska: House Judiciary Committee to Hear No-Duty-to-Retreat Legislation

Alaska: House Judiciary Committee to Hear No-Duty-to-Retreat Legislation

Contact the committee today!

The House Judiciary Committee will hear House Bill 80 tomorrow, February 9, at 1:00 p.m.

Introduced by state Representative Mark Neuman (R-15), HB 80 would remove the duty-to-retreat in Alaska. Under this bill, Alaskans would have the right to use force, including deadly force, for self-defense anywhere they have a right to be.

Please contact members of the House Judiciary Committee TODAY and respectfully urge them to support HB 80. Contact information for this committee can be found below. **Most importantly, there needs to be a strong public record of support in the House Judiciary Committee hearing on HB 80. You can help provide this support by visiting your local Legislative Information Office tomorrow to participate in the hearing and testify in favor of this bill.** A list of offices and contact information can be found here.

House Judiciary Committee

Representative Carl Gatto (R-13), Chairman
465-3743

NRAILA.
Write Yo
Represent
Write The
Get Involved
Register To
Contribu
Follow NR

Representative_Carl_Gatto@legis.state.ak.us

Representative Steve Thompson (R-10), Vice Chairman
465-3004
Representative_Steve_Thompson@legis.state.ak.us

Representative Wes Keller (R-14)
465-2186
Representative_Wes_Keller@legis.state.ak.us

Representative Bob Lynn (R-31)
465-4931
Representative_Bob_Lynn@legis.state.ak.us

Representative Lance Pruitt (R-21)
465-3438
Representative_Lance_Pruitt@legis.state.ak.us

Representative Max Gruenberg (D-20)
465-4940
Representative_Max_Gruenberg@legis.state.ak.us

Representative Lindsey Holmes (D-26)
465-4919
Representative_Lindsey_Holmes@legis.state.ak.us

Representative Chenault (R-34)
465-3779
Representative_Mike_Chenault@legis.state.ak.us

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NRAILA.org | Current Legislation | Get Involved Locally | Register To Vote
Contribute | Edit Your Profile

Sarah Munson

From: Karen Sawyer
Sent: Wednesday, February 09, 2011 8:34 AM
To: Sarah Munson
Subject: FW: Support HB 80

-----Original Message-----
From: Cheri Weed [mailto:akkid78@hotmail.com]
Sent: Wednesday, February 09, 2011 8:24 AM
To: Rep. Carl Gatto
Subject: Support HB 80

Dear Representative,

I would like to urge you to support House Bill 80. It concerns me that I am limited in my right to defend myself when the use of "deadly force"
becomes necessary.

I am a new mother with a five month old baby boy. Having to take a baby with me everywhere I go has made me much more vulnerable than I ever used to be! This makes me much more concerned about defending myself if the situation ever calls for it.

Being able to defend myself with "deadly force" is a choice I hope I never have to make but if I do I certainly hope the law will be on my side.

Sincerely,
Cheri Weed
907-488-0450

Sarah Munson

From: Dennis Jackson [drjackson48@hotmail.com]
Sent: Tuesday, February 08, 2011 4:26 PM
To: Rep. Carl Gatto
Subject: Duty to Retreat

Sir:

Thank you for your service in the legislature.

I am writing to urge you to vote for and continue to push for passage of this Bill. The right to defend oneself is the basic of rights in the Natural Law. The Natural Law has been citied as the basis for our jurisprudence since the first English settlers. The great commentator on the English Common Law Sir William Blackstone commented that the foundation of the right to bear arms in defense of oneself was the true right of a free person. Indeed the right goes back to the field at Runnymead England when John was forced to sign the Magna Carta. It is an embedded inherent right of survival and the foundation of the rights of a free people.

Nothing is so intimate as the right to repel an attacker. The old saying when you have only seconds the police are minutes away is so very true. Many would argue that we need to retreat to preserve life but I say anyone who puts their own life in peril and has assumed the risk by committing the crime is at fault. We know that the police would not retreat, why would anyone ask it of a citizen, have we erected an elite group that exercise a greater right than the citizen had before the formation of government? Indeed the right has been passed to the police for the orderly execution of justice but it was never given away in its entirety.

The example of violence along our southern boarder is an example of the citizens need to be able to defend themselves. Violence is not just localized in the south nor is it exclusive of the boarder. The example of the rampage against police in recent weeks is proof of this. Last year an officer was shot in Anchorage while doing reports in his cruiser, and not long after a trooper was shot while on patrol. This occurred just shortly after 4 officers in Lakewood, Washington were gunned down while they sat in a coffee stop. The plain truth is that lawlessness is very real and very dangerous. But this law that creates a duty to pause may be the pause that ends a lawful law abiding citizen's life. Too often it is a criminal that crys foul, why is it then that we should create another impediment by allowing a criminal to do so again. The law in its present state shifts the burden from the criminal to the victim, how utterly unreasonable can that possibly be? It is an old concept that if you run from a vicious animal you will encourage the attack. Whoever would by violence do harm to another has already proved their viciousness. Are we then to be encumbered by the doubt as to whether we will be judged to have acted prematurely? Are we to be victims before we are able to suppress a violent attack? Are we encumbered by the thought that we may be held liable for the acts of another? It goes beyond the pale of being reasonable.

Imagine a lone individual minding their business in a local store when a group of gang members enter and begin to accost the individual. Imagine then one of the assailants draws a weapon and in a threatening manner approaches the individual and begins an attack. If the defender draws a weapon and defends in a correct manner of self defense he has no witnesses. Do you suppose the gang member's friends would speak the truth?? Has this happened, on a daily basis? You have to but peruse the news papers, the internet or watch TV to find such events throughout the country.

I trust sir that you will do the right thing.

Dennis Jackson Fairbanks, Alaska

Sarah Munson

From: Karen Sawyer
Sent: Tuesday, February 08, 2011 5:03 PM
To: Sarah Munson
Subject: FW: HB-80 Supprot

Follow Up Flag: Follow up
Flag Status: Flagged

From: Kevin McCarthy [mailto:northpolegallery@yahoo.com]
Sent: Tuesday, February 08, 2011 3:47 PM
To: Rep. Carl Gatto
Subject: HB-80 Supprot

Hello!

My name is B. Kevin McCarthy and I am on the City of North Pole's City Council.

I would like to urge you to consider passing HB-80, a bill that would allow all Alaskans to protect themselves. As a retired US Coast Guard Chief and long time concealed firearm permit holder - Alaskans should be allow to protect family, friends, and themselves.

Thank you very much!

B. Kevin McCarthy
1051 Refinery Loop Rd
North Pole, Alaska 99705

Looking for earth-friendly autos?
Browse Top Cars by "Green Rating" at Yahoo! Autos' Green Center.

Sarah Munson

From: Brandon Erickson [christianguy_95@yahoo.com]
Sent: Tuesday, February 08, 2011 3:29 PM
To: Rep. Carl Gatto
Subject: Support of HB 80

Sir,

I'm writing to encourage you to support HB 80. I am an Alaskan and have lived here since my birth 33 years ago except for the years that I served as an infantryman in the US Army.

For me, one of the most important rights that I have as an American, is my right to defend both my life and the lives of those around me. Most of the time that I am not at work, I carry a concealed handgun. I have taken courses and training in the laws surrounding when I can use my weapon to defend the mine and other's lives...and just as importantly, when not to use my weapon. I also shoot regularly as I believe that as someone who carries a weapon, I have a responsibility to be as prepared as possible in the event that I have to use it.

Taking another's life is something that I pray that I never have to do. But should I find myself in a situation where I am confronted by an attacker who is armed with either a weapon or a knife, turning my back to that attacker both presents a danger to myself as well as shifting responsibility for stopping an attack to someone else who may not be able to either defend themselves or flee. I may be able to run away safely, but that attacker will still be free to go after other people. Removing the requirement to flee, would enable me to help deter future attacks on others by either presenting my weapon and holding the attacker for the police, or God forbid, remove the threat myself.

Too often in today's society, we turn a blind eye and ignore what we don't want to see. Too often we flee away from an attacker rather than confront and overcome them. If I am in a position to stop a threat to either myself or others, I don't want to have to worry about my actions being reviewed in the comfort of a courtroom and then having others decide whether I may have been able to flee or not.

I thank you for your time and again, please allow Alaskans to defend themselves.

Respectfully,

Brandon Erickson

We won't tell. Get more on shows you hate to love
(and love to hate): Yahoo! TV's Guilty Pleasures list.

Sarah Munson

From: Christopher Nugent [cnugentak@gmail.com]
Sent: Tuesday, February 08, 2011 3:19 PM
To: Rep. Carl Gatto
Subject: HB 80

Dear Representative Carl Gatto
I respectfully urge you to support HB 80, No-Duty-to-Retreat Legislation.
Christopher Nugent, Maj, USAF (Ret)
Wasilla, AK

Sarah Munson

From: Mike Reeves [michaelr311@gmail.com]
Sent: Tuesday, February 08, 2011 3:19 PM
To: Rep. Carl Gatto
Subject: support HB 80

As crimes against persons are ever growing in Alaska we need this law to send the message that we are armed, and detour the perpetrator from infringing on our civil rights to be a safe, rather armed or for the unarmed, this will help send a message that Alaskans want to protect themselves and property from unwanted harm. No man or women should have to retreat or fear prosecution for self-defense of life and property.

I urge you to support this bill, it may save someone you know or love

Mike Reeves
Wasilla, Alaska

Sarah Munson

From: Vincent L. McCutcheon [gra8wulf@gmail.com]
Sent: Tuesday, February 08, 2011 3:17 PM
To: Rep. Carl Gatto
Subject: Support HB80

I respectfully request that you support HB 80.

My Very Best Regards,

Vincent L McCutcheon
P.O. Box 467
Willow AK, 99688

Phone: (907) 495.4076
Cell: (907) 232.1058
Gra8wulf@gmail.com

Sarah Munson

From: RICHARD KOWALSKI [richkow777@hotmail.com]
Sent: Tuesday, February 08, 2011 3:47 PM
To: Rep. Carl Gatto
Subject: HB 80...

Sir, my name is Richard Kowalski. I live in Hoonah and I would be very grateful if you would support HB 80. I'm sure you've heard "when danger threatens the police are only minutes away". No one should be forced by law to run from your own home if confronted by a common criminal.

Thank you,
Capt. R.C. Kowalski
Merchant Ser. Ret.

Sarah Munson

From: bullitt [bullitt@acsalaska.net]
Sent: Tuesday, February 08, 2011 3:46 PM
To: Rep. Carl Gatto
Subject: HB80

As a tax paying citizen of the United States of America and a resident of Alaska for 39 years I respectfully request that you support HB 80 when it comes to vote. Sincerely, Craig Rowell

Sarah Munson

From: Douglas Hart [dsimshart@gmail.com]
Sent: Tuesday, February 08, 2011 3:41 PM
To: Rep. Carl Gatto
Subject: House Bill 80 - "No-Duty-to-Retreat" Legislation

I am FULLY in favor of ANY legislation that provides for my ability to defend myself and my family from preditors. Please consider this Bill FULLY and CAREFULLY.

Doug Hart
Douglas S. Hart, Sr
Master Sergeant, US Army (Retired)

"ΜΟΛΩΝ ΛΑΒΕ"

Sarah Munson

From: Jerry Books [book@ptialaska.net]
Sent: Tuesday, February 08, 2011 4:10 PM
To: Rep. Carl Gatto

we support house bill 80.....
we should have the right to defend ourselves.
i urge your support.
jerry books
soldotna

Sarah Munson

From: Bob Esper [besper@mail.com]
Sent: Tuesday, February 08, 2011 3:57 PM
To: Rep. Carl Gatto
Subject: HB 80

I respectfully urge you to support HB 80

Sarah Munson

From: Tim Gobbi [gobiwon@acsalaska.net]
Sent: Tuesday, February 08, 2011 3:57 PM
To: Rep. Carl Gatto
Subject: HB 80

I respectfully urge you to support HB 80

Thank you
Tim Gobbi

Sarah Munson

From: Doreen [tdlow@acsalaska.net]
Sent: Tuesday, February 08, 2011 4:24 PM
To: Rep. Carl Gatto
Subject: Hb-80.....YES!!!

I urge you to support HB-80.....
Thank You,
Thomas T. Low
Fairbanks, Alaska

Sarah Munson

From: Karen Sawyer
Sent: Tuesday, February 08, 2011 5:01 PM
To: Sarah Munson
Subject: FW: A MESSAGE IN SUPPORT OF HOUSE BILL 80

Follow Up Flag: Follow up
Flag Status: Flagged

From: Eleanor Murphy [mailto:joelie10@hotmail.com]
Sent: Tuesday, February 08, 2011 4:30 PM
To: Rep. Carl Gatto
Subject: A MESSAGE IN SUPPORT OF HOUSE BILL 80

Representative Carl Gatto
Chairman, House Judiciary Committee

Mr Chairman:

"Introduced by state Representative Mark Neuman (R-15), **HB 80 would remove the duty-to-retreat in Alaska**. Under this bill, Alaskans would have the right to use force, including deadly force, for self-defense anywhere they have a right to be."

I fully support the intent of House Bill 80, as stated above. It is time to give more reasonable options to law abiding Alaskans. This is one of them, and it is long overdue. I hope this Bill will get the strong support it deserves from the House Judiciary Committee. I would like to see this Bill become law in Alaska.

Alaskans should not be at the mercy of the lawless, nor should we have to "read law on whether we have a right to self defense" in order to decide if we are "allowed" to protect ourselves and our loved ones. Let the lawless reap the consequences of their actions in a more timely manner for a change.

My thanks to Representative Neuman for introducing this Bill for the benefit of all law abiding Alaskans. I hope it will become law soon.

I have exercised my right to vote in every election since I became eligible, after arriving in Alaska in 1977. I AM a serious Alaskan.

Eleanor G Murphy
PO Box 594
Homer, AK 99603

907-299-0972 cell phone

Sarah Munson

From: Rep. Mark Neuman
Sent: Tuesday, February 08, 2011 4:54 PM
To: Sarah Munson
Subject: FW: HB 80

Follow Up Flag: Follow up
Flag Status: Flagged

-----Original Message-----
From: Christopher Nugent [mailto:cnugentak@gmail.com]
Sent: Tuesday, February 08, 2011 3:24 PM
To: Rep. Mark Neuman
Subject: HB 80

Dear Representative Mark Neuman
Thank you for introducing the No-Duty-to-Retreat Legislation. I fully support you on this very important piece of legislation.
Christopher Nugent, Maj, USAF (Ret)
Wasilla, AK

Sarah Munson

From: Karen Sawyer
Sent: Tuesday, February 08, 2011 3:10 PM
To: Sarah Munson
Subject: FW: I support House Bill 80 and U should too!

Follow Up Flag: Follow up
Flag Status: Flagged

From: C6288439@aol.com [mailto:C6288439@aol.com]
Sent: Tuesday, February 08, 2011 3:08 PM
To: Rep. Carl Gatto
Subject: I support House Bill 80 and U should too!

Hello my name is Chuck Cook I strongly support House Bill 80. Vote for "the people" and remember we balance budget and cut spending in AK and Fed's
Thank U
907-953-2560

Sarah Munson

From: Karen Sawyer
Sent: Tuesday, February 08, 2011 5:00 PM
To: Sarah Munson
Subject: FW: House bill 80

Follow Up Flag: Follow up
Flag Status: Flagged

From: Ken Logan [mailto:scotty_in_alaska@yahoo.com]
Sent: Tuesday, February 08, 2011 4:59 PM
To: Rep. Carl Gatto
Subject: House bill 80

Please support this legislation.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

DATE: February 14, 2011

TO: House Finance Committee members

FROM: Representative Carl Gatto
House Judiciary Chair

RE: Fiscal Note HB080-LAW-CRIM-02-09-11

The House Judiciary Committee has reservations about the fiscal note from the Criminal Division of the Department of Law on HB 80 "Self Defense." Several members have concerns about the Department's claim that this legislation will produce a sufficient amount of new cases to merit two additional full-time attorneys. The committee also questions whether $450,000 annually is an appropriate estimate for these two positions.

We respectfully request that the House Finance Committee exercise due care and consideration of this fiscal note.

<TARGET><BILL>HB 87</BILL><SUBJECT>HB 87</SUBJECT><COMM>HJUD27</COMM></TARGET>

L8

HB

Representatives
Kurt Olson &
Lindsey Holmes

Capitol Room 405
465-4919
465-2137 fax

M E M O R A N D U M

Date: 14 March 2011

To: Representative Carl Gatto,
Chair of the House Judiciary Committee

From: Representative Kurt Olson
Representative Lindsey Holmes

RE: Hearing Request for House Bill 87

Mr. Chair, I would like to request a hearing for House Bill 87, "An act relating to antitrust violations," in the House Judiciary Committee. HB 87 modernizes the penalties for antitrust violations by increasing them to reflect modern levels. Attached you will find a copy of the bill, the (H) L&C committee substitute for the bill, the sponsor statement, a sectional prepared by legislative legal and a sheet of back up information provided by the Department of Law. We expect that Ed Sniffen from the Department of Law will testify in favor of the bill. James R. Waldo from Rep. Holmes' staff is carrying this bill. He can be reached by email at james.waldo@legis.state.ak.us or his direct line at 465.6597. Please contact myself, James or Konrad Jackson from Rep. Olson's office if you have any questions regarding this legislation. Thank you very much for your consideration.

received
3-14-11 @ 3:15

Representatives Kurt Olson and Lindsey Holmes

House Bill 87 Sponsor Statement

"An Act relating to penalties for antitrust violations."

House Bill 87 updates the criminal penalties for the state's anti-trust laws, and adds a civil penalty provision. Under current law, an antitrust violation under AS 45.50.562 or 45.50.564 is a misdemeanor that is punishable by a fine of up to $20,000 for natural persons or $50,000 for organizations. These penalties do not serve as a significant deterrent to individuals and companies engaging in antitrust violations.

HB 87 increases criminal fines to $1 million for an individual and $50 million for an organization, and make such a violation a class "C" felony. Under analogous Federal antitrust law, violations are a felony and criminal fines are set at $1 million for individuals, and $100 million for a corporation (15 U.S.C.A. § 3).

Additionally, HB 87 adds a new provision to the antitrust law that will allow the Department of Law to pursue a civil action for antitrust violations, with the same maximum penalties of $1 million for a natural person and $50 million for an organization. The antitrust laws in most other states already contain civil penalty provisions, with fines of varying amounts.

This update to our antitrust statutes will give the Department of Law the necessary teeth for dealing with any antitrust violations in our state. Please join us in supporting HB 87

State Capitol, Juneau, Alaska 99801 · (907) 465-4919 · Fax: (907) 465-2137
Rep.Lindsey.Holmes@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 25, 2011

SUBJECT: Sectional summary of CSHB 87( ) relating to civil and criminal penalties for antitrust violations (Work Order No. 27-LS0331\I)

TO: Representative Lindsey Holmes
Attn: James Waldo

FROM: Theresa Bannister
Legislative Counsel

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

Section 1. Amends AS 45.50.578 to increase the criminal penalty for a violation of AS 45.50.562 or 45.50.564 to a class C felony. Increases the possible fine for a natural person to $1,000,000, and refers to AS 12.55 (the sentencing and probation chapter) for the possible imprisonment for a natural person. Increases the possible fine for a person who is not a natural person to $50,000,000.

Section 2. Authorizes the attorney general to bring a civil action against a person who violates specified antitrust provisions or who violates an injunction issued under AS 45.50.580. Sets the maximum civil penalties.

If I may be of further assistance, please advise.

TLB:ljw
11-143.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB087**
() Publish Date

Identifier (file name): HB087-LAW-CIV-02-25-11
Dept. Affected: Law
Title: An Act relating to penalties for antitrust violations.
Appropriation: Civil
Allocation: Commercial and Fair Business
Sponsor: Representative(s) Olson, Holmes
Requester: (H) Labor & Commerce
OMB Component Number: 2717

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/25/11 1:30 PM
Approved by: John J. Burns, Attorney General — Date: 2/25/2011
Department of Law

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB087

Analysis

HB 87 will amend Alaska's antitrust statute to increase the criminal penalty for violating the statute from a misdemeanor to a class C felony, and increase the criminal fines from $20,000 to $1 million for a natural person, and from $50,000 to $50 million if not a natural person. It will also add a new section that allows the attorney general to bring a civil action for antitrust violations, and seek the same amounts in civil penalties.

There will be no fiscal impacts to the Department of Law.

STATE ANTITRUST CIVIL PENALTIES

State	Penalty	Notes
Alaska	$5,000/natural person, $50,000 all others	Also can be a CP violation – up to $25,000 per violation
California	$250,000 individual, $1 million all others, or 2x gross gain or loss	
Connecticut	$25,000 individual, $250,000 corporation	Trying to get it raised to $100k/$1 million
Delaware	$1,000 minimum to $100,000 maximum	No distinction between individual/corporation
Florida	$100,000 individual, $1 million corporation	
Illinois	$$100,000 individual, $1 million others	
Kansas	$100 to $5,000 per day	
New Jersey	Treble damages + Attorneys Fees + Cost of suit	
New Mexico	$50,000 individual, $250,000 corporation	Passed in 1979
North Carolina	$5,000/violation per week	
North Dakota	$50,000 everyone	
Nevada	5% of gross income	
Ohio	$500/day for each violation	
South Carolina	$5,000/violation per week	
Virginia	$100,000 for all	Must be willful or flagrant violation
Wisconsin	$50,000 individual, $100,000 corporation+ forfeiture	
U.S.D.O.J	$10 million individual $100 million others	Criminal penalty

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27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, L. 1979; amd. Sec. 1, Ch. 575, L. 1995.

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25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

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Provided by Montana Legislative Services

Report of the 2011 Alaska Minerals Commission

Aqqaluk pit at Red Dog, the next twenty years

Arctic deposit Ambler district - Brooks Range

LMS drilling - Goodpaster district

Bornite headframe—Ambler district

ACTION ITEMS

1. **Provide support for permitting agencies instead of wasting state resources on an ill-timed Pebble study.**
2. **Implement reforms to prevent public litigant and third-party lawsuits from stifling development.**
3. **Build a road to Western Alaska that includes access to Brooks Range mineral deposits.**
4. **Support efforts to communicate the benefits that mining brings to Alaska and its communities.**
5. **Bring energy infrastructure to western Alaska to support communities and mining projects in the region.**

Mining provides the necessary building blocks of our society. The mining industry has demonstrated its ability to help diversify Alaska's economy and to provide wide-ranging employment opportunities in both rural and urban areas, all while operating to the highest environmental standards. In an industry controlled by global economic conditions, Alaska mineral development must be competitive while developing a sustainable industry. To this end, there are actions that the Governor and Legislature should take now in order for the mining industry to be able to grow and to continue to contribute to our society in the future for the prosperity of Alaska.

The Alaska Minerals Commission presents this 2011 report with the 5 specific action items identified above, thereby fulfilling the Commission's statutory mandate to make recommendations annually to the Governor and Legislature on ways to mitigate constraints on the development of minerals in Alaska.

CRITICAL SUPPORT FOR PERMITTING AGENCIES

Spending $750,000 on a poorly timed and misguided "study" aimed at Pebble is a waste of State resources. Alaska's interest would be better served by spending the money to augment the State's technical review of the project if and when one is proposed.

Funding a study of Pebble now would be a waste of State resources because there is no specific project to evaluate and the study lacks a specific scope or objective. Such a study could only be a sham, with the appearance of a predetermined outcome, as it would have no choice but to conjecture about potential project configurations and would have no way to evaluate what actually might be proposed by the company, including any mitigative measures that might be included. Such a small sum of money could never hope to improve upon the years of field work and the over one hundred million dollars that have been spent to understand the environment in the region. With no specific project to review and no way to better understand the local environment, such a study is doomed to irrelevancy compared to the multi-year, multi-million dollar environmental review process that surely awaits the actual project.

Spending this sum now would also impair the investment climate for the entire mining industry in Alaska, as unfortunately it would demonstrate that the project review process in Alaska is political rather than science based.

RECOMMENDATION

A better use of limited public funds would be to invest in technical support for the State Large Mine Permitting team. These funds could augment the team with experienced staff and third party technical experts to critically evaluate the project once a definitive proposal that warrants review is received. In fact, the State should critically review its financial support for all regulatory agencies to ensure that a core of competent staff are available to timely review all development projects in Alaska, not just at Pebble.

An alternative use of the funds would be for the legislature to study the entire permitting process to see if there are ways to make the process more efficient while still maintaining Alaska's high environmental standards.

LITIGATION REFORM

Resource development in Alaska must comply with one of the most stringent environmental jurisdictions in North America, yet public litigant and third-party lawsuits are further delaying and stifling development. Beyond the adverse impact on industries and investment in Alaska, the information requests for "discovery purposes" are further paralyzing the agencies by consuming their budgets and diverting limited staff from completing their constitutionally and legislatively assigned tasks. The following administrative and legislative support is required to limit the negative impact from this obstructionist legal maneuvering:

RECOMMENDATION

- Require bonds from organizations initiating legal actions;
- Continue to enjoin suits as an affected party in other states if an adverse decision in that case will become a precedent that may be applied in Alaska;
- Continue to enjoin suits filed in Alaska if an adverse decision in that case will adversely affect the state's ability to financially benefit from its natural resources;
- Support budgets to hire legal expertise needed in natural resource development cases;
- Require plaintiffs to pay legal fees for all portions of the rulings against their position;
- Support budgets that will enable the Attorney General to evaluate previous litigation reform in court rulings to develop a game plan for meaningful reform; and Work with other states to petition U.S. Congress to remove the "Tax Exempt" status from these litigious organizations.

TRANSPORTATION INFRASTRUCTURE

The Commission would like to thank the Governor's office and the legislature for support for the Western Alaska Access Project and for the Ambler Mining District Access studies. We encourage ongoing support to complete these critical projects.

RECOMMENDATION

- Build a road from Fairbanks to Nome that includes access to the Brooks Range mineral deposits in the Ambler Mining District through the Roads to Resources program.
- Investigate transportation corridors in southwest Alaska that would facilitate mineral development and also lower the cost of living and provide more affordable energy.

FINDINGS

- Transportation infrastructure related to mineral development has played a critical role in rural areas of the state, supporting lower cost energy and a lower cost of living. With the current upswing in commodity prices and interest in minerals development, Alaska can capitalize on leveraging private sector development with statewide goals and rural needs in public-private partnerships.
- The increase in activity in the Arctic for shipping, energy, and mineral development is necessitating an increased presence by the U.S. Coast Guard in the Arctic. The need for deep water ports in the Arctic associated with this increased presence provides an opportunity to coordinate roads to potential ports with mineral development projects.
- We also recommend that any transportation plan grow from the regional and project need in concert with statewide planning. Local support will be key for any projects to advance, hence the need for local support. Again a good example is the growing interest in roads in Northwest Alaska from the local levels and the coordination of the Department of Transportation working with industry and the communities for viable projects with local support.

MARKETING AND EDUCATION

The State of Alaska must very actively market itself to the rest of the world and demonstrate that it is open for business in resource development. Legislators and Alaskans in general need to understand the great benefits that mining brings to the State and its communities.

RECOMMENDATION

- Expand budget for marketing presence domestically and in foreign countries
- Encourage elected officials to participate in mine tours provided through the Council of Alaska Producers
- Increase funding for Alaska Resource Education (ARE) to $150,000 annually
- Provide funding for a statewide Minerals Education & Promotion Program
- Provide funding to make the UAF College of Engineering and Mines the premier mining and geology program in the United States
- Support state and federal programs to train and educate workers for the mining industry

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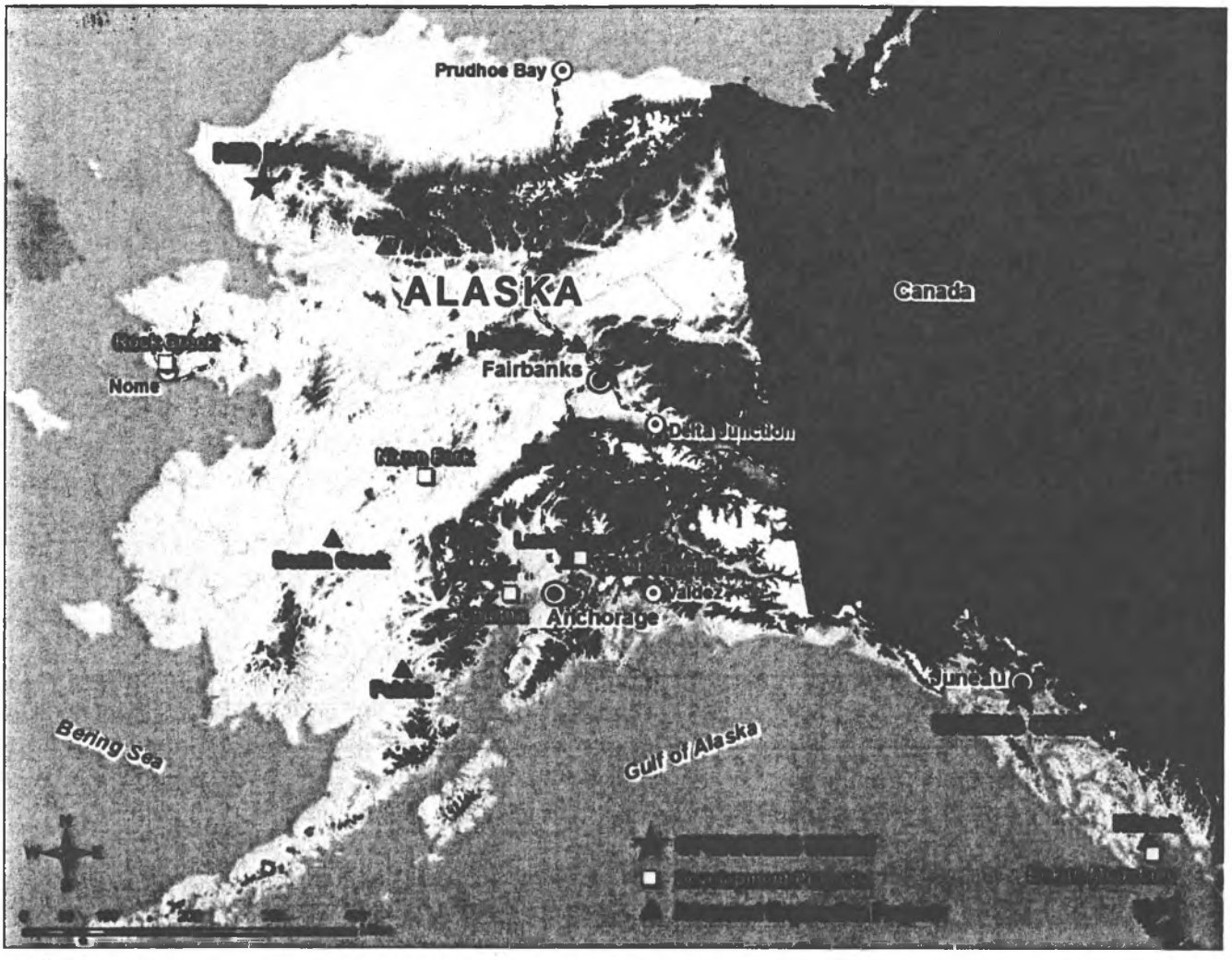

ENERGY

Invest in low-cost energy capacity on the existing grid. On a regional basis, expand energy distribution infrastructure and generation capacity using the least costly, most available resource whether that is coal, wind, solar, hydro, geothermal, or small scale nuclear.

RECOMMENDATION

- Bring energy infrastructure to western and southwestern Alaska to support communities and mining projects in the region.
- Expand low-cost base load energy on the existing electrical grid.

The Alaska Minerals Commission was created by the 14th Legislature and signed into law on June 6, 1986. The enabling legislation instructs the Commission to make recommendations to the Governor and Legislature on ways to mitigate constraints, including governmental constraints, on the development of minerals, including coal, in the state.

This publication was released by the Department of Commerce, Community, and Economic Development. Its purpose is to report the findings and recommendations of the Alaska Minerals Commission to the Governor and to the Legislature of Alaska. It was produced at a cost of $1.13 per copy and printed in Anchorage, Alaska. This publication is required by Chapter 98, Session Laws of Alaska, as amended by Chapter 4, Session Laws of Alaska, 1993.

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MEMORANDUM March 21, 2011

SUBJECT: Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

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[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

DCB:med
11-026.med

court to require the plaintiff to give security for the reasonable expense, including attorney fees, that may be incurred by the moving party. The amount of the security may be increased or decreased from time to time in this discretion of the court upon a showing that the security has become inadequate or excessive. The corporation or other defendants may have recourse to the security in an amount as the court may determine upon the termination of the derivative action, whether or not the court finds the action was brought without reasonable cause.

(i) A derivative action may not be discontinued, abandoned, compromised or settled without the approval of the court having jurisdiction of the action. If the court determines that the interests of the shareholders or any class or classes of shareholders will be substantially affected by a discontinuance, abandonment, compromise, or settlement, the court in its discretion may direct that notice, by publication or otherwise, shall be given to the shareholders or class or classes of shareholders whose interests will be affected. If the court directs notice to be given, it shall determine which of the parties to the action shall bear the expense of giving the notice in an amount the court determines to be reasonable in the circumstances. The amount shall be awarded as special costs of the action.

(j) If the derivative action is successful, in whole or in part, or if anything is received as a result of the judgment, compromise, or settlement of that action, the court may award to the plaintiff or plaintiffs reasonable expenses, including reasonable attorney fees, and shall direct an accounting to the corporation for the remainder of the proceeds. This subsection does not apply to a judgment rendered only for the benefit of injured shareholders and limited to a recovery of the loss or damage sustained by them.

(Added by SCO 258 effective November 15, 1976; amended by Chief Justice Special Order No. 2052a effective July 1, 1989)

Note: Civil Rule 23.1 in its entirety was adopted by the Alaska Legislature in ch. 166, §§ 1, 17, SLA 1988, rather than by the Alaska Supreme Court.

Annotations

Cases

Shareholders who filed a derivative suit against the directors of a village corporation were not prevailing parties because the trial court found that the shareholders' failure to make a pre-suit demand was not excused; the trial court did not err in denying the shareholders' request for attorney fees. **Jerue v. Millett,** Op. No. 5676, 66 P.3d 736 (Alaska 2003).

Where a village corporation did not become a party plaintiff until after the events occurred that mooted a derivative suit, the village was not a prevailing party for purposes of recovering attorney fees. **Jerue v. Millett,** Op. No. 5676, 66 P.3d 736 (Alaska 2003).

Rule 23.2. Actions Relating to Unincorporated Associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interest of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23 (d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

(Added by SCO 258 effective November 15, 1976)

Rule 24. Intervention.

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the ground therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. When the constitutionality of a state statute affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of Alaska of such fact, and the state shall be permitted to intervene in the action.

(Adopted by SCO 5 October 9, 1959; amended by SCO 258 effective November 15, 1976; corrected January, 1993; amended by SCO 1153 effective July 15, 1994; by SCO 1342 effective September 15 1998; by SCO 1713 effective May 16, 2009; and by SCO 1716 effective July 1, 2009)

Note: AS 10.06.628, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 24 by allowing a shareholder or creditor of a corporation to intervene in an action for involuntary dissolution of the corporation under AS 10.06.628.

Note: Chapter 105 SLA 1998 adopts AS 13.36.175 pertaining to contract actions against a trustee. According to section 23 of the act, subsection (c) of this statute amends Civil Rule 24 by allowing a beneficiary, or the attorney general and certain corporations under certain circumstances, to intervene in a contract action against a trustee without satisfying the criteria in the court rule. The act also adopts AS 13.36.185 pertaining to the tort liability of a trust. According to section

HB

88

<TARGET><BILL>HB 88</BILL><SUBJECT>HB
88</SUBJECT><COMM>HJUD27</COMM></TARGET>

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Representative Carl Gatto

CSHB 88 (HSTA) Use of Foreign Law

America has unique values of liberty which do not exist in foreign legal systems. Yet foreign laws are increasingly finding their way into U.S. court cases, particularly in the area of family law, involving divorce and child custody.

CSHB 88 (STA) aims at preventing "a court or other enforcement authority" from enforcing foreign law in Alaska. The bill preempts violations of an individual's constitutional rights resulting from the application of foreign law. CSHB 88 (STA) exempts corporations, partnerships, or other forms of business association. The CS also states that foreign law shall not mean, nor shall it include, any laws of the Alaska Native or American Native tribes in the state of Alaska, in the limited circumstances when tribal members may be subject to the concurrent jurisdiction of the tribal courts and the state courts.

CS for HB88 (STA) offers a baseline law that provides a statutory framework for precluding constitutionally objectionable foreign laws and legal systems from finding their way into the state judicial system. To the question of whether this bill would affect conventions or treaties, such as, the Law of the Sea, Pacific Salmon Treaty, etc., the Attorney General replied in a legal opinion, dated March 21, 2011, *"...it is the United States who is a party to some of these conventions and/or treaties... These federal laws, to the extent they apply to Alaska, will preempt inconsistent state law, including HB88."*

There are 16 other states with similar legislation regarding foreign law being considered in state courts. Alaska, like other states, recognizes the growing need to emphasize the fact that our state and U.S. constitutions are the fundamental basis for civil law for everyone in our country.

This bill is *not* about religion or First Amendment rights. Nothing in this bill prevents any person from freely exercising his or her right to freedom of religion and worship. CSHB88 (STA) only applies to legal doctrines in our court systems. The bill is not even principally focused on religious law, but any foreign law that violates constitutionally protected liberties. But to those who are accustomed to their religion and their civil laws being inextricably connected, we must clarify that all individual rights are guaranteed and protected under the Constitution of the State of Alaska and the United States Constitution.

Contact: Karen Sawyer
465-5025
27-LS0333\B
March 25, 2011

Representative.Carl.Gatto@legis.state.ak.us

Alaska State Legislature

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Representative Carl Gatto

Explanation of Changes from HB 88, version M To CSHB 88 (STA) version I

There were several questions asked at the first hearing in HSTA Committee regarding how HB 88 will affect corporations, partnerships, or other business associations. In addition, a legal opinion from the Department of Law indicated that "*HB 88 might affect a foreign entity's willingness to do business ...in Alaska...*"

Therefore, a change to Page 2, Line 26 adds

> (g) This section shall not apply to a corporation, partnership, or other form of business association.

There are several states with similar legislation and this amendment has been inserted in those bills as well.

In addition, there were concerns if HB 88 affected family matters involving tribes in Alaska. The Department of Law legal opinion states that although family matters should not be affected, "*...in limited circumstances, tribal members may be subject to the concurrent jurisdiction of the tribal courts and the state courts. ... Tribes have the concurrent authority to initiate cases regarding children's proceedings or custody proceedings involving native children.*"

To alleviate questions about tribal law under this Act, a change to Page 2, Line 25 adds

> After 'States.' For the purposes of this act, foreign law shall not mean, nor shall it include, any laws of the Alaska Native or American Native tribes in the state of Alaska.

Karen Sawyer
March 23, 2011

Representative.Carl.Gatto@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **CSHB088(STA) \B**
() Publish Date

Identifier (file name): CSHB088-LAW-CIV-03-25-11
Dept. Affected Law
Title An Act prohibiting the use of foreign law that violates an individual's right under the United States Constitution.
Appropriation Civil
Allocation Commercial and Fair Business
Sponsor Representative(s) Gatto
Requester (H) JUD
OMB Component Number 2717

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Fiscal analysis revised due to changes in CS version.

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 3/25/11 10:00 AM
Approved by John J. Burns, Attorney General
Department of Law
Date 3/25/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB088(STA) \B

Analysis

This bill is designed to protect the rights of citizens of Alaska from the application of foreign law if the application would violate the individual's rights guaranteed by the Alaska Constitution or the United States Constitution. The Department of Law cannot estimate how many cases in which the State or State agencies might be named in which this new standard might be an issue. The new legal standard could likely involve interpretation of federal treaties and compacts and the application of those treaties on states by federal law.

The fiscal impact of this legislation cannot be accurately determined at this time.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SEAN PARNELL, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-8554

March 21, 2011

Representative Carl Gatto
State Capitol
Room 118
Juneau, AK 99801-1182

Re: HB 88

Representative Gatto:

You have asked the Department of Law ("Department") for an opinion on HB 88 and its impact on Alaska natives and tribal law, international conventions, litigation with foreign corporations, and contracts with foreign entities. One premise applicable to all of the questions posed is that HB 88 would have no effect to the extent it conflicts with a federal law or treaty. Pursuant to the Supremacy Clause of the US Constitution (Article VI, clause 2), the US Supreme Court has recognized for many years that State laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

HB 88 defines "foreign law" as a law, rule or legal code or system used or applied outside of the United States and the territories of the United States. With regard to family matters, tribes operate within the United States. Accordingly, HB 88 should not affect family matters involving tribes. Tribal members are citizens of Alaska as well as citizens of their tribes. Therefore, in limited circumstances, tribal members may be subject to the concurrent jurisdiction of the tribal courts and the state courts. One example of this concurrent jurisdiction is domestic relations among members. Tribes have the concurrent authority to initiate cases regarding children's proceedings or custody proceedings involving native children. As to the final question regarding American Indian tribal law and Alaska Indian tribal law, there is no difference between the two.

With regard to conventions on the Law of the Sea, the International Pacific Halibut Convention, and the Pacific Salmon Treaty, to name a few, Alaska is not a party to these conventions. Instead, it is the United States who is a party to some of these conventions and/or treaties. For example, the United States has not yet signed the latest Law of the Sea Convention, though there is a resolution currently pending before the Alaska legislature urging the United States to ratify the convention. The laws that directly affect Alaska are the federal statutes and regulations that implement the treaties,

such as the Northern Pacific Halibut Act. These federal laws, to the extent they apply to Alaska, will preempt inconsistent state law, including HB 88.

In general, Alaska courts and enforcement entities can only apply Alaska law and federal law. Sometimes they will apply applicable law from another state, but only after determining that that law is applicable to the matter before the tribunal. But Alaska courts will not apply a foreign law if application of the law would violate an individual's constitutional rights. Generally, "foreign law" does not apply in Alaska. Judges take an oath to uphold the laws of the state and of the United States. If a foreign choice of law provision in a contract deprives the party to the contract of a fundamental constitutional right, the offending provision would be void as against public policy. In some instances a court might confront the application of foreign law, but these instances likely involve foreign treaties and compacts (such as the Hague Convention on the Civil Aspects if International Parental Child Abduction), in which case the foreign law would not be impacted by a state statute such as HB 88.

All courts have the ability to reform or modify a contract provision if enforcement of the provisions would be contrary to public policy. This would apply to both a choice of law provision and choice of venue or choice of forum provision. If the contract has a choice of venue or forum provision and a party (whether an individual or a corporation or other type of business entity) complies with the provision by filing a dispute in the foreign venue, then HB 88 would have no effect for Alaska law would not be applicable in the foreign venue. The provisions of HB 88 would apply if the party filed a lawsuit in Alaska and was opposing a motion to change venue to the foreign venue because of the clause in the contract. If the fundamental constitutional rights of the party opposing the change of venue motion would be impaired by the foreign venue, the Alaska court could void the venue provision as against public policy.

HB 88 might affect a foreign entity's willingness to do business with individuals or businesses in Alaska if it knows that provisions of the contract may be void by law should HB 88 become law. If a contract is entered into with a foreign entity to provide goods or services to the foreign entity in that entity's country, it would not be unusual for the contract to contain choice of law and/or choice of venue provisions. The foreign entity might be hesitant to enter into such a contract if there is the possibility that in the future the terms of the contract might be changed by an Alaskan court because the other party to the contract claims that his or its constitutional rights are being violated if the choice of law or choice of venue provisions are enforced. Finally, what is unclear from HB 88 is how an Alaska state court could interpret a choice of venue or forum provision so as to preserve constitutional rights other than by determining the provision to be void and to allow a lawsuit to proceed in Alaska rather than in the country chosen in the contract.

As part of the common law doctrine of forum non conveniens, consideration is given to the laws applicable in the foreign jurisdiction and their impact on the parties to a lawsuit. A party will not be sent to a jurisdiction that does not have equal protection and due process. For example, in a divorce case between two Kenyan citizens, a judge denied a forum non conveniens motion to move the case to Kenya because the wife would have had diminished property rights under the laws of Kenya.

In conclusion, the general concern the Department has with HB 88 is whether the legislation is necessary considering the current ability of the courts to reform or modify contracts if enforcement of provisions of the contract would be contrary to public policy and the general premise that Alaska courts and enforcement entities apply only Alaska and federal law, not foreign law of a foreign country.

The Department is available to answer any question you have about these comments.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Mary Ellen Beardsley
Mary Ellen Beardsley
Assistant Attorney General

MEB/ma

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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Juneau, Alaska 99801-1182
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MEMORANDUM March 15, 2011

SUBJECT: Limited application of foreign law
(Work Order No. 27-LS0333\M)

TO: Representative Carl Gatto
Attn: Karen Sawyer

FROM: Dennis C. Bailey DCB
Legislative Counsel
and
Dan Wayne
Legislative Counsel

Since there is a hearing on your bill coming up on March 17 and drafting attorney Dennis Bailey has been out of the office because of illness for a few days, I've briefly addressed the three concerns raised in the March 10 e-mail from Karen Sawyer to this office.

1. The bill's potential for interfering with a choice of law provision in a contract seems direct and not inadvertent, as far as I am able to determine. Language on page 2 of the bill, lines 2 - 8, relates to agreements containing choice of law provisions. This language would void an agreement containing a choice of law provision if the provision has an effect that violates an individual's constitutionally protected individual rights unless the provision can be changed to eliminate its unconstitutional effect.

2. The bill uses the term "foreign law" instead of "law," and defines the term to mean "a law, rule, or legal code or system established and used or applied in a jurisdiction outside of the United States and the territories of the United States." I understand that the "foreign law" that is of concern to you is the law from outside of the U. S. If that is correct, no change is necessary.

3. HB 88 does not necessarily conflict with provisions of AS 25.30.400 - 25.30.590 that may require enforcement of foreign orders under the Hague Convention on the Civil Aspects of International Child Abduction, a multinational treaty to which the United States is a signatory. The United States Congress implemented the Convention in the International Child Abduction Remedies Act, (ICARA), 42 U.S.C. 11601 et seq. The ICARA grants concurrent jurisdiction to state and federal courts. 42 U.S.C. 11603. It allows a court that has jurisdiction to exercise discretion that is potentially very broad. 42 U.S.C. 11604. This may reduce the risk of a conflict between the bill's provisions and federal law to some degree. 42 U.S.C. 11604, reads:

§ 11604. Provisional remedies

(a) Authority of courts. In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603 (b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority. No court exercising jurisdiction of an action brought under section 11603 (b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Keep in mind that, as noted in the December 30, 2010 memo to your office, if the bill's provisions are adopted and are later found to be in conflict with federal law, including ICARA, the Supremacy Clause of the U. S. Constitution would cause the conflict to be resolved in favor of the federal law.

If I can be of further assistance, please advise.

DCB:DCW:plm
11-138.plm

Karen Sawyer

From: Karen Sawyer
Sent: Thursday, March 10, 2011 3:35 PM
To: LAA Legal
Cc: 'Carl Gatto'
Subject: HB 88 legal opinion requested
Attachments: HB 88; HB 88

Importance: High

Follow Up Flag: Follow up
Flag Status: Flagged

Hello,

Attached are two e-mails from Doug Wolliver, Courts System legislative liaison, in response to my request for information about whether any of the Family Courts in Alaska have experienced cases where foreign law (example, Sharia Law) had been invoked. These two e-mails are his replies to date. I am requesting a legal opinion on the questions below.

Doug made these suggestions based on what the family court judges said:

- look into **"choice of law" clauses in contracts**. I don't believe that such a contract clause can be upheld if it violated our constitutions and your bill drafter has probably already considered this (they generally think of most everything).
    - **MY REQUEST:** double-check just to make sure the bill does not inadvertently interfere with choice of law clauses. which are routine.
- consider **defining law "foreign law."** In many contexts a foreign jurisdiction is any jurisdiction other than Alaska. So, for example, registering a domestic violence restraining order from Washington State is considered registering a foreign order.
    - **MY REQUEST:** HB 88, version M, already has a definition of foreign law. However, it limits the jurisdiction to the United States and its territories. **Do we need to specifically mention "Alaska jurisdiction", or is it okay as is?**
- **AS 25.30.400-590 (a portion of the Uniform Child Custody Jurisdiction and Enforcement Act)** provides for the enforcement of foreign orders under the Hague Convention on the Civil Aspects of International Child Abduction. I don't know if HB 88 conflicts with that statute, but it is something you might consider investigating.
    - **MY REQUEST:** Does HB 88 conflict with statute above?

FYI: My request of the Department of Law regarding cases involving foreign law came back with the answer of 'the State has had no cases'.

We have a bill hearing on HB 88 next week, Thursday, March 17th, at 8AM in House State Affairs.

Thanks much.

American Public Policy Alliance

Representative Civil Legal Cases Involving Shariah Law

November 8, 2010

American Public Policy Alliance
www.publicpolicyalliance.org

Representative Civil Legal Cases Involving Shariah Law

Civil Legal Cases involving Shariah Law 3

ILLINOIS 3

Shaheed Allah, Plaintiff, v. Adella Jordan-Luster, et al., Defendants: Inmate demands Halal-slaughtered meat in prison 3

United States District Court, C.D. Illinois - August 3, 2007 3

Wafra Leasing Corporation, Plaintiff, v. Prime Capital Corporation, et al., Defendants. 3

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MARYLAND 5

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MASSACHUSETTS 6

Rhodes v. ITT Sheraton Corp: Rejection of Saudi Arabia as an Alternate Forum for Resolving a Dispute 6

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MICHIGAN 7

Saida Banu Tarikonda v. Bade Saheb Pinjari: Lower court recognizes Shariah divorce law; appeals court overrules 7

Court of Appeals of Michigan – April 7, 2009 7

Nabil Taiseer Hassan and Sawsan Hassan v. Eric H. Holder, Jr.: Michigan case cites Shariah courts, documents and marriage certificates 8

United States Court of Appeals, Sixth Circuit - May 11, 2010. 8

MINNESOTA 9

Mohamed D. ABD ALLA v. Mohamed MOURSSI: Minnesota man appeals to court regarding decision in Islamic arbitration hearing 9

Court of Appeals of Minnesota – June 1, 2004 9

NEW JERSEY 10

S.D. v. M.J.R.: Man rapes wife and claims Shariah as a defense S.D. v. M.J.R. 10

Superior Court of New Jersey, Appellate Division - Decided July 23, 2010. 10
Odatalla v Odatalla – Enforcement of Islamic Mahr Agreement 11
Superior Court of New Jersey, Chancery Div., Passaic County - June 24, 2002 11
NEW YORK 12
Sofyan Ali SALEH, Petitioner,v. UNITED STATES DEPARTMENT OF JUSTICE: Yemeni jailed in US fights deportation on Shariah grounds 12
United States Court of Appeals, Second Circuit - Decided April 29, 1992 12
PEOPLE of the STATE of NEW YORK v. IBRAHIM BEN BENU: 13
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Case of forced child marriage following Islam that was voided as against public policy; the father of the child forced into marriage was also acknowledged to be in a polygamous "marriage" 13
OHIO 13
Mohammed Zawahiri v. Raghad Zahar Alwattar: Islamic *Mahr* Agreements in Civil Courts 13
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HOSSEIN AGHILI VS. HAMIDEH SABA SAADATNEJADI: Legitimates Polygamy and "expertise" in Islamic Studies 13
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Civil Legal Cases involving Shariah Law

ILLINOIS

Shaheed Allah, Plaintiff, v. Adella Jordan-Luster, et al., Defendants: Inmate demands Halal-slaughtered meat in prison

United States District Court, C.D. Illinois - August 3, 2007

http://scholar.google.com/scholar_case?case=10507683704817451581

Shaheed Allah, an inmate incarcerated at Pontiac Correctional Center, alleged violations of the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") caused by the Defendants' failure to provide him with a Halal diet.

Allah requested to be provided with a Halal diet. Pontiac Correctional Center claimed it was already in compliance with this dietary requirement as pork and pork by-products are not served at Pontiac. The Plaintiff disagreed that the only dietary restriction for Muslims is the abstinence of pork and pork by-products. Plaintiff requested that the Defendants confer with Aqueel Khan, the Muslim Chaplain, to verify the validity of the Plaintiff's dietary request.

Although he was provided with bread, fruit and vegetables, he asserted that a Halal diet must consist of "meat that has been slaughtered in the manner prescribed by the Sharia."

> **According to Plaintiff, the prescribed method for Halal meat includes keeping the animal "in a humane way prior to slaughter," then slaughtering the animal by "slitting of the throat" while reciting the Qur'an.**

The court found that the Plaintiff has not met his initial hurdle of showing a substantial burden was placed upon his religious beliefs as he admittedly could consume vegetables and grains without violating his faith. Thus, the practice of the Plaintiff's faith was not hindered by the provision of a general prison diet rather than the Halal diet the Plaintiff sought.

Wafra Leasing Corporation, Plaintiff, v. Prime Capital Corporation, et al., Defendants.

United States District Court, N.D. Illinois, Eastern Division - August 30, 2004

http://scholar.google.com/scholar_case?case=1862554034514970966

Prime Capital was a specialty finance company that through its affiliates financed certain equipment leases. Wafra Leasing Corp. invested in Prime Capital securities. Wafra claimed it was the victim of securities fraud and improper auditing.

> **The plaintiff corporation, Wafra, is a wholly owned subsidiary of the Wafra Fund. The sole owners of the Wafra Fund are the Kuwaiti National Security Administration, a branch of the Kuwaiti government, and Aref Investment Group, owned by the Kuwait Public Institution for Social Security and an Islamic bank. Wafra invested in the 1999-A Securitization on May 4, 1999. Wafra's investors sought to comply with Islamic law, or Sharia, which prohibits investors from collecting interest, but allows them to earn money from the ownership and operation of assets.**

Of the multiple counts against Prime Capital individuals, several requests for summary judgments were approved.

LOUISIANA

Amin v. Bakhaty: Louisiana court refuses to enforce Egyptian child custody order

Supreme Court of Louisiana - October 16, 2001

http://www.thenewamerican.com/index.php/usnews/politics/4342-states-take-preemptive-strike-against-shariah

http://scholar.google.com/scholar_case?case=4590415366527786188

In the 2001 custody case of Amin v. Bakhaty, 01-1967 (La.10/16/01), 798 So.2d 75, the defendant (father) Abdelrahman Bakhaty filed an affidavit when he petitioned for a civil warrant stating that by operation of Egyptian law both the temporary guardianship and physical custody of the child rested exclusively with him. Egypt follows Islamic family law, which structures some of the rights between family members based solely on gender. Under the Egyptian concept of "guardianship," the father has the absolute right to the guardianship and the physical custody of the minor child.

Louisiana Supreme Court refused to enforce an Egyptian custody order stating that:

> **The only other forum that could possibly determine custody would be Egypt. However, the Egyptian Court is not compelled to consider the minor child's best interest. [The father] would have the absolute right to guardianship, as well as the right to physical custody. This Court believes that a parent's interest in a relationship with his or her child is a basic human right. The unique circumstances of this case required more consideration for the best interest of this child than for the extension of comity toward the Egyptian/Islamic legal system.**

The court ruled that the child would stay in the custody of the mother, Magda Amin, in Louisiana.

MARYLAND

Aleem vs. Aleem: Maryland's Highest Court Refuses to Recognize Pakistani Shariah Divorce

Court of Appeals of Maryland - May 6, 2008

http://volokh.com/archives/archive_2008_05_04-2008_05_10.shtml#1210196695

http://mdcourts.gov/opinions/coa/2008/108a07.pdf

Farah Aleem filed suit for a limited divorce from her husband, Irfan Aleem in the Circuit Court of Montgomery County, MD. In response her husband, a Pakistani resident of Maryland, tried to divorce her preemptively by entering the Pakistani Embassy in Washington, DC and performing *talaq*, the Shariah-approved way for a man to declare a divorce by simply stating "I divorce thee ..." three times.

The court reasoned that while foreign divorces are generally recognized unless they violate the state's public policy, the sex-discriminatory nature of Islamic divorce law does violate Maryland public policy when the parties are Maryland residents:

> The *talaq* divorce of countries applying Islamic law, unless substantially modified, is contrary to the public policy of this state and we decline to give *talaq*, as it is presented in this case, any comity. The Pakistani statutes providing that property owned by the parties to a marriage, follows title upon the dissolution of the marriage unless there are agreements otherwise, conflicts with the laws of this State where, in the absence of valid agreements otherwise or in the absence of waiver, marital property is subject to fair and equitable division. **Thus the Pakistani statutes are wholly in conflict with the public policy of this State as expressed in our statutes and we shall afford no comity to those Pakistani statutes.**

Hosain v. Malik: Maryland grants custody of child to father over mother in accordance with (Shariah-based) Pakistani law

Court of Special Appeals of Maryland – February 21, 1996

http://www.thenewamerican.com/index.php/usnews/politics/4342-states-take-preemptive-strike-against-shariah

http://scholar.google.com/scholar_case?case=13345154354945640474

In Hosain v. Malik, 108 Md.App. 284, 671 A.2d 988 (Md.1996), a Maryland Court granted comity and enforced a Pakistani custody order turning a child brought to the US by the mother (Joohi Q. Hosain) over to the father (Anwar Malik).

The Maryland Court held that: the burden was on the mother to prove the Pakistani court did not apply law in "substantial conformity with Maryland law" by a preponderance of the evidence; the case was "not about whether Pakistani religion, culture, or legal system is personally offensive to us or whether we share all of the same values, mores and customs, but rather whether the Pakistani courts applied a rule of law, evidence, or procedure so contradictory to Maryland public policy as to undermine the confidence in the trial"; the best interest of the child should not be "determined based on Maryland law, i.e., American cultures and mores," but rather "by applying relevant Pakistani customs, culture and mores"**;"a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of ... Pakistan"; "in the Pakistani culture, the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teachings"**;

The court recognized the **"longstanding doctrine [of Hazanit1] of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is [not] repugnant to Maryland public policy."**

The mother argued that Maryland law was violated because she may have been arrested for adultery if she returned to Pakistan for the custody proceedings and have been subject to "public whipping or death by stoning." The court found this was "not repugnant" to Maryland public policy because such punishments were "extremely unlikely."

MASSACHUSETTS

Rhodes v. ITT Sheraton Corp: Rejection of Saudi Arabia as an Alternate Forum for Resolving a Dispute

Massachusetts Superior Court - 1999

http://volokh.com/2009/08/12/rejection-of-saudi-arabia-as-an-alternate-forum-for-resolving-a-dispute/

The Plaintiff Rhodes was a British citizen on summer break from her university when she visited her parents at their home in Jeddah, Saudi Arabia. On August 23, 1994, she and her sister met two of their friends at the Sheraton Jeddah Hotel and Villas. The resort complex encompassed a beach, a large concrete wharf, a wooden platform or jetty and a lagoon. Coral stretched out from under the jetty and around the edge of the lagoon. The Plaintiff struck her head on this coral when she dove into the lagoon from the jetty. She lay in the water, face

down and unable to move, until she was pulled out and taken to a nearby hospital. The Plaintiff sustained a high level spinal injury and Plaintiff's expert estimated that her medical expenses resulting from the accident would exceed ten million dollars.

Under Massachusetts law a judge may dismiss or stay an action upon finding "that in the interest of substantial justice the action should be heard in another forum." The judge found that Saudi Arabia was not an adequate alternative forum because the **Plaintiff would experience severely restricted rights under the Shariah-based Saudi legal code**:

> The first significant drawback to trial of this case in Saudi Arabia is that **plaintiff would not be permitted to testify**...
>
> Prevailing in Saudi Arabia would be even more difficult for plaintiff in light of the requirement that, "[i]n financial matters, **a party must produce two male witnesses or one male and two female witnesses in order to prove a point**."...
>
> Saudi Arabia does not offer parties the opportunity to be heard by a jury...
>
> ... a Saudi forum would deprive plaintiff of basic procedures which she expects to enjoy in a Massachusetts forum.
>
> **Finally, the existence of biases against women and non-Muslims in Saudi Arabia would impose additional disadvantages on plaintiff.** Defendants' expert attributes the differential treatment based on gender and religion to "long-standing, well-known provisions in the law." Although defendants promise to ensure that any recovery by plaintiff in a Saudi court would not be diminished because of her gender and religion, their guarantee cannot insulate plaintiff entirely from the systemic prejudices...

MICHIGAN

Saida Banu Tarikonda v. Bade Saheb Pinjari: Lower court recognizes Shariah divorce law; appeals court overrules

Court of Appeals of Michigan – April 7, 2009

http://www.michbar.org/opinions/appeals/2009/040709/42377.pdf

http://scholar.google.com/scholar_case?case=4294001533062003586

Plaintiff Tarikonda (wife) and defendant Pinjari (husband) are Muslim citizens of India who were married in Hyderabad, India in 2001. The couple resided in Michigan from February 2006 to January 2008, when they separated. Plaintiff remained in Michigan and defendant moved to New Jersey.

The triple talaq is a mechanism for divorce which exists in Sunni Islam. It simply consists of the husband saying the phrase I divorce you (Arabic:talaq) to the wife, three times.

In April 2008, the husband traveled to India and pronounced the following written triple talaq:

> Now this deed witnesses that I the said Bade Pinjari, do hereby divorce Saida Tarikonda, daughter of T. Babu Khan, by pronouncing upon her Divorce/Talaq three times irrevocably and by severing all connections of husband and wife with her forever and for good.
>
> 1. I Divorce thee Saida Tarikonda
> 2. I Divorce thee Saida Tarikonda
> 3. I Divorce thee Saida Tarikonda

In May 2008, the wife filed a complaint for divorce in Michigan. The husband filed a motion to dismiss the complaint pursuant because of the existing Indian divorce. To prove the divorce occurred, he offered a divorce certificate from a Wakf Board in Andhra Pradesh, India. The trial court granted his motion. It instructed the wife to register the Indian divorce in Michigan and file a separate complaint for custody and child support.

On appeal, the wife argues that the trial court erred when it recognized the Indian divorce, because the triple talaq is violative of due process and contrary to public policy. **The court of appeals reversed the previous decision as void and against public policy since it violates due process and equal protection.**

Nabil Taiseer Hassan and Sawsan Hassan v. Eric H. Holder, Jr.: Michigan case cites Shariah courts, documents and marriage certificates

United States Court of Appeals, Sixth Circuit - May 11, 2010.

http://scholar.google.com/scholar_case?case=17900651172709546887

The Petitioners were Nabil Hassan and his wife Sawsan Hassan, both Muslim and self-identified "Palestinians" born and raised in Jerusalem. Nabil Hassan was admitted to the United States in 1995 on an F-24 Immigrant Visa, which is reserved for unmarried children of lawful permanent residents. Hassan qualified for this visa because his mother was living in the United States and had LPR status. Sawsan Hassan entered the United States on the same day as Nabil and was admitted to the country on a Nonimmigrant Tourist Visa. On April 10, 1995, Nabil and Sawsan had a small wedding ceremony at a mosque in Michigan and signed documents to certify their marriage.

On December 29, 1999, Nabil filed an application for naturalization. Daniel Wells of the Immigration and Naturalization Service was assigned to investigate and adjudicate Nabil's application. On July 27, 2000, Officer Wells conducted an in-person interview of Nabil Hassan and became suspicious that Nabil and Sawsan had in fact married sometime before their 1995 entry in the United States. Nabil's naturalization application was denied. On May 23, 2002, the government served Nabil Hassan with a Notice to Appear, alleging that he had married Sawsan before entering the United States which would automatically revoke his visa.

Pursuant to Israeli law, the Shariah courts (and Shariah law) control personal status matters of Muslims residing in Jerusalem. Therefore the evidence in the case was based on Shariah marriage documents

issued by Islamic legal authorities in Jerusalem and whether the couple had "completed" their Shariah marriage via sexual intercourse.

Nabil testified that on February 24, 1995, the families created a written engagement contract, and that a Sharia agent named Nasra helped the families create the document and then file it with the appropriate authorities. **Nabil claimed that he and Sawsan did not finalize (i.e. consummate) their marriage in Jerusalem, however. Instead, they waited until April 10, 1995, when they had their ceremony in the mosque and celebration in Michigan.**

The appeals court noted that the lower court was looking for **"evidence that Petitioners had performed all the steps required for a marriage under Sharia law before they left for the United States."** The lower court found that **"the evidence on the record, when viewed as a whole, compels the contrary conclusion that the government did not offer clear and convincing evidence that Petitioners had completed the steps required for a Muslim marriage under Sharia law before entering the United States."**

The appeals court both affirmed in part and reversed in part the ruling, but ordered that "removal proceedings against Petitioners" be quashed and that they may remain in the United States.

MINNESOTA

Mohamed D. ABD ALLA v. Mohamed MOURSSI: Minnesota man appeals to court regarding decision in Islamic arbitration hearing

Court of Appeals of Minnesota – June 1, 2004

http://scholar.google.com/scholar_case?case=8449493111914467247

In August 2001, Mourssi and respondent Mohamed D. Abd Alla entered into a partnership to manage and acquire restaurants. The partnership was subject to a partnership agreement. The partnership agreement included an arbitration clause, which provides:

> Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be **submitted to and settled by arbitration before the Arbitration Court of an Islamic Mosque located in the State of Minnesota pursuant to the laws of Islam** (or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or Federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the costs of its own experts, evidence, and counsel.

At some point, the partnership acquired the Al-Bustan Restaurant. After purchasing the restaurant, numerous disputes arose between the partners. The parties agreed to arbitrate their difference before an Islamic arbitration committee. In September 2002, the committee issued its decision in favor of Abd Alla against Mourssi.

In April 2003, Abd Alla moved the district court to confirm the arbitration award. On May 14, 2003, Mourssi responded that the court should deny Abd Alla's motion and vacate the arbitration award "on the grounds that it was procured by corruption, fraud or other undue means and that the Committee exceeded its authority." During the hearing Abd Alla argued Mourssi had not timely contested the arbitration award and therefore could not now contest the award. **Mourssi argued that under Islamic law there is no set time for appeal.**

The district court confirmed the arbitration reward and appeals court affirmed their decision under Minn.Stat., ch. 572.

NEW JERSEY

S.D. v. M.J.R.: Man rapes wife and claims Shariah as a defense S.D. v. M.J.R.

Superior Court of New Jersey, Appellate Division - Decided July 23, 2010.

http://www.leagle.com/unsecure/page.htm?shortname=innico20100723325

Plaintiff S.D. (wife) and defendant M.J.R.(husband) are Muslim citizens of Morocco who were wed in an arranged marriage on July 31, 2008, when plaintiff was seventeen years old. On August 29, 2008, they came to New Jersey as the result of defendant's employment in this country as an accountant.

She describes a continual pattern of abuse culminating on January 22, 2009, when the defendant forced plaintiff to have sex with him while she cried. Plaintiff testified that defendant always told her, **"This is according to our religion. You are my wife, I c[an] do anything to you. The woman, she should submit and do anything I ask her to do."**

While recognizing that defendant had engaged in sexual relations with plaintiff against her expressed wishes in November 2008 and on the night of January 15 to 16, 2009, the judge did not find sexual assault or criminal sexual conduct to have been proven. He stated:

> **This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.**

After acknowledging that this was a case in which religious custom clashed with the law, and that under the law, plaintiff had a right to refuse defendant's advances, the judge found that defendant did not act with a criminal intent when he repeatedly insisted upon intercourse, despite plaintiff's contrary wishes.

An appellate court reversed in 2010, writing: **"Defendant's conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did."**

The appeals court ruled that the judge was wrong to excuse the Defendant's actions due to his religious beliefs. The appellate court remanded for entry of a restraining order.

Odatalla v Odatalla – Enforcement of Islamic Mahr Agreement
Superior Court of New Jersey, Chancery Div., Passaic County - June 24, 2002

http://scholar.google.com/scholar_case?case=2649501230049632360

This case presented the issue of whether a civil court can enforce the terms of an Islamic Mahr Agreement, and arose in an action brought by the plaintiff for a divorce based upon grounds of extreme cruelty. The Defendant filed an answer and a countercomplaint for divorce also on grounds of extreme cruelty. The plaintiff sought enforcement of the Mahr Agreement contained in the Islamic marriage license.

The court used testimonial evidence from both plaintiff and defendant and an **actual copy of the Islamic marriage license. The videotape of the entire ceremony showed the families sitting on separate couches in the living room negotiating the terms and conditions of the entire Islamic marriage license including those of the Mahr Agreement.** After the negotiations, when a sum of money was determined for the Mahr Agreement, both families went to a table where the Imam began preparing the written Islamic marriage license including the Mahr Agreement. When the Islamic marriage license, including Mahr, was completed, the Imam presented it to each party for their signature. Each party read the entire license and Mahr Agreement and signed the same freely and voluntarily.

The Mahr Agreement, a section of the Islamic marriage license in the lower left portion of the license, read: "According to Islamic Law Dower is: Prompt One golden pound coin, Postponed Ten Thousand U.S. Dollars, Personal conditions___"

The defendant, Zuhair Odatalla, claimed the agreement was not a valid contract under New Jersey law. The court found that the Mahr Agreement is not void simply because it was entered into during an Islamic ceremony of marriage. Rather, enforcement of the secular parts of a written agreement is consistent with the constitutional mandate for a "free exercise" of religious beliefs. The court found that all of the essential elements of a contract were present and ruled that the defendant owed to the plaintiff the sum of $10,000.

Clearly, the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals.

NEW YORK

Sofyan Ali SALEH, Petitioner,v. UNITED STATES DEPARTMENT OF JUSTICE: Yemeni jailed in US fights deportation on Shariah grounds

United States Court of Appeals, Second Circuit - Decided April 29, 1992.

http://scholar.google.com/scholar_case?case=12533084801905965406

Saleh contended that because he was under a death sentence imposed by an Islamic court in Yemen for a homicide which he committed in the United States that had already resulted in his imprisonment here, he had established a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" within the meaning of 8 U.S.C. § 1101(a)(42) (1988), and thus qualified for asylum and withholding of deportation.

Saleh, a Yemeni citizen, became a permanent resident alien through marriage to a U.S. citizen in 1982. On February 4, 1983, while living in New York City, he shot and killed Abdulla Elhosheshi, another Yemeni national. Saleh pled guilty to first degree manslaughter and commenced serving a sentence of 8 1/3 to 25 years. **Based on the same occurrence, Saleh was also tried and convicted in absentia in Yemen and sentenced to death by a "Sharia" (Islamic) court. Jurisdiction existed because Saleh and the victim were both Yemeni Muslems.**

He submitted a memorandum of law arguing that his Yemeni conviction entitled him to asylum. He argued that he was being persecuted on account of his religion — because he would be punished in Yemen under the **"fanatical interpretation of age old [religious] laws and customs,"** and that he was being persecuted because of his membership in a particular social group — Yemeni Moslems residing outside of Yemen, "upon whom the Islamic authorities in Yemen are attempting to exert their power and control."

Also, under Islamic law, the victim's family could waive the death sentence by electing to receive "blood money" from Saleh in lieu of his execution. In this case, the amount of "blood money" could range from $186,000 to $360,000. Saleh contended that he was being persecuted on account of his membership in the "particular social group" of poor Yemenis who could not afford to pay "blood money" to buy their way out of a death sentence.

On June 5, 1990, the IJ rendered a decision that denied Saleh's applications and ordered his deportation. The IJ concluded that Saleh's conviction in Yemen did not constitute statutory "persecution" because Saleh had simply been "`prosecut[ed] for a common law offense.'"

PEOPLE of the STATE of NEW YORK v. IBRAHIM BEN BENU:

CRIMINAL COURT OF THE CITY OF NEW YORK, KINGS COUNTY - May 13, 1976

Case of forced child marriage following Islam that was voided as against public policy; the father of the child forced into marriage was also acknowledged to be in a polygamous "marriage"

http://ny.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%5CNY%5CNY3%5C1976%5C19760513_0042949.NY.htm/qx

OHIO

Mohammed Zawahiri v. Raghad Zahar Alwattar: Islamic *Mahr* Agreements in Civil Courts

Court of Appeals of Ohio - July 10, 2008

http://volokh.com/archives/archive_2008_07_13-2008_07_19.shtml#1216332053

Mohammed Zawahiri and Raghad Z. Alwattar were married, in an arranged marriage. The day of the wedding, Zawahiri signed a "mahr" under which he promised to pay his wife $25,000 in the event of divorce.

This case is similar to the *Odatalla v Odatalla* mahr agreement case in New Jersey above.

TENNESSEE

HOSSEIN AGHILI VS. HAMIDEH SABA SAADATNEJADI: Legitimates Polygamy and "expertise" in Islamic Studies

COURT OF APPEALS OF TENNESSEE June 11, 1997

http://www.tsc.state.tn.us/opinions/TCA/PDF/972/aghilih.pdf

This appellate decision dealt with the validity of an Islamic marriage under U.S. law, and the decision acknowledges that Islamic law supports polygamy with up to four wives:

> This appeal involves the validity of an Islamic marriage. Shortly after the marriage, the husband filed suit in the Circuit Court for Davidson County seeking a divorce or, in the alternative, an annulment. After the wife counterclaimed for a divorce, the husband moved for a summary judgment on his annulment claim. The trial court granted the summary judgment, finding that the undisputed evidence demonstrated that the officiant was not qualified to perform the marriage under Islamic law and that the officiant had failed to file the marriage license within the legally prescribed time. The wife takes issue on this appeal with the trial court's conclusion that the marriage was void ab initio. We have determined that the trial court erred and, therefore, reverse the summary judgment.

TEXAS

AMIR AHMED V. AFREEN S. AHMED: Texas Divorce Case; $50,000 Mahr agreement disputed

Court of Appeals of Texas - June 17, 2008

http://scholar.google.com/scholar_case?case=13628678145937799273

MAJORITY OPINION

LESLIE B. YATES, Justice.

In this divorce case, appellant Amir Ahmed appeals from the trial court's order awarding his ex-wife, appellee Afreen S. Ahmed, $50,000 pursuant to an Islamic marriage certificate signed by the parties. We affirm in part and reverse and remand in part.

Amir and Afreen married in a civil ceremony in November 1999. Both are of Indian descent, and both practice the Islamic faith. The marriage was arranged 193*193 between the parties' families. They did not live together until about six months later after their Islamic marriage ceremony in New York on May 21, 2000. As part of this ceremony, the parties signed an Islamic marriage certificate called a "Nikah Nama," which mentions a deferred "Mahr" of $50,000. According to Afreen's trial testimony, a Mahr is an Islamic religious custom whereby the husband contracts to give the wife a sum of money, either at the time of the marriage or deferred in the event of a divorce. On appeal, Amir argues that the trial court erred in enforcing the Mahr because (1) it is not a valid premarital agreement under the Family Code, (2) its terms are too vague and uncertain to be enforced, (3) the evidence is legally and factually insufficient to support the $50,000 award, (4) it is a religious agreement and enforcing it violates the Establishment Clause of the United States Constitution, (5) it

encourages divorce, which is against public policy, and (6) according to **Islamic law**, enforcing a Mahr is inconsistent with an additional division of marital property.

The Court erred when it granted a money judgment in favor of [Afreen] in the amount of $50,000 for a [Mahr] agreement between the parties. Even though the court did not make an express finding, the court erred when it implicitly found that the religious based [Mahr] agreement constitutes an enforceable contract under the laws of Texas and [the] United States. The finding is not supported by evidence, or in the alternative, there is insufficient evidence to support the finding.

Saadallah JABRI and Aida Jabri, Appellants, v. Jamal QADDURA, Appellee: Texas Islamic arbitration court taken into account in divorce case

Court of Appeals of Texas - May 8, 2003

http://scholar.google.com/scholar_case?case=9457607297329156688

http://www.2ndcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=14601

Rola Qaddura and Jamal Qaddura were married on September 3, 1993. Previously, on August 28, 1993, they had signed an "Islamic Society of Arlington Islamic Marriage Certificate" which reflects that the 407*407 "dowry for the bride" was: "One-half of the value of the house located at 2206 Gladstone. This is in addition to $40,000 Fourty [sic] Thousand U.S. Dollars the payment of which is deferred."

On October 19, 1999, Rola filed for divorce. She sought sole managing conservatorship of the parties' two children, child support, division of the parties' estate, and enforcement of the terms of the Islamic Marriage Certificate. Rola subsequently sued Jamal's brother, Osama Qaddura, as a third-party defendant, alleging he was engaged in a conspiracy with Jamal whereby Jamal was wrongfully transferring community assets to Osama, including a house on Vesta Via Court.

Jamal filed a counterclaim seeking sole managing conservatorship and child support. He sought a declaration that the Islamic Marriage Certificate was unenforceable because it was induced by Rola by fraud. He also alleged a separate cause of action against Rola for "defamation and false light," in which he sought $250,000 actual damages and $1,000,000 exemplary damages.

Osama filed a counterclaim seeking a declaratory judgment that he is the sole owner of the house on Vesta Via Court (with no right of reimbursement by Rola or Jamal) and of a specific bank account.

On January 18, 2002, Jamal filed a separate suit seeking a protective order against Rola's parents (the children's grandparents), Saadallah Jabri and Aida Jabri, alleging the children had been injured while in their care.

On September 25, 2002, all five parties signed an "Arbitration Agreement" to submit all claims to the TEXAS ISLAMIC COURT, 888 S. Greenville Ave., Suite 188, Richardson, Texas.

Accomodations

- **Deference to Islamist sensibilities in education.** A St. Cloud State student, who was disabled and assisted by a dog, was simply granted credit for a required course when the dog was found to be offensive to the majority of Muslim students at the school location where he was assigned to gain his teaching credit. http://www.wnd.com/?pageId=64151
- **A public school with Islamist principles.** The Tarek ibn Ziyad Academy in Minneapolis is a public, magnet school, funded with taxpayer money, that was discovered to mandate prayer on the premises and impose other sharia mandates on its students, such as full coverage uniforms for female students. There is a mosque on campus and a Muslim studies course taught in addition to the regular curriculum, which is essentially mandatory due to the fact that school buses do not leave the campus until the extra course ends each day. http://www.startribune.com/local/17406054.html
- **State governments going outside their duty to accommodate sharia.** In Minnesota, the state actively works to sponsor Murabaha financed mortgages, acting as intermediaries when they buy homes from realtors and re-sell them to Muslims at their total, with mortgage interest included, price. It is not within a state's duty to actively participate in the real estate market. http://wcco.com/local/islamic.mortgages.minnesota.2.952805.html
- **US medical organization adopts accommodationist stance on FGM.** On April 26, the American Association of Pediatrics revised its 1998 policy on FGM. They replaced "mutilation" with "cutting" and advocated a "compromise" position of "clitoral nicking" be practiced in the United States. Under intense scrutiny from anti-FGM advocates, AAP reversed itself a month later. The WHO has fervently and repeatedly condemned the practice on ethical and medical grounds. http://www.who.int/reproductivehealth/publications/fgm/en/index.html
- **Sharia activism in the political system.** In certain parts of Minnesota, politicians directly engage their constituency on a platform advocating Somali Muslim rights and sensibilities. Particularly, Representative Keith Ellison has come to be their national campaigner. It is clear that as a Muslim community with Islamist interests they are attempting to make a voice for themselves within the American legal system. Ellison's strong ties to radical groups is enough to cause great alarm. http://www.weeklystandard.com/Content/Public/Articles/000/000/012/764obcsx.asp?page=2
- **Sharia rules for Minneapolis cabbies.** In October of 2006, the issue of sharia incorporation was brought to national attention when Minneapolis-St. Paul airport taxi cab drivers were refusing services to any potential riders who were carrying alcohol. They made an attempt to make a legal right of their refusal of service, going so far as to work with the Metropolitan Airports Commission to make sure that drivers were in no way penalized for this refusal. Only after major public outcry did the MAC back down on proposed solutions that seemed partial to sharia law deference. http://www.danielpipes.org/4046/dont-bring-that-booze-into-my-taxi
- **Muslim on trial exempted from strip search**. An imprisoned oncologist, Rafil Dhafir, charged with setting up an unlicensed charity and illegally funneling $4 million to Iraq was allowed to attend his trial without being strip-searched. Dhafir said strip searches were against his Muslim faith. http://query.nytimes.com/gst/fullpage.html?res=9C01E1DD133AF93AA25753C1A9629C8B63

- **Teaching jihad in public schools.** "Become a Muslim warrior during the crusades or during an ancient jihad." Thus read the instructions for seventh graders in *Islam: A Simulation of Islamic History and Culture, 610-1100*, a three-week curriculum produced by Interaction Publishers, Inc. In classrooms across the United States, students who follow its directions find themselves fighting mock battles of jihad against "Christian crusaders" and other assorted "infidels." Upon gaining victory, our mock-Muslim warriors "Praise Allah." A lawsuit to stop the program's use in California schools failed in 2003.
  http://www.danielpipes.org/430/become-a-muslim-warrior
- **Proselytizing with taxpayer funds.** In 2002, PBS aired a documentary entitled "Muhammad: Legacy of a Prophet" funded in large part by the Corporation for Public Broadcasting, a private, nonprofit corporation created by Congress that in fiscal 2002 received $350 million in taxpayers' funds. The film treated religious beliefs, such as Muhammad's trip to Heaven, as historical fact, painted Muslim wars as exclusively defensive, and praised Muhammad's treatment of women while ignoring the conditions of women in the Muslim world.
  http://www.danielpipes.org/982/pbs-recruiting-for-islam
- **Muslim-only swim time.** A Seattle pool sets aside time for Muslim women to use the pool by themselves so they could adhere to strict religious restrictions, which require women to be completely covered. The outfit that organizes and pays for the Muslim Sister Swim program is the North Seattle Family Center, a unit of the Children's Home Society, a non-profit that gets most of its money from various government sources. As such, it should strictly comply with non-discrimination guidelines. Nevertheless, the Muslim Sister Swim is open exclusively to Muslims.
  http://www.soundpolitics.com/archives/004929.html
- **Gender-separate classrooms.** In 2005, 60 faculty members from King Abdulaziz University in Saudi Arabia were taking courses at Virginia Tech. Though taking identical courses, the students met in gender-specific classes. Tech officials said administrators from the Saudi university separated the sexes to mirror classroom settings at their home institution, which operates separate campuses for men and women. The university spokesman said Tech chose to respect the Saudi culture "rather than impress our culture on them."
  http://www.roanoke.com/news/roanoke/28903.html
- **Public Univerisites, including University of Michigan and George Mason University, have installed Islamic footbaths in student restrooms. In 2007,** UM-Dearborn announced that it would install $25,000 foot-washing stations in several bathrooms to accommodate a student body that is 10% Muslim. According to the New York Times, "But as a legal and political matter, that solution has not been quite so simple. When word of the plan got out this spring, it created instant controversy, with bloggers going on about the Islamification of the university, students divided on the use of their building-maintenance fees, and tricky legal questions about whether the plan was a legitimate accommodation of students' right to practice their religion or unconstitutional government." http://www.nytimes.com/2007/08/07/world/americas/07iht-muslims.4.7022566.html

- **A community for sharia-practicioners only.** Little Rock, Arkansas's Local Planning Commission has granted the right to zone land for an Islamic community, which will feature a mosque, school, and public calls to prayer. Most importantly, however, the community will ban all alcohol, which is in direct contrast to American law, making this a specifically sharia-abiding community. Although the community is proclaimed as "open to everybody," there is no doubt that it will attract mainly Muslims.
  http://www.danielpipes.org/blog/2004/08/permit-muslim-only-enclaves

- **Restrictions on mail to U.S. military.** Mail sent from United States families to their military relatives serving in foreign countries is often censored, with restrictions to certain codes barring the mailing of pork or pork byproducts, or more jarringly, "religious materials contrary to Islamic faith." http://www.usps.com/cpim/ftp/bulletin/2003/html/pb22097/apofpo.html#0.2.LMRPOZ.NQFEZ8.BZO8BH.H
- **Endorsement of prayer breaks in public schools.** Students at a San Diego elementary school are given 15 minute prayer breaks, and it has been alleged that a school aide often led these prayers. Opponents of the prayer breaks have noted that they feel the school to be endorsing Islam over other faiths, especially when it is considered that no other religious groups are given equal access to prayer leaders such as priests or rabbis. http://legacy.signonsandiego.com/news/metro/20070702-9999-1n2prayer.html
- **An Arab-language institution may promulgate sharia.** In New York, the Khalil Gibran International Academy, was originally pitched as an Arabic-language institution, however, concerns soon arose when it became clear that the group's leadership was known to have radical Islamist ties, and that the majority of the advisory board was composed of local imams. Add to this the fact that much Arab literature has Islamist overtones, and the school runs the risk of being a fully sharia-propagating shop. http://www.danielpipes.org/blog/2007/03/on-new-yorks-khalil-gibran-international
- **Christians arrested for handing out leaflets at Arab festival.** http://the-american-catholic.com/2010/06/24/sharia-in-dearborn/
- **Shariah compliant mortgages in NJ** http://creepingsharia.wordpress.com/2010/06/08/islamic-shariah-based-banking-in-new-jersey/

  http://minnesota.publicradio.org/display/web/2010/07/23/electrolux-eeoc-complaint/

- **Colorado Plant Segregates Prayer Rooms for Muslims** ("JBS, Muslims vow harmony")

  http://www.greeleytribune.com/article/20090821/NEWS/908219988/1001

- Boston Mosque to Broadcast Amplified Call to Prayer Against Previous Assurances

  http://www.solomonia.com/blog/archive/2008/09/boston-mosque-to-broadcast-amplified-cal/index.shtml

AMERICAN LAWS FOR AMERICAN COURTS (ALAC)

FAQ, ISSUES AND OBJECTIONS

1. **This bill is not needed because it states what is already reality in state courts**

First, this is not true. Most states merely state that foreign laws and judgments that violate the state's "public policy" shall not be recognized. But the courts consistently rule that the state legislature has the responsibility to articulate clearly what the state's public policy actually is. For the state to make clear that comity, choice of law, and choice of venue issues must still safeguard fundamental state and federal constitutional rights is precisely the role of the state legislature.

Second, there are actually hundreds of cases on the books in which foreign laws and foreign legal doctrines were invoked by parties to a dispute. In many cases those foreign laws and foreign legal doctrines are anathema to our constitutional ideals.

2. **This bill is not needed because shariah is not a threat in the US and is not in our court systems.**

The Act is not simply about shariah but also transnationalism—or the documented creep of foreign and offensive laws being recognized by state and federal courts. More, shariah has already creeped into the legal systems of Western Europe, including 85 shariah courts operating openly with the full authority of law in the United Kingdom. There are numerous cases in which shariah doctrines have been invoked in the US. Here is a sampling of 17 examples from 11 states:

http://publicpolicyalliance.org/wp-content/uploads/2010/11/Shariah_Cases_11states_11-08-2010.pdf

3. **This bill interferes with foreign treaties.**

By operation of law this cannot be. Treaties, when signed by the President of the United States and ratified by the United States Senate, are the law of the United States, and not foreign law. Thus, the *Act*, or a specific application of the *Act*, could not by operation of the Supremacy Clause affect in any way a treaty.

Some uninformed critics of the Act assume, without citation, that certain ratified treaties require the enforcement of foreign judgments or the application of foreign law in contradiction with the *Act*. Although some treaties address the treatment of foreign arbitral awards or child custody judgments, all of these treaties have an exemption when the foreign tribunal enforces a law that violates the fundamental public policy of the domestic

state. This is also the common law and state statutory rule for recognizing foreign judgments of any kind not affected by federal treaty or federal preemptive statutes.

The Act articulates what the boundaries are for the state's important public policy—to protect fundamental state and federal constitutional liberties.

Further, state courts consistently hold that it is up to the state legislature to set the state public policy in the first instance.

4. This bill restricts the right to contract.

The right to contract is not unlimited. The state may legitimately restrict the right to contract if the contract is found to have some deleterious effect on the public or to contravene some other matter of public policy. As the Supreme Court has noted, a state's police power to protect the health and safety of its citizenry in the area of contract law not touching upon a suspect class is subject to a rational basis scrutiny—does the state law have any rational basis.

Innumerable regulations exist governing contractual provisions, including choice of law and forum selection clauses. For an impairment of a contract to violate the constitutional right to contract the state regulation must constitute a substantial impairment, and no significant and legitimate public purpose may justify the regulation. The requirement of a legitimate public purpose is primarily designed to prevent a state from embarking on a policy motivated by a simple desire to escape its financial obligations or to injure others through the repudiation of debts or the destruction of contracts or the denial of the means to enforce them.

It is patently clear that the Act—which merely sets fundamental state and federal constitutional liberties as protectable interests—is constitutional.

Indeed, all of the state courts and the federal courts have allowed such impairments of contract when the provisions violate the public policy announced in statutes.

Moreover, American Laws for American Courts only restricts the right to contract in terms of enforcement. Theoretically, people can contract for whatever they want to, on whatever terms. Obviously the only time the state gets involved with regard to policy is when there is a dispute and the parties go to the courts to resolve and enforce. In this case it is properly the role of the state to protect constitutional liberties.

5. **This bill impacts "comity" and violates the Full Faith & Credit Clause of the US Constitution**

The Full Faith & Credit Clause only applies to sister states. Moreover, even sister states may deny comity if the sister state's foreign judgment violates the domestic state's public policy. In the context of the Act, however, only foreign country judgments are at issue. All state courts have ruled, as has the U.S. Supreme Court, that foreign judgments from aboard are subject to the public policy of the state granting comity.

Even in the case of granting domestic arbitral awards comity or recognition in state courts, the Federal Arbitration Act permits states to preclude granting comity or recognition if the arbitral award was based on a decision process or law that was contrary to public policy.

6. **This bill interferes with business activity and commerce and thus would adversely impact economic development in the state.**

Protecting the fundamental constitutional rights of the citizens of a state does not adversely impact commerce or business. In fact, quite the contrary. Our free enterprise system was built upon the fundamental liberties in our constitutions and thus preserving them protects free enterprise.

Specifically, state courts have consistently refused to allow parties to enter into agreements that violate public policy. Moreover, a party to a contract does not typically knowingly waive his/her/its fundamental constitutional liberties. The question the courts consistently ask is whether the contract waiver was entered into knowingly and at arm's length. Courts consistently reject waivers of a parties statutory or inherent rights when the parties are not equally sophisticated and where there is evidence that the contract was an adhesion contract more or less forced upon the waiving party.

If these protections are applied to statutory or inherent rights, a fortiori they apply to is a purported waiver of a fundamental constitutional liberty.

Thus, in the case of two businesses entering into a contract and one business waiving its constitutional protections, at the very least any amendment to the Act should limit such waivers only to cases where all of the parties to the contract are businesses and the waiving party has expressly waived its fundamental constitutional liberties protected by the Act.

Nevertheless, because so many of the cases involving foreign laws that violate constitutional rights infiltrating our state legal systems involve family law, particularly the rights of women and children, appropriate language can be included to exempt businesses and corporations without destroying the intent of American Laws for American Courts.

7. **The business exemption language used in some states violates the equal protection clause of the constitution.**

The *Act* would not likely be struck as violative of "equal protection" simply because it exempts contracts involving corporations. There is no "protected class", such as race, religion, sex or even age, affected by distinguishing individuals from corporations, that would require "strict scrutiny" by the judiciary. All the legislature requires is a "rational basis" for the distinction, the lowest level of judicial scrutiny. As constitutional rights affecting individuals rationally receive greater concern than rights of businesses, and businesses tend to be more sophisticated in entering contracts, the legislature has a rational basis for making the distinction and allowing businesses to contractually waive rights when submitting to foreign law, but individuals to not.

8. **Provisions of this bill would violate the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).**

The UCCJEA only applies to foreign child custody judgments for those foreign countries not "contracting parties" to the Hague Child Abduction Convention. The UCCJEA specifically exempts states from granting comity or enforcing a foreign child custody judgment or foreign jurisdiction when doing so violates "fundamental principles of human rights." It is hard to imagine how fundamental state and federal constitutional liberties are not fundamental human rights in the context of state law.

And, even among the contracting parties to the Hague Child Abduction Convention, the treaty exempts cases where the foreign jurisdiction or judgment would violate the public policy of the domestic jurisdiction.

9. **This bill could violate the federal Parental Kidnapping Prevention Act (PKPA)**

The PKPA does not apply to foreign jurisdictions. It applies within the US between the states.

10. This bill would violate international treaties dealing with child custody, namely the Hague Convention.

As noted above, the Hague Convention itself provides a public policy exemption. Beyond this, as a treaty entered into by the federal government, the Hague Convention is federal law and cannot be trumped by state law. There is no way for ALAC to do so. Moreover, it is important to note that the only country that employs shariah in its legal system that is a member of the Hague Convention is Morocco. The following countries are some that are not parties to the Hague Convention, thus it does not apply to US relations with them:

- Egypt
- Iran
- Pakistan
- Saudi Arabia
- Syria
- Jordan
- Libya
- Sudan
- Somalia
- Algeria
- Lebanon
- Indonesia
- Afghanistan
- Iraq
- India
- Bangladesh
- Nigeria
- Kuwait
- Bahrain
- Qatar
- Tunisia
- Yemen
- United Arab Emirates
- Oman

11. This bill would interfere with English Common Law

To the extent that English Common Law forms the foundation of our legal traditions, it is not a foreign law. Moreover, all states have by statute or by "common law" adopted the common law as adopted by the courts in that state to be part of state law and thus not foreign.

Moreover, this bill does not ban all foreign or international law, just the use of such law when it would violate the constitutional rights of someone in the state AND specifically applied in the particular case. The fact that a country like Germany or China might have some law that violates our constitutional liberties is wholly irrelevant. It only becomes relevant if the particular offensive law is the law at issue in the particular case being litigated in the domestic state court.

12. This bill would open up states that pass it to expensive law suits

This legislation already passed in two states in 2010 with no legal challenges. There is no basis on which to challenge a law which seeks to safeguard individual constitutional rights as its express purpose. Indeed, it is absurd to even suggest such a proposition. A state might be sued if it does NOT protect fundamental state and federal constitutional liberties.

13. This bill would interfere with Native American tribal law

Federal law, in the form of treaties with Native Americans, preempts state law. Thus, ALAC would not because it could not as a matter of law affect those federal laws. If absolutely necessary, language can be inserted in ALAC expressly confirming this.

14. This bill would interfere with Jewish law

This bill would not interfere with Jewish law because Jewish law has a provision inherent which instructs people of the Jewish faith to follow the law of the land in which they live. Moreover, ALAC only applies when the use of a foreign legal doctrine in a court would violate someone's constitutional rights. This is not the case with Jewish law.

15. ALAC unfairly targets Muslims

Nothing in the ALAC bill prevents any person from freely exercising his or her right to freedom of religion and worship. ALAC only applies to legal doctrines in our court systems. Furthermore, ALAC is facially neutral. It does not discriminate in any way based on faith of any kind. The bill makes no mention of Islam or Muslims and is not even principally focused on religious law, but any foreign law that violates constitutionally protected liberties.

List of country legal systems

From Wikipedia, the free encyclopedia

The **legal systems of the world** today are generally based on one of three basic systems: civil law, common law and religious law — or combinations of these. However, the legal system of each country is shaped by its unique history (see State law), and so incorporates individual variations.

Legal Systems of the World

- Civil law
- Common law
- Bijuridical (civil and common law, also known as mixed jurisdiction)
- Customary law
- Shariah

Contents

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Civil law

Main article: Civil law (legal system)

Civil law is the most widespread system of law around the world. It is also sometimes known as *Continental European law*. The central source of law that is recognized as authoritative are codifications in a constitution or statute passed by legislature, to amend a code.

While the concept of codification dates back to the Code of Hammurabi in Babylon ca. 1790 BC, civil law systems mainly derive from the Roman Empire, and more particularly, the *Corpus Juris Civilis* issued by the Emperor Justinian ca. AD 529. This was an extensive reform of the law in the Byzantine Empire, bringing it together into codified documents. Civil law was also partly influenced by religious laws such as Canon law and Islamic law.[1][2] Civil law today, in theory, is interpreted rather than developed or made by judges. Only legislative enactments (rather than judicial precedents, as in common law) are considered legally binding.

Shamash (the Babylonian sun god) hands King Hammurabi a code of law

Scholars of comparative law and economists promoting the legal origins theory usually subdivide civil law into four distinct groups:

- French civil law: in France, the Benelux countries, Italy, Romania, Spain and former colonies of those countries;
- German civil law: in Germany, Austria, Switzerland, former Yugoslav republics, Greece, Portugal, Turkey, Japan, South Korea and the Republic of China;
- Scandinavian civil law: in Denmark, Norway and Sweden. As historically integrated in the Scandinavian cultural sphere, Finland and Iceland also inherited the system.
- Chinese law: a mixture of civil law and socialist law in use in the People's Republic of China.

A comprehensive list of countries that base their legal system on a codified civil law follows:

Country	Description
Albania	The Civil Code of the Republic of Albania, 1991 [1] (http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014893.pdf)
Angola	Based on Portuguese civil law
Argentina	The Spanish legal tradition had a great influence on the Civil Code of Argentina, basically a work of the Argentine jurist Dalmacio Vélez Sársfield, who dedicated five years of his life on this task. The Civil Code came into effect on January 1, 1871. Beyond the influence of the Spanish legal tradition, the Argentinian Civil Code was also inspired by the Draft of the Brazilian Civil Code, the Draft of the Spanish Civil Code of 1851, the Napoleonic code and the Chilean Civil Code. The sources of this Civil Code also include various theoretical legal works, mainly of the great French jurists of the 19th century. It was the first Civil Law that consciously adopted as its cornerstone the distinction between i. rights from obligations and ii. real property rights, thus distancing itself from the French model. The Argentinian Civil Code was also in effect in Paraguay, as per a Paraguayan law of 1880, until the new Civil Code went in force in 1987. During the second half of the 20th century, the German legal theory became increasingly influential in Argentina.
Andorra	Courts apply the customary laws of Andorra, supplemented with Roman law and customary Catalan law.[3]
Aruba	Based on Dutch civil law
Austria	The Allgemeines bürgerliches Gesetzbuch (ABGB) of 1811
Azerbaijan	
Belarus	
Belgium	The Napoleonic Code is still in use, although it is heavily modified (especially concerning family law)
Benin	
Bolivia	Influenced by the Napoleonic Code
Bosnia and Herzegovina	Influenced by Austrian law. The Swiss civil law (Zivilgesetzbuch) was a model for the Law on Obligations of 1978.
Brazil	Derived from the German and Roman civil law
Bulgaria	Civil Law system influenced by Germanic and Roman law systems
Burkina Faso	
Burundi	
Chad	

People's Republic of China	civil law system; based on native customs and practices with Soviet and German influence
Republic of the Congo	
Democratic Republic of the Congo	
Cote d'Ivoire	
Cambodia	
Cape Verde	Based on Portuguese civil law
Central African Republic	
Chile	The Spanish legal tradition exercised an especially great influence on the civil code of Chile. On its turn, the Chilean civil code influenced to a large degree the drafting of the civil codes of other Latin-American states. For instance, the codes of Ecuador (1861) and Colombia (1873) constituted faithful reproductions of the Chilean code, but for very few exceptions. The compiler of the Civil Code of Chile, Venezuelan Andrés Bello, worked for its completion for almost 30 years, using elements, of the Spanish law on the one hand, and of other Western laws, especially of the French one, on the other. Indeed, it is noted that he consulted and used all of the codes that had been issued till then, starting from the era of Justinian. The Civil Code came into effect on January 1, 1857. Its technique is regarded as perfect; it is distinguished for the clarity, logic and cohesiveness of its provisions. As mentioned by Arminjon, Nolde, and Wolff ('Traite de droit comparé', Paris, 1950–1952) Andrés Bello may be regarded as one of the great legislators of mankind. The influence of the Napoleonic code is great; it is observed however that *e.g.* in many provisions of property law, the solutions of the French *code civil* were put aside in favor of pure Roman law.
Colombia	Civil code introduced in 1873. Nearly faithful reproduction of the Chilean civil code
Costa Rica	First Civil Code (a part of the General Code or Carrillo Code) came into effect in 1841; its text was inspired by the South Peruvian Civil Code of Marshal Andres de Santa Cruz. The present Civil Code is into effect since January 1, 1888, and reveals the influenced by the Napoleonic Code and the Spanish Civil Code of 1889 (from its 1851 draft version).
Croatia	Influenced by Austrian and Hungarian law. The Law on Obligations of 2005.

Cuba	Influenced by Spanish and American law with large elements of Communist legal theory.
Czech Republic	Descended from the Civil Code of the Austrian Empire (1811), influenced by German (1939-45) and Soviet (1947/68-89) legal codes during occupation periods, substantially reformed to remove Soviet influence and elements of socialist law after the Velvet Revolution (1989).
Denmark	Scandinavian-German civil law
Dominican Republic	Based by the Napoleonic Code
Ecuador	Civil code introduced in 1861. Nearly faithful reproduction of the Chilean civil code
El Salvador	
Estonia	
Finland	civil law system based on Swedish law[4]
France	Based on the Napoleonic code (*code civil* of 1804)
Equatorial Guinea	
Ethiopia	
Gabon	
Guinea	based on French civil law system, customary law, and decree[4]
Guinea-Bissau	
Georgia	
Germany	The Bürgerliches Gesetzbuch of 1900 ("BGB"). The BGB is influenced both by Roman and German law traditions.
Greece	The Greek civil code of 1946, highly influenced by the German civil code of 1900 (Bürgerliches Gesetzbuch); the Greek civil code replaced the Byzantine-Roman civil law in effect in Greece since its independence (Νομική Διάταξη της Ανατολικής Χέρσου Ελλάδος, Legal Provision of Eastern Mainland Greece, November 1821: 'Οι Κοινωνικοί Νόμοι των Αειμνήστων Χριστιανών Αυτοκρατόρων της Ελλάδος μόνοι ισχύουσι κατά το παρόν εις την Ανατολικήν Χέρσον Ελλάδα', 'The Social [i.e. Civil] Laws of the Dear Departed Christian Emperors of Greece [referring to the Byzantine Emperors] alone are in effect at present in Eastern Mainland Greece')

Guatemala	Guatemala has had three Civil Codes: the first one from 1877, a new one introduced in 1933, and the one currently in force, which was passed in 1963. This Civil Code has suffered some reforms throughout the years, as well as a few derogations relating to areas which have subsequently been regulated by newer laws, such as the Code of Commerce and the Law of the National Registry of Persons. In general, it follows the tradition of the roman-French system of civil codification. Regarding the theory of 'sources of law' in the Guatemalan legal system, the 'Ley del Organismo Judicial' recognizes 'the law' as the main legal source (in the sense of legislative texts), although it also establishes 'jurisprudence' as a complementary source. Although jurisprudence technically refers to judicial decisions in general, in practice it tends to be confused and identified with the concept of 'legal doctrine', which is a qualified series of identical resolutions in similar cases pronounced by higher courts (the Constitutional Court acting as a 'Tribunal de Amparo', and the Supreme Court acting as a 'Tribunal de Casación') whose theses become binding for lower courts.
Haiti	Influenced by the Napoleonic Code
Honduras	
Hungary	Based on codified Roman law, with elements of the Napoleonic civil code
Iceland	Based on Germanic traditional laws and influenced by Medieval Norwegian and Danish laws.
Italy	Based on codified Roman law, with elements of the Napoleonic civil code; civil code of 1942 replaced the original one of 1865
Japan	Modeled after European (primarily German) civil law system. Japanese civil code of 1895.
Latvia	Largely influenced by Germany, medium influences from Russian and Soviet law.
Lebanon	Modeled after French civil law
Lithuania	Modeled after Dutch civil law
Luxembourg	Influenced by the Napoleonic Code
Macau	Based on the Portuguese strand of the continental tradition, itself much influenced by Germany; also influenced by the law of the PRC

Mexico		"Th both Gre and com thro Lati Eur http Jain auth
Mongolia	Civil Code of 2002 based on German BGB	
Montenegro	First: the General Property Code for the Principality of Montenegro of 1888, written by Valtazar Bogišić. Present: the Law on Obligations of 2008.	
Netherlands	Influenced by the Napoleonic Code	
Norway	Scandinavian-German civil law. King Magnus VI the Lawmender unified the regional laws into a single code of law for the whole kingdom in 1274. This was replaced by Christian V's *Norwegian Code* of 1687.	
Panama		
Paraguay	The Paraguayan Civil Code in force since 1987 is largely influenced by the Napoleonic Code and the Argentinian Code	
Peru	Based on civil law system; accepts compulsory ICJ jurisdiction with reservations	
Poland	The Polish Civil Code in force since 1965	
Portugal	Influenced by the Napoleonic Code and later by the German Civil Law	
Republic of China (Taiwan)	Codification derived from German BGB.	
Romania	Based on the Napoleonic Code	
Russia	Civil Law system descendant from Roman Law through Byzantine tradition. Heavily influenced by German and Dutch norms in 1700-1800's. Socialist-style modification in 1900's, and Continental European Law influences since 1990's.	
São Tomé e Príncipe	Based on Portuguese civil law	
Serbia	First: the Civil Code of Principality of Serbia of 1844, written by Jovan Hadžić, was influenced by the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch). Present: The Swiss civil law (Zivilgesetzbuch) was a model for the Law on Obligations of 1978.	

Slovakia	Descended from the Civil Code of the Austrian Empire (1811), influenced by German (1939-45) and Soviet (1947/68-89) legal codes during occupation periods, substantially reformed to remove Soviet influence and elements of socialist law after the Velvet Revolution (1989).
Slovenia	A Civil Law system influenced mostly by Germanic and Austro-Hungarian law systems
Spain	Influenced by the Napoleonic Code, it also has some elements of Spain's legal tradition, starting with the Siete Partidas, a major legislative achievement from the Middle Ages. That body of law remained more or less unchanged until the 19th century, when the first civil codes were drafted, merging both the Napoleonic style with the Castilian traditions.
Sweden	Scandinavian-German civil law. Like all Scandinavian legal systems, it is distinguished by its traditional character and for the fact that it did not adopt elements of Roman law. It is indeed worth mentioning that it assimilated very few elements of foreign laws whatsoever. It is also interesting that the Napoleonic Code had no influence in codification of law in Scandinavia. The historical basis of the law of Sweden, just as for all Nordic countries, is Old German law. Codification of the law started in Sweden during the 18th century, preceding the codifications of most other European countries. However, neither Sweden, nor any other Nordic state created a civil code of the kind of the *Code Civil* or the BGB.
Switzerland	The Swiss civil code of 1908 and 1912 (obligations; fifth book)
Turkey	Modeled after the Swiss civil law (Zivilgesetzbuch) of 1907; this has been a conscious choice of Kemal Atatürk, the founder of the modern Turkish state, in order to abolish the Islamic law (Sharia), aiming at westernizing the country
Ukraine	Civil Code of Ukraine of 2004
Uruguay	
Uzbekistan	Represents an evolution of Soviet civil law. Overwhelmingly strong impact of the Communist legal theory is traceable.
Vietnam	Communist legal theory and French civil law

Common law

Main article: Common law

Common law and equity are systems of law whose sources are the decisions in cases by judges. Alongside, every system will have a legislature that passes new laws and statutes. The relationships between statutes and judicial decisions can be complex. In some jurisdictions such statutes may overrule judicial decisions or codify the topic covered by several contradictory or ambiguous decisions. In some jurisdictions judicial decisions may decide whether the jurisdiction's constitution allowed a particular statute or statutory provision to be made or what meaning is contained within the statutory provisions. Statutes were allowed to be made by the government. Common law developed in England, influenced by the Norman conquest of England which introduced legal concepts from Norman law, which in turn was influenced by aspects of Islamic law.[2] Common law was later inherited by the Commonwealth of

Nations, and almost every former colony of the British Empire has adopted it (Malta being an exception). The doctrine of *stare decisis* or *precedent by courts* is the major difference to codified civil law systems.

King John of England signs Magna Carta

Common law is currently in practice in Ireland, most of the United Kingdom (England and Wales and Northern Ireland), Australia, India (excluding Goa), Pakistan, South Africa, Canada (excluding Quebec), Hong Kong, the United States (excluding Louisiana) and many other places. In addition to these countries, several others have adapted the common law system into a mixed system. For example, Nigeria operates largely on a common law system, but incorporates religious law.

In the European Union the Court of Justice takes an approach mixing civil law (based on the treaties) with an attachment to the importance of case law. One of the most fundamental documents to shape common law is Magna Carta[5] which placed limits on the power of the English Kings. It served as a kind of medieval bill of rights for the aristocracy and the judiciary who developed the law.

Country	Description
American Samoa	
Antigua and Barbuda	based on English common law
Australia	based on English common law
Bahamas	based on English common law
Barbados	based on English common law
Belize	based on English common law
Bhutan	
British Virgin Islands	based on English common law
Canada	based on English common law, except in Quebec, where a civil law system based on French law prevails in property and private matters
Dominica	based on English common law
England and Wales (UK)	primarily common law, with early Roman and some modern continental influences
Fiji	based on English common law
Gibraltar	based on English common law
Ghana	
Myanmar	based on English common law
Grenada	based on English common law
Hong Kong	principally based on English common law
India	based on English common law (except Goa which follows a Civil Law based on Portuguese Civil Law)
Ireland	based on Irish law before 1922, which was itself based on English common law
Jamaica	based on English common law
Kiribati	based on English common law
Marshall Islands	based on U.S. Law
Nauru	based on English common law
New Zealand	based on English common law
Northern Ireland (UK)	based on Irish law before 1921, which was itself based on English common law
Palau	based on U.S. Law
Pakistan[6]	based on English common law with some provisons of Islamic law
Saint Kitts and Nevis	based on English common law
Saint Vincent and the Grenadines	based on English common law

Singapore	based on English common law, but Muslims are subject to the Administration of Muslim Law Act, which gives the Syariah Court jurisdiction over Muslim personal law, e.g., marriage, inheritance and divorce.
Tonga	based on English common law
Trinidad and Tobago	based on English common law
Tuvalu	based on English common law
Uganda	based on English common law
United States	Federal courts and 49 states use legal system originally based on English common law but which diverged greatly in 19th century with substantial indigenous innovations and borrowing of some civil law practices such as codification; State law in the U.S. state of Louisiana is based upon French and Spanish civil law (see below)

Religious law

Main article: Religious law

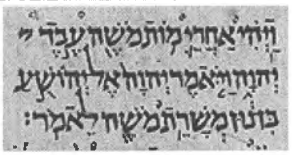
Religious law refers to the notion of a religious system or document being used as a legal source, though the methodology used varies. For example, the use of Jewish Halakha for public law has a static and unalterable quality, precluding amendment through legislative acts of government or development through judicial precedent; Christian Canon law is more similar to civil law in its use of civil codes; and Islamic Sharia law (and Fiqh jurisprudence) is based on legal precedent and reasoning by analogy (*Qiyas*), and is thus considered similar to common law.[7]

The main kinds of religious law are Sharia in Islam, Halakha in Judaism, and canon law in some Christian groups. In some cases these are intended purely as individual moral guidance, whereas in other cases they are intended and may be used as the basis for a country's legal system. The latter was particularly common during the Middle Ages.

The Islamic legal system of Sharia (Islamic law) and Fiqh (Islamic jurisprudence) is the most widely used religious law, and one of the three most common legal systems in the world alongside common law and civil law.[8] It is the most protected divine law, because, the majority of the rulings of Sharia law are based on the Qur'an and Sunnah, while a small fraction of its rulings are based on the Ulema (jurists) who used the methods of *Ijma* (consensus), *Qiyas* (analogical deduction), *Ijtihad* (research) and *Urf* (common practice) to derive *Fatwā* (legal opinions). An Ulema was required to qualify for an *Ijazah* (legal doctorate) at a *Madrasah* (school) before they could issue *Fatwā*.[9] During the Islamic Golden Age, classical Islamic law may have had an influence on the development of common law[2] and several civil law institutions.[1] Sharia law governs a number of Islamic countries, including Saudi Arabia and Iran, though most countries use Sharia law only as a supplement to national law. It can relate to all aspects of civil law, including property rights, contracts or public law.

The Halakha is followed by orthodox and conservative Jews in both ecclesiastical and civil relations. No country is fully governed by Halakha, but two Jewish people may decide, because of personal belief, to have a dispute heard by a Jewish court, and be bound by its rulings.

Canon law is not a divine law, properly speaking, because it is not found in revelation. Instead, it is seen as human law inspired by the word of God and applying the demands of that revelation to the actual situation of the church. Canon law regulates the internal ordering of the Roman Catholic Church, the Eastern Orthodox Church and the Anglican Communion. Canon law is amended and adapted by the legislative authority of the church, such as councils of bishops, single bishops for their respective sees, the Pope for the entire Catholic Church, and the British Parliament for the Church of England.



Aleppo Codex: 10th century Hebrew Bible with Masoretic pointing

Country	Description
Afghanistan	Islamic law
Bangladesh	Formerly based on English common law
The Gambia	English common law, Islamic law and customary law
Ghana	Based on English common law
Iran	Islamic law
Libya	Islamic law
Mauritania	mix of Islamic law and French Civil Codes, Islamic law largely applicable to family law.
Morocco	mix of Islamic law and French Civil Codes, Islamic law largely applicable to family law.
Nigeria	Sharia
Oman	Sharia and tribal custom laws
Saudi Arabia	Islamic law
Sudan	Based on Islamic law
Vatican City	Based on principles of Code of Canon Law
Yemen	Islamic law

Pluralistic systems

Civil law and common law

Country	Description
Botswana	South African law (a mixed system) transferred *uno acto* through a proclamation of reception
Cameroon	
Cyprus	Based on English common law (Cyprus was a British colony 1878-1960), with admixtures of French and Greek civil and public law, Italian civil law, Indian contract law, Greek Orthodox canon law, Muslim religious law, and Ottoman civil law.
Guyana	
Israel	Originally (1948) based on English common law; in the process, influenced by German civil law—for instance, between 1962 and 1981, the Knesset issued twenty (20) wide-ranging laws, which were clearly influenced by civil law, and were in the form of codes. Religious law plays a role, especially in matters of personal status and family law, and judicial and legislative decisions take into account Jewish law (halakhah) on occasion.[10]
Lesotho	South African law (a mixed system) transferred *uno acto* through a proclamation of reception
Louisiana (U.S.)	Based on French and Spanish civil law, but federal laws (based on common law) are in effect in Louisiana as well.
Malta	Initially based on Roman Law and eventually progressed to the Code de Rohan, Code Napoleon with influences from Italian Civil Law. English common law however is also a source of Maltese Law, most notably in Public Law
Mauritius	
Namibia	South African law (a mixed system) transferred *uno acto* through a proclamation of reception
Philippines	Based on Spanish law; influenced by U.S. common law after 1898 Spanish and Philippine-American Wars, personal law based on sharia law applies to Muslims
Puerto Rico (U.S.)	Based on Spanish law; influenced by U.S. common law after 1898 (victory of the U.S. over Spain in the Spanish-American war of 1898 and cession of Puerto Rico to the U.S.)
Quebec (Canada)	After the defeat of the French in the battle at the Plains of Abraham, the British tried to convert Quebec to English language and Common Law, but given the growing menace of the United States, had to allow them to keep their language (French), their religion (Roman Catholicism), and their legal system (civil law), as part of the Quebec Act of 1774. However, as Quebec is part of the Canadian Confederation (since 1867), English-based laws applied at the federal level are in effect in Quebec also.
Saint Lucia	
Scotland (UK)	Based on Roman and continental law, with common law elements dating back to the High Middle Ages

Seychelles	The substantive civil law is based on the French Civil Code. Otherwise the criminal law and court procedure are based on the English common law. See Seychelles Legal Environment (http://sites.google.com/site/theseychelleslegalenvironment/legal-system) .
South Africa	An amalgam of English common law and Roman-Dutch civil law as well as Customary Law.
Sri Lanka	An amalgam of English common law, Roman-Dutch civil law and Customary Law
Swaziland	South African law (a mixed system) transferred *uno acto* through a proclamation of reception
Thailand	The Thai legal system became an amalgam of German, Swiss, French, English, Japanese, Italian, and Indian laws and practices. Even today, Islamic laws and practices exist in four southern provinces. Over the years, Thai law has naturally taken on its own Thai identity.
Vanuatu	Consists of a mixed system combining the legacy of English common law, French civil law and indigenous customary law.
Zimbabwe	South African law (a mixed system) transferred *uno acto* through a proclamation of reception

Civil law and religious law

Country	Description
Afghanistan	
Algeria	
Bahrain	
Comoros	
Djibouti	
Egypt	Based on Islamic law and French civil law system
Eritrea	
Indonesia	Based on civil law of Holland and adat (cultural law of Indonesia)
Jordan	Mainly based on French Civil Code and Ottoman Majalla, Islamic law applicable to family law
Morocco	Based on Islamic law and French and Spanish civil law system
Oman	
Qatar	Based on Islamic law and Egyptian civil law system (after the French civil law system)
Syria	Based on Islamic law and French civil law system
United Arab Emirates	Based on Islamic law and Egyptian civil law system (after the French civil law system)

Common law and religious law

Country	Description
Bangladesh	
Brunei	
Gambia	
Malaysia	based on English common law, personal law based on sharia law applies to Muslims
Nigeria	Sharia is applied in some northern states
Pakistan	based on English Common Law, some Islamic law applications in inheritance. Tribal Law in FATA

Hybrid law

The most prominent example of a hybrid legal system is the Indian legal system. India follows a mixture of civil, common law and customary or religious law. Separate personal law codes apply to Muslims, Christians, and Hindus. Decisions by the Supreme Court of India and High Courts are binding on the lower courts. Further, most of the laws are statutory and it also has a constitution which signifies the Civil nature of law in India.

Systems by geography

Despite the usefulness of different classifications, every legal system has its own individual identity. Below are groups of legal systems, categorised by their geography. Click the "show" buttons on the right for the lists of countries.

See also

- Comparative law
- English common law
- Rule of law
- Rule According to Higher Law
- Islamic law
- Socialist law
- Soviet law
- Tribal sovereignty
- Western law
- Anarchy

External links

- World Legal Systems (http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php) , Website of the Faculty of Law of the University of Ottawa
- Australian Institute of Comparative Legal Systems (http://ausicl.com)

- Factbook list of legal systems (https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html)
- International & Foreign Law Community (http://www.lexisnexis.com/community/international-foreignlaw/)

References

1. ^ [a] [b] Badr, Gamal Moursi (Spring, 1978), "Islamic Law: Its Relation to Other Legal Systems", *The American Journal of Comparative Law* **26** (2 [Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, February 24–25, 1977]): 187–198 [196–8], doi:10.2307/839667 (http://dx.doi.org/10.2307%2F839667)
2. ^ [a] [b] [c] Makdisi, John A. (June 1999), "The Islamic Origins of the Common Law", *North Carolina Law Review* **77** (5): 1635–1739
3. ^ Andorra (11/07) (http://www.state.gov/r/pa/ei/bgn/3164.htm)
4. ^ [a] [b] https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html
5. ^ "Magna Carta" (http://www.fordham.edu/halsall/source/magnacarta.html) . http://www.fordham.edu/halsall/source/magnacarta.html. Retrieved 2006-11-10.
6. ^ https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html
7. ^ El-Gamal, Mahmoud A. (2006), *Islamic Finance: Law, Economics, and Practice*, Cambridge University Press, p. 16, ISBN 0521864143
8. ^ Badr, Gamal Moursi (Spring, 1978), "Islamic Law: Its Relation to Other Legal Systems", *The American Journal of Comparative Law* **26** (2 - Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, February 24–25, 1977): 187–198, doi:10.2307/839667 (http://dx.doi.org/10.2307%2F839667)
9. ^ Makdisi, George (April–June 1989), "Scholasticism and Humanism in Classical Islam and the Christian West", *Journal of the American Oriental Society* **109** (2): 175–182 [175–77], doi:10.2307/604423 (http://dx.doi.org/10.2307%2F604423)
10. ^ *E.g.*, see the work of Menachem Elon and Nahum Rakover.

- Moustaira Elina N., *Comparative Law: University Courses (in Greek)*, Ant. N. Sakkoulas Publishers, Athens, 2004, ISBN 960-15-1267-5
- Moustaira Elina N., *Milestones in the Course of Comparative Law: Thesis and Antithesis (in Greek)*, Ant. N. Sakkoulas Publishers, Athens, 2003, ISBN 960-15-1097-4

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Karen Sawyer

From:	David Gallagher [denalidave2@gmail.com]
Sent:	Saturday, March 26, 2011 3:16 PM
To:	Rep. Carl Gatto
Cc:	Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	"Foreign Law" bill HB-88
Categories:	KAREN

Honorable Members of the Judiciary Committee,

Please be advised, as your constituent, I strongly urge YOU to support the "Foreign Law" bill HB-88.

And for your support of HB-88, I will remember you at the Ballot Box.

Thank You
Dave Gallagher
3141 E. 112th Ave.
Anchorage, Alaska
99516

Karen Sawyer

From: Chris & Jennie Grimwood [chris7grim@ctcak.net]
Sent: Monday, March 21, 2011 12:04 PM
To: Rep. Carl Gatto
Subject: re: HB 88

Categories: KAREN

To Rep. Gatto:

I am the new state president for Eagle Forum. Debbie Joslin was our former president. We support HB 88 and would like information on when to testify for this bill and when would be the most helpful.

Jennie Grimwood

Karen Sawyer

From: Albert Hamby [toddmilepost22@gmail.com]
Sent: Sunday, March 27, 2011 4:11 PM
To: Rep. Carl Gatto

Categories: KAREN

Regarding HB88

I and a number of my friends, your constituents, want HB88 passed. We live according to the laws written in the Constitution of the United States and the laws of the state Alaska. We don't want ANY!!!!!! foreign laws to have any influence on our laws or judges.

Respectfully

Al Hamby

Karen Sawyer

From: Katherine Hicks [katherine_l_hicks@yahoo.com]
Sent: Monday, March 28, 2011 8:57 AM
To: Rep. Carl Gatto
Subject: HB 88

Categories: KAREN

Chairman Gatto,

Thank you for sponsoring HB 88. Thank you for attempting to protect Alaskans from the influence of foreign laws and keeping our Constitution as written. I am very concerned with the direction our courts are taking and think this bill is a necessity.

Thanks again,
Katherine Hicks

Karen Sawyer

From: Ron Hightower [ron@lonelymountainjewelry.com]
Sent: Sunday, March 27, 2011 7:58 AM
To: Rep. Carl Gatto
Subject: HB 88

Categories: KAREN

Representative Carl Gatto
Dear Sir,
I strongly support HB088!
Thank you,
Ron Hightower

Ron Hightower
Lonely Mountain Jewelry
Custom Wedding Sets
7321 Bulen Drive
Anchorage, Alaska 99507
907-562-7464 (RING)
www.lonelymountainjewelry.com
product@lonelymountainjewelry.com

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Karen Sawyer

From: hillmer@mtaonline.net
Sent: Sunday, March 20, 2011 8:07 PM
To: Rep. Carl Gatto
Subject: Islamic Sharia law;

Categories: KAREN

I read your article in the paper and just wanted to let you know, we need more people like you doing the right think...thank you carl..dale hillmer, wasilla ak..

Karen Sawyer

From: Steve [hovenden3@alaska.com]
Sent: Friday, March 18, 2011 8:51 AM
To: Karen Sawyer
Subject: HB 88

Categories: Blue Category

Hooray for all of you! Please add my name to the list of enthusiastic supporters! Steve Hovenden, 360 Terrace Drive, Fairbanks, 99712. 457-8624.

Karen Sawyer

From: housemajority_email@housemajority.org
Sent: Wednesday, March 16, 2011 9:25 PM
To: Rep. Carl Gatto
Subject: HB 88

+--+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to garydkearney@hotmail.com If suspected Spam please forward to: support@housemajority.org
+--+

From: garydkearney@hotmail.com

HB 88 will be needed more as time goes by. It is essential that our constitution cannot be set aside by groups or individuals having laws contrary to our own.

~ gary d kearneyt
Zip Code: 99928
Voter ID: MUD BAY DISTRICT...KETCHIKAN

+--+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to garydkearney@hotmail.com If suspected Spam please forward to: support@housemajority.org
+--+

Karen Sawyer

From: David & Susan Kilpatrick [dskilpat@acsalaska.net]
Sent: Monday, March 21, 2011 11:21 AM
To: Rep. Carl Gatto
Subject: Sharia Law

Categories: KAREN

Sir, I am 64 years of age and now have the ability to say I have witnessed a lot of change within our country. Words absolutely cannot express my disappointment in individuals who call themselves "American" who first would allow any form of "Law" outside of that equated to the United States Constitutionally based expression of law.

I will not debate with anyone the personal basis early lawmakers based their conclusions, i.e, the Bible, Hammurabi, as that is just stupid argument.

My wife and I as well as most persons I call friends support your and Rep. Bob Lynn's effort to prohibit Sharia Law. Keep up this good fight.

Sincerely,
David

David & Susan Kilpatrick
632-4443

Karen Sawyer

From: John Lopetrone [lptrnak@acsalaska.net]
Sent: Saturday, March 19, 2011 7:38 PM
To: Rep. Carl Gatto
Subject: sharia law

Categories: KAREN

Rep. Gatto, I just finished reading "Infidel" by Ayaan Hirsr Ali. It was a real eye opener for me. I think most people in this country have no idea what dangerous times we are living in. We are at war with Islam.! Their whole objective is to destroy the west and all nonbelievers. We have our laws and they should be forced to obey them or get out of the country. If we are not careful and vigilant we will be in the same situation Europe finds itself in. Good luck in your efforts and we will pray for your success. Barbara Lopetrone

Karen Sawyer

From: Mike Madar [madar@gci.net]
Sent: Thursday, March 10, 2011 11:44 AM
To: Karen Sawyer
Subject: HB 88

Follow Up Flag: Follow up
Flag Status: Completed

Categories: Blue Category

I support HB 88 100% Mike Madar; 1270 Woodstock Dr; Palmer, Alaska 99645 (907) 746 6667

Karen Sawyer

From: Larry McPhee [skiguy11@hotmail.com]
Sent: Friday, March 18, 2011 7:46 AM
To: Rep. Carl Gatto
Subject: Nice work

Categories: KAREN

Thanks for standing up for the Constitution and the American court system

L McPhee
Fairbanks, AK

Karen Sawyer

From: Ray Phelps [rphelps@matsumail.com]
Sent: Friday, March 18, 2011 12:42 PM
To: Rep. Carl Gatto
Subject: note of support

Categories: KAREN

Dear Mr. Gatto,

As a constituent and a voting supporter, I want to voice my whole-hearted support of your bill prohibiting our state courts from honoring foreign laws. This is an important issue of national and state sovereignty. Keep up the good work! God bless.

Ray Phelps
Wasilla

Karen Sawyer

From: William Rome [WRome@webtv.net]
Sent: Sunday, March 27, 2011 2:09 PM
To: Rep. Carl Gatto
Subject: HB - 88

Categories: KAREN

Dear Rep Gatto,
I strongly support the foreign Law bill H888.
Bill Rome

Karen Sawyer

From: Vicki Schneibel [schneibeldale@gci.net]
Sent: Saturday, March 19, 2011 10:04 AM
To: Rep. Carl Gatto
Subject: One of Your Proposed Bills

Follow Up Flag: Follow up
Flag Status: Completed

Categories: KAREN

Hello Rep. Gatto,

My name is Vicki and I'm not a constituent, but I'm very interested in a bill you're bringing to the Legislature.

I recently read that you've proposed a bill that will eliminate foreign law being honored in Alaska. Bravo! How can I help you with that? I hope your bill is successful. From what I've been reading it seems our state should be out a head of any problems that may come our way over this issue. If we're pro-active(like the State of Virginia and the ObamaCare bill) it seems to me our standing is much stronger.

Please let me know what I can do. I don't know what the bill number is or any details in order to contact my Rep. and Senator about it.

Thanks for looking out for us Alaskans!

Vicki Schneibel
4811 E. 112 Avenue
Anchorage, AK 99516

907/349-5505

Karen Sawyer

From: Rod & Vickie [randvalaska@mtaonline.net]
Sent: Friday, March 25, 2011 9:47 AM
To: Karen Sawyer
Subject: Thanks!

Just wanted to thank Mr.Gatto for his stand to protect the people of Alaska from "sharia law". Hopefully, the judges won't intervene to stop his attempt! Sincerely, Vickie Schultz

Karen Sawyer

From:	Rodney and Shelly [fishingtools@alaska.net]
Sent:	Sunday, March 27, 2011 4:42 PM
To:	Rep. Carl Gatto
Cc:	Rep. Steve Thompson; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault; Rep. Wes Keller
Subject:	Fwd: HB-88
Categories:	KAREN

Dear Sir,
Please approve HB-88 (American Law for American Courts). This approval of this bill will prohibit Alaska Courts from using any law other than the U.S. Constitution and the Alaska Constitution.
Thank You
Rodney and Shelly Small
Nikiski, Alaska.

Karen Sawyer

From: Bob & Connie Weel [weel@clearwire.net]
Sent: Saturday, March 19, 2011 4:58 PM
To: Rep. Carl Gatto
Subject: Islamic Sharia Law

Categories: KAREN

Dear Representative Gatto,

I saw a story on page A-3 of this morning's ADN and fully support your bill prohibiting state courts from honoring foreign law such as the Islamic Sharia Law. For other members of the State House who have any doubt about passing this bill, I would ask that you share the following message and video.

I am currently reading a book titled CRUEL AND USUAL PUNISHMENT - The terrifying global implications of Islamic Law written by Nonie Darwish. If you think what the video states are not true, I encourage you to read this woman's book.

A group calling themselves "White Roses" created a video to inform non-Muslims about Islam. The name of this video is Three Things About Islam. White Roses is headquartered in Sweden.
The name "White Roses" is based on a student resistance group "Die weiße Rose" in Nazi Germany. The group became known for an anonymous leaflet campaign, from June 1942 until February 1943, which called for active opposition to Adolf Hitler's regime.

I urge you to view this video and forward it to your email list. You may be familiar with the points made in this video, but many Americans are to dumb to pull their heads out of the sand to avoid confronting the problem or just simple ignorance of the crisis we face. It may not be possible to get all the Dramatis Persona to acknowledge this Islamic road to perdition but those Americans, who just do not know, out of ignorance, just might find the learning experience worth while.

As a person who has spent time studying Islam I can tell you this video is one of the best I have seen. It's short and to the point and all those points are right on!

http://www.youtube.com/watch?v=Ib9rofXOl6w&feature=player_embedded
God Bless Alaska and America,

Robert C. Weel

Help us END POLIO NOW: www.rotary.org/endpolio

"You have not lived a perfect day until you have done something for someone who will never be able to repay you."

P.O. Box 3915
Palmer, AK 99645

The Honorable Carl Gatto
State Capitol, Room 118
Juneau, AK 99801-1182

9 March, 2011

Subject: House Bill 88, Use of Foreign Law

Dear Representative Gatto:

It appears to me that the effect of House Bill 88 is to preclude within the borders of the State of Alaska the subjugation of Alaskans to the whims of laws practiced by foreign entities that conflict with rights guaranteed to us by our laws and Constitution. Particularly, it will shield Alaskans from the depredations of Islamic Sharia law. I fully support its' adoption.

I am forwarding this because the body of evidence suggests it's true that Sharia law is an affront to every person who values human rights. Already there is a shrill, galling Muslim voice in America that demands the practice of Sharia law be allowed here, and there are gullible, bleeding-heart non-Muslims who blindly and stupidly support this insidious Islamic "cause." Already, among Muslims, it is happening in our America!

I personally will not condone the imposition of Sharia law at any level of our free society, not for myself nor for anyone else in America. Those who wish to impose Sharia law in America are the enemies of my blood. Sharia law is the antithesis of every right guaranteed to Alaskans and to all people in the United States of America. This is the land of the free and our demand for equality is that which makes us great among nations. The practices and punishments inflicted by Sharia law are patently illegal in this land. Enslavement, subjugation, beating, torture, mutilation, murder, discrimination, and child abuse deprive others of their guaranteed human rights under our Constitution and are crimes, all punishable upon conviction in this country.

Anyone in Alaska or America, who harms another person or deprives another person of guaranteed rights under the auspices of Sharia law or any other alien, foreign law, including Muslims, must be held accountable under our country's laws and prosecuted to our law's fullest extent. Multiculturalism be damned. Sharia law is an abomination and a pox on anyone who seeks to practice it or condone it in these United States of America.

Champions of Sharia BEWARE! There is only one law in America, and that is American jurisprudence, established by the duly enacted legislations of those freely elected to represent us. I pledge, as a duty of my American citizenship and as the right of a human being, to seek the prosecution of anyone I find inflicting the cruel and illicit depredations of Sharia law upon anyone in my America and I expect every other American citizen to do the same.

It's time for Alaskans and all Americans to stand together, get some guts, and renounce all efforts to suborn our freedoms and subjugate us under the illusion that any discriminatory foreign law should have any sway within the boundaries the State of Alaska or of these United States of America.

Sincerely,

Jim

James B. Wood

Karen Sawyer

From: Todd Antonovich [todd.antonovich@gmail.com]
Sent: Monday, March 28, 2011 11:56 AM
To: Rep. Carl Gatto
Subject: Hb-88

Categories: KAREN

I am in great support of house bill 88. Thank you for your service...

-Todd Antonovich via iPhone

Karen Sawyer

From:	Mary Barr [ak031764@customcpu.com]
Sent:	Monday, March 28, 2011 8:01 AM
To:	Rep. Carl Gatto; Rep. Steve Thompson
Cc:	Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	HB 88 Use of Foreign Law
Categories:	KAREN

Please support HB 88, Use of Foreign Law.
It is totally appropriate to forbid the use of foreign or religious law in Alaska courts and require our judges to adhere to the laws of the state and the nation.

Thank you for your consideration.

Mary Barr
9441 Strathmore Dr
Anchorage AK 99502

907-248-2429

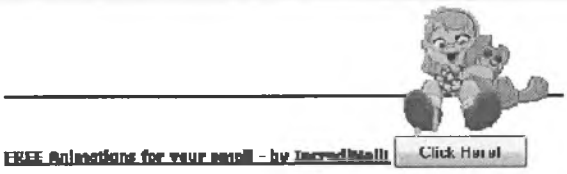
Karen Sawyer

From: Lucy [Lucky8118@alaska.net]
Sent: Monday, March 28, 2011 10:31 AM
To: Rep. Carl Gatto
Subject: Bill HB-88 must be passed !

Categories: KAREN

Please vote to pass this bill into law !

Thanks, Lucy Bishop,,,,337-3145



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Karen Sawyer

From: housemajority_email@housemajority.org
Sent: Friday, March 25, 2011 6:52 AM
To: Rep. Carl Gatto
Subject: Sharia Bill

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to akdougjr@gmail.com If suspected Spam please forward to: support@housemajority.org
+----------+

From: akdougjr@gmail.com

Dear Rep Gatto,

Thank you for your service to the people and State of Alaska and for your work to get Sharia Law blocked from Alaska's courts. As you know, Sharia law is totally at odds with our Constitution and I applaud you for taking that stand.

Doug Briney
4040 E 66th Ave
Anchorage, AK 99507
(907) 229-5028

~ Doug Briney
Zip Code: 99507

+----------+
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Then change the TO: address to akdougjr@gmail.com If suspected Spam please forward to: support@housemajority.org
+----------+

Karen Sawyer

From: Rich Chamberlain [div10inc@alaska.net]
Sent: Sunday, March 27, 2011 9:56 PM
To: Rep. Carl Gatto
Subject: HB-88

Categories: KAREN

Representative Gatto,

Thank you for getting out ahead of this issue.
No foreign law in any shape or form should be of influence in the Alaska Courts.
You have the support of myself and my wife in this issue.

Rich Chamberlain
Jean Kennedy
Anchorage 345-6662

Karen Sawyer

From: JChuckwuk [brisbay@nushtel.net]
Sent: Friday, March 25, 2011 3:35 PM
To: Karen Sawyer
Subject: CS for HB #88(STA)

Honorable Representative Gatto & et al

Just a short note to show my support on the subject matter captioned above.

Certainly, any legislation that strengthens and supports the Alaskan or U.S. constitutional laws benefits all citizens of the state or national citizens.

I appreciate the vision and foresight of the committee and legislature on behalf of all its citizens.

Thank you for all your work and effort!

Joseph Chuckwuk
P.O. Box 8
Dillingham, Ak 99576

Karen Sawyer

From: A. J. Clark [aj@lea.com]
Sent: Sunday, March 27, 2011 9:22 PM
To: Rep. Carl Gatto
Subject: HB-88
Attachments: faint_grain.jpg

Categories: KAREN

Honorable Representative Carl Gatto,
I would like you to know as an Alaskan of over 20 years I strongly support the "Foreign Law Bill" HB-88 and request you do all in your power to support and pass this bill

Thank you.
Ms. A. J. Clark
Anchorage

Karen Sawyer

From: housemajority_email@housemajority.org
Sent: Saturday, March 19, 2011 9:15 AM
To: Rep. Carl Gatto
Subject: Email to Rep. Gatto

Categories: KAREN

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to near_and_far17@hotmail.com If suspected Spam please forward to: support@housemajority.org
+----------+

From: near_and_far17@hotmail.com

Dear Mr. Gatto,

Thank you very much for protecting our Alaskan laws and pushing to prevent other foreign laws from being used in our justice system. It makes no sense whatsoever to use sharia or even just another country's system of law when we have our own.

God Bless you for standing for what's right.

Jayme Cupples

~ Jayme
Zip Code: 99654

+----------+
DO NOT REPLY DIRECTLY TO THIS EMAIL: your reply will go to enews@housemajority.org To correspond with the author Hit 'Reply' or 'Forward'.
Then change the TO: address to near_and_far17@hotmail.com If suspected Spam please forward to: support@housemajority.org
+----------+

Karen Sawyer

From: cush [mmcushman@hotmail.com]
Sent: Friday, March 18, 2011 10:52 AM
To: Karen Sawyer
Subject: Thanks to Rep. Gatto

Categories: Blue Category

Thanks for Alaskan people intelligence for watching to protect American freedoms with State House Bill #88. Where the United Nations would force the U.S.A. to abandon our sovereignty. Thank you Rep Gatto.

Sincerely,
Rev. Mark Cushman

Karen Sawyer

From: John Wm. Foster [jfoster@gci.net]
Sent: Monday, March 28, 2011 7:08 AM
To: Rep. Carl Gatto
Subject: House Bill 88

Categories: KAREN

Dear Representative Gatto:

I am writing to urge you and your committee to support HB 88. Alaska and the United States has no need for our system of laws and judiciary to be corrupted by outside influences, most especially Sharia Law. I consider the backing of Sharia Law by groups such as CAIR and the Muslim Brotherhood to be a sure sign of the intention by these groups to impose their doctrine and ultimately destroy our culture, otherwise known as "creeping jihad". Our laws must be based only on the constitutions of Alaska and the USA.

Thank you for your sponsorship of HB 88.

Sincerely yours,
John Wm. Foster
Juneau
jfoster@gci.net

Karen Sawyer

From: salam@gci.net on behalf of Salam [salam@gci.net]
Sent: Tuesday, March 29, 2011 9:09 AM
To: Rep. Carl Gatto
Subject: HB 88 - Supporting
Attachments: HB 88 letter.docx; ATT00001.htm

March 25, 2011

Dear Representative Gatto:

This letter is in regard to HB-88, specifying that no individual citizen's Constitutional rights may be violated by the application of foreign laws, rules or provisions. I am in favor of the bill and urge you to vote in favor of it.

Law is a form of communication within a society. The clearer the communication, the better. When two or more contradictory legal systems operate within a single society, there is confusion and insecurity. For example, after the fall of the Ottoman Empire, European colonial powers brought their own judicial systems into the Middle East, which had been governed for centuries by Islamic law (Shari'ah). The result was two incompatible legal systems operating side-by-side in the same locale. In some cases, aggrieved individuals would complain to the system they thought most likely to give them the desired result, and if they lost would appeal to the other system. The result was confusion and expense rather than justice.

There must be clarity about which source of law carries ultimate authority. In Alaska, the Constitution of Alaska is the predominant and overarching source of law. If that ever changes, it should be as a result of an open and public process, not as a result of individuals or judges altering things bit by bit.

Different legal systems can rest on entirely different foundations, as do the two systems mentioned previously (Western law and Shari'ah). Because they appeal to different sources of ultimate authority, they are *fundamentally* incompatible and cannot be adopted piecemeal or cobbled together into a cohesive whole. Such incompatibility is stressed again and again by Muslim writers. The following quotes are from books recently kpurchased at a prominent California mosque:

> *Islam is an original genuine system with its own unique bases and an integral comprehensive plan, not mere adjustments to current outstanding conditions. —Sayyid Qutb in Islam: The Religion of the Future*
>
> *Islam and Western civilization, being built on diametrically opposed conceptions of life, are not compatible. —Muhammad Asad in Islam at the Crossroads*
>
> *Islam should either be adopted and applied as a whole or wholly abandoned. As a system of life it can bear fruit only if all its demands and its instructions are followed and complied with in toto. — Muhammad Qutb in Islam: The Misunderstood Religion*
>
> *Allah alone is entitled to prescribe laws and regulations for making things lawful or unlawful, pure and impure; consequently all laws imposed by others must be abolished. —Sayyid Abul A'la Al-Mawdudi*
>
> *Islam and democracy can never coexist. In Islam, every decision is based on the demands of Allah. Democracy is based on what the people want. Allah holds the ultimate power. He does not require the people's consent. —Abu Bakar Bashir*

Karen Sawyer

From: Diane Sanderlin [dougdiane70@yahoo.com]
Sent: Tuesday, March 29, 2011 9:20 AM
To: Rep. Carl Gatto
Subject: HB 88

We are behind you on this bill

Doug and Diane Sanderlin

Karen Sawyer

From: Richard Shear [badbushhog@att.net]
Sent: Tuesday, March 29, 2011 8:02 AM
To: Rep. Carl Gatto
Subject: HB88

Rep Gatto
I wish to pass my strong support for this bill along to you . This is just acommon sense vote, There should never be any law to consider other than US Constitution or Alaska law .

Rick Shear , Talkeetna AK

Karen Sawyer

From: M R Spikes [mrspikesak@gmail.com]
Sent: Tuesday, March 29, 2011 9:54 AM
To: Rep. Carl Gatto
Subject: HB 88

Mr. Gatto. This bill needs to pass. I am counting on you to help see that the does pass. Please do not disappoint me. Thanks Hank Spikes.

Karen Sawyer

From: amythom@mtaonline.net
Sent: Tuesday, March 29, 2011 8:21 AM
To: Rep. Carl Gatto
Subject: HB-88

I am behind you 100% on HB-88. Please do not be swayed by the lobbyists who are doing their best to destroy our judicial system.
Amy Thomas

Karen Sawyer

From: R T [highflytimm@yahoo.com]
Sent: Tuesday, March 29, 2011 8:11 AM
To: Rep. Carl Gatto
Cc: Rep. Bob Lynn; Rep. David Guttenberg; Rep. Lance Pruitt; Rep. Lindsey Holmes; Rep. Mike Chenault; Rep. Steve Thompson; Rep. Wes Keller
Subject: HB88

Dear Representatives,

Please consider my **strong** support for **HB88. The Foreign Law Bill.** I think it very wise, prudent and timely to enact this bill before things in this area get too out of hand, allowing for further and faster erosion of our state and national sovereignty. Thank you for considering such a bill in the first place. I think it appropriate and urgent in this political climate in which we find ourselves. Often we have judiciary who pride themselves in thinking too far out of the box and need containment. This is one of those times. Thank you for your efforts to protect the residents of Alaska with this bill,

Sincerely,
Robert Timmins

Eagle River, AK
highflytimm@yahoo.com

Karen Sawyer

From:	dwest@gci.net on behalf of Dennis Weston [dwest@gci.net]
Sent:	Tuesday, March 29, 2011 5:26 AM
To:	Rep. Carl Gatto
Cc:	Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	HB 88

I am very much in support of HB 88 and urge its passage.

Central to Alaskan and American justice is the idea of equality of individual citizens before the law, irrespective of group identity. Though we do not always reach that ideal, it should remain the standard toward which we strive. For that fundamental idea to be upheld, there must be only ONE standard of law in Alaskan courts.

Thank you for your service to the state. Please vote in favor of this bill.

Dennis H. Weston

Karen Sawyer

From: Sandi Williams [knikhusky@mtaonline.net]
Sent: Tuesday, March 29, 2011 9:10 AM
To: Rep. Carl Gatto
Cc: Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject: HB-88 (Foreign Law)

Hello!

I wanted to take a moment to let all of you know that I STRONGLY SUPPORT the passing of HB-88. This bill would prohibit Alaska courts from using any law other than the US Constitution or the Alaska Constitution. Courts would not be allowed to consider European Law, International Law or Sharia Law while adjudicating in Alaska.

The US Constitution is the supreme law of our nation. Our Alaska Constitution is the supreme law for our state. No other type of law should be considered when litigating cases in our state and federal courts.

Please do what is right for our state and our nation by passing HB-88. Protect our nation and our state by protecting our courts from Foreign Law. It is the right thing to do.

Thank you.
Sandra Williams
Wasilla, Alaska

Karen Sawyer

From: Paul Baertschiger [chig@mtaonline.net]
Sent: Tuesday, March 29, 2011 8:34 AM
To: Rep. Carl Gatto
Subject: HB 88

I support HB 88. Please continue to support HB 88.

Thanks
Paul Baertschiger
chig@mtaonline.net

Karen Sawyer

From: Gerry Bailey [gerryb@mtaonline.net]
Sent: Tuesday, March 29, 2011 8:27 AM
To: Rep. Carl Gatto
Subject: "Foreign Law" bill HB-88

Dear Representative Gatto,

I support the "Foreign Law" bill HB-88 and hope that you will vote for the bill.

Yours truly,

Gerald Bailey

Karen Sawyer

From:	Mary Barr [ak031764@customcpu.com]
Sent:	Monday, March 28, 2011 8:01 AM
To:	Rep. Carl Gatto; Rep. Steve Thompson
Cc:	Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	HB 88 Use of Foreign Law
Categories:	KAREN

Please support HB 88, Use of Foreign Law.
It is totally appropriate to forbid the use of foreign or religious law in Alaska courts and require our judges to adhere to the laws of the state and the nation.

Thank you for your consideration.

Mary Barr
9441 Strathmore Dr
Anchorage AK 99502

907-248-2429

Karen Sawyer

From: LAVONNE BOYD [lavonnekmbq@gmail.com]
Sent: Tuesday, March 29, 2011 9:32 AM
To: Rep. Carl Gatto
Cc: Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject: RE:Foreign Law bill
Attachments: image001.gif; image008.jpg; image009.jpg; image010.jpg

Dear Mr. Gatto and Committee,
I strongly support the passage of the Foreign Law Bill. I feel it is one of the most important laws you can pass.
I hear about Sharia Law creeping into many decisions and many states.
I am fearful about the many losses to liberty that are happening and this bill is very important to see that are judicial system in Alaska stays strong.
Thank you for your consideration.
Sincerely, LaVonne

LaVonne Boyd, Account Representitive
Spirit of Alaska Broadcasting
373-0222 ext 18, Cell 907-841-6951
Fax: 376-1575
lavonnekmbq@gmail.com

REMEMBER.....RADIO IS ALWAYS ON!!
RADIO IS NEVER FOLDED UP OR THROWN OUT.
SOMEONE ALWAYS HEARS.

Karen Sawyer

From: Kath Carlson [kath009@hotmail.com]
Sent: Monday, March 28, 2011 10:33 PM
To: Rep. Bill Stoltze; Rep. Bill Thomas; Rep. Anna Fairclough; Rep. Mia Costello; Rep. Bryce Edgmon; Rep. Reggie Joule; Rep. Mark Neuman; Rep. Tammie Wilson; Rep. Mike Doogan; Rep. Les Gara; Rep. David Guttenberg; Rep. Carl Gatto; Rep. Steve Thompson; Rep. Mike Chenault; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Lance Pruitt; Rep. Bob Lynn; Rep. Wes Keller
Subject: House Bills

Please support House Bills 80 and 88.

Thanks muchly!

Kath McCubbins-Carlson

Karen Sawyer

From: Barbara Clinton [iufan@ak.net]
Sent: Tuesday, March 29, 2011 9:35 AM
To: Rep. Carl Gatto
Subject: HB88
Attachments: image001.jpg

Dear Chairman Gatto and Members of the Judiciary Committee.

I would like to encourage your support of HB 88. Both The Us Constitution and the Alaska Constitutions have served this country well for many years. The laws of this land should be American laws.

Sincerely,

Barbara Clinton

4121 North Point Drive

Anchorage, Alaska 99502

243-6885

iufan@ak.net

Karen Sawyer

From: Amanda Compton [arazien@yahoo.com]
Sent: Tuesday, March 29, 2011 10:36 AM
To: Karen Sawyer
Cc: Pamela Geller
Subject: Keep Pamela Geller in foreign law hearings, please.

Good afternoon, Karen!

I'm writing to ask you to please not exclude Pamela Geller – per CAIR's request – from the legislation hearings regarding your state's foreign law legislation. In these hearings, you will need people like Pamela who are willing to take on CAIR (who we know is linked to the Muslim Brotherhood) and not shy away from the facts out of fear of offending someone. It is time we have this conversation – openly and candidly.

Sincerely,
~Amanda Compton, a concerned American citizen, St. Louis, Mo.

Karen Sawyer

From: Rodger Dodger [indy125@hotmail.com]
Sent: Tuesday, March 29, 2011 8:50 AM
To: Rep. Carl Gatto
Subject: HB88

I as well as any true American am in complete support of HB 88. Any court that would support anything other than American laws and American justice would have my support to move to whatever country is aligned to their fantasy laws and rules. Now more than ever we need to take back our country and clean up our judiciary.

Roland

Sent via iToy

Karen Sawyer

From: Dorothy Dory [denalidot@yahoo.com]
Sent: Tuesday, March 29, 2011 8:51 AM
To: Rep. Carl Gatto
Subject: HB-88

Representative Gatto:

I strongly support the foreign law bill HB-88. I want Alaska courts to use the U.S. Constitution and Alaska's Constitution as the basis of legal decisions.

Thank you,

Dorothy Dory
2750 S. Desiree Cir.
Wasilla, AK 99654

Karen Sawyer

From: Ilona Farr [afmc4045@yahoo.com]
Sent: Tuesday, March 29, 2011 8:31 AM
To: Rep. Carl Gatto; Rep. Steve Thompson
Cc: Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject: Ilona Farr MD re HB 88

Representatives;

Please pass this legislation HB 88. We do not need any foreign or religious law here in Alaska. There should be one set of laws, one set of standards for all Alaskans. England is dealing with over 90 Sharia law courts now and it is creating chaos. Shariah law permits caning of women, marriage of girls as young as 6, limb amputations for minor crimes, and killing of nonbelievers or believers who convert from Islam to other faiths.

International law is now removing Christian home schooled children from their families and forcing them into public institutions which is unethical and against our freedom of speech, religion and violates our rights as parents. There are hundreds of other examples but this bill is very important to retain our freedoms here in Alaska and America. The judge in Florida by agreeing to use Shariah law in an American court is setting a very dangerous precedent. We need to pass this legislation before it becomes an issue here.

Ilona Farr MD

Karen Sawyer

From: Lauchlan Ford [ljfmah@gmail.com]
Sent: Tuesday, March 29, 2011 10:02 AM
To: Rep. Carl Gatto
Subject: HB 88

I strongly urge your support for HB-88.

L J Ford
Anchorage

Karen Sawyer

From:	J Gillette [loggiemonster@hotmail.com]
Sent:	Monday, March 28, 2011 11:33 PM
To:	Rep. Carl Gatto; Rep. Max Gruenberg; rep_lindsay_holmes@legis.state.ak.us; Rep. Wes Keller; Rep. Mike Chenault; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Steve Thompson
Subject:	Please Support House Bill 88

Ladies & Gentlemen of the Judiciary Committee,

Please consider passing House Bill 88, Use of Foreign Law. Rep. Gatto is correct to design a law that protects our State and US Constitutional rights as citizens. He took an oath to protect those precious documents and his constituents kept him in office knowing that he would keep his oath. It's disheartening to even need a Bill that specifically protects our citizens, but what is even more disheartening is someone voting against this protection.

Too many countries have been too "tolerant" and allowed laws and courts that conflict with theirs to be introduced. I have read a lot of regrets about this. I've also spent a little time in Saudi Arabia and saw first hand how women are treated. I experienced some of that as well.

We have the opportunity to keep our freedoms afforded to us by our Constitutions now. Please do what is right for the people of Alaska. Vote Yes on HB 88. I have included an in depth report from Great Britain on this subject and the challenges it has posed. Here are some excerpts:

Sharia law is being exercised in Great Britain. "Sharia has been operating here, in parallel to the British legal system, since 1982. Work includes issuing fatwas - religious rulings on matters ranging from why Islam considers homosexuality a sin to why two women are equivalent to one male witness in an Islamic court."

Under Muslim law, a man can divorce his wife simply by uttering the word 'talaq', yet a woman cannot be granted a divorce without the consent of her husband or winning a dissolution of the marriage from the Imam. Even if the couple is divorced under British law, they remain married under Islam until divorced under the religious law, too.

Read more: http://www.dailymail.co.uk/news/article-1197478/Sharia-law-UK--How-Islam-dispensing-justice-side-British-courts.html#ixzz1HyBqhx5f

Respectfully,

Julie Gillette

4301 S. Well Site Rd

Karen Sawyer

From: Leone Harris [leone@mtaonline.net]
Sent: Tuesday, March 29, 2011 8:11 AM
To: Rep. Carl Gatto
Subject: HB-88

Representative Gatto,

I am asking you to please vote, YES, on HB-88. It is extremely important to our sovereignty that we not allow our courts to follow any other laws other than our own State constitution and the United States Constitution.
In fact, you could make this bill even better by adding language to it, that if any court in this land, attempts to use any other guide for their basis of law, besides our State or the US constitution, the judge presiding over that court should stand trial and face prison time, for violating either constitution.

We could be the example to the rest of our country and encourage other states to follow suit. The only way we will ever win back our freedoms is to start taking a stand.

PLEASE take that stand on not only on our behalf, but for our ancestors and what they fought and died for.

Sincerely,
Leone Harris
907-775-0226

Karen Sawyer

From:	John Smith [naherr@gmail.com]
Sent:	Tuesday, March 29, 2011 9:58 AM
To:	Rep. Carl Gatto
Cc:	Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	HB 88-Foreign Law

Sir, et al, I would first like to introduce myself. My name is LTC(Ret) Nick Herrera and I am resident of Wasilla. I served in the United States Army for over 22 years and deployed on numerou occasions. I have served in over 70 countries, many of which were Muslim countries, and I can tell you that no country is greater than the United States of America. I fought to defend our Constitution, rights, and the people of this great country of ours, often leaving my family for long periods of time (as long as two years) at great cost to my family, but I did it willingly and with pride in the service of our country. Its also important for you to note that I have extensive background in the Muslim culture, religion, and dealing with Muslim sensitivities as I also lived (and grew up) in the Middle East for 12 years living among the Muslim population and even practicing their customs, traditions, and learning their language. In fact, prior to entering service into the Army, I had spent half of my life living in the Middle East. My parents worked in the Middle East for 33 years straight and recently retired from there. Thus, I feel I fully understand their culture and religion. Despite what anyone may say or advocate, I am a strong believer that all faiths have the God given right to practice their faith in this country, and I respect that. That said, I will tell you from personal experience from living in the Middle East, that Islam is NOT a religion of tolerance or respect. I am a practicing Catholic and have seen first hand the persecution of non-Muslim faiths in the Middle East. As a practicing Catholic, my family and I were NOT allowed to practice our faith in the Middle East. In fact, on one case, I was present when the "Mutawa" (Muslim religious police), came into the home of a Catholic priest who was holding a secret church service (since we were not permitted to openly or secretly practice our faith) for us, and burst into his home and violently subdued him, arrested him, and dragged him off during the church service and then had him deported. This is NOT a religion of tolerance!! Islam does NOT practice any form of tolerance, but only DOMINATION and submission of all non-Muslims. I was also present on numerous occasions for "public beheadings, floggings, and punishments" executed by this "tolerant religion". I personally can recount friends who were tortured merely because of a "Ministry of Vice and Virtue" had received "confessions (aka tortured). I could go on about how, while on active duty, as an American soldier in Bosnia I witnessed the results of what Islam, this religion of tolerance, did to other faiths in the name of "Allah", but I will stop here.

I strongly urge you to pass HB 88. I am NOT alone in STRONGLY SUPPORTING this bill. This bill does NOT restrict our Constitutional Rights. In fact, it protects us from becoming SUBJECTS to a FOREIGN LAW in our OWN COUNTRY. Failing to pass HB 88 signals victory for Islam and our enemies who would seek to subjugate us, within our own country, to a foreign law. We have our Constitution which protects us, and you, our representatives, are our "first line of defense", and much like our Armed Services fight to protect us, we/I, rely on YOU to protect us. PLEASE pass this bill and protect us, your citizens here in Alaska. Much like you relied on me to defend your rights and this country, now I depend on YOU to protect me and my family for foreign laws and invaders.

God bless you all, guide you, and the United States of America.

Sincerely,
Nick Herrera
LTC (Ret), USA

Karen Sawyer

From: Fritz Hoffman [fritz@rockridgeservices.com]
Sent: Tuesday, March 29, 2011 9:06 AM
To: Rep. Carl Gatto
Cc: Rep. Wes Keller
Subject: HB 88 support

Thank you Carl for seeing the big picture and protecting my children's future enacting your Foreign Law bill.

A few thoughts...

AS the national economy slows and AK's P fund appears as a easy ride to new arrivals.....
I'd like to see new families with another state's welfare history - with any miners having repeated criminal history - contract to re- pay the state with the families permanent fund money for state expenses.
Alaska should appear un-friendly to non-productive individuals. Let the moms and dads be motivated to raise their children to be productive self sufficent adults.
Do not enable (through the P fund) adults to be dead beat parents.

Also...
I suggest you find a way for children / miners to have meaningful trade work site experience. Most kids do not see the use for their HS education, few goals are set beyond the discharge diploma.

Today, the only way a miner can learn and understand gainful employment experience is if he/she is working in their family's business.
The child labor laws are to restrictive and do not allow exposure to work site tasks and challenges that train for a trade's entry position.
Few businesses can afford to "carry a kid" that cannot legally have a productive job task.

Thank you.
--
Fritz Hoffman, project manager
Rock Ridge Services
PO Box 875436
Wasilla, Alaska 99687

office 907-357-1556
fax 907-357-8550
cell 907-354-1568

Karen Sawyer

From: Bill Hutchison [billh@gci.net]
Sent: Tuesday, March 29, 2011 9:53 AM
To: Rep. Carl Gatto
Subject: HB

HB-88

This is a great idea! Thanks for your help with it!

Bill Hutchison
Anchorage

Politically Correct is Objectively Wrong.
Gun Control: Best achieved using both hands.

Karen Sawyer

From:	Aimee Kopp [yukonaimee@yahoo.com]
Sent:	Tuesday, March 29, 2011 10:06 AM
To:	Rep. Carl Gatto
Cc:	Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	HB-88

I am writing to encourage your support of HB-88 or the "Foreign Law" bill." Thank you for taking a stand to protect the laws and sovereignty of the United States.
Sincerely,
Aimee Kopp
Houston, Alaska

"Though you have not seen Him, you love Him: and even though you do not see Him now, you believe in Him and are filled with an inexpressible and glorious joy, for you are receiving the goal of your faith, the salvation of your souls." 1Peter 1:8-9

Karen Sawyer

From: jclehman@gci.net
Sent: Tuesday, March 29, 2011 10:24 AM
To: Rep. Carl Gatto
Subject: "Foreign Law" HB-88

I strongly support "Foreign Law" HB_88.

J. Lehman

Karen Sawyer

From:	David Gallagher [denalidave2@gmail.com]
Sent:	Saturday, March 26, 2011 3:16 PM
To:	Rep. Carl Gatto
Cc:	Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Chenault
Subject:	"Foreign Law" bill HB-88
Categories:	KAREN

Honorable Members of the Judiciary Committee,

Please be advised, as your constituent, I strongly urge YOU to support the "Foreign Law" bill HB-88.

And for your support of HB-88, I will remember you at the Ballot Box.

Thank You
Dave Gallagher
3141 E. 112th Ave.
Anchorage, Alaska
99516

Karen Sawyer

From: tammyargend@aol.com
Sent: Tuesday, March 29, 2011 8:39 AM
To: Rep. Carl Gatto
Subject: HB 88

Dear Rep. Gatto:

As one of your constituents I hope you strongly consider voting for HB88.

I don't know how we could ever think about using a law except the laws of our state and country.

Thank You
Tammy Leslie

Karen Sawyer

From: Mike Matera [materamike@gmail.com]
Sent: Tuesday, March 29, 2011 9:59 AM
To: Rep. Carl Gatto
Subject: HB88

Dear Sir,

As an Alaska resident and a proud United States Citizen and Combat Veteran I would encourage you to strongly support HB 88.

Thank You,
Mike Matera

Karen Sawyer

From: Christopher Nugent [cnugentak@gmail.com]
Sent: Tuesday, March 29, 2011 10:32 AM
To: Rep. Carl Gatto
Subject: HB-88

Representative Carl Gato

Please support HB-88. Our US and Alaskan Constitutions are the supreme law of the land, and should remain so. This is America, let's keep it American.

Christopher Nugent, Maj, USAF (Ret)
4051 S Eagle Bay Drive
Wasilla, AK 99654-9428
907-376-4114

Karen Sawyer

From: Marj Oines [marjo@gci.net]
Sent: Monday, March 28, 2011 5:33 PM
To: Rep. Carl Gatto
Subject: HB 88 Use of Foreign Law

I am so pleased that you are bringing up the issue of using foreign law in the USA. I support your efforts in this matter.Thank you.
The USA should never have to be subject to foreign law.

Marj Oines
Box 591
Petersburg, Ak
99833
marjo@gci.net

PHONE CALLS re: CSHB 88 (STA)

as of March 29, 2011

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21 support calls – Alaska

8 support calls – outside Alaska

2 oppose call - Alaska

About Janet Levy

Janet Levy, MSW, MBA, is a political activist, writer, public speaker and world traveler. She has contributed to American Thinker, Pajamas Media, FrontPage Magazine, Family Security Matters, and other publications and has served as an investigative reporter for Full Disclosure Network. Ms. Levy has been a guest on several radio programs, including Tammy Bruce, General Vallely's Stand-up America, Pundit Review, the Center for Individual Freedom, and Alan Jones.

As a staunch advocate for the preservation of constitutional freedoms, Ms. Levy has worked with various organizations and government representatives to stem the incursion of Islamic Shariah law into the American justice system. She has presented seminars on the effect of shariah law on women, the global jihad, the Islamist infiltration of American society and institutions and illegal immigration. In 2007, Ms. Levy was a media guest of the Joint Task Force – Guantanamo Bay detention facility in Cuba.

She blogs at www.womenagainstshariah.com.

Biography of Nonie Darwish: Director

Nonie Darwish is an American human rights activist, writer, public speaker and founder of Arabs For Israel. She is the author of the book Now they Call Me Infidel; Why I Renounced Jihad for America, Israel and the War on Terror. Her second book is Cruel And Usual Punishment: The Terrifying Global Implications of Islamic Law. Her speech topics cover human rights, with emphasis on women's rights and minority rights in the Middle East.

Born in Egypt, Darwish is the daughter of an Egyptian Army lieutenant general, who, when assassinated by the Israeli army in 1956, was called a "shahid" by the Egyptian president Gamal Abdel Nasser, although Darwish blames "the Middle Eastern Islamic culture and the propaganda of hatred taught to children from birth" for the assassination. In 1978, she moved with her husband to the United States, and converted to Christianity there. After September 11, 2001 she has written on Islam-related topics.

Born in Cairo, Egypt, Darwish moved to Gaza in the 1950s when her father, Lt. General Mustafa Hafez, was sent by Gamal Abdel Nasser to serve as commander of the Egyptian Army Intelligence in Gaza, which was under supervision of Egypt. Hafez founded the fedayeen who launched raids across Israel's southern border, that between 1951 and 1956, killed some 400 Israelis. In July 1956 when Nonie was eight years old, her father became the first targeted assassination carried out by the Israeli Defense Forces in response to Fedayeen's attacks, making him a shahid. During his speech announcing the nationalization of the Suez Canal, Nasser vowed that all of Egypt would take revenge for Hafez's death. Darwish claims that Nasser asked her and her siblings, "Which one of you will avenge your father's death by killing Jews?"

Biography of Pam Geller

Pamela Geller is the founder, editor and publisher of Atlas Shrugs.com, bringing you the news you will not hear from the mainstream media, providing original reportage, covering little-reported events of great import, and giving an unblinkingly honest examination of global affairs. She is also the executive director of Freedom Defense Initiative (FDI)/Stop Islamization of America (SIOA), and is a regular columnist for Andrew Breitbart's *Big Government* and *Big Journalism*, the *American Thinker*, and other publications. Pamela Geller is the author of the book *The Post-American Presidency: The Obama Administration's War on America* with Robert Spencer (foreword by Ambassador John Bolton), published by Simon & Schuster. Pamela Geller the 2010 recipient of the Annie Taylor Award for Courage, presented by the David Horowitz Freedom Center.

Pamela Geller was the subject of a profile on *60 Minutes* and has been profiled in a cover story in the Sunday *New York Times* Metro section. The Times conducted an in-depth interview of Geller's views as well. She has made appearances on NBC Nightly News, ABC, CNN, AP, Reuters, Hannity, Red Eye, Geraldo, the Mike Huckabee show, and other shows on the Fox News channel. She has appeared in the New York Times, the Washington Post, the LA Times, the Daily Mail and the Telegraph. She made an acclaimed appearance on the Joy Behar Show in February 2010, engaging in an impromptu debate with Ron Reagan about Sarah Palin and the Tea Party Movement. She is a frequent guest on talk radio and has regular segments on two radio shows, The Jaz McKay Show and Jamie Allman in the Morning. Geller was a featured speaker at the David Horowitz Freedom Center's Restoration Weekend in 2009 and was the featured speaker for the Collin County, Texas, Conservative Republicans in November 2009. She speaks regularly to political and activist organizations, synagogues and other groups across this nation.

Pamela Geller's interviews on a wide range of current events have won enthusiastic acclaim, as have her exclusive Atlas interviews with internationally renowned authorities on jihad, terrorism, and related issues, including John Bolton, Geert Wilders, Bat Ye'or, Benjamin Netanyahu, Mark Steyn, Steve Emerson, Christopher Hitchens, Natan Sharansky, and many others. (Videos of many of these interviews are available at AtlasShrugs.com.) She routinely confers with leading scholars on the Middle East, Islam, Eurabia, China and Russia.

Pamela Geller has broken numerous important stories -- notably the questionable and illegal foreign sources of some of the financing of the Obama campaign, the anti-Semitic posts on Obama's website, Obama's political organizing in public school classrooms, ACORN's destruction of Republican voter registrations, and many more. Her articles and op-eds have been published in the *Guardian*, Fox News, *The Washington Times*, Big Government, Big Journalism, Human Events, The American Thinker, Newsmax, the Hudson Institute, NY, Pajamas Media, Israel National News, World Net Daily, FrontPage magazine, New Media Journal, and Canada Free Press, among other publications.

Pamela Geller began her publishing career at *The New York Daily News* and subsequently took over operation of *The New York Observer* as Associate Publisher. AtlasShrugs.com won the 2005 "Best New Blog" Jewish & Israeli Blog Award, was a finalist in the 2005 Weblog Awards, and finished in third place for "Best Conservative Blog" in the 2008 Weblog Awards. She also won the "Grande Conservative Blogress Diva" Award for 2008 and for 2009.

About Robert Spencer

ROBERT SPENCER is the director of Jihad Watch, a program of the David Horowitz Freedom Center, and the author of ten books, including the *New York Times* bestsellers *The Truth About Muhammad* and *The Politically Incorrect Guide to Islam (and the Crusades)* (both Regnery). He is coauthor, with Pamela Geller, of *The Post-American Presidency: the Obama Administration's War on America* (Threshold Editions/Simon & Schuster). Spencer is a weekly columnist for *Human Events* and *FrontPage Magazine*, and has led seminars on Islam and jihad for the United States Central Command, United States Army Command and General Staff College, the U.S. Army's Asymmetric Warfare Group, the FBI, the Joint Terrorism Task Force, and the U.S. intelligence community.

Spencer has also written eleven monographs and well over three hundred articles about jihad and Islamic terrorism. In addition to the above books, he is the author of *Islam Unveiled: Disturbing Questions About the World's Fastest Growing Faith* (Encounter); *Onward Muslim Soldiers: How Jihad Still Threatens America and the West* (Regnery); *Religion of Peace? Why Christianity Is and Islam Isn't* (Regnery), a refutation of moral equivalence and call for all the beneficiaries and heirs of Judeo-Christian Western civilization, whatever their own religious or philosophical perspective may be, to defend it from the global jihad; *Stealth Jihad: How Radical Islam is Subverting America without Guns or Bombs* (Regnery), an expose of how jihadist groups are advancing their agenda in the U.S. today by means other than terrorist attacks; and *The Complete Infidel's Guide to the Koran* (Regnery). He is coauthor, with Daniel Ali, of *Inside Islam: A Guide for Catholics* (Ascension), and editor of the essay collection *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims* (Prometheus). Spencer's books have been translated into many languages, including Spanish, Italian, Finnish, Korean, and Bahasa Indonesia.

Along with his weekly columns, Spencer has completed a weekly Qur'an commentary at Jihad Watch, *Blogging the Qur'an*, which has been translated into Czech, Danish, German, Italian, Spanish and Portuguese. He is a contributing writer to Steven Emerson's Investigative Project on Terrorism. His articles on Islam and other topics have appeared in the *New York Post*, the *Washington Times*, the *Dallas Morning News*, the UK's *Guardian*, Canada's *National Post*, *Middle East Quarterly*, *WorldNet Daily*, *First Things*, *Insight in the News*, *National Review Online*, and many other journals.

Spencer has discussed jihad, Islam, and terrorism at a workshop sponsored by the U.S. State Department and the German Foreign Ministry. He has also appeared on the BBC, ABC News, CNN, FoxNews's O'Reilly Factor, the Sean Hannity Show, the Glenn Beck Show, Fox and Friends, and many other Fox programs, PBS, MSNBC, CNBC, C-Span, France24 and Croatia National Televison (HTV), as well as on numerous radio programs including Bill O'Reilly's Radio Factor, The Laura Ingraham Show, Bill Bennett's Morning in America, Michael Savage's Savage Nation, The Sean Hannity Show, The Alan Colmes Show, The G. Gordon Liddy Show, The Neal Boortz Show, The Michael Medved Show, The Michael Reagan Show, The Rusty Humphries Show, The Larry Elder Show, The Barbara Simpson Show, Vatican Radio, and many others. He has been a featured speaker at Dartmouth College, Stanford University, New York University, Brown University, the University of North Carolina at Chapel Hill, the University of Virginia, the College of William and Mary, Washington University of St. Louis, the University of Wisconsin at Madison, the University of Wisconsin at Milwaukee, and many other colleges and universities.

Spencer (MA, Religious Studies, University of North Carolina at Chapel Hill) has been studying Islamic theology, law, and history in depth since 1980. As an Adjunct Fellow with the Free Congress Foundation in 2002 and 2003, he wrote a series of monographs on Islam: *An Introduction to the Qur'an*; *Women and Islam*; *An Islamic Primer*; *Islam and the West*; *The Islamic Disinformation Lobby*; *Islam vs. Christianity*; and *Jihad in Context*. More recently he has also written monographs for the David Horowitz Freedom Center: *What Americans Need to Know About Jihad*; *The Violent Oppression of Women In Islam* (with Phyllis Chesler); *Islamic Leaders' Plan for Genocide*; and *Muslim Persecution of Christians*.

March 15, 2011

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The Honorable Bob Lynn, Chair
The Honorable Wes Keller, Vice-Chair
House State Affairs Committee
Alaska State House of Representatives
State Capitol, Room 106
Juneau, AK 99801
via email: Representative_Bob_Lynn@legis.state.ak.us;
Representative_Wes_Keller@legis.state.ak.us

Re: House Bill 88
ACLU Review of Legal Issues

Chair Lynn, Vice-Chair Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 88, relating to the application of international law.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. We have several concerns with the proposed legislation, outlined in greater detail below, **and urge a DO NOT PASS vote by Members of the Committee.**

Attack on Separation or Powers and Judicial Independence

Fundamentally, HB 88 is counterproductive legislation. This bill represents an attack on the separation of powers, an unwarranted mistrust of the state judiciary and an unnecessary interference in the function of Alaska's legal system.

It is a core function of both state and federal courts to determine what law is at issue in a given matter. The Alaska Legislature should not seek to legislate what law the courts can and cannot consider when deciding cases. By doing so, the Legislature violates the fundamental principle of judicial independence and the constitutional principle of separation of powers.

Negative Impacts on Alaska Citizens and Businesses

Passage of HB 88 would harm the rights of Alaska citizens and businesses who travel and transact across international borders, and would also negatively impact the United States' standing in the global community.

In the normal course of business, organizations may voluntarily choose to waive certain constitutional rights. For instance, an individual generally retains the constitutional right to say what she thinks without restraint. U.S. Const., Amdt. I; Alaska Const., Art. I, Sec. 5. However, individuals regularly contract away their constitutional right to speak freely, for instance, by engaging in nondisclosure agreements. While the ACLU of Alaska strongly values constitutional rights, there are certainly legitimate and appropriate reasons why an informed, non-coerced waiver of such rights should be permitted and legally respected.

Contrary to these principles, the language of HB 88 presumes to disregard **all** waivers of constitutional rights, in any contract that contains a choice of law clause preferring the law of a foreign jurisdiction. For instance, proposed AS 09.68.140(b) states that if a contract contains a choice of law clause preferring foreign law and "if the interpretation or enforcement of the agreement would violate an individual's [constitutional] right," the contract **must** be read to preserve the constitutional right, not to waive it. The effect of the statute – by its literal terms – appears to be to nullify ***any waiver*** of constitutional right where made in conjunction with a foreign choice of law provision.

Other examples of commonly waived constitutional rights include the right of medical privacy permitting medical records to be shared with a foreign medical provider, or a due process right to an official hearing or trial, such as a provision mandating that disputes go to an arbitrator. The Alaska Legislature risks sweeping up a wide variety of commonplace waivers of constitutional rights in the bill as currently drafted.

HB 88 is structurally flawed in that it is not narrowly tailored to prevent coerced or uninformed waiver of rights. Its only *caveat* is that the contract must have a foreign choice of law provision. This overbreadth would result – should the bill pass – in exposing foreign partners to the potential that Alaska businesses may unilaterally ***and improperly*** evade their contractual obligations by using the Bill's provisions. This obvious legal flaw would make it highly problematic for Alaskans to conduct business with foreign individuals or organizations.

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Choice of Forum Provision

A similar problem attends subsections (c) and (d), which prohibit the application of choice of forum or venue contractual provisions, and the granting of motions to dismiss on the grounds of *forum non conveniens*, where a constitutional right could be impaired.

In the case of subsection (c), a business or person may have a valid, legally appropriate and commercially necessary reason to waive certain constitutional rights. But, the extremely broad language of the legislation would invalidate the contractual provisions.

An example of a problem with this language is presented by the Seventh Amendment to the United States Constitution, which guarantees the right to trial by jury in any civil case addressing a matter in value of at least twenty dollars. U.S. Const., Amdt. VII.

The United States jury system does not necessarily have a corollary in judicial proceedings in other countries. Not all countries apply a common law system, and fewer still have regular jury trials. HB 88 could thus be used to prevent the enforcement of any choice of venue or forum clause ***in any contract with a foreign company***, or any *forum non conveniens* action, if the foreign court at issue does not guarantee a jury trial for civil action where $20 or more was at stake. This would seriously deter foreign individuals or corporations from doing business in Alaska.

U.S. and Alaska Standing in Foreign Relations

HB 88 would generally strain our relations and standing with other nations. Opportunistic businesses and individuals could thwart efficient judicial enforcement by filing suit in Alaska and then demanding that the defendant respond in Alaska.

For example, a person with a contractual dispute with a Spanish oil services company[1] could (assuming that the matter had sufficient minimal Alaska contacts to establish personal and subject matter jurisdiction), file a suit for declaratory relief in Anchorage, even where all the evidence, witnesses, and items at issue were in Spain.

Even where such a suit would normally be dismissed as *forum non conveniens* and then re-filed in Spain, an Alaska court could be obliged to hear the case in Alaska, since the plaintiff would be deprived of her Seventh Amendment right to a jury trial if the case were heard in Spain.

While there may be foreign jurisdictions whose legal systems are so deeply unfair as to offend fundamental American values of fairness, there are many – such as Spain's – that do not. One should also note that the doctrine of *forum non conveniens* **is one of mutual respect**, which may

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[1] http://www.businessweek.com/ap/financialnews/D9LRODGO0.htm.

be undermined where one nation flouts the respect owed to other nations. Passage of HB 88, along with similar bills in sister states, could result in many American litigants finding themselves sued in foreign jurisdictions and unable to remove their cases to Alaska or other US state courts.

HB 88 signals to the rest of the world that Alaska believes that our judges have "little to learn from their counterparts in other nations . . . . This wholesale rejection of the value of consulting international law or foreign decisions in certain circumstances evokes years of 'American exceptionalism,' during which the U.S. was internationally criticized for exempting itself from human rights standards that were otherwise universal."[2]

A vote for HB 88 would have the effect of alienating U.S. allies and the commercial partners of Alaska companies, putting at risk U.S. interests at home and abroad. Indeed, the simple perception that the United States is ignoring its legal obligations puts Alaskan citizens and Alaskan companies seeking to do business internationally at risk. If potential foreign business partners believe that Alaska's courts will not enforce foreign judgments or adhere to the businesses' choice of law in their contracts, international companies may simply be unwilling to contract with Alaska businesses or establish commercial ties to our state. Given the ambiguity surrounding which laws Alaskan courts may consider, foreign investors may be wary of ever consenting to jurisdiction in our state courts.

Conclusion

In sum, HB 88 is unnecessary, and its passage would cause real harm to Alaska's citizens, businesses, and judicial system. **We urge you to oppose HB 88.**

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[2] Martha Davis & Johanna Kalb, *Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, American Constitution Society Issue Brief, 5 (2011).

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Paul Seaton, Representative_Paul_Seaton@legis.state.ak.us
Representative Peggy Wilson; Representative_Peggy_Wilson@legis.state.ak.us
Representative Max Gruenberg; Representative_Max_Gruenberg@legis.state.ak.us
Representative Pete Petersen; Representative_Pete_Petersen@legis.state.ak.us
Representative Kyle Johansen; Representative_Kyle_Johansen@legis.state.ak.us
Sponsor, Representative Carl Gatto, Representative_Carl_Gatto@legis.state.ak.us

Karen Sawyer

From: Neil O'Donnell [n.odonnell@gci.net]
Sent: Sunday, March 20, 2011 1:40 PM
To: Rep. Carl Gatto
Subject: Comment on HB No. 88

Categories: KAREN

Dear Representative Gatto:

I reviewed HB 88 after reading the recent ADN article about the bill. Having practiced law in Alaska for 28 years, I believe this bill is a "solution" in search of a problem. The bill – reflecting the lack of any real problem – is extremely vague and overbroad. It is very hard to predict what effect this bill would have if passed. What if an Alaskan company wants to work as a subcontractor for a Canadian company building a gas line across Alaska and Canada? Under HB 88, the Canadian general contractor and the Alaska subcontractor apparently cannot choose Canadian law or a Canadian forum to the extent that any dispute might be affected by the U.S. or Alaska Constitutions if the dispute were instead heard in Alaska under Alaska law. Maybe the Canadian company will just pass on hiring the Alaskan company and avoid this vague legal morass.

And if this bill is really directed against "Sharia law," as stated in the ADN article, then it seems even more pointless and counterproductive. I have never seen, heard, or have anyone ever suggest that "Sharia law" applied to any legal dispute in Alaska. Since the U.S. Constitution has unquestionably been the supreme law in the land since the United States Supreme Court decided Marbury v. Madison in 1803, I also cannot conceive of how "Sharia law" could possibly "violate an individual's right under . . . the United State Constitution" as stated in the bill's legislative "findings" provision. Absent a real problem, the only remaining purpose of the bill is simply to pander to anti-Muslim sentiment.

We have hosted several exchange students over the years including two Muslim students. Through them we have met several members of the small Anchorage Muslim community, including an Egyptian engineer working for a major oil company and several successful small business owners. The world in becoming more interconnected. Unless there is some real problem that needs to be addressed, I think it is a bad idea to be passing legislation intended to mark one religious group as dangerous outsiders whose alleged practices need to be carefully watched and guarded against.

As sponsor of HB 88, can you please include this e-mail as part of the official comments on this bill and any companion Senate bill.

I appreciate your consideration.

Neil O'Donnell
8537 Cormorant Cove Cr.
Anchorage, Alaska 99507

Karen Sawyer

From: John Feero [johnfeero@yahoo.com]
Sent: Friday, March 25, 2011 2:00 PM
To: Rep. Carl Gatto
Cc: Rep. Max Gruenberg
Subject: HB 88

Mr. Gatto:

Sharia Law, Christian Law, Jewish Law. I choose none of the above.

I choose Constitutional Law.

Please stop your fear-mongering and get on with REAL legislative business. You owe that to you direct constituents and the rest of the people of Alaska.

Thank you.

John Feero
2715 Arlington Drive
Anchorage, AK 99517

COUNCIL ON AMERICAN-ISLAMIC RELATIONS (CAIR)

453 New Jersey Avenue SE
Washington, DC
20003

Phone :202-488-8787
Fax :202-488-0883
URL :http://www.cair-net.org/

- Civil rights group partially funded by the Saudi Wahhabi establishment
- Has numerous ties to extremist Islamic organizations

The Council on American-Islamic Relations (CAIR) describes itself as a "non-profit, grassroots membership organization ... established to promote a positive image of Islam and Muslims in America," to protect Muslims from hate crimes and discrimination, and to present "an Islamic perspective on issues of importance to the American public." According to the Council's Director of Communications, Ibrahim Hooper, "We are similar to a Muslim NAACP." As of June 2007, CAIR claimed 32 branch affiliates in the United States and one in Canada.

CAIR was co-founded in 1994 by Nihad Awad and Omar Ahmad, both of whom had close ties to the Islamic Association for Palestine (IAP), which was established by senior Hamas operative Mousa Abu Marzook and functioned as Hamas' public relations and recruitment arm in the United States. Awad and Ahmad previously had served, respectively, as IAP's Public Relations Director and President. Thus it can be said that CAIR was an outgrowth of IAP.

CAIR opened its first office in Washington, DC, with the help of a $5,000 donation from the Holy Land Foundation for Relief and Development (HLF), a self-described charity founded by Mousa Abu Marzook. In May 1996, CAIR coordinated a press conference to protest the decision of the U.S. government to extradite Marzook for his connection to terrorist acts performed by Hamas. CAIR characterized the extradition as "anti-Islamic" and "anti-American." When President Bush closed HLF in December 2001 for collecting money "to support the Hamas terror organization," CAIR decried his action as "unjust" and "disturbing."

From its inception, CAIR has sought to portray itself as a moderate, mainstream organization, and as early as 1996 its officials became frequent guests at State Department and White House events. In the aftermath of 9/11, when the Bush administration tried to reassure American Muslims that Islam was not the target of the war on terrorism, CAIR officials were prominent among the invitees. CAIR was the main Islamic group to gain U.S. media access in the post-9/11 period, providing the "Muslim view" of the terrorist attacks and of America's response to them. As self-acclaimed Muslim spokesmen, CAIR officials typically refused to "simplify the situation" by blaming Osama bin Laden for the attacks on America. Moreover, while they eventually were induced by journalists to condemn Palestinian

suicide terror in a *pro forma* manner, they hedged their disavowals by describing it as an understandable response to Israeli brutality.

Contending that American Muslims are the victims of wholesale repression, CAIR has provided sensitivity training to police departments across the United States, instructing law officers in the art of dealing with Muslims respectfully.

CAIR further claims that U.S. foreign policy is dictated largely by Zionist extremists. As Evan McCormick of the Center for Security Policy puts it: "By convincing moderate Muslims that they are being targeted unfairly by the Bush administration's [anti-terror] policies, CAIR incites fear in members of that demographic. If innocent Muslims are then convinced that they will be the target of government action, then they have no incentive to reject an extremist ideology that resists the government's anti-terror policies. ... This is the essence of CAIR's strategy: shock moderate Muslims about the motivations of the U.S. Government, turn them into post-[9/11] victims, and then recruit them as supporters for your political agenda when they are ripe for the taking."

Along the same lines, a civil suit filed by the estate of 9/11 victim and former high-ranking FBI counter-terrorism agent John O'Neill, Sr. asserted that CAIR's goal "is to create as much self-doubt, hesitation, fear of name-calling, and litigation within police departments and intelligence agencies as possible so as to render such authorities ineffective in pursuing international and domestic terrorist entities."

CAIR endorsed an October 22, 2002 "National Day of Protest" whose premise was: "Since September 11th thousands of Muslims, Arabs and South Asians have been rounded up, detained and disappeared. ... Hard-won civil liberties and protections have been stripped away as part of the government's 'war on terrorism.' The USA-PATRIOT Act brings in a new set of repressive laws and restrictions on people and grants even greater power to law enforcement agents of all kinds." Moreover, this document explicitly defended the convicted murderers Mumia Abu-Jamal and Leonard Peltier, as well as Lynne Stewart and Jose Padilla, who were convicted on terrorism-related charges -- depicting all four as persecuted political prisoners of a repressive American government.

CAIR was a signatory to a February 20, 2002 document, composed by C. Clark Kissinger's radical group Refuse & Resist, condemning military tribunals and the detention of immigrants apprehended in connection with post-9/11 terrorism investigations. The document lamented that "the denial of any due process for Arab[s], Muslim[s], South Asians and others" bore "chilling similarities to a police state."

In February 2003, CAIR joined the American Muslim Council, the American Muslim Alliance, and the Muslim Public Affairs Council in forming a coalition to repeal and amend the Patriot Act -- alleging that it violated the civil liberties of Americans, particularly Muslims. CAIR also endorsed the Civil Liberties Restoration Act of 2004, which was designed to roll back, in the name of protecting civil liberties, vital national-security policies that had been adopted after

the 9/11 terrorist attacks.

CAIR promotes a radical Islamic vision, as evidenced by the fact that its co-founder Omar Ahmad told a Fremont, California audience in July 1998: "Islam isn't in America to be equal to any other faith, but to become dominant. The Koran ... should be the highest authority in America, and Islam the only accepted religion on Earth." In a similar spirit, co-founder Ibrahim Hooper told a reporter in 1993: "I wouldn't want to create the impression that I wouldn't like the government of the United States to be Islamic sometime in the future." In 2003 Hooper stated that if Muslims ever become a majority in the United States, they will likely seek to replace the U.S. Constitution with Islamic law, which they deem superior to man-made law. In the late 1980s, Ihsan Bagby, who would later become a CAIR Board member, stated that Muslims "can never be full citizens of this country," referring to the United States, "because there is no way we can be fully committed to the institutions and ideologies of this country."

In 2003 CAIR invested, according to its own Form 990 filed with the Internal Revenue Service, $325,000 from its California offices with the North American Islamic Trust (NAIT). According to *Newsweek*, authorities say that over the years "NAIT money has helped the Saudi Arabian sect of Wahhabism -- or Salafism, as the broader, pan-Islamic movement is called -- to seize control of hundreds of mosques in U.S. Muslim communities." A recent study by the Center for Religious Freedom found that a very large number of American mosques teach hatred of Jews and Christians, coupled with doctrines of Islamic supremacism.

Writes Islam scholar Stephen Schwartz: "CAIR should be considered a foreign-based subversive organization, comparable in the Islamist field to the Soviet-controlled Communist Party USA, and the Cuban-controlled front groups that infiltrated 'Latin American solidarity' organizations in the U.S. during the 1980s. It has organized numerous community branches and has had immense success in gaining position as an 'official' representative of Islam in the U.S."

Notable facts about CAIR's *pas de deux* with Islamic extremism and terrorism include the following:

- Co-founder Nihad Awad asserted at a 1994 meeting at Barry University, "I am a supporter of the Hamas movement." Awad wrote in the *Muslim World Monitor* that the 1994 trial which had resulted in the conviction of four Islamic fundamentalist terrorists who had perpetrated the previous year's World Trade Center bombing was "a travesty of justice."
- On February 2, 1995, U.S. Attorney Mary Jo White named CAIR Advisory Board member and New York imam Siraj Wahhaj as one of the "unindicted persons who may be alleged as co-conspirators" in Islamic Group leader Omar Abdel Rahman's foiled plot to blow up numerous New York City monuments.
- On June 6, 2006, CAIR's Ohio affiliate held a large fundraiser in honor of Siraj Wahhaj. Following the event, CAIR-Ohio issued a press release heralding the more than $100,000 that Wahhaj had helped raise that evening for the organization's "civil

liberties work."

- In October 1998, CAIR demanded the removal of a Los Angeles billboard describing Osama bin Laden as "the sworn enemy." According to CAIR, this depiction was "offensive to Muslims."
- In 1998, CAIR denied bin Laden's responsibility for the two al Qaeda bombings of American embassies in Africa. According to Ibrahim Hooper, the bombings resulted from "misunderstandings of both sides."

- In September 2003, CAIR's former Community Affairs Director, Bassem Khafagi, pled guilty to three federal counts of bank and visa fraud and agreed to be deported to Egypt. Federal investigators said that a group Khafagi founded, the Islamic Assembly of North America, had funneled money to activities supporting terrorism and had published material advocating suicide attacks against the United States. Khafagi's illegal activities took place while he was employed by CAIR.

- In July 2004, Ghassan Elashi, a founding Board member of CAIR's Texas chapter, was convicted along with his four brothers of having illegally shipped computers from their Dallas-area business, InfoCom Corporation, to Libya and Syria, two designated state sponsors of terrorism. That same month, Elashi was charged with having provided more than $12.4 million to Hamas while he was running HLF. In April 2005, Elashi and two of his brothers were also convicted of knowingly doing business with Hamas operative Mousa Abu Marzook, who was Elashi's brother-in-law. Elashi's illegal activities took place while he was employed by CAIR, whose Dallas-Fort Worth chapter depicted the Elashis' indictment as "a war on Islam and Muslims."

- On September 6, 2001, the day that federal agents first raided Infocom's headquarters, CAIR Executive Director Nihad Awad denounced the U.S. government for "tak[ing] us back to the McCarthy era."

- FBI wiretap evidence which was introduced during the 2007 trial of the Holy Land Foundation (a trial that explored HLF's financial ties to Hamas), proved that Nihad Awad had attended a 1993 Philadelphia meeting of Hamas leaders and operatives who collaborated on a plan to disguise funding for Hamas as charitable donations.

- CAIR co-founder and Chairman Emeritus Omar Ahmad was named, in the same 2007 Holy Land Foundation trial, as an unindicted co-conspirator with HLF. During the trial, evidence was supplied proving that Ahmad had attended, along with Nihad Awad, the aforementioned 1993 Philadelphia meeting of Hamas leaders and operatives. Moreover, prosecutors described Ahmad as a member of the Muslim Brotherhood's "Palestine Committee" in America.

- The home of Muthanna al-Hanooti, one of CAIR's directors, was raided in 2006 by FBI agents in connection with an active terrorism investigation. FBI agents also searched the offices of Focus on Advocacy and Advancement of International Relations, al-Hanooti's Michigan- and Washington DC-based consulting firm that investigators suspect to be a front supporting the Sunni-led insurgency in Iraq.

  Al-Hanooti is an ethnic Palestinian who, according to a 2001 FBI report, "collected over $6 million for support of Hamas" and attended, along with CAIR and Holy Land Foundation officials, the previously cited Hamas fundraising summit in Philadelphia in 1993. Currently a prayer leader at a Washington-area mosque that aided some of the 9/11 hijackers, he is a relative of Shiek Mohammed al-Hanooti, an unindicted co-conspirator in the 1993 World Trade Center bombing. Muthanna al-Hanooti formerly helped run an organization called LIFE for Relief and Development, a suspected Hamas terror front whose Michigan offices were raided by the FBI in September 2006, and whose Baghdad office was raided by U.S. troops in 2004.

  In March 2011, al-Hanooti was sentenced to a year in federal prison for violating U.S. sanctions against Iraq. According to the FBI, al-Hanooti also raised more than $6 million for support of Hamas and was present with CAIR and Holy Land Foundation officials at a secret Hamas fundraising summit held in Philadelphia during the 1990s.

- Randall Todd Royer, who served as a communications specialist and civil rights coordinator for CAIR, trained with Lashkar-I-Taiba, an al Qaeda-tied Kashmir organization that is listed on the State Department's international terror list. He was also indicted on charges of conspiring to help al Qaeda and the Taliban battle American troops in Afghanistan. He later pled guilty to lesser firearm-related charges and was sentenced to twenty years in prison. Royer's illegal activities took place while he was employed by CAIR.

- Onetime CAIR fundraiser Rabih Haddad was arrested on terrorism-related charges and was deported from the United States due to his subsequent work as Executive Director of the Global Relief Foundation, which in October 2002 was designated by the U.S. Treasury Department for financing al Qaeda and other terrorist organizations.

- During the 2005 trial of Sami Al-Arian, who was a key figure for Palestinian Islamic Jihad in the United States, Ahmed Bedier of CAIR's Florida branch emerged as one of Al-Arian's most vocal advocates.

- In the aftermath of 9/11, federal agents raided the Washington-area home of CAIR civil rights coordinator Laura Jaghlit as part of a probe into terrorist financing, money laundering and tax fraud. Her husband Mohammed Jaghlit, a

director of the Saudi-backed SAAR Foundation, is a suspect in the still-active (as of January 2008) investigation.

- Abdurahman Alamoudi, one of CAIR's former directors, is a supporter of both Hamas and Hezbollah, and is currently serving a 23-year prison sentence for terrorism-related convictions.

- Current CAIR board member Nabil Sadoun co-founded, along with Mousa Abu Marzook, the United Association for Studies and Research (UASR), which investigators consider to be a key Hamas front in America. Sadoun now sits on UASR's board.

- Current CAIR research director Mohamed Nimer previously served as a Board Director for UASR.

- One of CAIR's founding directors, Rafeeq Jaber, is a supporter of Hezbollah and served as the longtime President of the Islamic Association for Palestine.

- CAIR Board member Hamza Yusuf was investigated by the FBI shortly after 9/11 because, just two days before the attacks, he had told a Muslim audience: "This country [the U.S.] is facing a terrible fate and the reason for that is because this country stands condemned. It stands condemned like Europe stood condemned because of what it did. And lest people forget, Europe suffered two world wars after conquering the Muslim lands."

The foregoing affiliations have drawn the notice of numerous commentators:

- Steven Pomerantz, the FBI's former chief of counter-terrorism, has stated that "CAIR, its leaders and its activities effectively give aid to international terrorist groups."

- WorldNetDaily quotes an FBI veteran as saying: "Their [CAIR's] offices have been a turnstile for terrorists and their supporters."

- The family of John P. O'Neill, Sr., the former FBI counter-terrorism chief who died at the World Trade Center on 9/11, named CAIR in a lawsuit as having "been part of the criminal conspiracy of radical Islamic terrorism" responsible for the September 11 attacks.

- Terrorism expert Steven Emerson, citing federal law enforcement sources and internal documents, characterizes CAIR as "a radical fundamentalist front group for Hamas."

- U.S. Senator Richard Durbin has said, "CAIR is unusual in its extreme rhetoric and its associations with groups that are suspect."

- On September 17, 2003, U.S. Senator Charles Schumer stated that CAIR co-founders Nihad Awad and Omar Ahmad have "intimate links with Hamas." He later remarked that "we know [CAIR] has ties to terrorism."

- According to U.S. Rep. Sue Myrick (R - North Carolina), co-founder of the House Anti-Terrorism/Jihad Caucus: "Groups like CAIR have a proven record of senior officials being indicted and either imprisoned or deported from the United States."

- During September 2003 hearings held by the Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security, Chairman Jon Kyl noted the connections between such groups as CAIR and the Saudi government, stating: "A small group of organizations based in the U.S. with Saudi backing and support is well advanced in its four-decade effort to control Islam in America -- from mosques, universities and community centers to our prisons and even within our military. Moderate Muslims who love America and want to be part of our great country are being forced out of those institutions."

A number of American Muslims have made similar observations:

- The late Seifeldin Ashmawy, who published *Voice of Peace*, called CAIR the champion of "extremists whose views do not represent Islam."

- Tashbih Sayyed of the Council for Democracy and Tolerance (CDT) called CAIR "the most accomplished fifth column" in the United States. Jamal Hasan, also of CDT, said that CAIR's goal is to spread "Islamic hegemony the world over by hook or by crook."

- According to Kamal Nawash of the Free Muslim Coalition Against Terrorism, CAIR and similar groups "condemn terrorism on the surface while endorsing an ideology that helps foster extremism," and adds that "almost all of their members are theocratic Muslims who reject secularism and want to establish Islamic states."

In 1998, CAIR co-hosted a rally at Brooklyn College where Islamic militants exhorted the attendees to carry out "*jihad*" and described Jews as "pigs and monkeys." The crowd chanted: "No to the Jews, descendants of the apes." Referring to Israel as a "racist country and state," CAIR was a signatory to a MAY 20, 2004 "Joint Muslims/Arab-American Statement on Israeli Violence in Gaza," which "strongly condemn[ed]" Israel's "indiscriminate killings of innocent Palestinians, including many children," and its "demolition of Palestinian homes." In August 2006 CAIR accused Israel of practicing state terrorism in its war against the Lebanese terrorist organization Hezbollah. Said CAIR Communications Director Ibrahim Hooper, "Our [American] government must end its support for Israel's campaign of terror in Lebanon and join an international effort to protect and bring humanitarian aid to the civilian population of that devastated

nation."

CAIR officials have displayed a double standard for denouncing violence. For example, Ibrahim Hooper in a *Pittsburg Post-Gazette* interview refused to denounce the terrorism of Hamas and Hezbollah, stating, "we're not in the business of condemning." By contrast, when Israeli troops killed Hamas leader Ahmed Yassin, CAIR condemned "the assassination of a wheelchair-bound Palestinian Muslim religious leader," calling the operation "an act of state terror."

According to terrorism expert Steven Emerson: "Hussam Ayloush, the Executive Director of the Southern California chapter of [CAIR] ... is known to use the term 'Zionazi' to refer to Israelis, and [he] compare[s] Zionism to Nazism, once writing in an e-mail, 'Indeed, the Zionazis are a bunch of nice people; just like their Nazi brethren!'"

CAIR chose not to endorse or participate in the May 14, 2005 "Free Muslims March Against Terror," an event whose stated purpose was to "send a message to the terrorists and extremists that their days are numbered ... [and to send] a message to the people of the Middle East, the Muslim world and all people who seek freedom, democracy and peaceful coexistence that we support them."

CAIR states that it "works in close cooperation with other civic and civil liberties groups such as the American Civil Liberties Union, Amnesty International, NAACP, Hispanic Unity, Organization of Chinese Americans, Japanese American Citizens League, Sikh Mediawatch and Resource Task Force, among many others." CAIR also identifies the National Council of Churches as a "partner" organization.

On December 12, 2006, CAIR Board Chairman Parvez Ahmed called the war in Iraq a "pure unadulterated projection of raw power" and said the U.S. should withdraw its forces immediately.

Another notable CAIR official is Altaf Ali, the organization's Florida Director. Ali alleges that America responded to the 9/11 attacks by trampling on the civil liberties of all Muslims, and he has wavered on the question of whether or not the victims who died in the World Trade Center on 9/11 could be classified as innocents whose killings were unjustified.

In 2007 CAIR became involved in the infamous "flying imams" lawsuit, a case that centered around six Muslim clerics aboard a November 2006 US Airways flight from Minneapolis to Phoenix. Shortly before takeoff, they began engaging in bizarre behaviors eerily reminiscent of those that had been used by the 9/11 hijackers: shouting slogans in Arabic; leaving their assigned seats to position themselves in different places; requesting seat belt extenders that they positioned on the floor, rather than using them to secure themselves. Responding to the concerns of alarmed passengers and the flight crew, authorities removed the imams from the plane. Soon thereafter the imams filed a lawsuit against US Airways, claiming that they had been removed from the flight for no

reason other than anti-Muslim discrimination. The lawyer representing the imams was Omar T. Mohammedi, who as of 2006 was President of CAIR's New York chapter.

In February 2007, CAIR endorsed a call by the American Muslim Taskforce for Civil Rights and Elections, for a worldwide "rolling fast" in support of the incarcerated Sami Al-Arian, who had initiated a hunger strike on January 21 to protest his detention and treatment by federal authorities. Participants in the campaign agreed to fast every Monday, Wednesday, and Friday for as long as Al-Arian continued his hunger strike.

On June 4, 2007, the *New York Sun* reported that CAIR had been named as an unindicted co-conspirator in an alleged criminal conspiracy to support both Hamas and the Holy Land Foundation for Relief and Development (HLF). The federal prosecution document, in naming CAIR as an unindicted co-conspirator, described the organization as a present or past member of the U.S. Muslim Brotherhood's Palestine Committee.

Also named as unindicted co-conspirators in the HLF trial were groups such as Hamas, INFOCOM, the Islamic Association for Palestine, the Islamic Society of North America, the Muslim Arab Youth Association, the United Association for Studies and Research, and the North American Islamic Trust. The list also included many individuals affiliated with the Muslim Brotherhood and/or Hamas. Among these were Omar Ahmad, Abdurahman Alamoudi, Jamal Badawi, Yousef al-Qaradawi, Abdallah Azzam, Mohammad Jaghlit, Mousa Abu Marzook, Abdel Aziz Rantisi, and Ahmed Yassin.

Two weeks after the Justice Department had named CAIR as an unindicted co-conspirator in the HLF trial, the organization legally changed its name to "Council on American-Islamic Relations Action Network."

In the summer 2007 Holy Land Foundation trial, it was learned that CAIR's parent organization, the Islamic Association for Palestine, had been named in a May 1991 Muslim Brotherhood memorandum as one of the Brotherhood's likeminded "organizations of our friends" who shared the common goal of conducting "a kind of grand Jihad in eliminating and destroying the Western civilization from within and 'sabotaging' its miserable house by their hands ... so that ... God's religion [Islam] is made victorious over all other religions."

According to a June 2007 *Washington Times* report, CAIR's membership had declined more than 90 percent since the September 11, 2001 terrorist attacks, from approximately 29,000 in the year 2000, to fewer than 1,700 six years later. As a result, CAIR's annual income from dues dropped from $732,765 in 2000 (when yearly dues cost $25 per person), to $58,750 in 2006 (when dues cost $35). As of 2007, the majority of CAIR's $3 million annual budget derived from about two dozen individual donors.

M. Zuhdi Jasser, Director of the American-Islamic Forum for Democracy, said in June 2007 that the decline in CAIR's membership contradicted the organization's claim that it represents the interests

and concerns of 7 million American Muslims. "This is the untold story in the myth that CAIR represents the American Muslim population," said Jasser. "They only represent their membership and donors."

CAIR has received funding from the Community Foundation for Greater Atlanta, the New York Foundation, and the Tides Foundation.

CAIR also receives considerable funding from Saudi Arabia, whose Washington embassy in 1999 announced a $250,000 grant by the Saudi-based Islamic Development Bank to help CAIR purchase some land in Washington, DC -- to be used in the construction of "an education and research center." In 2002 the World Assembly of Muslim Youth, which is bankrolled by the Saudi government, financed CAIR's distribution of books on Islam and CAIR's immensely expensive advertising campaign in a number of American publications -- including a weekly ad in *USA Today* which cost approximately $1.04 million over the course of the year. In 2003, Saudi Prince Alwaleed bin Talal donated $500,000 to help CAIR distribute the Koran and other Islam-related books throughout the United States. Two years later, a Saudi Arabian named Adnan Bogary gave CAIR's Washington branch a donation of more than $1.36 million.

In 2006 Sheikh Hamdan bin Rashid Al Maktoum, Deputy Ruler of Dubai, financed the building of a property in the United States to serve as an endowment for CAIR. That property now generates some $3 million annually for CAIR.

According to the Investigative Project on Terrorism, CAIR in 2006 sent delegations to Saudi Arabia and the United Arab Emirates in an effort to procure millions of dollars in donations from wealthy Gulf donors.

According to the Investigative Project on Terrorism, in September 2009 CAIR executive ditector Nihad Awad (along with CAIR national spokesman Ibrahim Hooper and chairman Larry Shaw) praised Libyan dictator Muammar Gaddafi for his "leadership" and his "continuing efforts for world peace," and asked him to underwrite a CAIR program to distribute a million copies of the Quran to American government officials and the general public. "We want to assure you that Muslims in America are your brothers and supporters," Shaw said. "They share with you your interests and aspirations." The CAIR officials also asked Gaddafi for financial assistance to help them run an entity known as the Muslim Peace Foundation, founded in 2008 ostensibly to help repair American-Muslim relations. One of the foundation's founders was a man named Winslow Seale, a Muslim convert who later changed his name to Johari Abdul Malik. Malik's *Dar al-Hijrah* mosque is believed to be "associated with Islamic extremists" and "has been linked to numerous individuals linked to terrorism financing."

In October 2010, CAIR announced that it was forming a new "Islamophobia" department that would produce an annual report tracking "trends in rhetorical attacks on Islam and Muslims and ... offer accurate and balanced information to be used in the struggle for tolerance and mutual understanding."

In November 2010, Muneer Awad, director of CAIR's Oklahoma state chapter, filed a federal lawsuit challenging a measure -- approved by 70 percent of Oklahoma voters -- that barred the state's judges from considering Sharia, or Islamic law, in formulating their rulings. According to Awad, the measure not only violated the First Amendment right to "free exercise" of religion, but also singled out Islam for "profound stigma."

IBRAHIM HOOPER

- Spokesman and co-founder of the Council on American Islamic Relations
- Wants "government of the United States to be Islamic sometime in the future"
- Downplays threat of Islamic extremism and declined to condemn Islamic terrorist groups

Ibrahim Hooper (formerly Doug Hooper) is a white American convert to Islam and one of the founders of the Council on American-Islamic Relations (CAIR). At present, he serves as a spokesman and "Director of Strategic Communications" for that organization. He holds a bachelor's degree in history and a master's degree in journalism & mass communication.

Hooper has candidly stated that while he does not endorse the violent tactics of Islamic radicals, he does share their desire to impose Islam on all of America. "I wouldn't want to create the impression that I wouldn't like the government of the United States to be Islamic sometime in the future," he told the *Minneapolis Star Tribune* in a 1993 interview. "But I'm not going to do anything violent to promote that. I'm going to do it through education."

Ten years later, in 2003, Hooper stated that if Muslims were ever to become a numerical majority in the U.S., they would likely seek to replace the Constitution with Islamic law (Sharia), which they view as divinely inspired and thus superior to all other legal systems.

In 1998 Hooper and CAIR denied Osama bin Laden's culpability for that year's bombings of two U.S. embassies in Africa. Despite the demonstrable links between the al Qaeda leader and the bombings, Hooper asserted that "a great deal of what happened is ... due to misunderstandings on both sides." Three years later, in the wake of the 9/11 attacks, Hooper again hedged on whether he thought bin Laden was responsible: "*If* Osama bin Laden was behind it, we condemn him by name." (Emphasis added)

Hooper attended an October 28, 2000 rally in Washington, DC, where Abdurahman Alamoudi, then-President of the American Muslim Federation, shouted to a cheering crowd: "We are all supporters of Hamas." In the event's aftermath, neither CAIR nor Hooper publicly criticized Alamoudi's comment.

On March 17, 2001, Hooper spoke at a "Conference on Palestine" held at the University of Michigan. The event was co-sponsored by a number of organizations, including the Global Relief Foundation, the International Action Center, the Islamic Association for Palestine, and CAIR. Also speaking at the event was Stephen Sosebee, head of the Palestine Children's Relief Fund. The conference began with the screening of a video titled *The New Uprising*, a reference to the Second Palestinian *Intifada* against Israel.

In June 2001, Hooper helped organize a "sit-in" where a dozen leaders of various American Muslim groups demonstrated outside the U.S. State Department. American Muslim Council Director Ali Ramadan Abu Zakouk used the occasion to declare that suicide-bombing attacks on civilian targets were a "God-given right" for Muslims. When Hooper later was asked whether Zakouk's assertion could be interpreted as a defense of terrorism, he claimed that he "did not hear" the statement. Videotape footage chronicling the event, however, clearly showed Hooper standing only a few feet away from Zakouk as he made the comments.

As the public voice of CAIR, Hooper has routinely characterized the U.S. government's counterterrorism initiatives as threats to the civil rights of American Muslims. For example, when the Justice Department asked visa holders from Middle Eastern countries to voluntarily submit to interviews by American authorities in the wake of 9/11, Hooper complained that the request sent "a chill through the community" by unjustly perpetuating "racial and religious profiling of American Muslims and Arab-Americans."

When the *Washington Post* in November 2001 asked Hooper if he would disavow the terrorist activities of Hamas and Islamic Jihad, he responded, "It's not our job to go around denouncing." He reprised the same theme in a 2002 interview with the *Pittsburg Post-Gazette,* refusing to condemn Hamas and Hezbollah because "we're not in the business of condemning." (By contrast, Hooper and CAIR have commonly condemned Israeli military strikes against Hamas and other Palestinian terrorist groups.)

When onetime Palestinian Islamic Jihad operative Sami Al-Arian was indicted by the U.S. government in 2003, Hooper appeared on the cable television program *Buchanan and Press* to defend Al-Arian's right to support "Islamic causes and the struggle of the Palestinian people to be free of Israeli occupation." He portrayed Al-Arian as the blameless victim of an organized conspiracy by "attack dogs of the pro-Israel

lobby" seeking to bring about the "Israelization of American policy and procedures."

In 2004 Hooper said that after two decades of attending services at U.S. mosques, "I've never heard violence preached [therein]; I've never heard anti-Semitism or anti-Americanism preached." On other occasions, however, he has contradicted that assertion to some degree, arguing that the extremism found in mosques, while real, is less dangerous than the threat posed by critics of radical Islam, especially those on conservative talk radio. "There is a difference with hate speech at your local mosque and talk radio that reaches millions," says Hooper.

In a similar vein, Hooper equates conservative Christian televangelists such as Pat Robertson, Jimmy Swaggart, and the late Jerry Falwell with Islamic terrorists -- claiming that if given the opportunity, such individuals would commit mass murder against Muslims.

During Israel's 2006 war against Hezbollah (in Lebanon), Hooper said: "Our [American] government must end its support for Israel's campaign of terror in Lebanon and join an international effort to protect and bring humanitarian aid to the civilian population of that devastated nation."

In September 2006 Hooper stated publicly that CAIR did not "take money from the government of Saudi Arabia." Contrary to that claim, however, CAIR's ideological and financial connections to the Saudi Wahhabi establishment are numerous and well documented.

In late November 2006, shortly after airport police in Minneapolis had forcibly removed six Muslim imams from a U.S. Airways plane because of their bizarre behavior just before takeoff, Hooper said: "Unfortunately, this is a growing problem of singling out Muslims or people perceived to be Muslims at airports, and it's one that we've been addressing for some time." It was later learned that one of the imams was affiliated with a Hamas-linked organization and had developed a connection to Osama bin Laden during the 1990s.

In the aftermath of the U.S. Airways incident, CAIR filed a lawsuit against both the airline and the passengers who had complained about the six imams' suspicious behavior. In response to the suit, Republican congressmen Peter King and Steven Pearce crafted an amendment (which ultimately was passed by the House of Representatives) granting legal immunity to citizens who, in good faith, report suspicious behavior to authorities. Hooper nonetheless defended the CAIR lawsuit and suggested that the passengers in question had exhibited "malicious intent" by demanding that the imams be deplaned.

In December 2007, CAIR produced a media guide to "disabuse journalists of misinformation" about Islam. According to Hooper, his organization had developed this publication because the negative portrayal of Islam and Muslims in the media was "one of the hot-button issues for American Muslims and Muslims worldwide."

Alaska Catholic Conference

March 30, 2011

Representative Mike Chenault
Room 208 Alaska State Capital
Juneau, Alaska 99811

Dear Representative Chenault:

We are writing today to express our concerns on CSHB88, "An Act prohibiting a court, arbitrator, mediator, administrative agency, or enforcement authority from applying a law, rule, or provision of an agreement that violates an individual's right under the Constitution of the State of Alaska or the United States Constitution."

Within the Roman Catholic Church, we operate under Canon Law which could be considered "foreign law" as the bill is currently written. Passage of CSHB88 would impact decisions made by the bishops and or their canon lawyers on matters important within the church. For example, one of us could make the decision to close a parish within our jurisdiction, completely within the bounds of canon law. However, we could envision a situation where a suit gets filed by parishioners claiming the process that lead to our decision did not afford all of the constitutional protections to members of the congregation. This has happened in St Louis. A second example could be priests who could be canonically required to operate under Canon Law requirements that would have no bearing in a civil court.

However, of a larger concern is our Marriage Tribunals. The tribunals operate within the confines of Canon Law specifically in regards to marriages and divorces. The tribunal process allows for Catholic marriages, once the civil decisions are rendered, to be annulled allowing for remarriage within the Church at a future date. During the tribunal process often very personal information is shared about one person or the other in the marriage. Sometimes these people hold public positions within the community. While we respect civil law, the tribunal has nothing to do with civil law. This legislation could potentially allow for one party or the other to sue in civil court to obtain confidential information shared in the marriage tribunal office that had no bearing on a civil divorce case.

Alaska Catholic Conference of Bishops
Archdiocese of Anchorage • Diocese of Fairbanks • Diocese of Juneau
225 Cordova Street • Anchorage, AK 99501
Phone 907-297-7744 • Fax: 907-279-3885

We have contacted Bishops in other regions of the country where similar legislation has been introduced. We thought you might be interested to see the language that Arizona is currently considering within it's legislature. That link is: http://www.azleg.gov/legtext/50leg/1r/adopted/s.2064jud.pdf We have been assured by our lawyers that this legislation would not effect the Catholic churches ability to operate under the direction of Canon Law. We respectfully ask that you consider this language if this legislation will advance.

Sincerely,

+Roger L. Schwietz, OMI	+Donald Kettler	+Edward J. Burns
Archbishop of Anchorage	Bishop of Fairbanks	Bishop of Juneau

cc: House Judiciary Committee

Alaska Catholic Conference of Bishops
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March 30, 2011

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The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

Re: House Bill 88
ACLU Review of Legal Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony regarding House Bill 88, relating to the application of international law.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. We have several concerns with the proposed legislation, outlined in greater detail below, **and urge a DO NOT PASS vote by Members of the Committee.**

Attack on Separation of Powers and Judicial Independence

Fundamentally, HB 88 is counterproductive legislation. This bill represents an attack on the separation of powers, an unwarranted mistrust of the state judiciary and an unnecessary interference in the function of Alaska's legal system.

It is a core function of both state and federal courts to determine what law is at issue in a given matter. The Alaska Legislature should not seek to legislate what law the courts can and cannot consider when deciding cases. By doing so, the Legislature violates the fundamental principle of judicial independence and the constitutional principle of separation of powers.[1]

Negative Impacts on Alaska Citizens and Businesses

Passage of HB 88 would harm the rights of Alaska citizens and businesses who travel and transact across international borders, and would also negatively impact the United States' standing in the global community.

In the normal course of business, organizations may voluntarily choose to waive certain constitutional rights. For instance, an individual generally retains the constitutional right to say what she thinks without restraint. U.S. Const., Amdt. I; Alaska Const., Art. I, Sec. 5. However, individuals regularly contract away their constitutional right to speak freely, for instance, by engaging in nondisclosure agreements. While the ACLU of Alaska strongly values constitutional rights, there are certainly legitimate and appropriate reasons why an informed, non-coerced waiver of such rights should be permitted and legally respected.

Contrary to these principles, the language of HB 88 presumes to disregard **all** waivers of constitutional rights, in any contract that contains a choice of law clause preferring the law of a foreign jurisdiction. For instance, proposed AS 09.68.140(b) states that if a contract contains a choice of law clause preferring foreign law and "if the interpretation or enforcement of the agreement would violate an individual's [constitutional] right," the contract **must** be read to preserve the constitutional right, not to waive it. The effect of the statute – by its literal terms – appears to be to nullify ***any waiver*** of constitutional rights where made in conjunction with a foreign choice of law provision.

Other examples of commonly waived constitutional rights include the right of medical privacy permitting medical records to be shared with a foreign medical provider, or a due process right to an official hearing or trial, such as a provision mandating that disputes go to an arbitrator. *See,* pg. 3, *infra.* The Alaska Legislature risks sweeping up a wide variety of commonplace waivers of constitutional rights in the bill as currently drafted.

HB 88 is structurally flawed in that it is not narrowly tailored to prevent coerced or uninformed waiver of rights. Its only *caveat* is that the contract must have a foreign choice of law provision. This overbreadth would result – should the bill pass – in exposing foreign

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[1] In this regard, we draw the Committee's attention to the Opinion Letter of the Attorney General, dated March 21, 2011, "Re: HB 88," signed by Mary Ellen Beardsley, Assistant Attorney General ("Beardsley, AG Opinion"), wherein she notes: "Alaska courts will not apply a foreign law if application of the law would violate an individual's constitutional rights." *Id.* at 2. Thus, HB 88 does not provide any positive protections, and has only negative consequences.

partners to the potential that Alaska businesses may unilaterally ***and improperly*** evade their contractual obligations by using the Bill's provisions. This obvious legal flaw would make it highly problematic for Alaskans to conduct business with foreign individuals or organizations.[2]

Choice of Forum Provision

A similar problem attends subsections (c) and (d), which prohibit the application of choice of forum or venue contractual provisions, and the granting of motions to dismiss on the grounds of *forum non conveniens*, where a constitutional right could be impaired.

In the case of subsection (c), a business or person may have a valid, legally appropriate and commercially necessary reason to waive certain constitutional rights. But, the extremely broad language of the legislation would invalidate the contractual provisions.

An example of a problem with this language is presented by the Seventh Amendment to the United States Constitution, which guarantees the right to trial by jury in any civil case addressing a matter in value of at least twenty dollars. U.S. Const., Amdt. VII.

The United States jury system does not necessarily have a corollary in judicial proceedings in other countries. Not all countries apply a common law system, and fewer still have regular jury trials. HB 88 could thus be used to prevent the enforcement of any choice of venue or forum clause ***in any contract with a foreign company***, or any *forum non conveniens* action, if the foreign court at issue does not guarantee a jury trial for civil action where $20 or more was at stake. This would seriously deter foreign individuals or corporations from doing business in Alaska.

Negative Impact on Elections to Arbitrate

Courts across the country encourage alternative dispute resolution, as an option to reduce the work-load on an often over-taxed judicial system, and as a benefit to the parties in reducing the potentially high costs of litigation. Many contracts include an arbitration clause. In some cases, parties may choose a specific arbitrator or alternate quasi-judicial forum. HB 88 would unnecessarily introduce uncertainty into the validity of these provisions, negatively impacting both the courts and the parties.[3]

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[2] Again, it is instructive to note that Alaska's Attorney General has cited this problem as well. *See*, Beardsley AG Opinion, pg 2, "HB 88 might affect a foreign entity's willingness to do business with individuals or businesses in Alaska if it knows that provisions of the contract may be void by law . . . ."

[3] Of note, attorneys in Georgia, where a bill similar to HB 88 was introduced, testified against it. "Michael J. Broyde, academic director of Emory University's law and religion program, said he thinks 'the consequences of the bill have not been well thought out' partly because its restrictions on arbitrators and choice of venue would

U.S. and Alaska Standing in Foreign Relations

HB 88 would generally strain our relations and standing with other nations. Opportunistic businesses and individuals could thwart efficient judicial enforcement by filing suit in Alaska and then demanding that the defendant respond in Alaska.

For example, a person with a contractual dispute with a Spanish oil services company[4] could (assuming that the matter had sufficient minimal Alaska contacts to establish personal and subject matter jurisdiction), file a suit for declaratory relief in Anchorage, even where all the evidence, witnesses, and items at issue were in Spain.

Even where such a suit would normally be dismissed as *forum non conveniens* and then re-filed in Spain, an Alaska court could be obliged to hear the case in Alaska, since the plaintiff would be deprived of her Seventh Amendment right to a jury trial if the case were heard in Spain.

While there may be foreign jurisdictions whose legal systems are so deeply unfair as to offend fundamental American values of fairness, there are many – such as Spain's – that do not. One should also note that the doctrine of *forum non conveniens* **is one of mutual respect**, which may be undermined where one nation flouts the respect owed to other nations.[5] Passage of HB 88, along with similar bills in sister states, could result in many American litigants finding themselves sued in foreign jurisdictions and unable to remove their cases to Alaska or other US state courts.

HB 88 signals to the rest of the world that Alaska believes that our judges have "little to learn from their counterparts in other nations . . . . This wholesale rejection of the value of consulting international law or foreign decisions in certain circumstances evokes years of 'American exceptionalism,' during which the U.S. was internationally criticized for exempting itself from human rights standards that were otherwise universal."[6]

'incapacitate Georgia companies as they engage in international commerce.' [¶] A bigger problem, he added, is that the bill 'violates the Federal Arbitration Act and becomes an unconstitutional exercise of state authority. Arbitration is a routine business exercise by people who are prepared to sacrifice some of their constitutional rights in return for reduced cost and expediency,' said Broyde, who also is an ordained rabbi and member of the Beth Din of America -- the largest Jewish law court in the country. Banning people from 'willingly submitting to an ecclesiastical tribunal' is 'inconsistent with traditional American practice.' *Lawyers Speak Against Ga. Bill That Bans Use of Foreign Laws in State Courts*, Kathleen Baydala Joyner, Fulton County Daily Report, February 07, 2011. http://www.law.com/jsp/article.jsp?id=1202480459397&Lawyers_Speak_Against_Ga_Bill_That_Bans_Use_of_Foreign_Laws_in_State_Courts&slreturn=1&hbxlogin=1.

[4] http://www.businessweek.com/ap/financialnews/D9LRODGO0.htm.

[5] Yet again, this analysis is shared by Alaska's Attorney General, s*ee*, Beardsley AG Opinion, pg 3, "A party will not be sent to a jurisdiction that does not have equal protections and due process."

[6] Martha Davis & Johanna Kalb, *Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, American Constitution Society Issue Brief, 5 (2011).

A vote for HB 88 would have the effect of alienating U.S. allies and the commercial partners of Alaska companies, putting at risk U.S. interests at home and abroad. Indeed, the simple perception that the United States is ignoring its legal obligations puts Alaskan citizens and Alaskan companies seeking to do business internationally at risk. If potential foreign business partners believe that Alaska's courts will not enforce foreign judgments or adhere to the businesses' choice of law in their contracts, international companies may simply be unwilling to contract with Alaska businesses or establish commercial ties to our state. Given the ambiguity surrounding which laws Alaskan courts may consider, foreign investors may be wary of ever consenting to jurisdiction in our state courts.

Misrepresentations of American Public Policy Alliance and Others

It is important to note the misleading testimony that has been supplied at length in support of this bill by, amongst others, the American Public Policy Alliance. *See*, "Representative Civil Legal Cases Involving Shariah Law," November 8, 20101, American Public Policy Alliance, HB88 Supporting Documents-Relevant Cases APPA 11-08-10.pdf, http://www.legis.state.ak.us/basis/get_documents.asp?session=27&bill=HB88, implying that Sharia law is being used in US courts to the detriment of parties' rights. *See, also,* HB88 Supporting Documents-FAQ ALAC 03-14-11.pdf, "**2. This bill is not needed because shariah is not a threat in the US and is not in our court systems.** The Act is not simply about shariah but also transnationalism—or the documented creep of foreign and offensive laws being recognized by state and federal courts. More, shariah has already creeped into the legal systems of Western Europe, including 85 shariah courts operating openly with the full authority of law in the United Kingdom. There are numerous cases in which shariah doctrines have been invoked in the US. Here is a sampling of 17 examples from 11 states."

In fact, however, the document mostly contains examples of cases where Islam was involved due to a religious freedom claim, an arbitration claim, or in connection with a discussion of comity being granted to a decision of a foreign legal system that happens to be based on Islam. Other cases merely involve reference to Islam because it bears on the facts of the case. Such references to Islam are not impermissible.

The cases cited in this report illustrate exactly why Sharia law is NOT being improperly imposed in the United States and highlight the problem with this measure and others intended to target Islam.

Courts often consider a prisoner's religious beliefs and requirements when adjudicating a claim under RLUIPA, **a law passed to protect the religious exercise rights of prisoners of all faiths**. Thus, the court's discussion of an inmate's religious views in *Allah v. Jordana-Luste*r, which is the first case cited in the report, is appropriate. Were the courts to be barred from referring to religious laws in these cases, Christian and Jewish inmates (or inmates of other faiths) would be unable to provide support for their free exercise claims. In any event, the court did not accept the inmate's evidence in that case, and the inmate lost his claim for halal meat.

In other cases involving Islamic law, where it conflicts with our public policy, courts have refused to recognize it, just as they are required to do with regard to any rule that violates public policy. For example, in *Aleem vs. Aleem,* which is cited in the report, a Maryland court of appeals held that a Pakistani divorce granted in accordance with Pakistani customs (based on Islamic law) would not be recognized in Maryland because it conflicted with state public policy requiring fair and equitable division of assets.

In another case, when a New Jersey court held that a man's Islamic religious beliefs regarding sex with his spouse meant that he did not have the requisite intent to commit sexual assault, consistent with our public policy, the appeals court immediately reversed the decision and issued a restraining order to the petitioning wife.

Other cases involve courts enforcing agreements to present disputes for Islamic arbitration. ***But it is not unusual for a court to enforce an arbitration agreement where the parties agree in advance that they will take any disputes to a particular type of arbitrator. The court's enforcement is based on neutral principles of law and denying courts the ability to enforce such agreements could compromise arbitration itself as a means to settle legal disputes.***

These cases show that our courts are very aware of their obligations to comply with public policy and do so when presented with any claims that may undermine that public policy, regardless of whether Islam or some other faith may be involved.

Potential for Needless Entanglement in Lengthy Litigation

Finally, we note that there are significant constitutional infirminties with respect to HB 88 and constitutional protections for the free exercise of religion and the establishment clause.

While the plain language of HB 88 refers only to "international law," in reviewing the constitutionality of HB 88 or any statute, the courts will necessarily look to legislative intent. In that regard, the Sponsor Statement will be reviewed by the courts as one element of that intent.

While the revised Statement does not reference Sharia, it is important to note that the original does so, asserting:

> HB88 offers a baseline law that provides a statutory framework for precluding constitutionally objectionable foreign laws and legal systems from finding their way into the state judicial system. **One example of an offending transnational law is sharia—authoritative Islamic law that is applied as the law of the land in many countries around the world. Sharia is patently offensive to U.S. and Alaska constitutional law** because it criminalizes apostasy (violation of Free Exercise of Religion) and blasphemy against Islam, Mohammed, and sharia itself (violation of

> Free Speech). Sharia also violates principles of due process and equal protection by discriminating against non-Muslims and women.

HB 88 Use of Foreign Law, original Sponsor Statement, dated March 9, 2011, (emphasis added).

Conclusion

In sum, HB 88 is unnecessary, and its passage would cause real harm to Alaska's citizens, businesses, and judicial system. **We urge you to oppose HB 88.**

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
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Alaska Catholic Conference

April 1, 2011

Representative Carl Gatto, Chair
Members House Judiciary Committee
Alaska State Capitol
Juneau, Alaska 99811

Dear Representative Gatto and Members of the House Judiciary Committee:

Thank you for the opportunity to submit our views on HB88. We appreciate your openness to the presentation by Father Pat Travers regarding our concerns on the effect this bill might have on the legitimate application of Canon Law in the governance of the Catholic Church in our State. We hope Fr. Travers' testimony clarified that the bill could upset a complex existing legal structure that has generally worked well to govern the application of religious law in the United States. This consists of State and Federal constitutional provisions, court decisions, statutes, and regulations governing religious freedom, avoidance of government entanglement in religious affairs, contracts, and such matters as choice of law and court jurisdiction and venue. From our perspective, this legal structure has safeguarded the application of Canon Law within its legitimate sphere of the internal governance of the Catholic Church and the religious affairs of its members. At the same time, it has so limited the applicability of Canon Law and other religious law systems as to prevent them from impinging on secular affairs and the rights and freedoms of those Americans who do not freely choose to be governed by these systems.

Yesterday, our counterparts in Florida, where a similar bill is being considered, brought to our attention the attached article from *The Florida Independent* of March 24, 2011. Without in any way endorsing the opinions expressed about the motivation of this or similar bills, we believe it illustrates the disruption of legitimate, useful, and freely entered legal arrangements that could result from such legislation. While the article focuses on examples involving Jewish and Islamic laws, these are quite similar to the examples we provided the Committee on ways a bill like this could disrupt such arrangements relying on Canon Law.

Alaska Catholic Conference of Bishops
Archdiocese of Anchorage Diocese of Fairbanks Diocese of Juneau
225 Cordova Street Anchorage, AK 99501
Phone 907-297-7744 Fax: 907-279-3885

In light of these considerations, we respectfully request that HB88 not be reported out of Committee. Perhaps an immediate alternative would be a careful study, under the auspices of the Department of Law, of the current and prospective roles of religious legal systems in the lives of Alaskans. We would be very happy to cooperate in such a study. We believe it would show the current legal structures sufficiently prevent the abuses against with HB88 is directed. To the extent that further safeguards might be required, we would be ready to assist in their development.

Thank you for your consideration of our views, and for your service to the people of our State. Please feel free to contact any of us through the number below. Additionally, Fr. Pat Travers is available to answer any other concerns or questions you may have. He can be reached on his cell phone at 723-7303. Please be assured of our best wishes and prayers as you continue your service.

Sincerely,

+Roger L. Schwietz, OMI	+Donald Kettler	+Edward J. Burns
Archbishop of Anchorage	Bishop of Fairbanks	Bishop of Juneau

Attachment

cc: House Judiciary Committee

Alaska Catholic Conference of Bishops
Archdiocese of Anchorage Diocese of Fairbanks Diocese of Juneau
225 Cordova Street Anchorage, AK 99501
Phone 907-297-7744 Fax: 907-279-3885

27-LS0333\D
Bailey
3/30/11

CS FOR HOUSE BILL NO. 88( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GATTO, Lynn, Keller

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting a court, arbitrator, mediator, administrative agency, or enforcement authority from applying a law, rule, or provision of an agreement that violates an individual's right under the Constitution of the State of Alaska or the United States Constitution."

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

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS. The legislature finds that citizens of the state should be protected from the application of a foreign law if application of the foreign law would violate an individual's right guaranteed by the Constitution of the State of Alaska or the United States Constitution.

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature that AS 09.68.140, enacted by sec. 3 of this Act, does not address, directly or indirectly, any question of tribal law or the

application of tribal law or otherwise address the intersection between state law and tribal law.

* **Sec. 3.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.140. Foreign law prohibited. (a) A court, arbitrator, mediator, administrative agency, or enforcement agency may not apply a foreign law if application of the foreign law would violate an individual's right guaranteed by the Constitution of the State of Alaska or the United States Constitution.

(b) If an agreement includes a choice of law provision requiring foreign law to govern its interpretation or the resolution of a dispute between the parties to the agreement and if the interpretation or enforcement of the agreement would violate an individual's right guaranteed by the Constitution of the State of Alaska or the United States Constitution, the agreement must be modified or amended as necessary to preserve the constitutional right. An agreement that may not be modified or amended in order to preserve the constitutional right of an individual under this section is void.

(c) If an agreement provides for the choice of venue or a choice of forum outside of the United States or its territories and if the enforcement of the agreement applying the choice of venue or choice of forum provision would result in a violation of an individual's right guaranteed by the Constitution of the State of Alaska or the United States Constitution, the choice of venue or choice of forum provision in the agreement shall be interpreted to preserve the individual's constitutional right.

(d) If a person subject to personal jurisdiction in the state asserts a claim of forum non conveniens in litigation in the state, and if a court, arbitrator, mediator, agency, or similar enforcement authority of this state finds that granting the claim of forum non conveniens or similar claim would violate an individual's right guaranteed by the Constitution of the State of Alaska or the United States Constitution, the claim shall be denied.

(e) This section applies only to an actual or foreseeable violation of an individual's constitutional right caused by the application of foreign law.

(f) This section does not apply to a corporation, partnership, or other form of business association.

(g) In this section, "foreign law" means a law, rule, or legal code or system established and used or applied in a jurisdiction outside of the United States and the

territories of the United States.

27-LS0333\I.1
Keller
04/01/2011

Conceptional Amendment

OFFERED IN THE HOUSE
TO: CS HB 88 (STA)

BY: REPRESENTATIVE KELLER

Page2, line 28

(g) In this section, "foreign law" means a law, rule, or legal code or system established and used or applied in a jurisdiction outside of the United States and the territories of the United States, except that "foreign law" does not mean nor shall it include a law **currently established in Alaska statute, Case Law, or** of an Alaska Native or Native American tribe in the state.

New Text Underlined [*DELETED TEXT BRACKETED*]

27-LS0333\D.1
Keller
04/01/2011

Conceptional Amendment

OFFERED IN THE HOUSE
TO: CS HB 88 (STA)

BY: REPRESENTATIVE KELLER

Page2, line 28

(g) In this section, "foreign law" means a law, rule, or legal code or system established and used or applied in a jurisdiction outside of the United States and the territories of the United States. "Foreign law" does not mean nor shall it include a law **currently established in Alaska statute, or Case Law**.

New Text Underlined [*DELETED TEXT BRACKETED*]

COMMITTEE ON JUDICIARY

SENATE AMENDMENTS TO H.B. 2064

(Reference to House engrossed bill)

Strike everything after the enacting clause and insert:

"Section 1. Title 12, Arizona Revised Statutes, is amended by adding chapter 22, to read:

CHAPTER 22

APPLICATION OF FOREIGN LAWS

ARTICLE 1. GENERAL PROVISIONS

12-3101. Definition

IN THIS CHAPTER, UNLESS THE CONTEXT OTHERWISE REQUIRES, "FOREIGN LAW" MEANS ANY LAW, RULE OR LEGAL CODE OR SYSTEM OTHER THAN THE CONSTITUTION, LAWS AND RATIFIED TREATIES OF THE UNITED STATES AND THE TERRITORIES OF THE UNITED STATES, OR THE CONSTITUTION AND LAWS OF THIS STATE.

12-3102. Application

A. THIS CHAPTER APPLIES ONLY TO ACTUAL VIOLATIONS OF THE CONSTITUTIONAL RIGHTS OF A PERSON OR ACTUAL CONFLICT WITH THE LAWS OF THIS STATE CAUSED BY THE APPLICATION OF THE FOREIGN LAW.

B. THIS CHAPTER DOES NOT APPLY TO A CORPORATION, PARTNERSHIP OR OTHER FORM OF BUSINESS ASSOCIATION.

12-3103. Prohibited enforcement of foreign law

A COURT, ARBITRATOR, ADMINISTRATIVE AGENCY OR OTHER ADJUDICATIVE, MEDIATION OR ENFORCEMENT AUTHORITY SHALL NOT ENFORCE A FOREIGN LAW IF DOING SO WOULD VIOLATE A RIGHT GUARANTEED BY THE CONSTITUTION OF THIS STATE OR OF THE UNITED STATES OR CONFLICT WITH THE LAWS OF THE UNITED STATES OR OF THIS STATE.

Sec. 2. Legislative intent

The legislature intends that the public policy of this state is to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right

guaranteed by the constitution of this state or of the United States or conflict with the laws of this state."

Amend title to conform

3/17/11
4:09 PM
S: GK/tf

Alaska State Legislature

SESSION ADDRESS:
Alaska State Capitol
Juneau Alaska 99801
Phone: 907-465-3743
1-800-565-3743
Fax: 907-465-2381

INTERIM ADDRESS:
600 E Railroad Avenue
Wasilla AK 99654
Phone: 907-376-3725
Fax: 907-376-4768

Representative Carl Gatto

Explanation of Changes from CSHB 88 (STA), version I to draft CSHB 88 ( ) version D

March 30, 2011

CSHB 88 (STA) includes language about Alaska Native or American Native tribes.

However, we received information this week from an attorney who specializes in tribal law, Peter Putzier, with the Alaska Department of Law. We agreed with his suggestions for language change as follows:

This language will amend the uncodified law by inserting the following language on Page 1, Section 1:

> "This Act is not intended directly or indirectly to address questions of tribal law or application of such tribal law, or otherwise to address the intersection between state law and tribal law."

The language in CSHB 88 (STA) could be confusing under Section 2, (g)
Delete the following language on Page 2, Section 2, (g) Lines 27-28:

After States, [,EXCEPT THAT "FOREIGN LAW" DOES NOT MEAN NOR SHALL IT INCLUDE A LAW OF AN ALASKA NATIVE OR NATIVE AMERICAN TRIBE IN THE STATE].

Peter Putzier will be available online for questions regarding this CS or tribal laws.

Contact: Karen Sawyer
465-5025

Representative.Carl.Gatto@legis.state.ak.us

HB 114

<TARGET><BILL>HB 114</BILL><SUBJECT>HB 114</SUBJECT><COMM>HJUD27</COMM></TARGET>

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 114**
Fiscal Note Number:
Publish Date:

Identifier (file name): HB114CS(L&C)-LAW-CIV-12-07-11
Title: An Act relating to an opt-out charitable giving program offered by an electronic or telephone cooperative.
Sponsor: Representative(s) Thompson
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Commercial and Fair Business
OMB Component Number: 2717

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 12/07/11 11:00AM
Approved by: John J. Burns, Attorney General — Date: 12/7/2011
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 114

Analysis

This bill proposes amendments to AS 10.25 by adding a new section that will allow an electric or telephone cooperative to engage in an opt-out "round-up" charitable giving program that allows the cooperative to round up customer bills to the next whole dollar amount. Amounts collected must be used for charitable purposes. Currently, all opt-out programs are prohibited under AS 45.45.930. The bill will amend AS 45.45.930 to create an exception for electric and telephone cooperatives organized under AS 10.25 that meet the opt-out criteria contained in the bill. In order to qualify for the exemption, the program must be a "round-up" program, and the cooperative must meet several criteria, including adequate notice of the program, disclosure on every bill that the round-up is voluntary, and an opportunity to ask for a full refund for up to three years.

There is no anticipated fiscal impact to Department of Law.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 114**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB114-DCCED-CBPL-12-14-11
Title: Opt-Out Charitable Giving Program
Sponsor: Representative Thompson
Requester: House Judiciary

Dept. Affected: DCCED
Appropriation: Corp., Business & Professional Lic.
Allocation: Corp., Business & Professional Lic.
OMB Component Number: 2360

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note updates the appropriation/allocation to accurately reflect the division affected.

Prepared by: Don Habeger, Director — Phone: 907-465-2536
Division: Corportations, Business and Professional Licensing — Date/Time: 12/14/11 1:00PM
Approved by: Susan K. Bell, Commissioner — Date: 12/28/2011
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 114
2012 LEGISLATIVE SESSION

Analysis

House Bill 114 gives statutory authority for electric and telephone cooperatives to offer an opt-out charitable giving program to their members, when the program has been approved by a majority of the membership.

DCCED does not anticipate any fiscal impact as a result of the passage of this legislation.

ALASKA STATE LEGISLATURE

Session:
State Capitol Building,
Room 428
Juneau, Alaska 99801-2186
Phone (907) 465-3004
Fax: (907) 465-2070
Toll Free: (877) 465-3004

Interim:
1292 Sadler Way
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

MEMORANDUM

To: Representative Carl Gatto, Chair
House Judiciary Committee

From: Representative Steve Thompson

Date: February 15, 2011

Re: Hearing request for HB114, **"An Act relating to opt-out charitable giving program offered by an electric or telephone cooperative"**

Please consider this memo as a request for the House Judiciary Committee to hear HB 114.

The following documents will be provided via email:

HB114 Sponsor Statement version __
Explanation of Changes from original bill
HB114 Sectional version __
HB114 version ___
HB114 version A
GVEA support document, Jan. 2011
Spreadsheet re: Electrical Cooperatives
Cordova Electric Cooperative letter of support
Homer Electric Association, Inc. letter of support
Molly Brann letter of support

Thank you.

E-Mail: Representative.Steve.Thompson@legis.state.ak.us
Website: www.akrepublicans.org/thompson/

ALASKA STATE LEGISLATURE

Session:
State Capitol Building,
Room 428
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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

Sponsor Statement
HB 114

"An Act relating to an opt-out charitable giving program offered by an electric or telephone cooperative"

House Bill 114 gives statutory authority for electric and telephone cooperatives to offer an opt-out charitable giving program to their members, when the program has been approved by a majority of the membership. More than 250 electric cooperatives across the U.S. have implemented similar successful programs.

House Bill 114 allows the cooperative's members the opportunity to participate in a charitable giving program that will round their monthly bill to the next whole dollar amount, not to exceed 99 cents a month.

Under HB 114, the participating cooperative would clearly have to identify on each monthly billing statement the amount voluntarily added to a member's bill, after rounding to the next whole dollar, and provide instruction on how to opt out of the program, should a member so choose.

The monies collected under HB 114 may only be used for charitable donations and members are given the opportunity to claim a full refund of all amounts they paid under the program for at least the three preceding years.

Based on the collective generosity of cooperative members, charitable donations will add up quickly. Funds will then be disbursed back into the community to benefit qualified organizations and help neighbors in need.

Additionally, HB 114 authorizes electrical cooperatives to provide weatherization and energy efficiency products and services to their members.

E-Mail: Representative.Steve.Thompson@legis.state.ak.us
Website: www.akrepublicans.org/thompson/

ALASKA STATE LEGISLATURE

Session:
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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

Sectional HB 114 version M

"An Act relating to an opt-out charitable giving program offered by an electric or telephone cooperative"

Section 1: AS 10.25.010(a) Authorizes an electric or telephone cooperative to offer a charitable giving program.

Section 2: AS 10.25.020 The powers of an electric cooperative are amended to allow electrical cooperatives to provide weatherization and energy efficiency products and services to their members.

Section 3: AS10.25.237 Adds a new section to statute that describes the framework and requirements for the cooperative's charitable giving program.

Section 4: AS 45.45.930 Clarifies that the this charitable giving program does not conflict with AS 45.45.930.

2/16/11

ALASKA STATE LEGISLATURE

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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

MEMORANDUM

To: House Judiciary Committee

From: Representative Steve Thompson

Date: February 16, 2011

Re: Changes from HB114 version A to L&C version M

The following changes were made to HB114 in the House Labor & Commerce Committee:

Amendment #1: Added section 2 to the bill, which added to the powers of an electric cooperative the ability to allow electrical cooperatives to provide weatherization and energy efficiency products and services to their members.

Amendment #2: Amended the language in proposed AS 10.25.237(b)(3) to put sideboards on what charitable donations the program's proceeds can be used for.

Amendment #3: Corrected sentence structure in proposed section AS 10.25.237.

E-Mail: Representative.Steve.Thompson@legis.state.ak.us
Website: www.akrepublicans.org/thompson/

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSHB114(L&C)**
() Publish Date

Identifier (file name): HB114CS(L&C)-LAW-CIV-02-17-11
Dept. Affected: Law
Title: An Act relating to an opt-out charitable giving program offered by an electric or telephone cooperative
Appropriation: Civil
Allocation: Commercial and Fair Business
Sponsor: Representative(s) Thompson
Requester: (H) L&C
OMB Component Number: 2717

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/17/11 2:30 PM
Approved by: John J. Burns, Attorney General — Date: 2/17/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB114(L&C)

Analysis

This bill proposes amendments to AS 10.25 by adding a new section that will allow an electric or telephone cooperative to engage in an opt-out "round-up" charitable giving program that allows the cooperative to round up customer bills to the next whole dollar amount. Amounts collected must be used for charitable purposes. Currently, all opt-out programs are prohibited under AS 45.45.930. The bill will amend AS 45.45.930 to create an exception for electric and telephone cooperatives organized under AS 10.25 that meet the opt-out criteria contained in the bill. In order to qualify for the exemption, the program must be a "round-up" program, and the cooperative must meet several criteria, including adequate notice of the program, disclosure on every bill that the round-up is voluntary, and an opportunity to ask for a full refund for up to three years.

There is no anticipated fiscal impact to Department of Law.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version
() Publish Date

Identifier (file name) HB114-CCED-DED-02-04-11
Title: Opt-Out Charitable Giving Program
Sponsor: Representative Thompson
Requester: House Labor & Commerce

Dept. Affected: DCCED
Appropriation: Economic Development
Allocation: Economic Development
OMB Component Number: 801

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Crystal Koeneman, Special Assistant — Phone: 465-2503
Division: Commissioner's Office — Date/Time: 2/4/11 8:00PM
Approved by: Susan K. Bell, Commissioner — Date: 2/4/2011
Commerce, Community and Economic Development

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. _____

Analysis

This bill has no fiscal impact to the Department.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB114**
() Publish Date

Identifier (file name): HB114-LAW-CIV-02-04-11
Dept. Affected Law
Title An Act relating to an opt-out charitable giving program offered by an electric or telephone cooperative
Appropriation Civil
Allocation Commercial and Fair Business
Sponsor Representative(s) Thompson
Requester (H) Labor & Commerce
OMB Component Number 2717

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/4/11 2:30 PM
Approved by John J. Burns, Attorney General
Date 2/4/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB114

Analysis

This bill proposes amendments to the statutes related to powers of electric or telephone cooperative by adding a new section for an opt-out charitable giving program.

There is no anticipated fiscal impact to Department of Law.

Jane Pierson

From: Mary Jane Shows
Sent: Tuesday, February 15, 2011 11:58 AM
To: Jane Pierson
Subject: FW: Round up Utilities

From: Molly Brann <brann@alaska.net>
Date: February 14, 2011 7:13:19 PM AKST
To: Katie Koester <Katie_Koester@legis.state.ak.us>
Subject: Round up Utilities

I sent this to Mary Ann Shows email address as listed on Rep Seaton's email, but it came back and said there was no such email address. Maybe they left off the s.

I have property in Oregon. I participate in the Midstate Electric program to "Round-up" my bill each month and the money goes to a variety of social services. Since my bill is often a round number like the $18 a month utilities charge, I receive a discount for prompt payment, that amount is then rounded up and goes to the charities. It is a win-win situation. I don't really notice the change and maybe it comes to $5 a year, but I am sure it adds up when every customer participates. If you have not already researched the other utilities that use this concept, you should check in with Midstate Electric in Oregon. They are actually donating the amount they would be gifting their customers for paying on time. They could be charging a late fee instead. So it is pretty cool for them to support their community this way and it probably saves them money because their customers enjoying paying on time.

Molly Brann
PO Box 1901
Homer, AK 99603

GVEA | 758 Illinois St. | Fairbanks, AK 99701 | (907) 452-1151

Good¢ents at a Glance

January 2011

About the program

Good¢ents, in the sense that it is a round up program, is not new. More than 250 electric cooperatives across the U.S. have implemented similar programs. And they have been wildly successful.

In 2010, GVEA's Member Advisory Committee suggested the co-op initiate a round-up program. The board of directors agreed it would benefit the cooperative and an amendment to the Bylaws allowing such a program was sent out for membership vote in the 2010 elections. This is how it was worded on the ballot:

> **GVEA Bylaw, Section 8. Utility Bill Round-up Program**
> **The Cooperative may establish a program to permit members to round up their bills to the nearest dollar. The monies collected shall be used for charitable purposes in the Cooperative's service area. Members may be automatically included in this program, but may voluntarily choose not to participate in the program by request to the Cooperative.**
>
> Discussion: … "This Section allows GVEA to form a fund to assist community organizations, but members may voluntarily choose not to participate. More than 250 electric co-ops have Operation Round Up programs. Approval of this amendment would make GVEA the first in Alaska with such a community-oriented program."

More than 70 percent of the membership that cast a ballot voted in favor of a round up program.

How the program will work

Good¢ents will round up a monthly electric bill to the next highest dollar. For example, a bill of $97.65 will round up to $98.00 with the additional 35 cents going to the Good¢ents fund. The small change, about 50 cents per bill per month, will add up quickly. The funds will be dispersed to qualified organizations and individuals in need on a quarterly basis by the Good¢ents Board of Trustees. The goal of the program is to help build a stronger community.

RCA Approval

In October, the RCA approved GVEA's amended tariff sheets for Good¢ents. At the same time, they cautioned us that Good¢ents may be in conflict with Alaska Statute 45.45.930, dealing with Opt-out Marketing Plans. Shortly thereafter, we received a letter from Senior Assistant Attorney General, Ed Sniffen, expressing the same concern.

GVEA had two options, hold fast to our attorney's written opinion that Good¢ents was not in conflict with AS 45.45.930, or pursue a legislative fix. We decided the best course of action was a legislative solution.

After meeting with Assistant AG Ed Sniffen and Senator Meyer's chief of staff, Josh Applebee about the situation, both agreed to support our efforts in a legislative solution.

Where we are now

Legislation has been introduced into the 27th Legislative session to formally authorize electric and telephone cooperatives to offer opt-out charitable giving programs. On January 21, 2011, House Bill 114 was introduced by Representative Steve Thompson (R), Fairbanks and co-sponsored by Mark Neuman (R), Big Lake. It was referred to the Labor & Commerce and Judiciary Committees.

HB 114 includes two provisions. The first to Alaska Statute 10.25.237, were it provides authorization for telephone or electric cooperatives to offer an opt-out charitable giving program. The second is an amendment to AS 45.45.930, which provides clarification that AS 45.45.930 does not apply to telephone or electric cooperative opt-out charitable giving programs.

CORDOVA
ELECTRIC
COOPERATIVE, INC
P.O. Box 20, 705 Second Street, Cordova, Alaska 99574-0020 * (907) 424-5555 * Fax (907) 424-5527

February 4, 2011

Alaska State House of Representatives
House Labor and Commerce Committee
Representative Kurt Olsen, Chair

RE: House Bill 114, Opt-out Charitable Giving by Cooperatives

Dear Sirs,

Cordova Electric Cooperative supports adoption of HB 114. One of the core tenants of the Cooperative model is that of democratic membership control. As a private, non-profit corporation solely owned by the rate-paying members of the Cooperative, the members are financially vested as equity owners. Members of a Cooperative have the freedom to adopt charitable giving programs to benefit the sustainable development of their communities either by a direct vote to amend their bylaws, or by a vote of their elected board of directors to adopt a policy. The Laws of the State of Alaska should not intervene.

In the opt-out charitable giving programs, the members are free to participate or decline thus retaining their freedom of choice in the matter. I strongly encourage you to recommend this bill for adoption, recognizing that it allows Cooperatives the freedom to exercise their democratic membership control to adopt either opt-in or opt-out charitable giving programs should they choose to engage in charitable giving programs within their communities.

Sincerely,

Clay R. Koplin
CEO
Cordova Electric Cooperative

Homer Electric Association, Inc.

Corporate Office
3977 Lake Street
Homer, Alaska 99603-7680
Phone (907) 235-8551
FAX (907) 235-3313

Central Peninsula Service Center
280 Airport Way
Kenai, Alaska 99611-5280
Phone (907) 283-5831
FAX (907) 283-7122

February 4, 2011

House Labor and Commerce Committee
Representative Kurt Olson, Chair
Capitol Building, Room 24
Juneau, Alaska 99801

Dear Chair Olson, Vice-Chair Johnson and members of the House Labor and Commerce Committee:

I would like to go on record in support of an amendment to House Bill 114 that would add language to the Electric and Telephone Cooperative Act (Act) allowing electric cooperatives to finance the purchase of weatherization and energy efficiency products and services. Currently, the Act only allows cooperatives to finance the purchase of electrical and plumbing appliances, fixtures and apparatus.

Homer Electric Association, Inc. (HEA) has a Line of Credit program that offers financing to its members for the purchase of products covered under the Act. While this is a popular program, many of our members have inquired about using the Line of Credit program to purchase materials and products that would improve the energy efficiency of their home or business. Unfortunately, due to the limitations specified in the Act, HEA is unable to offer any assistance in the purchase of these types of products.

Homer Electric has worked very hard over the past several years to provide its members with information that will help lower their energy usage and manage their electric bill. Along with regular newsletter articles, web site information and media advertisements, HEA has sponsored Energy and Conservation Fairs to promote energy efficiency products and services. The fairs have attracted nearly 1,000 HEA members annually over the past two years.

As we continue to promote conservation, it makes sense to have energy efficiency and weatherization products included in the Line of Credit program.

We believe that HB 114 is an excellent bill and the proposed amendment will be a valuable addition to this legislation. Thank you for considering our request.

Sincerely,

Bradley P. Janorschke
General Manager

Members as of Dec. 31, 2009	Electric Cooperatives
7,639	Alaska Village Electric Cooperative, Inc. AVEC
1,823	Barrow Utilities & Electric Cooperative, Inc. BUECI
81,047	Chugach Electric Association, Inc. CHUGACH
2,966	Copper Valley Electric Association, Inc. CVEA
1,498	Cordova Electric Cooperative, Inc. CEC
43,547	Golden Valley Electric Association, Inc. GVEA
28,648	Homer Electric Association, Inc. HEA
305	Inn Electric Cooperative, Inc. INNEC
1,284	Inside Passage Electric Cooperative, Inc. IPEC
3,991	Kodiak Electric Association, Inc. KEA
1,289	Kotzebue Electric Association KOTZ
70	Levelock Electric Cooperative
55,567	Matanuska Electric Association, Inc. MEA
190	Middle Kuskokwim Electric Cooperative MKEC
1,113	Naknek Electric Association, Inc. NEA
1,456	Nushagak Cooperative, Inc. NC
108	Tanalian Electric Cooperative TEC
351	Unalakleet Valley Electric Cooperative UVEC
232,892	

209,603	90% Participation Rate (members)
$ 104,801	Avg donation of $.50 per month
$ 1,257,617	Annual amount raised if all electric cooperatives adopted an opt-out charitable giving program

27-LS0424\M.2
Kane
2/24/11

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 114(L&C)

Page 4, lines 13 - 16:

Delete "relief of poverty, distress, or other conditions of general public concern but not for religious organizations, political organizations, organized labor unions, or other labor organizations, or for any political purpose"

Insert "public welfare or charitable, scientific, or educational purposes but not for any political purpose or for the pecuniary profit of any individual or organization or labor organization; in this paragraph, a charitable purpose includes the relief of poverty, distress, or other condition of concern in the state"

HB 116

<TARGET><BILL>HB 116</BILL><SUBJECT>HB 116</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
HOUSE RULES COMMITTEE
REPRESENTATIVE CRAIG JOHNSON, CHAIRMAN
State Capitol Room 216, Juneau, AK 99801-1182 (907) 465-4993, (907) 465-3872 Fax
716 W. 4th Ave., Ste. 640, Anchorage, AK 99501 (907) 269–0200, (907) 269-0204 Fax

MEMORANDUM

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Representative Craig Johnson

DATE: February 9, 2011

SUBJECT: Hearing Request for HB 116, Special Revisor's Bill by House Rules by Request of the Legislative Council

---

I respectfully request a hearing in the House Judiciary Committee for House Bill 116, a special revisor's bill related to criminal law, at your earliest convenience.

I have enclosed a copy of the current version of the bill and a sectional summary.

Gerald Luckhaupt, Assistant Revisor with Legal Services, will be testifying for the bill.

If you have any questions or need additional information, feel free to contact me or my aide, Debra Higgins, at 465-3764.

Thank you for your consideration.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 9, 2011

SUBJECT: Sectional Summary of a Special 2011 Revisor's Bill Relating to a Criminal Law Issue (Work Order No. 27-LS0369\A)

TO: Representative Carl Gatto
Attn: Sarah Munson

FROM: Gerald P. Luckhaupt
Assistant Revisor

This is a sectional summary of a special 2011 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the Legislative Affairs Agency, working in cooperation with the Revisor of Statutes

> shall make recommendations to the legislative council concerning deficiencies, conflicts, or obsolete provisions in and the need for reorganization or revision of the statutes, and, at the direction of the legislative council, shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state. . . .

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

Section 1 of the bill amends AS 11.71.170(b)(11) by correcting a misspelling of the drug "lorazepam." AS 11.71.170(b)(11) was enacted in 1982 and at that time a typographical error was made and "**lorazepa*m***" was spelled incorrectly as "**lorazepa*n***."

Section 2 of the bill provides an applicability provision to clarify that the correction that is being made in sec. 1 is not a substantive change to the law and that it applies generally to all persons who might be affected by AS 11.71.170(b)(11) before, on, or after the effective date of this bill. This provision is included out of an abundance of caution to ensure that former or ongoing criminal prosecutions are not called into question.

Section 3 of the bill provides an immediate effective date.

If you have any questions about the bill or this summary, please contact me at your convenience.

GPL:plm
11-068.plm

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB116**
() Publish Date

Identifier (file name): HB116-LAW-CRIM-02-11-11
Dept. Affected Law
Title An Act making a corrective amendment to Alaska Statutes by correcting the spelling of 'lorazepam.'
Appropriation Criminal
Allocation Criminal Justice Litigation
Sponsor Rules by Request of Legislative Council
Requester (H) Judiciary
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/11/11 4:45 PM
Approved by John J. Burns, Attorney General
Department of Law
Date 2/11/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 116

Analysis

HB 116 corrects the spelling of a Schedule IVA controlled substance. Currently AS 11.71.170(b) incorrectly spells the substance "lorazepam" as "lorazepan". The bill corrects the spelling.

There is zero fiscal impact to the Department of Law from this bill.

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

February 11, 2011

Representative Carl Gatto, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: HB 116 - 2011 Revisor's Bill on the correct spelling of Lorazepam

Dear Representative Gatto:

The Department of Law has reviewed HB 116, the 2011 revisor's bill on the correct spelling of Lorazepam.

The bill presents no legal issues and makes important technical improvements to the law.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

DEB:ajh

cc: Jerry Luckhaupt, Assistant Revisor of Statutes
Heather Brakes, Legislative Director, Office of the Governor
Mike Ford, Assistant Attorney General
Anne Carpeneti, Assistant Attorney General

HB

124

<TARGET><BILL>HB 124</BILL><SUBJECT>HB 124</SUBJECT><COMM>HJUD27</COMM></TARGET>

Similar to HB 124

CS FOR HOUSE BILL NO. 168(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/5/11
Referred: Rules

Sponsor(s): REPRESENTATIVES FEIGE, Chenault, Johnson, Thomas, Tammie Wilson, Fairclough, Keller, Thompson, Costello, Millett, Hawker, Lynn, Olson, Saddler, Dick

A BILL

FOR AN ACT ENTITLED

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

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

*** Section 1.** AS 09.40.230 is amended by adding new subsections to read:

(b) A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

In this subsection, "industrial operation" includes a construction, energy, or timber activity and oil, gas, and mineral exploration, development, and production.

(c) The existence of security under (b) of this section does not

(1) prohibit a person who is wrongly enjoined or restrained from obtaining relief that may be available to that person; or

(2) limit the amount that a party may recover in the action.

Alaska Legislature
Representative Charisse Millett

Session:
State Capitol Building, Room 13
Juneau, AK 99801
Phone (907) 465-3879
Fax (907) 465-2069

Interim:
Anchorage LIO
716 W 4th Ave., Room 630
Anchorage, AK 99501
Phone (907) 269-0222
Fax (907) 269-0223

MEMORANDUM

received
02/28/11 9:55am SM

To: Rep. Carl Gatto, House Judiciary Committee

From: Rep. Charisse Millett Charisse Millett
Subject: Scheduling request for HB 124
Date: Saturday, February 26, 2011

I respectfully request a hearing before the House Judiciary Committee on House Bill 124 at your earliest convenience.

Jeff Turner is the staffer assigned to this legislation and he can be reached at (907) 465-6588.

###

Alaska Legislature
Representative Charisse Millett

Session:
State Capitol Building, Room 13
Juneau, AK 99801
Phone (907) 465-3879
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Interim:
Anchorage LIO
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District 30

Invited Testimony for HB 124

Steve Borell, Alaska Miners Association

Ethan Schutt, CIRI

Alaska Legislature
Representative Charisse Millett

Session:
State Capitol Building, Room 13
Juneau, AK 99801
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District 30

Version: 27-LS0426\A

Sponsor Statement - House Bill 124

"An Act requiring a person who commences a cause of action seeking to delay a project on state or private land to provide security equal to 10 percent of the value of the project to protect a person who is wrongfully delayed."

Natural resource development is the foundation that Alaska's economy rests on. For as long as Alaska has been a state, developers of all types have fought legal action seeking to wrongfully delay or stop an environmentally responsible and beneficial project from happening.

House Bill 124 makes a direct, simple and significant change to state statutes to protect project developers. If passed, anyone seeking to delay a project on state or private land, including land owned by a subdivision of the state, will be required to post a bond or letter of credit equal to ten percent of the value of the project. The bond or letter of credit must be issued by a financial institution based in the United States.

This will cover damages and reasonable attorney fees incurred by the individual; group or business financially harmed by the restraining order or preliminary injunction.

HB 124 has been referred to the House Judiciary Committee. I encourage all my colleagues to endorse this legislation.

Prepared by Jeff Turner, Staff for Rep. Millett on February 16, 2011

HB 127

<TARGET><BILL>HB 127</BILL><SUBJECT>HB 127</SUBJECT><COMM>HJUD27</COMM></TARGET>

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste. 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

January 27, 2011

The Honorable Carl Gatto, Chair
House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, Alaska 99801

Re: House Bill 127 -- relating to stalking and child exploitation

Dear Representative Gatto:

I am writing to request that you schedule House Bill 127 for a hearing in the House Judiciary Committee at your earliest convenience. HB 127 is a bill that builds on and refines legislation adopted by the legislature in the past several years to address the serious problems of sexual exploitation and domestic violence.

The bill expands the crime of stalking to prohibit placing a person in fear of death or physical injury using technology such as global position devices or devices that invade, record or photograph events in private places like the home or office. It also addresses the issue of young people sending explicit images of themselves to others in a way that seeks to protect the young person.

A sectional analysis is attached that describes each provision of the bill. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and Sue Stancliff, Legislative Liaison from the Department of Public Safety to testify regarding this legislation. No teleconference sites are expected. Thank you for your consideration of this request.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By:
Richard Svobodny
Deputy Attorney General

HB127 CRIMES INVOLVING MINORS/STALKING/INFO
Witness List

In person:
Valerie Robinson (Department of Law)
Sue Stancliff (Department of Public Safety)
Annie Carpeneti (Department of Law)
Sgt. Derek DeGraaf (Alaska State Troopers)

STATE CAPITOL
PO Box 110001
Juneau, Alaska 99811-0001
907-465-3500
fax: 907-465-3532

550 West 7th Avenue #1700
Anchorage, Alaska 99501
907-269-7450
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www.Gov.Alaska.Gov
Governor@Alaska.Gov

Governor Sean Parnell
STATE OF ALASKA

January 24, 2011

The Honorable Mike Chenault
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Chenault,

Together, we can better protect Alaska's children against abuse, exploitation, harm, and fear. To that end, and under the authority of Article III, Section 18, of the Alaska Constitution, I am transmitting a bill relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information and probation.

The bill would strengthen Alaska laws related to sexual exploitation of children and domestic violence. The bill prohibits the creation of indecent images of children, online enticement of a child, and using a computer to solicit or entice a minor to engage in sexual behavior.

The bill would expand the crime of stalking to include those acts of following or monitoring the victim with a global positioning device, and using or installing a device to record or photograph events in the victim's home, workplace, vehicle, or on the victim's telephone or computer. These changes are in response to technologies that stalkers have available to terrorize victims.

Also, the bill would prohibit graphic texting, commonly known as "sexting." Perpetrators would be punished for distributing a sexually explicit image of a child under 16 years old.

The bill clarifies that conduct by predators outside the state that harm victims in Alaska may be prosecuted in this state. The bill also clarifies that a child under 16 years old may not be left with an individual who must register as a child kidnapper.

Finally, the bill would clarify that a court may order active supervision for probationers who are on felony probation. Active supervision in particular cases enhances public safety by requiring close supervision of certain offenders. Active supervision could also be provided to certain misdemeanants in the discretion of the commissioner of corrections.

I urge your prompt and favorable action on this measure.

Sincerely,

Sean Parnell
Governor

Enclosure

HB 127
STALKING AND EXPLOITATION OF A MINOR
Sectional Analysis

Sections 1 and 2 expand the crime of stalking by amending the definition of "nonconsensual contact". Stalking prohibits a person from engaging in a course of conduct that places another in fear of death or physical injury. "Course of conduct" is defined as repeated acts of nonconsensual conduct. The bill adds two ways that a defendant may contact a victim that is beyond the victim's consent. First, it includes following or monitoring the victim with a global positioning device. Second, it includes installing or attempting to install a device for observing, recording, or photographing events in the home, workplace, or vehicle of the victim, or on the victim's personal telephone or computer.

Section 3 raises the classification of the crime of online enticement of a minor for a person who is not required to register as a sex offender or child kidnapper from a class C felony (maximum term of imprisonment five years) to a class B felony (maximum term of imprisonment 10 years).

Section 4 raises the classification of the crime of online enticement of a minor for a person who is required to register as a sex offender or child kidnapper from a class B felony (maximum term of imprisonment 10 years) to a class A felony (maximum term of imprisonment 20 years).

Section 5 raises the classification of the crime of unlawful exploitation of a minor from a class B felony (maximum term of imprisonment 10 years) to a class A felony (maximum term of imprisonment 20 years).

Section 6 amends the crime of endangering the welfare of a child in the first degree by prohibiting a parent or guardian from leaving a child under 16 years of age with a person who is required to register as a child kidnapper. The law currently prohibits this conduct if the parent or guardian leaves a child with a person required to register as a sex offender.

Section 7 adopts a new crime – sending an explicit image of a minor. It would prohibit publishing or distributing an image of a minor's genitals, anus, or female breast if the minor is under 16 years of age and the publication or distribution was without the consent of the parent or guardian of the minor. The conduct would not apply to a minor under 16 years of age who publishes or distributes the minor's own image. The prohibited conduct would be a class B misdemeanor (maximum term of imprisonment 90 days) if the person publishes the image to one or two others; a class A misdemeanor (maximum term of imprisonment one year) if the person publishes the image to three or more others; and a

class C felony (maximum term of imprisonment five years) if the person publishes the image on the Internet.

Section 8 makes a conforming amendment to AS 11.61.120(a)(6), harassment in the second degree, to make it clear that the new crimes of sending an explicit image of a minor in **Section 7** are not included in the crime of harassment in the second degree.

Section 9 makes two amendments to the crime of distribution of indecent material to minors; first, to clarify that the person must know that the material distributed depicts the prohibited conduct; and second to clarify that if the minor to whom the material is sent is under 16 years of age, the defendant must be reckless as to that circumstance.

Section 10 adopts two new crimes – misconduct involving confidential information in the first and second degrees. The second degree offense prohibits a person from obtaining the confidential information about another person without legal authority or consent to do so. This conduct would be a class B misdemeanor (maximum term of imprisonment 90 days).

Misconduct involving confidential information in the first degree would prohibit a person from violating the second degree prohibition *and* using the confidential information to commit a crime or to obtain a benefit to which a person is not entitled, or injure or deprive another person of a benefit. This conduct would be a class A misdemeanor (maximum term of imprisonment one year).

Section 11 clarifies that a person may be prosecuted for online enticement of a minor and for sending an explicit image of a minor if the minor whose image is published, or with whom the person communicated, was in this state, even if the defendant was in another jurisdiction at the time he or she committed the prohibited acts.

Section 12 amends AS 12.55.125(i) (terms of imprisonment for persons who commit sex offenses) by conforming the terms of imprisonment for persons who commit unlawful exploitation of a minor or online enticement of a minor to the correct level in accord with the changes in **Sections 3 – 5** of the bill.

Section 13 clarifies the law by stating that while the Commissioner of Corrections provides probation officers to the superior court for the active supervision of person on probation for felony offenses, the Commissioner may, at his or her discretion, also provide probation officers for the active supervision of persons released for misdemeanor offenses.

Sections 14 and 15 include the applicability and effective date provisions.

HB 127
STALKING AND EXPLOITATION OF A MINOR
Sectional Analysis (Revised)

Sections 1 and 2 expand the crime of stalking by amending the definition of "nonconsensual contact". Stalking prohibits a person from engaging in a course of conduct that places another in fear of death or physical injury. "Course of conduct" is defined as repeated acts of nonconsensual conduct. The bill adds two ways that a defendant may contact a victim that is beyond the victim's consent. First, it includes following or monitoring the victim with a global positioning device. Second, it includes installing or attempting to install a device for observing, recording, or photographing events in the home, workplace, or vehicle of the victim, or on the victim's personal telephone or computer.

Section 3 raises the classification of the crime of online enticement of a minor for a person who is not required to register as a sex offender or child kidnapper from a class C felony to a class B felony. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of zero to two years for a first offense (maximum term of five years) to a range of five to 15 years for a first offense (maximum term of 99 years). Also refer to section 12 of this analysis.

Section 4 raises the classification of the crime of online enticement of a minor for a person who is required to register as a sex offender or child kidnapper from a class B felony to a class A felony. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of one to three years (maximum term of 10 years) to a range of 15 to 30 years for a first offense (maximum term of 99 years). Also refer to section 12 of this analysis.

Section 5 raises the classification of the crime of unlawful exploitation of a minor from a class B felony to a class A felony for all offenders. Under current law the offense is a class A felony if the person has previously been convicted of unlawful exploitation of a minor, and it is a class B felony for other offenders. This change, in addition to the amendments to AS 12.55.125(i) in the bill, would be to raise the penalty from a range of two to 12 years or five to 15 years (depending on whether it is a first or second offense) to a range of 15 to 30 years for a first offense. Also refer to section 12 of this analysis.

Section 6 amends the crime of endangering the welfare of a child in the first degree by prohibiting a parent or guardian from leaving a child under 16 years of age with a person who is required to register as a child kidnapper. The law currently prohibits this conduct if the parent or guardian leaves a child with a person required to register as a sex offender.

Section 7 adopts a new crime – sending an explicit image of a minor. It would prohibit publishing or distributing an image of a minor's genitals, anus, or female breast if the minor is under 16 years of age and the publication or distribution was without the consent of the parent or guardian of the minor. The conduct would not apply to a minor under 16 years of age who publishes or distributes the minor's own image. The prohibited conduct would be a class B misdemeanor (maximum term of imprisonment 90 days) if the person publishes the image to one or two others; a class A misdemeanor (maximum term of imprisonment one year) if the person publishes the image to three or more others; and a class C felony (maximum term of imprisonment five years) if the person publishes the image on the Internet.

Section 8 makes a conforming amendment to AS 11.61.120(a)(6), harassment in the second degree, to make it clear that the new crimes of sending an explicit image of a minor in **Section 7** are not included in the crime of harassment in the second degree.

Section 9 makes two amendments to the crime of distribution of indecent material to minors; first, to clarify that the person must know that the material distributed depicts the prohibited conduct; and second to clarify that if the minor to whom the material is sent is under 16 years of age, the defendant must be reckless as to that circumstance.

Section 10 adopts two new crimes – misconduct involving confidential information in the first and second degrees. The second degree offense prohibits a person from obtaining the confidential information about another person without legal authority or consent to do so. This conduct would be a class B misdemeanor (maximum term of imprisonment 90 days).

Misconduct involving confidential information in the first degree would prohibit a person from violating the second degree prohibition *and* using the confidential information to commit a crime or to obtain a benefit to which a person is not entitled, or injure or deprive another person of a benefit. This conduct would be a class A misdemeanor (maximum term of imprisonment one year).

Section 11 clarifies that a person may be prosecuted for online enticement of a minor and for sending an explicit image of a minor if the minor whose image is published, or with whom the person communicated, was in this state, even if the defendant was in another jurisdiction at the time he or she committed the prohibited acts.

Section 12 amends AS 12.55.125(i) (terms of imprisonment for persons who commit sex offenses) by conforming the terms of imprisonment for persons who commit unlawful exploitation of a minor or online enticement of a minor to the correct level in accord with the changes in **Sections 3 – 5** of the bill.

Section 13 clarifies the law by stating that while the Commissioner of Corrections provides probation officers to the superior court for the active supervision of person on probation for felony offenses, the Commissioner may, at his or her discretion, also provide probation officers for the active supervision of persons released for misdemeanor offenses.

Sections 14 and 15 include the applicability and effective date provisions.

Sec. 11.41.270. Stalking in the second degree.

(a) A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member.

(b) In this section,

(1) "course of conduct" means repeated acts of nonconsensual contact involving the victim or a family member;

(2) "family member" means a

(A) spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the victim, whether related by blood, marriage, or adoption;

(B) person who lives, or has previously lived, in a spousal relationship with the victim;

(C) person who lives in the same household as the victim; or

(D) person who is a former spouse of the victim or is or has been in a dating, courtship, or engagement relationship with the victim;

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(4) "victim" means a person who is the target of a course of conduct.

(c) Stalking in the second degree is a class A misdemeanor.

History -

(Sec. 1 ch 40 SLA 1993)

History Reports -

For Senate letter of intent in connection with the enactment of this section, see 1993 Senate Journal 1026 - 1027.

Decisions -

Constitutionality. - The potential due process and overbreadth problems in the definition of stalking do not require invalidation of the stalking statutes; rather, those problems should be resolved on a case-by-case basis. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Sufficiency of evidence. - Grand jury evidence was sufficient for indictment for first-degree stalking, under AS 11.41.260, where there was a protective order in place against defendant who nevertheless made ongoing contact with victim, including numerous hang-up calls to the victim and victim's boyfriend, paging the victim when she attended one of her boyfriend's musical performances, and slashing tires on her and her boyfriend's cars. Kenison v. State, 107 P.3d 335 (Alaska Ct. App. 2005).

Construction of "contact". - Inclusion within AS 18.66.100(c)(2) of the phrase "or otherwise communicating" immediately after "contacting" strongly suggests that nonphysical contact must involve

some element of direct or indirect communication and does not merely mean coming within view; further, "nonconsensual contact" in this section is not all that is needed for a crime to take place; the contact must also be "repeated," so that it is a course of conduct, and it must place the protected person in fear, and the need for these additional requirements to make stalking a crime argues against a construction that makes merely appearing in the sight of a protected person, without more, a crime. Cooper v. Cooper, 144 P.3d 451 (Alaska 2006).

Stalking of ex-wife as domestic violence. - Ex-husband's threatening communications to his ex-wife constituted stalking; these acts by the ex-husband were sufficient support for the issuance of a protective order under AS 18.66.990(3)(A) because stalking in the second degree is a crime involving domestic violence when committed against a former spouse. McComas v. Kirn, 105 P.3d 1130 (Alaska 2005).

Legitimate nonconsensual contacts and telephone calls not prohibited. - The stalking statutes do not prohibit telephone calls or other nonconsensual contact made for a legitimate purpose, even when the defendant knows that the person contacted may or will unreasonably perceive the contact as threatening. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Husband admitted to having been at a mall at a time when his wife, who had sought a protective order against the husband, was also there, but he denied having seen his wife. Only knowing contact was required, but the superior court's error was harmless in holding that contact must be intentional because there was no conduct that amounted to"contacting" within the meaning of AS 18.66.100(c)(2); being in the mere presence of the husband's wife did not mean the husband was "contacting" his wife; the meaning of "contacting" had a normal meaning, and a nonphysical "contact" did not mean merely coming within view. Cooper v. Cooper, 144 P.3d 451 (Alaska 2006).

Stated in Cook v. State, 36 P.3d 710 (Alaska Ct. App. 2001).

Cited in Prentzel v. State, 169 P.3d 573 (Alaska 2007).

Sec. 11.41.452. Online enticement of a minor.

(a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455(a)(1) - (7) and

(1) the other person is a child under 16 years of age; or

(2) the person believes that the other person is a child under 16 years of age.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the person enticed, solicited, or encouraged was not actually a child under 16 years of age.

(c) In a prosecution under this section, it is not necessary for the prosecution to show that the act described in AS 11.41.455(a)(1) - (7) was actually committed.

(d) Except as provided in (e) of this section, online enticement is a class C felony.

(e) Online enticement is a class B felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

History -
(Sec. 1 ch 97 SLA 2005)
Effective Date Notes -

Section 1, ch. 97, SLA 2005, which enacted this section, took effect on November 28, 2005.

Editors Notes -

Section 5, ch. 96, SLA 2005, provides that this section applies "to offenses occurring on or after November 28, 2005."

Sec. 11.41.455. Unlawful exploitation of a minor.

(a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality;

(6) the lewd exhibition of the child's genitals; or

(7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct.

(c) Unlawful exploitation of a minor is a

(1) class B felony; or

(2) class A felony if the person has been previously convicted of unlawful exploitation of a minor in this jurisdiction or a similar crime in this or another jurisdiction.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc.

History -

(Sec. 3 ch 166 SLA 1978; am Sec. 1 ch 57 SLA 1983; am Sec. 1 - 3, ch 161 SLA 1990; am Sec. 8 ch 79 SLA 1992; am Sec. 1, 2 ch 65 SLA 2000; am Sec. 1 ch 131 SLA 2004)

Cross References -

For crime of distribution of child pornography, see AS 11.61.125.

Amendment Notes -

The 2000 amendment, effective May 23, 2000, inserted ", video, electronic, or electromagnetic" and "or aurally" in subsections (a) and (b) and deleted "printed" preceding "material" near the end of subsection (b).

The 2004 amendment, effective September 27, 2004, added paragraph (c)(2) and made related changes.

Decisions -

"Live performance". - This section covers private, noncommercial live performances; however, "live performance" does not include the situation in which a single adult requests a child to display his or her genitals to that adult in private. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Statutory construction. - Defendant's interpretation of this section under the rule of lenity, alleging that it was absurd that he was permitted to have sex with someone between the ages of 16 and 18, yet he was prohibited from photographing someone between those ages, was not persuasive; the relevant provisions simply refer to a child under 18 years of age, and do not distinguish between child

pornography produced or possessed for private purposes and that intended for distribution. State v. Parker, 147 P.3d 690 (Alaska 2006).

AS 11.61.127(a) forbids the possession of pornographic material that is generated by the conduct prohibited by AS 11.41.455(a), pornography that was generated by the use of a child under the age of 18; the government had to prove that defendant knew that this child pornography was in their possession and that defendant acted knowingly with respect to the circumstance that the pornography was generated illegally. Ferrick v. State, 217 P.3d 418 (Alaska Ct. App. 2009).

Joinder of offenses. - Where defendant was charged with sexual abuse of a minor, unlawful exploitation of a minor, distribution of child pornography, and possession of child pornography stemming from his sexual involvement with his girlfriend's minor daughter, the trial court did not err in denying defendant's motion to sever the sexual abuse charges from the pornography charges because all charges stemmed from defendant's inappropriate relationship with the young girl and were connected. Ogletree v. State, - P.3d - (Alaska Ct. App. Aug. 19, 2009).

Solicitation of crime. - Where defendant was charged with soliciting the crime of unlawful exploitation of a minor based on his asking victims to take off their clothes and let him photograph them, defendant's argument that he did not "solicit" the crime because the victims could not be guilty of the intended crime was foreclosed by the provision of AS 11.31.110 that it is no defense that the person solicited could not be guilty of the crime that is the object of the solicitation. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Defendant's convictions for soliciting the crime of unlawful exploitation of a minor which were based on his asking victims to take off their clothes and let him photograph them were erroneous since defendant did not ask anyone else to engage in the prohibited conduct, i.e., inducing a child to engage in one of the sexual activities prohibited by this section, and thus he did not commit the crime of solicitation. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Aggravating factors. - Where the superior court found an aggravating factor at the defendant's original sentencing, he faced a sentence more severe than the four-year presumptive term for second felony offenders at the time of his sentencing for exploitation of a minor. Harris v. State, 980 P.2d 482 (Alaska Ct. App. 1999).

Conviction and sentence upheld. - See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Withdrawal of plea bargain denied. - Where defendant pleaded no contest to three felonies as part of a plea bargain, his decision to plead no contest was not materially influenced by his mistaken understanding concerning the consequences of winning a suppression motion; trial court did not err in denying defendant's motion to withdraw his plea. Parker v. State, 90 P.3d 194 (Alaska Ct. App. 2004).

"Least serious" mitigator held inapplicable. - Defendant's alleged lack of intent to distribute pornographic photographs and videos of children, purportedly evidenced by his concealment of them in a locked briefcase in a closet in his house, even if proven by clear and convincing evidence, did not mandate a "least serious" mitigator. State v. Parker, 147 P.3d 690 (Alaska 2006).

Applied in Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982); Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990); Parker v. State, 151 P.3d 478 (Alaska Ct. App. 2006).

Cited in Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988); Scroggins v. State, 951 P.2d 442 (Alaska Ct. App. 1998); Labrake v. State, 152 P.3d 474 (Alaska Ct. App. 2007).

Sec. 33.05.020. Duties of commissioner.

(a) The commissioner shall appoint and make available to the superior court, where necessary, qualified probation officers and assistants.

(b) The commissioner shall fix probation officers' and assistants' salaries, assign them to the various judicial districts, and shall provide for their necessary expenses including clerical services and travel. The commissioner may assign to all probation officers and personnel any duties concerning the administration of the parole system as provided in AS 33.16.

(c) The commissioner shall by regulation

(1) establish standards for calibration, certification, maintenance, and monitoring of ignition interlock devices required as a condition of probation or as part of a sentence under AS 12.55.102 or another statute; and

(2) establish a fee to be paid by the manufacturer for the cost of certifying an ignition interlock device.

(d) The regulations in (c) of this section must require that the ignition interlock device operate reliably over the range of automobile environments, otherwise known as automobile manufacturing standards, for the geographic area for which the device is certified.

(e) The commissioner shall notify the manufacturer of the ignition interlock device when the device is certified. The commissioner may not certify an ignition interlock device unless the device prominently displays a label warning that a person circumventing or tampering with the device violates AS 11.76.140 and may be imprisoned and fined.

History -

(Sec. 2 ch 105 SLA 1960; am Sec. 8 ch 57 SLA 1989; am Sec. 10, 11 ch 85 SLA 2010)

Amendment Notes -

The 2010 amendment, effective September 14, 2010, in (c), substituted "as a condition of probation or as part of a sentence under AS 12.55.102 or another statute;" for "as a condition of probation under AS 12.55.102"; in (e), substituted "violates AS 11.76.140 and may be imprisoned and fined" for "in violation of AS 11.76.140 may be imprisoned up to 30 days and fined up to $500".

Decisions -

Probation officers executive officers. The constitution does not assign probation officers to the exclusive jurisdiction of either the executive or the judicial branch of government, such that placing probation officers in the executive branch does not violate the separation of powers doctrine. Smith v. State, Dep't of Cors., 872 P.2d 1218 (Alaska 1994).

Judicial supervision of probation held proper. - Nothing in this section prohibits a trial judge from imposing, on a juvenile defendant who has violated AS 04.16.050, a requirement for defendant to report back to the judge every other week to provide updates on the status of the probation. Jackson v. State, 127 P.3d 835 (Alaska Ct. App. 2006).

Applied in Granato v. Occhipinti, 602 P.2d 442 (Alaska 1979).

Quoted in State v. Alaska Pub. Employees Ass'n, 644 P.2d 236 (Alaska 1982).

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account in the exploitation of children.

(a) In an investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128 and on reasonable cause to believe that an Internet service account has been used in the exploitation or attempted exploitation of children, the attorney general may issue in writing and cause to be served a subpoena requiring the production and testimony described in (b) of this section.

(b) A person receiving a subpoena under (a) of this section shall disclose, for the account that is the subject of the subpoena,

(1) the name of the person holding the account;

(2) the address and physical location associated with the account; and

(3) length of service, including service start date, and types of service used by the account.

(c) At any time before the return date specified on the subpoena, the subpoenaed person may petition a court of competent jurisdiction for the judicial district in which the person resides or does business for an order modifying or setting aside the subpoena or for an order sealing the court record.

(d) A subpoena under this section must describe the objects required to be produced and must prescribe a return date with a reasonable period of time within which the objects must be assembled and produced.

(e) If no case or proceeding arises from the production of records or other documents under this section within a reasonable time after those records or documents are produced, the attorney general shall either destroy the records and documents or return them to the person who produced them.

(f) A subpoena issued under this section may be served as provided for service of subpoenas under Rule 45, Alaska Rules of Civil Procedure, or for service of process under Rule 4, Alaska Rules of Civil Procedure.

(g) Except as provided in this section, any information, records, or data reported or obtained under a subpoena under this section shall remain confidential and may not be disclosed unless the disclosure occurs in connection with a criminal case related to the subpoenaed materials.

History -

(Sec. 19 ch 18 SLA 2010)

Effective Date Notes -

Section 22, ch. 18, SLA 2010, makes this section effective July 1, 2010.

Editors Notes -

Section 21(b), ch. 18, SLA 2010, provides that the 2010 enactment of this section applies to offenses committed before, on, or after July 1, 2010.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: **2**
Bill Version: **HB 127**
(H) Publish Date: **1/26/11**

Identifier (file name): 1840-LAW-CRIM-01-11-11
Dept. Affected: Law
Title: An act relating to crimes of stalking, online enticement, and exploitation of a minor, harassment, distribution of indecent material to a minor, and misconduct.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2203

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Dave Blaisdell, Director — Phone: 465-3673
Division: Administrative Services — Date/Time: 1/11/11 12:00 AM
Approved by: John J. Burns, Attorney General — Date: 1/11/2011
Department of Law

(Revised 12/29/2010 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

This bill amends the law relating to stalking by adding to the definition of nonconsensual conduct methods of contacting people with modern technology such as global positioning systems. It makes a clarifying amendment to AS 11.51.100, which prohibits endangering the welfare of a minor. It adopts new statutes to prohibit sending an explicit image of a minor and misconduct involving confidential information. It also increases the penalties for the crimes of online enticement of a minor and unlawful exploitation of a minor. The bill makes it clear that the commissioner of corrections may, in his or her discretion, provide supervised probation to a person on probation for conviction of a misdemeanor.

Although the bill would adopt new crimes we believe that they can be prosecuted with current resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 127
(H) Publish Date: 1/26/11

Identifier (file name): LL1840-DPS-DET-01-12-11
Dept. Affected: Public Safety
Title: "An Act relating to the crimes of stalking, online enticement... of a minor, related offenses, and misconduct..."
Appropriation: Alaska State Troopers
Allocation: AST Detachments
Sponsor: Rules Committee
Requester: Governor
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Not applicable, initial version.

Prepared by: Lt. Rodney Dial
Phone: 907-247-4480
Division: Alaska State Troopers
Date/Time: 1/24/11 2:20 PM
Approved by: Joseph Masters, Commissioner
Department of Public Safety
Date: 1/12/2011

(Revised 12/29/2010 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

This bill expands the crime of stalking by adding to the definition of nonconsensual contact, monitoring the victim with a GPS device and using or installing a device to record or photograph events concerning the victim. It also increases penalties for unlawful exploitation of a minor, online enticement of a minor, and provides for the prosecution of offenders from out of state. Finally, this bill adopts new offenses to include: sending explicit images of a minor, and misconduct involving confidential information.

Passage of this legislation will have no fiscal impact on the department.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 127
(H) Publish Date: 1/26/11

1840-DOA-PDA-1-12-11
Title: An Act relating to the crimes of stalking, online enticement ...
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	***		***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL							

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Quinlan Steiner, Director — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 1/12/11 2:45 PM
Approved by: John Cramer, Deputy Commissioner — Date: _____
Department of Administration

(Revised 12/29/2010 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

This bill expands the definition of "nonconsensual contact" under stalking; creates a new crime for sending an explicit image of a minor without the consent of the minor's parent; and creates new crimes for obtaining confidential information of another person.

The bill also provides for the prosecution of an out of state individual for online enticement of a minor if the communications involve an individual in the State of Alaska. Finally, the bill specifically permits the Department of Corrections to provide active supervision to a person placed on probation for a misdemeanor offense.

Expanding the definition of nonconsensual contact, creating additional crimes, and providing for supervised misdemeanor probation will likely result in an increase in cases assigned to the Public Defender Agency. It is not possible to reliably predict the number of cases that will be assigned to the Agency, however. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HB 127
(H) Publish Date: 1/26/11

Identifier (file name): 1840-DOC-OC-01-20-11
Title: "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering..."
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Part-time	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Temporary	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Why this fiscal note differs from previous version

This is the first version of the bill

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: DOC Admin. Services — Date/Time: 01/25/11 1:00 p.m.
Approved by: Joe Schmidt, Commissioner — Date: 1/25/2011
DOC

(Revised 12/29/2010 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 127

Analysis

DOC averages two new incarcerations per year for the crime of enticement of a minor. This bill would increase the penalty for this crime from a Class C felony to a Class B felony. This change has the potential to increase mandays by 10,220 in FY12 thru FY17. Applying the current cost of care ($134.21 per day), the increase of cost could be in the range of $0.0 to $1,371.60 to DOC.

DOC averages two incarcerations per year for the crime of online enticement of a minor. This bill increases the penalty for this crime from a Class B felony to a Class A felony if the defendant was, at the time of the offense, a registered or required to register as a sex offender or child kidnapper. This would increase the penalty three years. Applying the current daily cost of care ($134.21 per day), this could potentially increase costs in the range of $0.0 to $734.80 to DOC.

DOC averages one new incarceration per year for the crime of unlawful exploitation of a minor. This bill would increase the penalty for this crime from a Class B felony to a Class A felony. This would increase the penalty three years. This has the potential to increase mandays by 5,475 beginning in FY12 thru FY17. Applying the current daily cost of care ($134.21 per day) could potentially add costs in the range of $0.0 to $734.80 to DOC.

Other provisions that the department is unable to quantify at this time but will closely monitor for potential fiscal impact are as follows:

- Adding Monitoring a Person with a Global Positioning Device or Similar Technology Means
- Adding Child Kidnapper to 2(A) under AS12.63
- Adding Sending and Explicit Image of a Minor in the Degree and Second Degree to Statute
- Adding Crimes Involving Minors Committed Out of State, Specifically Online Enticement to Statute
- Adding Online Enticement of a Minor to Statute

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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JUNE PINNELL-STEPHENS, Fairbanks
NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

February 4, 2011

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

Re: House Bill 127
ACLU Review of Constitutional Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony with respect to House Bill 127.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that respect, we wish to advise you of constitutional issues with the Bill.

As you may know, the ACLU of Alaska Foundation is currently representing several Alaska bookstores and others in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns*. The federal court has already granted a preliminary injunction, on First Amendment grounds, against AS 11.61.128(a).

Section 9 of H.B. 127 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipients age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a) which was enjoined October 21, but even with these changes the law would still violate the First Amendment and the Commerce Clause of the US Constitution. We welcome the opportunity to work with the Attorney General and this Committee to amend Section 9 to make it constitutionally sound. We believe that modest changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our thoughts.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
Representative Max Gruenberg, Representative_Max_Gruenberg@legis.state.ak.us
Representative Lindsey Holmes, Representative_Lindsey_Holmes@legis.state.ak.us
Representative Mike Chenault, Representative_Mike_Chenault@legis.state.ak.us

MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

February 4, 2011

The Honorable Carl Gatto, Chair
Representative Thompson, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
Juneau, AK 99801

Delivered by email

Re: Section 9 of House Bill 127

Dear Chairman Gatto and Vice-Chair Thompson,

The members of Media Coalition have asked me to communicate their concerns regarding H.B. 127 sec. 9. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Alaska: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. Some of our members are plaintiffs in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns* (preliminary injunction granted as *ABFFE v. Sullivan*) a First Amendment challenge to 11.61.128(a).

Section 9 of H.B. 127 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipients age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a) which was enjoined October 21, but even with these changes the law would still violate the First Amendment and the Commerce Clause of the US Constitution. We welcome the opportunity to work with the Attorney General and this Committee to amend Section 9 to make it constitutionally sound. We believe that modest changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them.

We appreciate the chance to share our concerns with the Judiciary Committee. If you

Executive Director: David Horowitz Chair: Judith Platt, Association of American Publishers
Immediate past Chair: Chris Finan, American Booksellers Foundation for Free Expression Treasurer: Vans Stevenson, Motion Picture Association of America
General Counsel: Michael A. Bamberger, SNR Denton US LLP

19 Fulton Street, Suite 407 | New York, NY 10038 | 212.587.4025 | mediacoalition.org

would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

cc: Representative Keller
Representative Lynn
Representative Pruitt
Representative Gruenberg
Representative Holmes
Representative Cheneault, Alternate

Member

Standing Committees:
Judiciary
State Affairs
Transportation
Rules

Finance Subcommittees:
Corrections
Courts
Law

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

February 8, 2011

Anne Carpeneti, Assistant Attorney General
Department of Law
Criminal Division
Juneau, AK 99801

Dear Ms. Carpeneti:

As a follow-up to yesterday's House Judiciary Committee hearing on House Bill 127, I would appreciate a written response to the following questions:

Sec. 1: 1) Page 2, line 13: What if the residence or vehicle is not in the victim's name?

Sec. 3,4&5: 1) Is raising the penalties necessary? Is this to cure a known deficiency in current law?

Sec 6: 1) Has leaving children with child kidnappers been a problem?

2) What if a child is left with a group of people and one of them is a sex offender or child kidnapper?

3) Page 3, lines 11-16: Should we amend the statute to allow children to be left with people whose charges have been dismissed? If so, can DOL suggest language for an amendment?

Sec. 7: 1) How will prosecution of a minor under this section be handled?

2) (a) What constitutes "publication" and "distribution"? Does DOL have suggested definitions we could add in an amendment?

(b)Would showing a picture on your phone to another person count as distribution or publication? Eg. If a 15 year-old girl texts an explicit photo of herself to her 15 year-old boyfriend and he shows his phone to his friend sitting next to him, is that publication and/or distribution?

3) If a minor (or anyone else) is convicted under this section, might they need to register as a sex offender in another state?

4) If a person distributed pictures of their infant niece/nephew in the bath, could they be convicted under this section?

5) Page 4, lines 5-7: What about posting a photo on a restricted access webpage where the user can make a photo "private" and only available for viewing under his/her login? It seems that under the definition of "internet", this would also be a class C felony, despite the fact that no one else can access the photo.

6) What is the definition of "female breast"?

Sec. 9: 1) Page 5, lines 8-9: What must an online bookseller do to avoid being reckless as to a purchaser's age? Is Amazon reckless by not asking for the customer's age when a customer is purchasing "indecent" materials? Need they ask for age? Ask for proof of age? What is the duty?

2) Would all online booksellers who sell materials to people in Alaska be subject to this section? There probably wouldn't be adequate notice that they are all now required to ask for a customer's age if they want to avoid prosecution in Alaska.

Sec. 11: 1) Doesn't current law already provide for this? Is this section necessary?

Sec. 14: 1) Page 9, lines 11-12: Does current law allow for active supervision of misdemeanants? Could active supervision be considered part of the punishment for a crime? If it could be considered as punishment and current law does not allow for active supervision of misdemeanants, could there be ex post facto issues with this section?

If you have any questions, please contact my legislative aide, Gretchen Staft, at 465-4940. Thank you very much for your time.

Cordially,

Max Gruenberg

Rep. Max Gruenberg

CC: Sarah Munson

Rep. Carl Gatto, Chair
House Judiciary Committee

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

REPRESENTATIVE BOB LYNN
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TO: Rep. Carl Gatto, Chair
House Judiciary Committee

FR: Rep. Bob Lynn

RE: Conceptual Amendment to HB 127

Given that HB 127 deals with predatory use of computers and telephones, I would like to offer a conceptual amendment to prohibit false caller identification. Anyone can download software off the Internet that allows them to make calls that show up on the recipient's cell phone or Caller ID as coming from another number. A predator could use this technology to convince an innocent victim that he is calling from the police department, a local school, or the home of a close personal friend. It is not my intention that this amendment should prohibit any activities by law enforcement or U.S. intelligence agencies. I simply want to insure that the State of Alaska prohibits the average person from using false caller identification to defraud or mislead our citizens.

This is a conceptual amendment, and as such I am open to whatever construction suits the members of the committee and satisfies the drafting attorney. I have included the following construction for the purposes of discussion.

Page 5, line 27 add:

"knowingly obtains confidential information about the other person **or knowingly represents the other person's telephone number as their own for the purposes of misleading another, commonly known as false caller ID.**

Page 6, line 1 add:

"**(c) the telephone provision listed in (a) of this section does not apply to**

(1) law enforcement agencies of the federal government, the state government, or a municipality; or
(2) intelligence or security agencies of the United States government"

Renumber the proceeding sections accordingly.

AMENDMENT

OFFERED IN THE HOUSE BY _____

JUDICIARY COMMITTEE

TO: HB 127

Page 9, following line 6:

Insert a new bill section to read:

"* **Sec. 14.** AS 47.12.030(a) is amended to read:

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person**, except a violation of AS 11.41.455**;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the

offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person."

Renumber the following bill sections accordingly.

Page 9, line 9:

Delete "Sections 1 - 12"

Insert "Sections 1 - 12 and 14"

27G-1
(2/10/2011)
(3:19 PM)

AMENDMENT

OFFERED IN THE HOUSE BY _____

JUDICIARY COMMITTEE

TO: HB 127

Page 1, line 4, following "**probation;**"

Insert: "**relating to the subpoena power of the attorney general in cases involving use of an Internet service account;**"

Page 9, following line 6:

Insert a new bill section to read:

"***Sec. 14.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general or the attorney general's designee for an administrative subpoena to obtain the business records of the Internet service provider located within or outside the state.

(b) If an application meets the requirements of (a) of this section, the attorney general or the attorney general's designee may issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of

service associated with the account.

(c) A subpoena issued under (b) of this section shall prescribe a reasonable time after service for the production of the information.

(d) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general or the attorney general's designee, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the subpoena.

(e) An Internet service provider who knowingly fails to produce the information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(f) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(g) A person may not bring a civil action against an Internet services provider, its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (d) of this section."

Renumber the following bill sections accordingly.

Page 9, line 11:

Delete "Section 13 of this Act applies"

Insert "Sections 13 and 14 of this Act apply"

27-GH1840\A.1
Gardner
2/18/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE LYNN

TO: HB 127

Page 1, line 3, following "**minors,**":

Insert "**criminal impersonation,**"

Page 2, following line 30:

Insert a new bill section to read:

"*** Sec. 6.** AS 11.46.565(a) is amended to read:

(a) A person commits the crime of criminal impersonation in the first degree if

(1) the person

(A) [(1)] possesses an access device or identification document of another person;

(B) [(2)] without authorization of the other person, uses the access device or identification document of another person to obtain a false identification document, open an account at a financial institution, obtain an access device, or obtain property or services; and

(C) [(3)] recklessly damages the financial reputation of the other person**; or**

(2) the person violates AS 11.46.570 and the crime intended is a sex offense; in this paragraph, "sex offense" has the meaning given in AS 12.63.100."

Renumber the following bill sections accordingly.

Page 9, line 9:

Delete "Sections 1 - 12"

Insert "Sections 1 - 13"

Page 9, line 11:

Delete "Section 13"

Insert "Section 14"

27-GH1840\A.2
Gardner
2/17/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE THOMPSON

TO: HB 127

Page 3, line 7, following "person":

Insert "**is**"

Page 3, line 8:

Delete "is"

Insert "[IS]"

Page 3, line 11:

Delete "has been"

Insert "[HAS BEEN]"

Page 3, line 14:

Delete "has been"

Insert "[HAS BEEN]"

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 9, following line 6:

Insert a new bill section to read:

"* **Sec. 14.** AS 47.12.030(a) is amended to read:

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person**, other than a violation of AS 11.41.455**;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an

adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person."

Renumber the following bill sections accordingly.

Page 9, line 9:

Delete "Sections 1 - 12"

Insert "Sections 1 - 12 and 14"

27-GH1840\A.4
Gardner
2/21/11

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 1, line 4, following "**probation**":

Insert "**relating to the subpoena power of the attorney general in cases involving use of an Internet service account;**"

Page 9, following line 6:

Insert a new bill section to read:

"*** Sec. 14.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general or the attorney general's designee for an administrative subpoena to obtain the business records of the Internet service provider located inside or outside of the state.

(b) If an application meets the requirements of (a) of this section, the attorney general or the attorney general's designee may issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of service associated with the account.

(c) A subpoena issued under (b) of this section must prescribe a reasonable

time after service for the production of the information.

(d) At any time before the return date specified on the subpoena, the Internet service provider may petition a court of competent jurisdiction for the judicial district in which the provider resides or does business for an order modifying or setting aside the subpoena or for an order sealing the court record.

(e) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general or the attorney general's designee, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the subpoena.

(f) An Internet service provider who knowingly fails to produce the information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(g) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(h) A person may not bring a civil action against an Internet service provider, its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (e) of this section."

Renumber the following bill sections accordingly.

Page 9, line 11:

Delete "Section 13 of this Act applies"

Insert "Sections 13 and 14 of this Act apply"

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 3, line 20, through page 4, line 7:

Delete all material and insert:

"* **Sec. 7.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.116. Sending an explicit image of a minor. (a) A person commits the offense of sending an explicit image of a minor if the person, with intent to annoy or embarrass another person, distributes an electronic photograph or video that depicts the genitals, anus, or female breast of that other person taken when that person was a minor under 16 years of age.

(b) Sending an explicit image of a minor is

(1) a violation if the person distributes the image to one or two people;

(2) a class B misdemeanor if the person distributes the image to three or more people;

(3) a class A misdemeanor if the person distributes the image to an Internet site that is accessible to the public.

(c) In this section,

(1) "computer" has the meaning given in AS 11.46.990;

(2) "distributes" means to deliver the image to another person by sending the image to the other person's computer or telephone;

(3) "Internet" has the meaning given in AS 11.46.710(d)."

27-GH1840\A.6
Gardner
2/23/11

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 2, line 13:

Delete "**of**"

Insert "**used by**"

Page 2, line 14:

Delete "**of**"

Insert "**used by**"

27-GH1840\A.7
Gardner
2/23/11

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 5, line 25:

Delete "if"

Insert "of"

* **Sec. 7.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.116. Sending an explicit image of a minor. (a) A person commits the offense of sending an explicit image of a minor if the person, with intent to annoy or embarrass another person, distributes an electronic photograph or video that depicts the genitals, anus, or female breast of that other person taken when that person was a minor under 16 years of age.

(b) Sending an explicit image of a minor is

(1) a violation if the person distributes the image to one or two people;

(2) a class B misdemeanor if the person distributes the image to three or more people;

(3) a class A misdemeanor if the person distributes the image to an Internet site that is accessible to the public.

(b) In this section,

(1) "distributes" means to deliver the image to another person by sending it to the other person's computer or telephone; electronic device capable of retaining the image

(2) "Internet" has the meaning given in AS 11.46.710(d).

11.46.990 (3)

27-GH1840\M
Gardner
2/24/11

CS FOR HOUSE BILL NO. 127(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; relating to the subpoena power of the attorney general in cases involving use of an Internet service account; and providing for an effective date."

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

*** Section 1.** AS 11.41.270(b)(3) is amended to read:

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(H) following or monitoring that person with a global positioning device or similar technological means;

(I) using, installing, or attempting to use or install a device for observing, recording, or photographing events occurring in the residence, vehicle, or workplace used by that person, or on the personal telephone or computer used by that person;

*** Sec. 2.** AS 11.41.270(b) is amended by adding a new paragraph to read:

(5) "device" includes software.

*** Sec. 3.** AS 11.41.452(d) is amended to read:

(d) Except as provided in (e) of this section, online enticement is a class **B** [C] felony.

*** Sec. 4.** AS 11.41.452(e) is amended to read:

(e) Online enticement is a class **A** [B] felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

*** Sec. 5.** AS 11.41.455(c) is amended to read:

(c) Unlawful exploitation of a minor is a

[(1)] class **A** [B] felony [; OR

(2) CLASS A FELONY IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED OF UNLAWFUL EXPLOITATION OF A MINOR IN THIS JURISDICTION OR A SIMILAR CRIME IN THIS OR ANOTHER JURISDICTION].

* **Sec. 6.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person **is**

(A) [IS] registered or required to register as a sex offender **or child kidnapper** under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) [HAS BEEN] charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) [HAS BEEN] charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

* **Sec. 7.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.116. Sending an explicit image of a minor. (a) A person commits the offense of sending an explicit image of a minor if the person, with intent to annoy or embarrass another person, distributes an electronic photograph or video that depicts the genitals, anus, or female breast of that other person taken when that person was a minor under 16 years of age.

(b) In this section,

(1) "computer" has the meaning given in AS 11.46.990;

(2) "distributes" means to deliver the image to another person by sending the image to the other person's computer or telephone;

(3) "Internet" has the meaning given in AS 11.46.710(d).

(c) Sending an explicit image of a minor is

(1) a violation if the person distributes the image to one or two people;

(2) a class B misdemeanor if the person distributes the image to three or more people;

(3) a class A misdemeanor if the person distributes the image to an Internet website that is accessible to the public.

*** Sec. 8.** AS 11.61.120(a) is amended to read:

(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person

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

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

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

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact;

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

(6) **except as provided in AS 11.61.116,** publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act.

*** Sec. 9.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors if

(1) the person, being 18 years of age or older, knowingly distributes to another person any material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism;

(2) the material is harmful to minors; and

(3) either

(A) the other person is a child under 16 years of age **and the person acts recklessly regarding the age of the child**; or

(B) the person believes that the other person is a child under 16 years of age.

*** Sec. 10.** AS 11.76 is amended by adding new sections to read:

Sec. 11.76.113. Misconduct involving confidential information in the first degree. (a) A person commits the crime of misconduct involving confidential information in the first degree if the person violates AS 11.76.115 and obtains the confidential information with the intent to

(1) use the confidential information to commit a crime; or

(2) obtain a benefit to which the person is not entitled, to injure another person, or to deprive another person of a benefit.

(b) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(c) Misconduct involving confidential information in the first degree is a class A misdemeanor.

Sec. 11.76.115. Misconduct involving confidential information in the second degree. (a) A person commits the crime of misconduct involving confidential information in the second degree if the person, without legal authority or the consent of another person, knowingly obtains confidential information about the other person.

(b) In this section, "confidential information" includes

(1) information that has been classified confidential by law;

(2) information encoded on an access device, identification card issued under AS 18.65.310, or driver's license.

(c) Conviction under this section does not limit a person's ability to obtain

civil relief from another person.

(d) Misconduct involving confidential information in the second degree is a class B misdemeanor.

* **Sec. 11.** AS 12.05 is amended by adding a new section to read:

Sec. 12.05.030. Crimes involving minors committed outside state. In addition to any other jurisdictional basis expressed or implied in law, a person may be prosecuted under the laws of this state for conduct occurring outside the state for a violation of (1) AS 11.41.452 if the other person with whom the defendant communicated was in the state; or (2) AS 11.61.116 if the minor whose image is published or distributed was in the state.

* **Sec. 12.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40

to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, [OR] promoting prostitution in the first degree under AS 11.66.110(a)(2)**, unlawful exploitation of a minor, or online enticement of a minor under AS 11.41.452(e)** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, **online enticement of a minor under AS 11.41.452(d)** [UNLAWFUL

EXPLOITATION OF A MINOR], or distribution of child pornography may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, [UNLAWFUL EXPLOITATION OF A MINOR,] or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

*** Sec. 13.** AS 33.05.020(a) is repealed and reenacted to read:

(a) The commissioner shall appoint and make available to the superior court,

when ordered under AS 12.55.015(a), a qualified probation officer for the active supervision of a person placed on probation for a felony offense. The commissioner may provide active supervision to a person placed on probation for a misdemeanor offense.

* **Sec. 14.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general or the attorney general's designee for an administrative subpoena to obtain the business records of the Internet service provider located inside or outside of the state.

(b) If an application meets the requirements of (a) of this section, the attorney general or the attorney general's designee may, consistent with regulations adopted under (i) of this section, issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of service associated with the account.

(c) A subpoena issued under (b) of this section must prescribe a reasonable time after service for the production of the information.

(d) At any time before the return date specified on the subpoena, the Internet service provider may petition a court of competent jurisdiction for the judicial district in which the provider resides or does business for an order modifying or setting aside the subpoena or for an order sealing the court record.

(e) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general or the attorney general's designee, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the

subpoena.

(f) An Internet service provider who knowingly fails to produce the information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(g) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(h) A person may not bring a civil action against an Internet service provider, its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (e) of this section.

(i) The attorney general shall adopt regulations prescribing the manner of issuance of an administrative subpoena under (b) of this section.

*** Sec. 15.** AS 47.12.030(a) is amended to read:

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person**, other than a violation of AS 11.41.455**;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person.

*** Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1 - 12 and 15 of this Act apply to offenses committed on or after the effective date of this Act.

(b) Sections 13 and 14 of this Act apply to offenses occurring before, on, or after the effective date of this Act.

*** Sec. 17.** This Act takes effect July 1, 2011.

27-GH1840\M.1
Gardner
2/24/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE LYNN

TO: CSHB 127(JUD), Draft Version "M"

Page 1, line 2, following "**minor,**":

Insert "**criminal impersonation,**"

Page 2, following line 31:

Insert a new bill section to read:

"*** Sec. 6.** AS 11.46.565(a) is amended to read:

(a) A person commits the crime of criminal impersonation in the first degree if

(1) the person

(A) [(1)] possesses an access device or identification document of another person;

(B) [(2)] without authorization of the other person, uses the access device or identification document of another person to obtain a false identification document, open an account at a financial institution, obtain an access device, or obtain property or services; and

(C) [(3)] recklessly damages the financial reputation of the other person**; or**

(2) the person violates AS 11.46.570 and the crime intended is a sex offense; in this paragraph, "sex offense" has the meaning given in AS 12.63.100."

Renumber the following bill sections accordingly.

Page 11, line 16:

Delete "Sections 1 - 12 and 15"

Insert "Sections 1 - 13 and 16"

Page 11, line 18:

Delete "Sections 13 and 14"

Insert "Sections 14 and 15"

27-GH1840\M.3
Gardner
3/3/11

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 127(JUD), Draft Version "M"

Page 4, line 2:

Delete all material.

Renumber the following paragraphs accordingly.

Page 4, lines 3 - 4:

Delete "three or more people"

Insert "another person"

Member

Standing Committees:
Judiciary
State Affairs
Transportation
Rules

Finance Subcommittees:
Corrections
Courts
Law

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
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Anchorage (Mountain View, Russian Jack, East Anchorage)
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MEMORANDUM

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Gretchen Staft, Legislative Aide
Representative Max Gruenberg

DATE: March 10, 2011

RE: Amendment to Section 7 of CSHB 127(JUD), Version M

The attached amendment would eliminate the provision on page 4, line 2 of CSHB 127(JUD) which sets the penalty for distribution of an explicit image of a minor to one or two people as a violation. This is because it came to our attention that the penalty under this provision for distributing a nude picture of a minor is a lesser offense than distributing a nude picture of an adult, which is a class B misdemeanor under AS 11.61.120(a)(6). It seems that it was not the intention of the Department of Law or the members of the committee that we treat the distribution of nude pictures of minors as a lesser offense than the distribution of the same types of photos of adults. This amendment would simply make sending an explicit image of a minor to "another person" a class B misdemeanor, which is on par with the penalty for distributing explicit pictures of an adult under AS 11.61.120(a)(6). Distributing an explicit image of a minor to a publicly-accessible website would remain a class A misdemeanor.

STATE OF ALASKA

DEPARTMENT. OF HEALTH AND SOCIAL SERVICES

DIVISION OF JUVENILE JUSTICE

Sean Parnell, ***GOVERNOR***

P.O. BOX 110635
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PHONE: (907) 465-1382
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March 10, 2011

Representative Carl Gatto
Chair, House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, AK 99801

Dear Representative Gatto:

As the House Judiciary Committee considers amendments to House Bill 127 it may be helpful to recognize how the new offense created in Section 7 of the bill ("Sending An Explicit Image of a Minor") would be managed in the juvenile justice system.

Law enforcement officers refer minors to the Division of Juvenile Justice when the minors are alleged to have violated criminal laws. The Division assesses each minor and may provide any of a range of responses and services to the minor and victims depending on the seriousness of the offense, the risks for future offending, the needs of the victims, and the social and personal needs presented by the minor. For example, a youth who is referred to the Division for a misdemeanor and who has involved parents, a strong academic record, remorse for his behavior, no prior involvement with us, and other protective factors will likely have their offense handled outside of the formal court process. This youth might be given the opportunity to repair the harm he has done by writing a letter of apology to the victim, paying restitution, or participating in counseling. If he meets these expectations, the referral will be closed. On the other hand, a youth who is referred to the Division for the same misdemeanor, but whose parents show little concern for his behavior, who is failing in school, or has a history of disruptive behavior or substance abuse, would be more likely to have his offense petitioned to court. If adjudicated delinquent by a court, the youth may be placed under probation supervision or in the department's custody so the Division can be more assertive in ensuring that he is held accountable and receiving the services he needs.

In managing youth who would be referred to us on the new offense, "Sending An Explicit Image of a Minor," the Division would use a similar intake assessment process to determine the most appropriate response.

Some of the discussion about this bill has included a suggestion to classify "Sending an Explicit Image of a Minor" as a violation when the individual distributes an explicit image of a minor to one or two people. Note that because violations are non-criminal offenses they are not referred to the Division of Juvenile Justice, but are instead managed through District Courts. District Court management of a violation typically would entail a court appearance or payment of a fine, and the court records about the offense would be publicly available. In contrast, if the offense of sending an explicit image of a minor to one or two people is classified as a misdemeanor, the offense would be referred to the Division of Juvenile Justice, which would seek to tailor its response to the needs of both the offender and the victim. Juvenile delinquency court records are sealed after a youth turns 18, and Division of Juvenile Justice agency records are not disclosable except under the specific conditions provided in AS 47.12.310, AS 47.12.315, and AS 47.12.320.

Please let me know if I can provide further information.

Sincerely,

Tony Newman
Social Services Program Officer
Department of Health and Social Services, Division of Juvenile Justice

cc: Representative Steve Thompson, Vice Chair, House Judiciary Committee
Representative Wes Keller, Member, House Judiciary Committee
Representative Lindsey Holmes, Member, House Judiciary Committee
Representative Bob Lynn, Member, House Judiciary Committee
Representative Max Gruenberg, Member, House Judiciary Committee
Representative Lance Pruitt, Member, House Judiciary Committee

AMENDMENT

OFFERED IN THE HOUSE BY THE HOUSE JUDICIARY

TO: CSHB 127(JUD), Draft Version "M" COMMITTEE

Page 9, lines 15 - 16:

Delete ", consistent with regulations adopted under (i) of this section,"

Page 9, line 24, following "(d)":

Insert "Service of a subpoena issued under (b) of this section may be by any method authorized by law or acceptable to the Internet service provider."

Page 9, line 26:

Delete "setting aside"

Insert "quashing"

Page 10, lines 12 - 13:

Delete all material and insert:

"(i) For purposes of this section, the attorney general's designee must be in the Department of Law."

27-GH1840\M.5
Gardner
3/9/11

AMENDMENT

OFFERED IN THE HOUSE BY THE HOUSE JUDICIARY

TO: CSHB 127(JUD), Draft Version "M" COMMITTEE

Page 1, line 3:

Delete "**distribution of indecent material to minors,**"

Page 4, line 22, through page 5, line 10:

Delete all material.

Renumber the following bill sections accordingly.

Page 11, line 16:

Delete "Sections 1 - 12 and 15"

Insert "Sections 1 - 11 and 14"

Page 11, line 18:

Delete "Sections 13 and 14"

Insert "Sections 12 and 13"

MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

March 3, 2011

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
Chair, House Judiciary Committee
Alaska State House of Representatives
Juneau, AK 99801

Delivered by email

Re: Memo in Opposition to Section 9 of House Bill 127 and proposed amendments

Dear Chairman Gatto and Vice Chairman Thompson,

The members of Media Coalition have asked me to communicate their concerns regarding H.B. 127 sec. 9. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Alaska: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. Some of our members are plaintiffs in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns,* a First Amendment challenge to 11.61.128(a). (D. Alaska 3:10-CV-193 Oct. 20, 2010). A preliminary injunction was granted October 20, 2010 barring enforcement of the law as enacted last spring.

Section 9 of H.B. 127 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipients age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a), but even with these changes the law would still violate the First Amendment. We welcome the opportunity to work with the Committee to amend Section 9 to make it constitutionally sound. We believe that small changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them. I have attached to this letter our proposed changes to the bill which we ask the Committee to consider.

In addition to *ABFFE v. Burns,* there is a substantial body of case law striking down similar state and federal legislation that restricted such content on the Internet. The U.S. Supreme Court has already declared unconstitutional two federal laws that restricted the availability of sexual matter inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032

Executive Director: David Horowitz Chair: Judith Platt, Association of American Publishers
Immediate past Chair: Chris Finan, American Booksellers Foundation for Free Expression Treasurer: Vans Stevenson, Motion Picture Association of America
General Counsel: Michael A. Bamberger, SNR Denton US LLP

(2009). In addition to the ruling in the Third Circuit Court of Appeals, four other U.S. Courts of Appeal have struck down laws banning material harmful to minors on the Internet. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson,* 194 F.3d 1149 (10th Cir. 1999). Three more state laws have been struck down by U.S. District Courts. *See, Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D. S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Most recently, Massachusetts enacted a law very similar to AS 11.61.128(a). A legal challenge to the law was brought by some of the same plaintiffs as challenged Alaska's law and a preliminary injunction has been granted barring the statute's enforcement. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010). The legislature is considering a bill supported by the Attorney General, similar to what we are proposing to this Committee, that the communication must directed to specific which the sender has actual knowledge or believes is a minor. If passed, this bill will resolve this case.

The reckless standard does not overcome the First Amendment case law cited above. It is an inadequate knowledge requirement for criminalizing distribution of harmful to minors material, particularly on the Internet. Unlike a brick and mortar store, there is no way to know whether a particular person receiving sexually frank material is a minor or an adult. So there is no reasonable way to restrict access to such material solely to adults. As the Supreme Court found, anyone who makes material available on the Internet through a website, listserve or chat room knows that there is a reasonable likelihood that there are minors accessing their content. With hundreds or thousands of people accessing a website or chat room, it is inevitable that a minor is among the visitors. To assume there are no minors accessing a site would be reckless regarding a minor's presence. Thus, the effect of banning the dissemination on the Internet of material "harmful to minors" is to force a provider of such material to deny access to both minors and adults, depriving adults of their First Amendment rights or to risk being prosecuted.

We appreciate the chance to share our concerns with the Judiciary Committee. If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director

cc: Representative Keller
Representative Lynn
Representative Pruitt
Representative Gruenberg
Representative Holmes
Representative Cheneault, Alternate

M.Le

Media Coalition's proposed amendments to House Bill 127

*** Sec. 9.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors if

(1) the person, being 18 years of age or older, knowingly distributes to another person any material that **the person** distributing **knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism;

(2) the material is harmful to minors; and

(3) either

(A) the other person is a child under 16 years of age and the person distributing the material knows that the recipient is a child under 16 years of age; or

(B) the person believes that the other person is a child under 16 years of age.

A person who distributes an electronic communication with the intent to distribute it does not violate this section unless that person intends that the communication be viewed by a specific person he or she knows or believes to be a child under 16 years of age.

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27-GH1840\B
Gardner
3/11/11

CS FOR HOUSE BILL NO. 127(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, and misconduct involving confidential information; relating to probation; relating to the subpoena power of the attorney general in cases involving use of an Internet service account; and providing for an effective date."

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

* **Section 1.** AS 11.41.270(b)(3) is amended to read:

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or

on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(H) following or monitoring that person with a global positioning device or similar technological means;

(I) using, installing, or attempting to use or install a device for observing, recording, or photographing events occurring in the residence, vehicle, or workplace used by that person, or on the personal telephone or computer used by that person;

*** Sec. 2.** AS 11.41.270(b) is amended by adding a new paragraph to read:

(5) "device" includes software.

*** Sec. 3.** AS 11.41.452(d) is amended to read:

(d) Except as provided in (e) of this section, online enticement is a class **B** [C] felony.

*** Sec. 4.** AS 11.41.452(e) is amended to read:

(e) Online enticement is a class **A** [B] felony if the defendant was, at the time of the offense, required to register as a sex offender or child kidnapper under AS 12.63 or a similar law of another jurisdiction.

*** Sec. 5.** AS 11.41.455(c) is amended to read:

(c) Unlawful exploitation of a minor is a

[(1)] class **A** [B] felony [; OR

(2) CLASS A FELONY IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED OF UNLAWFUL EXPLOITATION OF A MINOR IN THIS JURISDICTION OR A SIMILAR CRIME IN THIS OR ANOTHER JURISDICTION].

*** Sec. 6.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person **is**

(A) [IS] registered or required to register as a sex offender **or child kidnapper** under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) [HAS BEEN] charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) [HAS BEEN] charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

* **Sec. 7.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.116. Sending an explicit image of a minor. (a) A person commits the offense of sending an explicit image of a minor if the person, with intent to annoy or humiliate another person, distributes an electronic photograph or video that depicts the genitals, anus, or female breast of that other person taken when that person was a minor under 16 years of age.

(b) In this section,

(1) "computer" has the meaning given in AS 11.46.990;

(2) "distributes" means to deliver the image to another person by sending the image to the other person's computer or telephone;

(3) "Internet" has the meaning given in AS 11.46.710(d).

(c) Sending an explicit image of a minor is

(1) a class B misdemeanor if the person distributes the image to another person;

(2) a class A misdemeanor if the person distributes the image to an Internet website that is accessible to the public.

* **Sec. 8.** AS 11.61.120(a) is amended to read:

(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person

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

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

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

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact;

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

(6) **except as provided in AS 11.61.116,** publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act.

* **Sec. 9.** AS 11.76 is amended by adding new sections to read:

Sec. 11.76.113. Misconduct involving confidential information in the first degree. (a) A person commits the crime of misconduct involving confidential information in the first degree if the person violates AS 11.76.115 and obtains the confidential information with the intent to

(1) use the confidential information to commit a crime; or

(2) obtain a benefit to which the person is not entitled, to injure another person, or to deprive another person of a benefit.

(b) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(c) Misconduct involving confidential information in the first degree is a class A misdemeanor.

Sec. 11.76.115. Misconduct involving confidential information in the second degree. (a) A person commits the crime of misconduct involving confidential information in the second degree if the person, without legal authority or the consent of another person, knowingly obtains confidential information about the other person.

(b) In this section, "confidential information" includes

(1) information that has been classified confidential by law;

(2) information encoded on an access device, identification card issued under AS 18.65.310, or driver's license.

(c) Conviction under this section does not limit a person's ability to obtain civil relief from another person.

(d) Misconduct involving confidential information in the second degree is a class B misdemeanor.

* **Sec. 10.** AS 12.05 is amended by adding a new section to read:

Sec. 12.05.030. Crimes involving minors committed outside state. In addition to any other jurisdictional basis expressed or implied in law, a person may be prosecuted under the laws of this state for conduct occurring outside the state for a violation of (1) AS 11.41.452 if the other person with whom the defendant communicated was in the state; or (2) AS 11.61.116 if the minor whose image is published or distributed was in the state.

* **Sec. 11.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, [OR] promoting prostitution in the first degree under AS 11.66.110(a)(2)**, unlawful exploitation of a minor, or online enticement of a minor under AS 11.41.452(e)** may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the

defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, **online enticement of a minor under AS 11.41.452(d)** [UNLAWFUL EXPLOITATION OF A MINOR], or distribution of child pornography may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, [UNLAWFUL EXPLOITATION OF A MINOR,] or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not

involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

* **Sec. 12.** AS 33.05.020(a) is repealed and reenacted to read:

(a) The commissioner shall appoint and make available to the superior court, when ordered under AS 12.55.015(a), a qualified probation officer for the active supervision of a person placed on probation for a felony offense. The commissioner may provide active supervision to a person placed on probation for a misdemeanor offense.

* **Sec. 13.** AS 44.23.080 is repealed and reenacted to read:

Sec. 44.23.080. Subpoena power of attorney general in cases involving use of an Internet service account. (a) If there is reasonable cause to believe that an Internet service account has been used in connection with a violation of AS 11.41.452, 11.41.455, or AS 11.61.125 - 11.61.128, and that the identity, address, and other information about the account owner will assist in obtaining evidence that is relevant to the offense, a law enforcement officer may apply to the attorney general or the attorney general's designee for an administrative subpoena to obtain the business records of the Internet service provider located inside or outside of the state.

(b) If an application meets the requirements of (a) of this section, the attorney general or the attorney general's designee may issue an administrative subpoena to the Internet service provider requiring the production of the following records:

(1) the name and other identifying information of the account holder;

(2) the address and physical location associated with the account;

(3) a description of the length of service, service start date, and types of service associated with the account.

(c) A subpoena issued under (b) of this section must prescribe a reasonable time after service for the production of the information.

(d) Service of a subpoena issued under (b) of this section may be by any method authorized by law or acceptable to the Internet service provider. At any time before the return date specified on the subpoena, the Internet service provider may petition a court of competent jurisdiction for the judicial district in which the provider resides or does business for an order modifying or quashing the subpoena or for an order sealing the court record.

(e) If the Internet service provider refuses to obey a subpoena issued under (b) of this section, the superior court may, upon application of the attorney general or the attorney general's designee, issue an order requiring the Internet service provider to appear at the office of the attorney general with the information described in the subpoena.

(f) An Internet service provider who knowingly fails to produce the information required to be produced by the subpoena or court order is guilty of contempt under AS 09.50.010.

(g) Nothing in this section limits the authority of law enforcement from obtaining process from the court or through a grand jury subpoena to obtain the information described in (b) of this section.

(h) A person may not bring a civil action against an Internet service provider, its officers, employees, agents, or other person for complying with an administrative subpoena issued under (b) of this section or a court order issued under (e) of this section.

(i) For purposes of this section, the attorney general's designee must be in the Department of Law.

* **Sec. 14.** AS 47.12.030(a) is amended to read:

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this

subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person**, other than a violation of AS 11.41.455**;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person.

* **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1 - 11 and 14 of this Act apply to offenses committed on or after the effective date of this Act.

(b) Sections 12 and 13 of this Act apply to offenses occurring before, on, or after the effective date of this Act.

* **Sec. 16.** This Act takes effect July 1, 2011.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 25, 2011

SUBJECT: Bill Section 10 -- Provision Disclaiming Limitation on Civil Relief (CSHB 127(JUD) - Work Order No. 27-GH1840\M)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Sarah Munson

FROM: Doug Gardner
Director

Enclosed is the draft CS(JUD) you requested. I have a concern with sec. 10 of the draft. Section 10 creates two new crimes dealing with ~~misconduct involving~~ confidential information, AS 11.76.113 and 11.76.115. Both sections contain a subsection -- subsection (b) in AS 11.76.113, and subsection (c) in AS 11.76.115 -- that provides:

> Conviction under this section does not limit a person's ability to obtain civil relief from another person.

As drafted, the goal of these subsections is unclear.

If the goal of these subsections is to clarify that the existence of this new crime does not interfere with a person's right to seek damages or another civil remedy from another person then neither subsection is needed. AS 11.81.210 provides:

> Sec. 11.81.210. Limitation on applicability. This title does not bar, suspend, or otherwise affect any right to or liability for damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in the proceeding constitutes an offense defined in this title.

Providing a special statement that just applies to these two new crimes could eventually lead a court to conclude that this general civil remedy savings clause does not actually do what we think it does and possibly limit the authority of a victim of a crime proscribed by another law from seeking civil relief.[1]

---

[1] The reasoning would be:

> If AS 11.81.210 means what it says why would the legislature adopt these new subsections? Obviously AS 11.81.210 must not mean what it says hence the need to adopt subsection (b) type language for every crime in Title 11.

The language of these new subsections can also be interpreted in a way that may not have been intended. The subsections may mean that a person who is convicted under these two new crimes is not limited in seeking civil relief from another person. That is, the defendant convicted of one of these new crimes is not prevented from defending in a civil suit and denying that the offense occurred or from suing the victim or another person and asserting that the other person is liable in the civil action. This would amount to a major change in the law. Normally, a defendant who is convicted of a crime is estopped from denying that the offense occurred or that the defendant committed the crime. See, e.g., *Pomeroy v. Rizzo*, 182 P.3d 1185 (Alaska 2008); *Lamb v. Anderson*, 147 P.3d 736 (Alaska 2006); *Burcina v. City of Ketchikan*, 902 P.2d 817 (Alaska 1995). Subsection (b) of these two new crimes appears to abrogate this line of case law in Alaska.

The other issue that the committee may want to address, is placement of proposed AS 11.76.113 and 11.76.115 in statute. AS 11.76 contains statutes that contain offenses that may not fit well with the subject matter of other chapters. In the case of AS 11.76.113 and 11.76.115, there is an argument that these proposed sections fit better in AS 11.56, Article 6. In fact, given the similarity between AS 11.56.860 (misuse of confidential information) and proposed AS 11.76.113 and 11.76.115, it would not be a difficult drafting assignment to combine existing AS 11.56.860 with AS 11.76.113 and 11.76.115 into a first and second degree offense if the committee chose to do so by way of a conceptual amendment.

DDG:ljw
11-140.ljw

Enclosure

HB

128

<TARGET><BILL>HB 128</BILL><SUBJECT>HB 128</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 2, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 3/14/12

The JUDICIARY Committee considered: **HB 128**

HOUSE BILL NO. 128
"An Act relating to prohibiting the use of cellular telephones by minors when driving motor vehicles; and providing for an effective date."

HB 128-BAN CELL PHONE USE BY MINORS WHEN DRIVING

Recommends it be replaced with [ ] HCS *or* [X] CS for CS HB 128 (TRA) ( )
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR _____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	LAW			X
2	DPS			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN		X		
	Greenberg	-			
	Keller		X		
	Hawker			*	
	Holmes	X			
	Pruitt		X		
Chair:					
Chair:					

ALASKA STATE LEGISLATURE

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Representative Berta Gardner

House District 24

March 2, 2012

SPONSOR STATEMENT
CSHB 128 (TRA)

"An Act relating to prohibiting the use of cellular telephones by minors when driving a motor vehicle; and providing for an effective date."

Our automobile insurance rates illustrate the well-established fact that younger and less experience drivers have more vehicle accidents than older drivers. Today, a growing body of evidence shows that use of cell phones increases risk of accident for all drivers, but especially for younger ones.

Each year, Alaska sees an increase in the number of motor vehicle accidents involving the use of cellular phones by drivers. Between 2002 and 2008 there were 399 traffic accidents involving cell phones in Alaska. The largest group, about 36 percent, involved drivers between 16 and 20 years old, although they make up only about 7.4% of Alaskan drivers.

Additionally, people between 16 and 24 are the most frequent cell phone users. While drivers age 21 or older with cell phones are about equally likely to use their cell phones for outgoing calls as they are to take incoming calls, cell phone-using drivers age 16-20 are more likely to use their cell phones to take incoming calls than they are to make outgoing calls while driving.

Other statistics show:

- 16 and 17 year old drivers have the highest fatality rate in car crashes.
- For the 16-to-20 age group, the crash fatality rate in 2004 was nearly twice as high as other age groups
- Motor vehicle crashes are number 1 cause of death among teenagers

The National Highway Traffic Safety Administration (NHTSA) has gathered data that nearly 25% of all vehicle accidents directly involve the use of cell phones. By limiting a minor's use of a cell phone while driving, we can make our roads safer for everyone.

Please join me in supporting CSHB 128 (TRA) to make our roads safer. If you have any questions, please contact my staff Noah Hanson at 465-4068 or Noah_Hanson@legis.state.ak.us.

CS FOR HOUSE BILL NO. 128(TRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE TRANSPORTATION COMMITTEE

Offered: 3/2/12
Referred: Judiciary

Sponsor(s): REPRESENTATIVES GARDNER, Gruenberg

A BILL

FOR AN ACT ENTITLED

"An Act relating to prohibiting the use of cellular telephones by minors when driving motor vehicles; and providing for an effective date."

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

*** Section 1.** AS 28.35 is amended by adding a new section to read:

Sec. 28.35.165. Prohibited use of cellular telephone. (a) A person under 18 years of age may not use a cellular telephone when driving a motor vehicle on a highway or vehicular way or area.

(b) Notwithstanding any other provision of law, a peace officer may not stop or detain a motor vehicle to determine compliance with (a) of this section, or issue a citation for a violation of (a) of this section, unless the peace officer is authorized by law to stop or detain the motor vehicle other than for a violation of (a) of this section.

(c) A person who violates this section is guilty of an infraction and may be punished as provided under AS 28.90.010.

*** Sec. 2.** This Act takes effect July 1, 2012.

ALASKA STATE LEGISLATURE

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Representative Berta Gardner

House District 24

CSHB 128 (TRA)

Explanation of Changes

Page 1, line 14: Deleted "2011" and inserted "2012"

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 128(TRA)**
Fiscal Note Number: **1**
Publish Date: **3/2/12 (H)**

Identifier (file name): HB128-LAW-CRIM-12-07-11
Title: An Act relating to prohibiting use of cellular telephones by minors when driving motor vehicles
Sponsor: Representative(s) Gardner
Requester: (H) Transportation

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 12/07/11 2:20PM
Approved by: John J. Burns, Attorney General, Department of Law — Date: 12/7/2011

(Revised 8/17/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 128(TRA)

Analysis

HB 128 prohibits a person under 18 years of age from driving on a highway or vehicular way while using a cell phone. It is an infraction. A law enforcement officer may not stop a minor solely for using a cell phone, but only if the peace officer is otherwise authorized to stop the vehicle may the person be cited.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 128(TRA)**
Fiscal Note Number: **2**
Publish Date: **3/2/12 (H)**

Identifier (file name)	HB128-DPS-DET-01-09-12	Dept. Affected	Public Safety
Title	"An Act prohibiting the use of cellular telephones by minors when driving motor vehicles."	Appropriation	Alaska State Troopers
		Allocation	AST Detachments
Sponsor	Representative Gardner		
Requester	(H) TRA	OMB Component Number	2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by	Kelly Howell	Phone	(907) 269-5591
Division	Office of the Commissioner	Date/Time	1/9/12 12:35 PM
Approved by	Joe Masters, Commissioner Department of Public Safety	Date	1/9/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 128(TRA)

Analysis

This legislation would amend AS 28.35 by adding a new section that would prohibit the use of cellular telephones by those under 18 years of age when driving a motor vehicle. Violation of this legislation would be an infraction and considered a secondary traffic offense.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal impact to the AST as a result of this legislation.

www.ktuu.com/news/alaska-bill-bans-teens-on-cellphones-while-driving-ktuu-20120315,0,4327505.story

ktuu.com

Alaska Bill Bans Teens on Cellphones While Driving

By the Associated Press

Austin Baird

6:59 AM AKDT, March 15, 2012

JUNEAU, Alaska

A divided House committee has advanced a bill that would prohibit teens from talking on the phone while driving.

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Anchorage Democratic Rep. Berta Gardner's HB128 would allow police to give citations only after someone has been pulled over for another violation.

The bill made it through the House Transportation Committee unopposed two weeks ago, but it narrowly cleared the House Judiciary Committee on Wednesday on a 4-3 vote.

Republican Reps. Wes Keller, Bob Lynn and Lance Pruitt opposed moving the bill, saying it goes too far.

Keller said his vote was mainly because he believes the bill would help future prohibitions of cellphone use while driving, which has been a point of contention among legislators this year. Lynn said he opposed the bill because he feels that teens need to be treated like adults.

Gardner said both criticisms ignore the overwhelming safety concerns caused by distracted teen drivers. She said she fought a law requiring adults to wear seat belts, because she believes the risk is theirs to take.

"But it's a different story when you're putting other people at risk," Gardner said, adding that she doubts broader bans of cellphone use while driving will find much support this session.

Judiciary Chair Carl Gatto supported the bill's advancement through his committee, but he voiced reservations.

"We're nibbling at the apple," Gatto said "I hope we can come to agreement on the larger issue."

The bill is ready for a floor vote.

JuneauEmpire.com

Committee acts to bar minors from using cell phones while driving

Concerns expressed about impulsive teens and 'emotional' girls

Posted: March 15, 2012 - 12:10am

By Pat Forgey

JUNEAU EMPIRE

Worried about sometimes-emotional teenage girls and other minors driving while talking on cell phones, a legislative committee Wednesday took steps to stop it.

A divided House Judiciary Committee passed House Bill 128, which would bar 16- and 17-year-olds from using cell phones while driving.

The action comes after the failure last year of a bill sponsored by Rep. Cathy Muñoz, R-Juneau, which would have banned anyone from using cell phones while driving.

HB 128's sponsor, Rep. Berta Gardner, told the Judiciary Committee the leading cause of traffic accidents for young people was inexperience and distractions, and that those under 18 should wait until they were more seasoned to combine phone usage with driving.

"They're most likely to be impulsive, and most easily distracted," Gardner said.

Drivers can also see their judgment impaired when they're emotionally upset, she said.

Committee chairman Carl Gatto, R-Palmer, said that teens often get emotionally upset.

"Probably the girls," agreed Gardner, the parent of two children, including a girl.

Not everybody agreed teens were most at risk.

"I don't think teenagers as a group need to be coddled," said Rep. Bob Lynn, R-Anchorage.

Teens may be inexperienced at driving, but they also have excellent reflexes, which can make up for that, he said.

Teens are easy to go after because they don't have lobbyists and don't vote, he said.

Lynn called limiting what teenagers can do "the camel's nose under the tent" for other limits.

Passage of HB 128 may lead to the state targeting other groups that have higher rates of accidents, he said.

"If we pass this, who's the next group that has a high rate of accidents, would it be senior citizens?" asked the 79-year-old Lynn.

Gardner said she understood the civil liberty argument, and that she personally didn't like seat belt laws.

People should have a right to be foolish if they want to be, she said.

The difference with cell phone usage, she said, was that distracted drivers impact everyone else on the road.

Gardner said that she, like many parents, had barred their children from using cell phones while driving.

"As a parent I unilaterally banned it for my house, but I think some parents would like to have some backup," she said.

Rep. Mike Hawker, R-Anchorage, said banning cell phones for teen drivers conflicted with his libertarian view that the government shouldn't be legislating common sense.

However, he said his legislative survey shows nearly 80 percent support for a ban and he'd be supporting it.

"I represent my constituents, and I respect the counsel they've given me," Hawker said.

Gatto, who had led opposition to Muñoz' bill last year, voted in favor of Gardner's more limited ban.

Muñoz' failed bill would have allowed use of hands-free cell phones, however, something that Gardner's bill doesn't allow. Muñoz is co-sponsor of Gardner's bill.

Gardner's cell phone ban for minor drivers makes usage a secondary offense, meaning it can be enforced along with something else, but a police officer can't stop a teen driver for cell phone use alone.

Gatto told Gardner he'd support the measure, but no further restrictions on drivers' rights.

Those wanting to restrict cell phone usage will get no more bites of the apple, he said.

"No more nibbling at the apple, this is the last and final nibble," he said.

Muñoz, though, said she'd still like to see a broader ban on drivers using cell phones, but praised the passage of Garner's bill.

"This is a good first step," she said.

House Rules Committee Chairman Craig Johnson, R-Anchorage, now decides when the bill goes to the House floor for a final vote. He opposed the ban in the Transportation Committee earlier in the process.

• Contact reporter Pat Forgey at 523-2250 or at patrick.forgey@juneauempire.com.

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HB 128
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Alaska Bill Bans Teens on Cellphones While Driving

Comments 0 Share 3

By the Associated Press
Austin Baird
6:59 a.m. AKDT, March 15, 2012

JUNEAU, Alaska— A divided House committee has advanced a bill that would prohibit teens from talking on the phone while driving.

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Gardner said both criticisms ignore the overwhelming safety concerns caused by distracted teen drivers. She said she fought a law requiring adults to wear seat belts, because she believes the risk is theirs to take.

"But it's a different story when you're putting other people at risk," Gardner said, adding that she doubts broader bans of cellphone use while driving will find much support this session.

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The Seattle Times
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Nation & World

Updated Tuesday, March 6, 2012 at 09:53 AM

Cellphone ban cuts traffic deaths in California

By Bruce Newman
San Jose Mercury News

SAN JOSE, Calif. — California drivers squawked, they talked, and one or two even balked at having cellphones ripped from their hands when the state law forbidding the use of handheld phones on the road went into effect in 2008. But according to a study announced Monday by the state Office of Traffic Safety, since that time the total number of traffic deaths in California declined by 22 percent. With fewer drivers yakking into handheld phones, the death-by-cellphone rate dropped an even more stunning 47 percent.

"Those are huge numbers," said state Sen. Joe Simitian, D-Palo Alto, author of the bill whose outcome the study tracked, while taking a (hands-free) victory lap after the announcement. Simitian submitted a version of the bill for five consecutive years and was rebuffed each time, before the Legislature finally relented in 2006.

The year after the law was implemented, the CHP reported 700 fewer fatal accidents, and that there were 75,000 to 100,000 fewer collisions. "The drop in collisions was the biggest single year-to-year drop in the history of the state since the CHP began keeping the data," Simitian said.

The report examined state crash records two years before and two years after the handheld ban went into effect.

Though the base fine for being caught driving with a phone in your hand is still only $20 — Gov. Jerry Brown vetoed Simitian's attempt to have it increased last year — the law here is viewed as more effective than other states' because it is strictly enforced.

"California is one of the few states that has been very aggressively enforcing its cellphone law," said Barbara Harsha, executive director of the Governors Highway Safety Association in Washington, D.C. "That's a big drop. We were surprised by the numbers. It shows that enforcement works, that other states should look at what California has done and follow its lead."

The study used a statewide census of police-reported traffic crashes, crunching the numbers and the fenders to produce the first analysis of its kind in the nation. Its findings were restricted to accidents caused specifically by drivers using handheld cellphones, and came to conclusions that were less grandiose than Simitian's — only 70-80 lives saved and about 5,000 injuries prevented in the first two years of the law.

Critics of the law also point to distractions other than talking on the phone — eating a sandwich, applying makeup, changing the radio station — as the cause of accidents. Asked if the 22 percent decline in traffic deaths traced to implementation of the hands-free phone law was too specific, David Ragland, the study's author, said, "It is."

The state agency that produced the study is already at work on expanding the distracted driver data. "The subject of distracted driving and cellphone use is so new that there hasn't been a lot of statistical studying done," said Chris Cochran, spokesman for Office of Traffic Safety. "We're in favor of not talking at all — handheld, hands-free, nothing. Because it's actually the talking that's more of a problem than the holding. Even though the law only covers half of the problem, it's affecting both holding and hands-free. It's doing good overall. But the

whole realm is in need of a lot more research."

For once, Simitian sounded satisfied.

"What's particularly heartening is the clear indication that the public gets it," he said. "The driving public understands that this is risky behavior, and most people are complying. I think we've had very good results the first couple of years, but we're talking about changing a culture. Just as it took a great many years for people to buckle up routinely, and a great many years to change attitudes about drinking and driving, this is a behavior change that will take a little time."

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Distributed By Representative Gardner

2002

Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	4233	17.6%	17	28.8%
21-25	2779	11.6%	8	13.6%
26-30	2169	9.0%	7	11.9%
31-35	2125	8.8%	9	15.3%
36-40	2231	9.3%	7	11.9%
41-45	2257	9.4%	4	6.8%
46-50	1983	8.2%	3	5.1%
51-55	1459	6.1%	0	0.0%
56-60	925	3.8%	1	1.7%
61-65	558	2.3%	0	0.0%
66-70	343	1.4%	1	1.7%
71-75	268	1.1%	1	1.7%
76-80	152	0.6%	0	0.0%
81+	102	0.4%	0	0.0%
Unknown	2467	10.3%	1	1.7%
Total	**24051**		**59**	

2003

Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	4512	19.2%	20	33.9%
21-25	3126	13.3%	9	15.3%
26-30	2285	9.7%	5	8.5%
31-35	2280	9.7%	7	11.9%
36-40	2309	9.9%	3	5.1%
41-45	2320	9.9%	6	10.2%
46-50	2217	9.5%	7	11.9%
51-55	1666	7.1%	1	1.7%
56-60	1096	4.7%	0	0.0%
61-65	620	2.6%	1	1.7%
66-70	388	1.7%	0	0.0%
71-75	298	1.3%	0	0.0%
76-80	185	0.8%	0	0.0%
81+	139	0.6%	0	0.0%
Unknown	3206	13.7%	0	0.0%
Total	**23441**		**59**	

2004

Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	4108	15.7%	22	36.1%
21-25	3302	12.6%	8	13.1%
26-30	2269	8.6%	6	9.8%
31-35	2216	8.4%	6	9.8%
36-40	2154	8.2%	6	9.8%
41-45	2439	9.3%	3	4.9%
46-50	2248	8.6%	6	9.8%
51-55	1726	6.6%	1	1.6%
56-60	1180	4.5%	2	3.3%
61-65	735	2.8%	0	0.0%
66-70	415	1.6%	0	0.0%
71-75	288	1.1%	0	0.0%
76-80	178	0.7%	0	0.0%
81+	121	0.5%	0	0.0%
Unknown	2864	10.9%	0	0.0%
Total	**26243**		**61**	

2005

Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	3652	15.5%	24	38.7%
21-25	3015	12.8%	6	9.7%
26-30	2118	9.0%	8	12.9%
31-35	1872	8.0%	6	9.7%
36-40	1872	8.0%	3	4.8%
41-45	2026	8.6%	6	9.7%
46-50	1982	8.4%	5	8.1%
51-55	1566	6.7%	1	1.6%
56-60	1091	4.6%	1	1.6%
61-65	689	2.9%	1	1.6%
66-70	397	1.7%	1	1.6%
71-75	256	1.1%	0	0.0%
76-80	165	0.7%	0	0.0%
81+	92	0.4%	0	0.0%
Unknown	2694	11.5%	0	0.0%
Total	**23487**		**62**	

2006				
Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	3114	14.7%	16	33.3%
21-25	2769	13.0%	12	25.0%
26-30	2017	9.5%	5	10.4%
31-35	1703	8.0%	2	4.2%
36-40	1661	7.8%	7	14.6%
41-45	1769	8.3%	4	8.3%
46-50	1796	8.5%	1	2.1%
51-55	1491	7.0%	0	0.0%
56-60	1119	5.3%	0	0.0%
61-65	638	3.0%	0	0.0%
66-70	356	1.7%	0	0.0%
71-75	238	1.1%	0	0.0%
76-80	156	0.7%	0	0.0%
81+	113	0.5%	1	2.1%
Unknown	2300	10.8%	0	0.0%
Total	21240		48	

2007				
Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	2910	15.7%	18	39.1%
21-25	2400	12.9%	9	19.6%
26-30	1636	8.8%	5	10.9%
31-35	1392	7.5%	1	2.2%
36-40	1414	7.6%	2	4.3%
41-45	1460	7.9%	3	6.5%
46-50	1489	8.0%	1	2.2%
51-55	1491	8.0%	2	4.3%
56-60	987	5.3%	1	2.2%
61-65	600	3.2%	0	0.0%
66-70	350	1.9%	1	2.2%
71-75	247	1.3%	0	0.0%
76-80	143	0.8%	0	0.0%
81+	97	0.5%	0	0.0%
Unknown	1958	10.5%	3	6.5%
Total	18574		46	

2008				
Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	3014	14.8%	25	39.1%
21-25	2756	13.5%	12	18.8%
26-30	1961	9.6%	7	10.9%
31-35	1489	7.3%	6	9.4%
36-40	1523	7.5%	5	7.8%
41-45	1542	7.6%	1	1.6%
46-50	1653	8.1%	2	3.1%
51-55	1541	7.6%	0	0.0%
56-60	1108	5.4%	2	3.1%
61-65	699	3.4%	0	0.0%
66-70	390	1.9%	0	0.0%
71-75	247	1.2%	0	0.0%
76-80	175	0.9%	0	0.0%
81+	111	0.5%	1	1.6%
Unknown	2178	10.7%	3	4.7%
Total	20387		64	

2009				
Age of Driver	Number of All Crashes	Percentage	Crashes with Driver Using Cell Phone	Percentage
16-20	3251	14.3%	8	18.6%
21-25	2977	13.1%	11	25.6%
26-30	2358	10.4%	9	20.9%
31-35	1773	7.8%	5	11.6%
36-40	1678	7.4%	2	4.7%
41-45	1657	7.3%	3	7.0%
46-50	1849	8.2%	1	2.3%
51-55	1679	7.4%	1	2.3%
56-60	1283	5.7%	1	2.3%
61-65	827	3.6%	2	4.7%
66-70	443	2.0%	0	0.0%
71-75	316	1.4%	0	0.0%
76-80	183	0.8%	0	0.0%
81+	160	0.7%	0	0.0%
Unknown	2241	9.9%	0	0.0%
Total	22675		43	

Total Number of Accident Between 2002 - 2008	Total Number of Accident Between 2002 - 2008 (16 - 20)	% of 16 - 20 All Crashes
180098	28794	16.0%
Total Number of Accidents involving a Cell Phone from 2002 - 2008	**Total Number of Accidents involving a Cell Phone from 2002 - 2009 (16 - 20)**	**% of 16 - 20 - Cell Phones**
442	150	33.9%

Elizabeth Moceri
Regional Counsel
Northwest Region

February 7, 2012

Berta Gardner
House of Representatives
State Capitol, Room
Juneau, AK 99801-1182

Dear Rep. Gardner:

Thank you for your support of HB 128. Allstate applauds your efforts to keep our teens and all of us safe by removing distractions from the road.

Mounting research indicates – and common sense supports – that that the use of cell phones while driving, especially among young drivers, is highly dangerous. A study published in the British Medical Journal found that cell phone use while driving resulted in a four-fold increase in crashes. Young drivers not only have the least experience but drivers between ages 16 and 24 also display the highest rates of cell phone use while driving, according to a study by the National Highway Traffic Safety Administration (NHTSA).

In 2005, The Allstate Foundation conducted a national survey of teen driving attitudes and behaviors. In the survey, 56 percent of teens said they make and answer cell phone calls while driving, and 13 percent write and/or read text messages. With 12.5 million teen drivers in the U.S., that's 1.62 million drivers writing and/or reading text messages while operating their vehicle.

This is truly an issue where you can make a lifesaving difference for families in Alaska. We look forward to the opportunity to work with you.

Sincerely,

Elizabeth Moceri
Regional Counsel

Allstate Insurance Company
18911 North Creek Parkway, Suite 301, Bothell, WA 98011 425-489-5399 emoce@allstate.com

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

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February 17, 2009

Representative Berta Gardner
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Gardner:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing HB 15, an act prohibiting the use of cellular telephones by minors when driving a motor vehicle; and providing for an effective date.

The APOA State Board's Legislative Committee recently reviewed this proposed legislation and unanimously decided to offer conditional support of this bill. We'd ask that it be amended to include all drivers and not be restricted to just minors. There is now empirical data showing that cell phone conversations (whether handheld or not) put the driver and other motorists at significant risk. A number of other states have now passed legislation outlawing the practice for all drivers, regardless of age.

We thank you for addressing this issue and urge you to consider expanding the bill to include all drivers. Please contact the APOA office in Anchorage at 277-0515, if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Angella Long
State President

Anchorage Police Department employees Association

500 W International Airport Rd.
P.O. Box 230330
Anchorage, Alaska 99523
Phone (907) 561-7500
www.apdea.net

January 24, 2012

Members of the Alaska State Legislature:

The Anchorage Police Department Employees Association (APDEA) represents over 500 rank and file employees of the Anchorage Police Department. As President of the APDEA, I am writing in support of HB 128, which would ban the use of cell phones by minors operating a motor vehicle.

APDEA members see firsthand the fatalities, injury, and property damage resulting from vehicular cell phone use by minors. Minors not only have the highest crash rates of any drivers, they are also involved in a disproportionate number of fatal accidents. When you add to the mix that minors are the most frequent cell phone users, a dangerous combination is created.

There is now a huge body of research on cell phones and driving. Studies both in this country and from places such as Canada and Australia consistently show that talking on cell phones quadruples a driver's chances of being involved in an accident. A recent study in Utah demonstrated that individuals talking on cell phones performed about as well at driving as individuals with a blood alcohol level of .08 percent. Major corporations and other large organizations have become so concerned about safety and liability that they banned on-road use of cell phones by their employees during work hours. The Harvard Center for Risk Analysis estimates that 2,600 deaths and 12,000 serious injuries occur each year in highway crashes caused by cell phone use.

Inexperienced drivers using cell phones only heightens the risk. APDEA members would love to never again respond to a serious accident involving a teenage driver talking on a cell phone. HB 128 would help achieve that goal.

Sincerely,

Derek Hsieh
President
APDEA

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VIA HAND DELIVERY

February 16, 2011

The Honorable Berta Gardner
Alaska House of Representatives
State Capitol, Room 424
Juneau, Alaska 99801-1182

Re: State Farm Support for HB 128 - Ban on Cell Phone Use by Minors While Driving

Dear Representative Gardner:

State Farm strongly supports a ban on cell phone use by minors while driving. There is no doubt this bill will in fact immediately begin to save lives and prevent injuries. Drivers between the ages 16 - 19 are four times more likely to be involved in a crash as other drivers. One in five of all auto deaths is attributed to teen driving. The leading causes of teen accidents include inexperience and distraction. A recent Research Report by the Children's Hospital of Philadelphia and State Farm determined that 9 out of 10 teenagers reported teen use of cell phones while driving was common, and 7 out of 10 said they have observed teens driving while being emotionally upset using a cell phone. That same survey indicated legal prohibitions and restrictions were the top motivations teens said would keep them from using a cell phone while driving.

As the insurance industry representative on the Alaska Highway Safety Improvement Program, State Farm thanks you for sponsoring this bill. Through an alliance with Children's Hospital of Philadelphia, State Farm has access to a wealth of information and resources should you or other members of the Legislature desire. If we can provide you any information or assistance, please let me know.

Sincerely,

Sheldon E. Winters
Lobbyist for State Farm Insurance Companies

SEW/lg
Gardner 02-16-11 letter of support.wpd

PRESS IMAGES

A student talks on a hands-free cell phone while operating a high-tech driving simulator. The simulator was used during a University of Utah study that found motorists who talk on cell phones while driving are as impaired as drunken drivers with blood-alcohol levels at the legal limit of 0.08 percent.

Photo Credit: Jim Moulin

Click to view...

DRIVERS ON CELL PHONES ARE AS BAD AS DRUNKS

UTAH PSYCHOLOGISTS WARN AGAINST CELL PHONE USE WHILE DRIVING

6

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June 29, 2006 -- Three years after the preliminary results first were presented at a scientific meeting and drew wide attention, University of Utah psychologists have published a study showing that motorists who talk on handheld or hands-free cellular phones are as impaired as drunken drivers.

"We found that people are as impaired when they drive and talk on a cell phone as they are when they drive intoxicated at the legal blood-alcohol limit" of 0.08 percent, which is the minimum level that defines illegal drunken driving in most U.S. states, says study co-author Frank Drews, an assistant professor of psychology. "If legislators really want to address driver distraction, then they should consider outlawing cell phone use while driving."

Psychology Professor David Strayer, the study's lead author, adds: "Just like you put yourself and other people at risk when you drive drunk, you put yourself and others at risk when you use a cell phone and drive. The level of impairment is very similar."

"Clearly the safest course of action is to not use a cell phone while driving," concludes the study by Strayer, Drews and Dennis Crouch, a research associate professor of pharmacology and toxicology. The study was set for publication June 29 in the summer 2006 issue of *Human Factors: The Journal of the Human Factors and Ergonomics Society.*

The study reinforced earlier research by Strayer and Drews showing that hands-free cell phones are just as distracting as handheld cell phones because the conversation itself – not just manipulation of a handheld phone – distracts drivers from road conditions.

Human Factors Editor Nancy J. Cooke praised the study: "Although we all have our suspicions about the dangers of cell phone use while driving, human factors research on driver safety helps us move beyond mere suspicions to scientific observations of driver behavior."

The study first gained public notice after Strayer presented preliminary results in July 2003 in Park City, Utah, during the Second International Driving Symposium on Human Factors in Driver Assessment, Training and Vehicle Design. It took until now for the study to be completed, undergo review by other researchers and finally be published.

Key Findings: Different Driving Styles, Similar Impairment

Each of the study"s 40 participants "drove" a PatrolSim driving simulator four times: once each while undistracted, using a handheld cell phone, using a hands-free cell phone and while intoxicated to the 0.08 percent blood-alcohol level after drinking vodka and orange juice. Participants followed a simulated pace car that braked intermittently.

Both handheld and hands-free cell phones impaired driving, with no significant difference in the degree of impairment. That "calls into question driving regulations that prohibited handheld cell phones and permit hands-free cell phones," the researchers write.

The study found that compared with undistracted drivers:

- Motorists who talked on either handheld or hands-free cell phones drove slightly slower, were 9 percent slower to hit the brakes, displayed 24 percent more variation in following distance as their attention switched between driving and conversing, were 19 percent slower to resume normal speed after braking and were more likely to crash. Three study participants rear-ended the pace car. All were talking on cell phones. None were drunk.

- Drivers drunk at the 0.08 percent blood-alcohol level drove a bit more slowly than both undistracted drivers and drivers using cell phones, yet more aggressively. They followed the pace car more closely, were twice as likely to brake only four seconds before a collision would have occurred, and hit their brakes with 23 percent more force. "Neither accident rates, nor reaction times to vehicles braking in front of the participant, nor recovery of lost speed following braking differed significantly" from undistracted drivers, the researchers write.

"Impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk," they conclude.

Are Drunken Drivers Really Less Accident-Prone than Cell Phone Users?

Drews says the lack of accidents among the study's drunken drivers was surprising. He and Strayer speculate that because simulated drives were conducted during mornings, participants who got drunk were well-rested and in the "up" phase of intoxication. In reality, 80 percent of all fatal alcohol-related accidents occur between 6 p.m. and 6 a.m. when drunken drivers tend to be fatigued. Average blood-alcohol levels in those accidents are twice 0.08 percent. Forty percent of the roughly 42,000 annual U.S. traffic fatalities involve alcohol.

While none of the study's intoxicated drivers crashed, their hard, late braking is "predictive of increased accident rates over the long run," the researchers wrote.

One statistical analysis of the new and previous Utah studies showed cell phone users were 5.36 times more likely to get in an accident than undistracted drivers. Other studies have shown the risk is about the same as for drivers with a 0.08 blood-alcohol level.

Strayer says he expects criticism "suggesting that we are trivializing drunken-driving impairment, but it is anything but the case. We don't think people should drive while drunk, nor should they talk on their cell phone while driving."

Drews says he and Strayer compared the impairment of motorists using cell phones to drivers with a 0.08 percent blood-alcohol level because they wanted to determine if the risk of driving while phoning was comparable to the drunken driving risk considered unacceptable.

"This study does not mean people should start driving drunk," says Drews. "It means that driving while talking on a cell phone is as bad as or maybe worse than driving drunk, which is completely unacceptable and cannot be tolerated by society."

University of Utah Cell Phone Research

Previous research by Strayer, Drews and colleagues include:

- A 2001 study showing that hands-free cell phones are just as distracting as handheld cell phones.
- A 2003 study showing that the reason is "inattention blindness," in which motorists look directly at road conditions but don't really see them because they are distracted by a cell phone conversation. And such drivers aren't aware they are impaired.
- A 2005 study suggesting that when teenagers and young adults talk on cell phones while driving, their reaction times are as slow as those of elderly drivers.

The University of Utah psychologists conducted the alcohol study because a 1997 study by other researchers evaluated the cell phone records of 699 people involved in motor vehicle accidents and found one-fourth of them had used their phone in the 10 minutes before their accident – a four-fold increase in accidents compared with undistracted motorists.

Those researchers speculated there was a comparable risk from drunken driving and cell phone use while driving. So Strayer and Drews conducted a controlled laboratory study.

The study included 25 men and 15 women ages 22 to 34 who were social drinkers (three to five drinks per week) recruited via newspaper advertisements. Two-thirds used a cell phone while driving. Each participant was paid $100 for 10 hours in the study.

The driving simulator has a steering wheel, dashboard instruments and brake and gas pedals from a Ford Crown Victoria sedan. The driver is surrounded by three screens showing freeway scenes. Each simulated daylight freeway drive lasted 15 minutes. The pace car intermittently braked to mimic stop-and-go traffic. Drivers who fail to hit their brakes eventually rear-end the pace car. Other simulated vehicles occasionally passed in the left lane, giving the impression of steady traffic flow.

Each study participant drove the simulator during three sessions – undistracted, drunk or talking to a research assistant on a cell phone – each on a different day.

The simulator recorded driving speed, following distance, braking time and how long it would take to collide with the pace car if brakes were not used.

The study was funded by a $25,000 grant from the Federal Aviation Administration – which is interested in impaired attention among pilots -- and by Strayer's and Drews' salaries. The Utah Highway Patrol loaned the researchers a device to measure blood-alcohol levels.

Driving while Distracted: A Growing Problem

The researchers cited figures from the Cellular Telecommunications Industry Association indicating that more than 100 million U.S. motorists use cell phones while driving. The National Highway Transportation Safety Administration estimates that at any given moment during daylight hours, 8 percent of all drivers are talking on a cell phone.

"Fortunately, the percentage of drunk drivers at any time is much lower," Drews says. "So it means the risk of talking on a cell phone and driving is probably much higher than driving intoxicated because more people are talking on cell phones while driving than are driving drunk." The main reason there are not more accidents is that "92 percent of drivers are not on a cell phone and are compensating for drivers on cell phones," he adds.

Cell phone use is far from the only distraction for motorists. The researchers cite talking to passengers, eating, drinking, lighting cigarettes, applying makeup and listening to the radio as the "old standards" of driver distraction.

"However, over the last decade many new electronic devices have been developed, and they are making their way into the vehicle," the researchers write. "Drivers can now surf the Internet, send and receive e-mail or faxes, communicate via a cellular device and even watch television. There is good reason to believe that some of these new multitasking activities may be substantially more distracting than the old standards because they are more cognitively engaging and because they are performed over longer periods of time."

News media may obtain a copy of the study by emailing leesiegel@ucomm.utah.edu or, starting June 29, by going to http://hfes.org and clicking on "What's New"

Other studies by Strayer and colleagues on cell phones and driving may be downloaded from: http://www.psych.utah.edu/AppliedCognitionLab/

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Q&As: Cellphones, texting, and driving

February 2011

More information on cellphones

Hide all answers

1 | How many people use cellphones?

Cellphone use in the United States has grown quickly during the past decade. There were about 293 million wireless cellphone subscribers as of June 2010, according to CTIA – The Wireless Association, an industry trade group.[1] That's up 51 percent from 194 million in June 2005 and 3 times the 97 million wireless subscribers in June 2000. Minutes of use have surged to about 2.3 trillion in June 2010 from 195 billion in June 2000.

2 | Do drivers frequently use phones behind the wheel?

Yes, though it's hard to determine accurately just how many drivers use phones. Combining observational and self-reported data on phone use, the federal government estimated that drivers using phones nearly tripled during 2000-08, from 4 to 11 percent, and then declined to 9 percent in 2009. Federal observational data indicate that 5 percent of drivers in 2009 were talking on hand-held phones at any moment during the day. This means about 672,000 passenger vehicles on the road at any moment during the day were driven by people talking on hand-held phones.[2]

A 2009 Institute telephone survey of 1,219 drivers 18 and older indicates phone use may be somewhat lower than government estimates. Drivers on average reported spending about an hour in the car each day, with about 4 minutes of that time on the phone. This translates into roughly 7 percent of time behind the wheel on the phone.[3] The discrepancy between the two estimates may be a result of drivers in the Institute survey understating how much phoning while driving they do because the practice has negative connotations. It also could reflect different methodologies. Government researchers observed hand-held phone use among drivers waiting at intersections during the daytime, then adjusted this for self-reported hands-free use. The Institute's survey estimates self-reported driver phone use on all kinds of roads during all hours.

3 | Who is most likely to talk on a cellphone while driving?

Young drivers ages 16-24 are more likely than other drivers to talk on hand-held cellphones according to daytime observational surveys of drivers the federal government conducted nationwide in 2009. Eight percent of drivers ages 16-24 were observed talking on hand-held phones, compared with 5 percent of those ages 25-69 and 1 percent of drivers 70 and older.[2] In the Institute's 2009 survey of drivers' self-reported phone use, people younger than 30 spent 16 percent of driving time on the phone, compared with 7 percent for drivers 30-59 years old, and just 2.5 percent for drivers 60 and older.[4]

Men in the Institute's survey reported spending slightly more time on the phone than women (7 percent versus 6 percent). This differs from the government's and other observations that female drivers use cellphones more. Drivers reported using phones more on weekdays and during afternoons and evenings. Use rates were 8 percent during these times.[3] This is in line with government observations that use is higher on weekdays.[2]

4 | Does using a cellphone while driving increase crash risk?

Yes. Two controlled studies link talking on a cellphone directly to increased crash risk. A 2005 Institute study of drivers in Western Australia found cellphone users four times as likely to get into crashes serious enough to injure themselves.[5] The study used cellphone billing records to verify phone use of crash-involved drivers. Increased risk was similar for males and females, drivers younger than 30 and those 30 and older, and hands-free and hand-held phones. The findings were consistent with 1997 research that showed phone use among Canadian drivers was associated with a fourfold increase in the risk of a property damage crash. The Canadian study also used cellphone billing records to verify phone use of drivers.[6]

5 | How many crashes have been caused by drivers using cellphones?

The federal government estimates that in 2009, 5,474 people were killed and an additional 448,000 were injured in motor vehicle crashes that were reported by police to have involved distracted driving. The government estimates that 18 percent of these deaths and 5 percent of these injuries involved cellphones.[7] However, these estimates are imprecise and likely underestimate distraction's role in crashes, as many police reports don't have information on distracting events. Police crash reports aren't a reliable way to count cellphone-related collisions because drivers often don't volunteer that they were on the phone.

It is possible to estimate the expected number of crashes linked to phoning while driving. An Institute analysis suggests this practice could account for 22 percent of all crashes, or about 1.3 million in 2008, based on how much phoning while driving motorists admitted to researchers and the estimated risk of driver phone use.[3] However, there is a disconnect between estimated crashes and real-world data, which indicate that crashes have been holding steady in recent years, even as cellphone use in general and driver use of phones in particular have proliferated.

About 5.5 million police-reported motor vehicle crashes occurred during 2009, the latest year for which federal data are available. This count doesn't differ much from the approximately 6 million crashes recorded annually during the early 1990s, when cellphones started getting popular, and it is lower than the 6.4 million crashes in 2000, when federal researchers began documenting the increase in phone use while driving.

An increase in cellphone-related crashes isn't showing up in insurance claims either. An analysis by the Highway Loss Data Institute indicates that the frequency of insurance claims for crash damage filed under collision coverage during 1998-2008 hasn't increased, even though driver phone use has escalated.[8]

A 2006 Virginia Tech Transportation Institute study used video cameras to monitor drivers in about 100 vehicles for about a year. Four percent of crashes or near-crashes were attributable to talking on a cellphone, researchers estimated.[9]

6 | Are hands-free cellphones safer?

No, at least not after the conversation begins. Two studies of crashes using cellphone billing records to verify phone use found about a fourfold increase in crash risk with conversing on both hands-free and hand-held phones.[5,6] The studies were unable to estimate crash risk from different types of hands-free devices. They also were unable to determine whether there was any benefit associated with hands-free devices while placing the call. Experimental research using driving simulators indicates that phone conversation tasks, whether using hand-held or hands-free devices, affect some measures of driving performance.[10,11] Hands-free phones may eliminate some of the physical distraction of handling phones, but the cognitive distraction from phone conversations remains.

7 | How does cellphone use affect driving performance?

An Institute review of more than 120 cellphone studies, about half of which were experimental studies using driving simulators or vehicles instrumented with video cameras, sensors, and other equipment, found that nearly all reported that some measures of driver performance were affected by the cognitive distractions associated with cellphone tasks.[11] Phone conversation tasks typically increased reaction times and travel speeds and increased lane deviations and steering wheel movements. Statistical analyses that aggregated the results of 33 studies and 23 studies, respectively, reported similar findings.[10,12] Some studies have found that older drivers' performance is more affected by cellphone tasks, particularly their reaction time. Few studies included drivers younger than 18, and evidence is mixed on the effects of phone use for teenage drivers compared with adult drivers. Findings also are mixed on whether driving performance while talking on a cellphone improves with practice. Some simulator studies suggest that the negative impact of phone use on driving performance may lessen with experience.[13,14] Other simulator research has found no change in performance with practice.[15]

Using functional magnetic resonance imaging, researchers at Carnegie Mellon University found a 37 percent reduction in brain activity associated with driving when research subjects listened via a headset to spoken sentences that they judged as true or false while steering in a driving simulator. Researchers concluded that listening and processing information from a phone conversation can draw mental

resources away from driving, worsening driving performance, even when drivers are not holding or dialing a phone.[16]

Further evidence comes from a few studies of small samples of people observed during their everyday driving. One study included drivers of 100 vehicles instrumented with video cameras and other monitoring technologies. Only a few serious crashes occurred, but researchers calculated the odds of being in a near-crash or crash were 2.8 times higher when dialing a hand-held phone than when phones weren't being used. The odds of a near-crash or crash were 1.3 times higher when talking on a hand-held phone, although this was not statistically significant. But because drivers spend more time talking on a hand-held phone than dialing, the percentage of crashes and near-crashes estimated to be attributable to talking and dialing on hand-held phones were both about 4 percent.[9]

8 | Do bans on hand-held phones work to reduce driver phone use?

Institute research has documented that all-driver bans on hand-held phoning can have large and lasting effects on phone use. In November 2001, New York became the first state to implement a universal ban on hand-held cellphones. Observed driver hand-held cellphone use declined by an estimated 47 percent immediately after the ban. Use then began going back up, but when measured more than 7 years after the ban, use was 24 percent lower than would have been expected without the ban. Soon after a ban was passed in the District of Columbia in 2004, observed driver hand-held phone use dropped by 41 percent. Nearly five years after the ban, the rate of phone use was 43 percent lower than would have been expected without a ban. Connecticut's ban took effect in 2005. Observed hand-held phone use declined an estimated 76 percent immediately after a ban; more than 3 years later, use was 65 percent lower than would be expected without a ban.[17]

In the Institute's telephone survey of cellphone use, drivers in states with hand-held bans were less likely to say they talk on phones while driving. Forty-four percent of drivers in states with bans reported they don't use phones when driving, compared with 30 percent in states without such laws. The percent of drivers who talk on phones and always talk hands-free was 22 in states with all-driver bans on hand-held phones, and 13 in states without all-driver bans.[4]

9 | Do hand-held phone bans reduce crashes?

There is no evidence so far that banning hand-held phone use reduces crashes, even though Institute research demonstrates that bans on hand-held phoning while driving can have big and long-term effects in curbing phone use. A 2009 analysis by the Highway Loss Data Institute found that hand-held bans had no effect on insurance claims. Researchers compared claims for crash damage in 4 jurisdictions before and after hand-held phone use bans, finding steady claim rates before and after laws went into effect.[8]

Many drivers still use hand-held phones where use is banned, and others may simply switch to hands-free phones. Given that crash risk increases substantially with drivers' use of either hand-held or hands-free phones, bans on hand-held cellphones won't eliminate the problem entirely. Laws prohibiting hands-free phones are difficult to enforce, plus drivers may be unfamiliar with restrictions in their state. In the Institute telephone survey, 18 percent of drivers in states with a universal ban on hand-held phone use either believed there was no law or were unsure. The proportion was even higher (48 percent) among drivers in states with a universal texting ban. Many drivers don't believe police pay much attention to them. Only 29 percent of drivers in states with universal hand-held phone bans who knew about the bans and 22 percent of drivers in states with universal texting bans who were aware of the restrictions felt they were strongly enforced.[4]

10 | How common are bans on hand-held cellphones and texting?

Bans are widespread in other countries and are becoming more common in the U.S. Nine states (California, Connecticut, Delaware, Maryland, New Jersey, New York, Oregon, Utah, and Washington) and the District of Columbia have enacted laws that ban drivers of all ages from using hand-held cellphones.

More common in the US are laws that restrict young drivers from using any type of cellphone. Teenage drivers in 28 states and the District of Columbia have such laws. School bus drivers in 19 states and the District of Columbia are restricted from using all cellphones while driving a bus.

In Australia, drivers in Victoria and Tasmania are banned from using all phones, except ones secured in a commercially designed holder fixed to the vehicle that can be operated without touching any part of the phone.

Text messaging is banned for all drivers in 30 states and the District of Columbia. In addition, novice drivers are banned from texting in 8 states (Alabama, Indiana, Maine, Mississippi, Missouri, Oklahoma, Texas, and West Virginia), and school bus drivers are banned from text messaging in 2 states (Oklahoma and Texas).

Cellphone laws in the US

11 | Why do more laws cover only teenage drivers?

Cellphone bans for young drivers are becoming more common amid concerns about the role distractions play in teenagers' elevated crash risk. Distractions of any type are a common factor in crashes of newly licensed 16-year-old drivers.[18] Some research also shows teenage drivers tend to use cellphones and other emerging technologies more than adult drivers.[19] States increasingly have graduated licensing laws that place restrictions on newly licensed drivers, e.g., limiting nighttime driving and the number of passengers a novice driver can carry. Cellphone bans are being added to those restrictions.

See Q&A: Teenagers — graduated driver licensing

More about the licensing law in your state, or any state

12 | Do teenagers comply with cellphone bans?

Young drivers often ignore cellphone restrictions, according to an Institute study of North Carolina's cellphone ban for young beginning drivers. The state bans the use of any telecommunications device by drivers younger than 18 under its graduated licensing system. Observed cellphone use by teenagers leaving high schools in the afternoon changed little from 1-2 months before to 5 months after the restriction took effect on Dec. 1, 2006.[20] About 11 percent of teenage drivers were seen using phones before the law. That percentage rose slightly to 12 percent in the postlaw survey. Cellphone use remained steady at about 13 percent at comparison sites in South Carolina, which doesn't restrict teenage drivers' phone use. When observed postlaw, less than 1 percent of teenage drivers in North Carolina were using hands-free phones. About 2 percent were observed dialing or texting and about 9 percent were holding a phone to their ear.

The study coupled driver observations with telephone surveys of North Carolina parents and their teenagers. In postlaw surveys, about two-thirds of teenagers said they knew about their state's law, compared with 39 percent of parents. Three-quarters of teenagers and 95 percent of parents said they approved of the law. The proportion of teenagers who reported using phones while driving declined somewhat following the law. However, of those who owned a phone and admitted to ever talking on the phone while driving, about half admitted they used their phones, if they had driven, on the day prior to the interview. There was no evidence of focused enforcement or publicity of the law. Only 22 percent of teenagers and 13 percent of parents believed the ban was being enforced fairly often or a lot.[20]

13 | Is cellphone use more distracting to drivers than other tasks?

Evidence is mixed. For example, some experimental studies found that phone conversations are more disruptive than conversations with passengers or adjusting a radio.[11] However, two statistical analyses combining the results of multiple experimental studies found similar decrements in reaction time for conversation tasks with passengers and with hand-held or hands-free phones.[10,12] Two studies reported that talking on cellphones or having a 0.08 percent blood alcohol concentration (BAC) — the legal threshold for impairment — has a comparable effect on some simulated driving tasks.[21,22] However, the risks associated with alcohol impairment accumulate over the entire duration of a trip, whereas the risks of cellphone use generally apply for only a portion of a trip. In addition, crash risk increases substantially at very high BACs, and the implications of the experimental studies for drivers in their own vehicles is unknown.

14 | Is texting while driving a problem?

Texting in general is on the increase. Annualized text messages soared to about 1.8 trillion in June 2010 from 57 billion in June 2005.[1] Many people report that they text while driving. A 2009 Institute survey found that 13 percent of drivers of all ages have texted while driving, and this jumps to 43 percent among 18-24-year-old drivers.[4] Similar results were found in other studies.[23,24]

There hasn't been a lot of research on the safety effects of texting and driving, but three studies of young drivers using driving simulators all found that receiving, and especially sending, text messages impeded drivers' reaction times and lane-keeping ability.[25,26,27] In a study involving large trucks instrumented with video cameras and other monitoring technology, the odds of a traffic conflict, lane drift, near-crash, or crash were 23 times higher when a truck driver was texting. A limitation is that less than 1 percent of the incidents involved crashes; most were lane drifts or other driver errors. It's unknown how such incidents relate to actual crashes. It also is unclear whether the results generalize to passenger vehicle drivers.[28]

15 | Do drivers comply with text messaging bans?

So far it appears that drivers, especially young adults, largely shrug off texting bans. An Institute study found that among 18-24 year-olds — the group most likely to text — 45 percent reported texting while driving in states that bar the practice, just shy of the 48 percent of drivers who reported texting in states without bans.[4] Among drivers 25-29, 40 percent reported texting in states with bans, compared with 55 percent in states without bans.

Many drivers are unclear about the laws in their state. Forty-eight percent of drivers in states with universal texting bans believed there was no law or were unsure. Plus, only 22 percent of drivers who were aware of the restrictions felt they were strongly enforced.[4]

16 | Do bans on driver text messaging reduce crashes?

Not according to research by the Highway Loss Data Institute. A 2010 study examined insurance claims filed for damage to vehicles before and after driver texting bans were enacted in four states. There was no reduction in claim rates relative to comparison states. Rather, there was a significant increase of 7-9 percent in the frequency of claims in 3 of the 4 study states. Increases in the frequency of claims also were found for rated drivers 25 and younger in these 3 states.[29]

17 | Can technology be used to prevent crashes caused by distracted driving?

Automakers are rolling out crash avoidance systems that warn drivers when they are not paying attention. Some systems may intervene if the system judges that a crash is imminent. Systems like lane -departure warning and forward-collision warning promise to prevent many kinds of distracted driving crashes, not just those that result from cellphone use (see *Status Report*, April 17, 2008). But this isn't a quick fix. Most new vehicles don't have crash avoidance features, and it will take some time before the systems are in wide use as newer vehicles supplant older ones. Plus, the effects of these technologies on real-world crashes have not yet been established.

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INSURANCE INSTITUTE
FOR HIGHWAY SAFETY

NEWS RELEASE

July 12, 2005

1ST EVIDENCE OF EFFECTS OF CELL PHONE USE ON INJURY CRASHES:
CRASH RISK IS FOUR TIMES HIGHER WHEN DRIVER IS USING A HAND-HELD CELL PHONE

ARLINGTON, VA — Common sense as well as experience tell us that handling and dialing cell phones while driving compromise safety, and evidence is accumulating that phone conversations also increase crash risk. New Institute research quantifies the added risk — drivers using phones are four times as likely to get into crashes serious enough to injure themselves. The increased risk was estimated by comparing phone use within 10 minutes before an actual crash occurred with use by the same driver during the prior week. Subjects were drivers treated in hospital emergency rooms for injuries suffered in crashes from April 2002 to July 2004.

The study, "Role of cellular phones in motor vehicle crashes resulting in hospital attendance" by S. McEvoy et al. is published in the *British Medical Journal*, available at bmj.com.

"The main finding of a fourfold increase in injury crash risk was consistent across groups of drivers," says Anne McCartt, Institute vice president for research and an author of the study. "Male and female drivers experienced about the same increase in risk from using a phone. So did drivers older and younger than 30 and drivers using hand-held and hands-free phones."

Weather wasn't a factor in the crashes, almost 75 percent of which occurred in clear conditions. Eighty-nine percent of the crashes involved other vehicles. More than half of the injured drivers reported that their crashes occurred within 10 minutes of the start of the trip.

— MORE —

1005 N. GLEBE RD. ARLINGTON, VA 22201 TEL. 703/247-1500 FAX 703/247-1588 www.iihs.org

The study was conducted in the Western Australian city of Perth. The Institute first tried to conduct this research in the United States, but U.S. phone companies were unwilling to make customers' billing records available, even with permission from the drivers. Phone records could be obtained in Australia, and the researchers got a high rate of cooperation among drivers who had been in crashes.

Another reason for conducting the study in Australia was to estimate crash risk in a jurisdiction where hand-held phone use is banned. It has been illegal while driving in Western Australia since July 2001. Still one-third of the drivers said their calls had been placed on hand-held phones.

Hands-free versus hand-held: The results suggest that banning hand-held phone use won't necessarily enhance safety if drivers simply switch to hands-free phones. Injury crash risk didn't differ from one type of reported phone use to the other.

"This isn't intuitive. You'd think using a hands-free phone would be less distracting, so it wouldn't increase crash risk as much as using a hand-held phone. But we found that either phone type increased the risk," McCartt says. "This could be because the so-called hands-free phones that are in common use today aren't really hands-free. We didn't have sufficient data to compare the different types of hands-free phones, such as those that are fully voice activated."

Evidence of risk is mounting: The findings of the Institute study, based on the experience of about 500 drivers, are consistent with 1997 research that showed phone use was associated with a fourfold increase in the risk of a property damage crash. This Canadian study also used cell phone billing records to establish the increase in risk. The Institute's new study is the second to use phone records and the first to estimate whether and how much phone use increases the risk of an injury crash.

— MORE —

Taken together, the two studies confirm that the distractions associated with phone use contribute significantly to crashes. Other studies have been published about cell phone use while driving, but most have been small-scale and have involved simulated or instrumented driving, not the actual experience of drivers on the road. When researchers have tried to assess the effects of phone use on real-world crashes, they usually have relied on police reports for information. But such reports aren't reliable because, without witnesses, police cannot determine whether a crash-involved driver was using a phone.

End of 3-page news release on cell phone risk while driving

For more information go to www.iihs.org

JuneauEmpire.com

State considers cell phone ban

Bill would prohibit virtually all phone use for all Alaska drivers

Sunday, February 07, 2010

Story last updated at 2/7/2010 - 5:02 am

State considers cell phone ban
Bill would prohibit virtually all phone use for all Alaska drivers

By Jeremy Hsieh | The Associated Press

Lawmakers in the nation's most inaccessible state capital are considering the most aggressive statewide ban in the United States on the use of cell phones while driving.

Six states and Washington, D.C., ban handheld cell phone use while driving and 21 states and D.C. ban all cell phone use for novice drivers, according to the Governors Highway Safety Association. But the bill sponsored by Alaska state Rep. Mike Doogan, D-Anchorage, would ban virtually all cell phone use for all drivers.

"We haven't endorsed that approach as an association, but it's clearly where the debate is going," said Jonathan Adkins, a spokesman for the Governors Safety group based in D.C. "The hang up is convincing the public. It's probably too bold of a step for some people."

Doogan introduced his stringent bill this year after Rep. Berta Gardner, a fellow Anchorage Democrat, proposed specifically banning use of cell phones by drivers under 18. Both bills would make driving while using a cell phone an infraction punishable by a fine of up to $300 and points toward suspension or revocation of a driver's license.

It would be a primary offense under Doogan's version, meaning law enforcement could make a stop and ticket a driver specifically to enforce the rule. Gardner's version makes it a secondary offense, meaning some other violation must trigger the stop.

The only exception in Doogan's bill is for emergency calls. Neither bill makes exceptions for handsfree cell phone use. Both sponsors cite research that indicates the main risk comes from the brain drain that comes with the act of communicating, rather than the physical act of holding a phone. A study from the University of Utah found that cell phone use, whether handheld or handsfree, can cause driver reaction delays comparable to the legal limit of alcohol.

Out of 78,145 traffic accidents in Alaska from 2002 to 2007, 335 - less than half a percent - were cell phone-related, according to state Department of Transportation and Public Facilities spokesman Roger Wetherell. More than a third of the cell phone-related accidents are attributable to drivers age 16 to 20.

Amber Burton, 22, of Valdez, said it's natural for her to answer her phone while she drives.

"I think I have more issues with changing a CD or picking up something that dropped than using

a phone," she said.

She only has a 3-mile commute to work ("Everything's relatively close in Valdez," she says) but thinks a ban is a good idea.

"I probably would feel safer. Even though I'm probably one of those people" that scares other drivers, she said. "Just because I'm comfortable with it, doesn't mean everyone else is."

Part of Rick Burchell's job as a partner and instructor of AA Drivers Educational School Inc. in Anchorage is teaching his students to watch out for distracted drivers, especially cell phone users.

National cell phone-specific accident data is unavailable, though the ratio of "distracted drivers" in fatal crashes is on the rise, from 8 percent in 2004 to 11 percent in 2008, according to data compiled by the National Highway Traffic Safety Administration.

Meanwhile, an insurance industry study released Friday by the Highway Loss Data Institute found that state laws banning the use of handheld devices to make calls or send text messages while driving have not resulted in fewer vehicle crashes. It examined insurance claims from crashes before and after such bans took effect in California, New York, Connecticut and Washington, D.C.

Driving instructor Burchell sees merit in both bills, but admits he's slightly off-task when he's driving because of his own phone use, albeit through a handsfree system. Part of Burchell's rationale for limiting the risk through a handsfree system rather than abstaining entirely stems from parallels he sees with the safety fight decades ago against radios in cars. Like cell phones, radios introduced new distractions, but neither technology is going away, he said.

When Burchell's son, now 18, got his license, Burchell made him agree to never answer his phone behind the wheel.

"And then - all the kids think this is really despicable - dad made calls to the cell phone to make sure he wasn't answering," Burchell said. "He knew that his automobile would be lost forever if he picked up the phone."

Gardner said she'd like a ban for all drivers, but that the teens approach would meet less opposition. However, Gardner doesn't expect a hearing to be scheduled in the House Finance Committee, where her bill has sat since March despite a zero budget-impact statement from the Department of Public Safety.

"For all intents and purposes, the bill is dead," Gardner said.

That hasn't discouraged Doogan.

"I don't worry about that," he said, noting co-sponsor Peggy Wilson's role as chair of the House Transportation Committee, where his bill is awaiting a hearing date. Wilson is a Republican from Wrangell.

Key lawmakers in gatekeeper roles beyond Wilson's committee have declined to comment or said they don't know what the prospects are for Doogan's bill.

Alaska's big three cell phone service providers have different views on the proposal. AT&T supports restricting phone use by teen drivers, except in emergencies, said spokesman Kerry Hibbs. It recently launched an education campaign on the dangers of texting while driving.

Alaska Communications Systems advocates for laws requiring drivers to use handsfree devices, said spokeswoman Heather Cavanaugh.

And General Communication Inc., Alaska's largest telecommunications company, is neutral on the bills, but is generally opposed to legislation that curbs customer choice on handsets, said spokesman Curtiss Clifton.

The effort follows a state ban on drivers texting and watching videos that took effect in 2008 and a national ban on texting for truck and bus drivers that took effect Jan. 26.

March 13, 2009

The Honorable Berta Gardner
Alaska State Capitol, Room 424
Juneau, Alaska 99801

Dear Representative Gardner:

We are pleased to offer the National Safety Council's support of HB15, an Act prohibiting the use of cellular telephones by minors while driving a motor vehicle, to be considered by the Alaska Legislature during its 2009 session.

The National Safety Council applauds the Alaska Legislature for considering HB15. This Act's prohibition of cellular telephone use by teens while driving in Alaska would be a major step toward improving the safety of its citizens. As "novice" drivers, teens lack driving experience and tend to ignore risks; consequently, they are proportionately involved in twice as many fatal crashes as drivers 35-74 years of age. This is why the NSC and many other transportation safety leaders advocate that Graduated Driver Licensing (GDL) laws include a ban on teen driver cell phone and text messaging use while driving. At present sixteen states have a similar provision in their teen driver licensing law.

It is estimated that 80% of preventable motor vehicle crashes are caused in part by some form of driver inattention. Scientific research has determined that talking on a cell phone increases a driver's risk of a crash by four times. One study has reported that text messaging while driving increased the odds of a crash by six times. We invite the Alaska legislature to consider further action restricting the use of cell phones for all drivers and offer you the following links to scientifically reliable information for your reference should you wish to consider such action.
http://www.nsc.org/resources/issues/factsheet.aspx
http://www.nsc.org/resources/issues/distracteddriving.aspx

The National Safety Council is a non-profit organization that saves lives at work, at home, in communities and on the roads through leadership, research, education and advocacy. During the last forty years, the NSC has trained over sixty million drivers in defensive driving techniques. Please contact John Ulczycki, NSC's Group Vice President for Research, Communications, and Advocacy (john.ulczycki@nsc.org or 630-775-2160) if we may offer further assistance.

Sincerely,

Janet Froetscher

Janet Froetscher
President & CEO

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Melanie Lesh

From: Noah Hanson
Sent: Friday, March 02, 2012 9:03 AM
To: Melanie Lesh
Cc: Jane Pierson
Subject: Hearing Request for CSHB 128
Attachments: CSHB 128 (TRA) Hearing Request.pdf; CSHB 128 (TRA) Sponsor Statement.pdf; CSHB 128 (TRA).pdf; CSHB 128 Crash Data.pdf; CSHB 128 Hearing Request.pdf; CSHB 128 Letter of Support Allstate.pdf; CSHB 128 Letter of Support APDEA.pdf; CSHB 128 Letter of Support APOA HB 15.pdf; CSHB 128 Letter of Support NSC HB 15.pdf; CSHB 128 Letter of Support State Farm.pdf; CSHB 128 Studies and Articles.pdf; CSHB 128 Teen Driver Fact Sheet.pdf; CSHB 128 TRA Committee Report.pdf; HB 128.pdf; CSHB 128 Explanation of Changes.pdf

Good Morning Melanie,

I have attached the bill packet for CSHB 128. If you have any questions, or would like this in a different format, please let me know.

Thanks,

Noah Hanson
Staff to Representative Berta Gardner
State Capitol Building, Room 424
Juneau, AK 99801
Ph: (907) 465-4068
Fax: (907) 465-3834
http://www.RepBertaGardner.com
http://www.Facebook.com/BertaGardner

HJUD

3/14/12 – Rep. Gardner

– Rep. Lynn, camels nose/tent next group: seniors.

– Rep. Keller, 'hands free' – limits ability to talk?

Rep. Gardner teenagers disproportionately use cell phones. fatalities/statistics eg. CA. 47% ↓; passengers particip.

Rep. Holmes – 'vehicular way' – Effective date Δ Q: Art.2 Sec.17

Q. Gatto: 1st. DUI 2nd offense. procedural. law enforcement is limited. Q. infraction A. set by Court up to 300 fine.

Rep. Lynn Δ age of drivers lic.

Gardner phase in? Public information get voluntary.

Keep off date in.

Rep. Hawker 'When driving' a motor vehicle
actually moving. A. Lt. Dial if pulled over OK.
operation is different. common sense usually
should dictate. His survey response = 80% yes!

Gruenberg eg. stopped at stoplight. on record.
re text case. or 'similar device'.

HB

133

<TARGET><BILL>HB 133</BILL><SUBJECT>HB 133</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
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Doug Wooliver
Administrative Attorney

February 15, 2011

The Honorable Carl Gatto
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Gatto:

The Alaska Supreme Court respectfully requests that the House Judiciary Committee schedule HB 133 for a committee hearing. The bill creates two new superior court judge positions in Anchorage. The judges will handle civil cases.

Additional judges are needed because Anchorage superior court judges are the busiest in the state and a combination of more time being devoted to Child in Need of Aid cases and an ever-increasing number of unrepresented litigants has created a workload that is unsustainable.

Adding two new judges will not completely solve this problem, but it will provide some relief as the court works to develop alternative ways to manage the workload.

A fiscal note and sponsor statement are attached. Thank you for considering this request.

Sincerely,

Doug Wooliver
Administrative Attorney
Alaska Court System

Sponsor Statement
HB 133

The Alaska Supreme Court is asking for two new superior court judges in Anchorage. The judges will be assigned to civil cases.

Additional judges are needed because Anchorage superior court judges have the highest caseloads in the state and a combination of devoting more time to Child in Need of Aid (CINA) cases and an ever-increasing number of domestic relations cases where the parties choose to litigate their case without the assistance of attorneys has created a workload that is unsustainable.

Although some of the additional work comes from an increase in case filings, much is the result of improved practices that better meet the needs of those who come to court. This is particularly true with CINA cases.

One change that has impacted workload involves how CINA cases are assigned to judges. Prior practice was to have standing masters (specialists who hear cases and make recommendations to judges) preside over all phases of a case with the exception of contested hearings. If a hearing was contested it would be assigned to an available superior court judge who would resolve the contested issue and then return the case to the standing master. Although that practice saved superior court time, it led to other problems as the family was shuffled back and forth between judges.

The new practice begins the same as the old; a CINA case starts with a master until there is a contested issue. However, once that occurs the case is permanently assigned to a superior court judge; it does not return to the master. This eliminates the judge-shuffling and allows the judge and the family to get to know each other. All parties agree that familiarity improves both the process and the outcome for the families. However, this model results in superior court judges spending more of their time on these cases.

In addition to CINA cases, another prime driver behind the current workload is the prevalence of unrepresented litigants in domestic relations cases. Although we do not have historical statistics that track these cases, Alaska judges, like judges from across the country, have seen a significant increase over the past several years.

Judges cite a list of time-consuming challenges that arise when counsel is absent from one side or both sides. Frequent motion practice, arguments unrelated to the relevant legal issues, delays stemming from the failure to submit needed information and judicial time spent calculating child support awards are some of those challenges. However, even though these litigants take more time, their cases are as important as those where the parties have lawyers and the judiciary is committed to ensuring that they too can meaningfully access the court.

Adding two new judges will not significantly reduce the workload of the Anchorage superior court (Anchorage superior court judges will still be the busiest superior court judges in the state), but it will provide some relief as the court works to develop alternative ways to manage that workload. Thank you for considering this request.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version HB133-ACS-TC-02-03-11
() Publish Date

Identifier (file name)
Title An Act Relating to the Number of Superior Court Judges
Dept. Affected
Appropriation Alaska Court System
Allocation Trial Courts
Sponsor Senate Rules Committee
Requester Alaska Supreme Court
OMB Component Number 768

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	888.4		888.4	888.4	888.4	888.4	888.4
Travel	10.0		10.0	10.0	10.0	10.0	10.0
Services	37.6		20.0	20.0	20.0	20.0	20.0
Commodities	79.6		12.0	12.0	12.0	12.0	12.0
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**1,015.6**	**0.0**	**930.4**	**930.4**	**930.4**	**930.4**	**930.4**
CAPITAL EXPENDITURES	**425.2**						
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	1,440.8		930.4	930.4	930.4	930.4	930.4
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**1,440.8**	**0.0**	**930.4**	**930.4**	**930.4**	**930.4**	**930.4**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**8.0**	**8.0**	**8.0**	**8.0**	**8.0**	**8.0**	**8.0**
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the initial fiscal note for this bill.

Prepared by Doug Wooliver, Administrative Attorney
Division Alaska Court System
Approved by Doug Wooliver for Christine Johnson, Administrative Director
Alaska Court System

Phone 907-463-4750
Date/Time 2/3/2011 @ 10:30 am
Date 2/3/2011

(Revised 1/27/2011 OMB)

Analysis

House Bill 133 adds two new superior court judges to the Anchorage Bench. The Judges will be assigned civil caseloads. This fiscal note reflects the cost of the new judges along with their accompanying staff and one-time office-related expenses. This note also reflects the capital remodel costs necessary to accommodate two new superior court judges in the Nesbett Courthouse. These remodel costs are also included in the Alaska Court System's capital budget request as part of the court's long-term capital goals. Should the court's capital budget request be fully funded those costs would be removed from this note.

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB133

Analysis

Alaska Court System
Fiscal Note Calculations for HB133

Personal Services

Superior Court Judge - Anchorage (2)	514,200
In-Court Clerk - Anchorage, Range 12A (2)	125,200
Law Clerk - Anchorage, Range 13D (2)	123,800
Administrative Assistant - Anchorage, Range 12A (2)	125,200
Subtotal Personal Services	888,400
Travel	
Judicial Conferences/Other	10,000
WAN Fees, Software & Licensing	37,600
Supplies (desk, computer, courtroom electronics, and chair) for four PFT positions	79,600
Fiscal Note Total (Operating Expenses)	1,015,600
Breakdown by Expense Category:	
Personal Services Total	888,400
Travel Total	10,000
Services Total	37,600
Commodities Total	79,600
Total Operating Expenses	1,015,600

Capital Expenditures

Remodel Nesbett Courthouse to Accommodate Judges & Staff	
Total Capital Expenses	425,200

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB 133**
() Publish Date

Identifier (file name)
Title An Act Relating to the Number of Superior Court Judges
Sponsor House Rules Committee
Requester Alaska Supreme Court

Dept. Affected Alaska Judicial Council
Appropriation
Allocation
OMB Component Number

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel	9.0	0.8	0.8	0.8	0.8	0.8	0.8
Services	14.1	1.2	1.2	1.2	1.2	1.2	1.2
Commodities	0.1	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**23.2**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	23.2	1.9	1.9	1.9	1.9	1.9	1.9
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**23.2**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Larry Cohn, Executive Director
Division Alaska Judicial Council
Approved by

Phone 907-279-2526 ext. 1
Date/Time 2/1/11 4:30 p.m.
Date

(Revised 1/27/2011 OMB)

FISCAL NOTE
Alaska Judicial Council

Analysis

STATE OF ALASKA **BILL NO.** HB 133
2011 LEGISLATIVE SESSION

HB 133 adds two new superior court judges in the Third Judicial District. This fiscal note assumes that these positions will be filled separately, either because they will be in different venues or because the court may not have the facilities to proceed immediately on two new positions in a single venue. The Judicial Council's initial costs of filling these vacancies include funds needed to solicit applicants, to conduct investigations into their qualifications, and to convene a meeting to interview applicants and nominate the most qualified to the governor for appointment. A breakdown of costs is as follows:

Travel	Council members' travel to two meetings		9,000
Contractual	Printing, mailing, survey hosting, data analysis, advertising, miscellaneous		14,100
Commodities	Paper		100
		Total	23,200

If the Alaska Court System is able and willing to fill the two new positions simultaneously, and if the positions are in the same venue, the Judicial Council will coordinate its solicitation and screening of judicial applicants to achieve lower costs. In that case, the Council's funding request would be as follows:

Travel	Council members' travel to one meeting		5,500
Contractual	Printing, mailing, survey hosting, data analysis, advertising, miscellaneous		7,900
Commodities	Paper		100
		Total	13,500

An average superior court judge serves for twelve years. Costs associated with filling these positions in the future are amortized over the next twelve years.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB 133**
(H) Publish Date 2/21/11

Identifier (file name)
Title An Act Relating to the Number of Superior Court Judges
Sponsor House Rules Committee
Requester Alaska Supreme Court

Dept. Affected Alaska Court System
Appropriation Judicial Council
Allocation Judicial Council
OMB Component Number 771

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel	9.0	0.8	0.8	0.8	0.8	0.8	0.8
Services	14.1	1.2	1.2	1.2	1.2	1.2	1.2
Commodities	0.1	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**23.2**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	23.2	1.9	1.9	1.9	1.9	1.9	1.9
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**23.2**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**	**1.9**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Larry Cohn, Executive Director
Division Alaska Judicial Council
Approved by

Phone 907-279-2526 ext. 1
Date/Time 2/1/11 4:30 p.m.
Date

(Revised 1/27/2011 OMB)

FISCAL NOTE
Alaska Judicial Council

Analysis

STATE OF ALASKA **BILL NO. HB 133**
2011 LEGISLATIVE SESSION

HB 133 adds two new superior court judges in the Third Judicial District. This fiscal note assumes that these positions will be filled separately, either because they will be in different venues or because the court may not have the facilities to proceed immediately on two new positions in a single venue. The Judicial Council's initial costs of filling these vacancies include funds needed to solicit applicants, to conduct investigations into their qualifications, and to convene a meeting to interview applicants and nominate the most qualified to the governor for appointment. A breakdown of costs is as follows:

Travel	Council members' travel to two meetings		9,000
Contractual	Printing, mailing, survey hosting, data analysis, advertising, miscellaneous		14,100
Commodities	Paper		100
		Total	23,200

If the Alaska Court System is able and willing to fill the two new positions simultaneously, and if the positions are in the same venue, the Judicial Council will coordinate its solicitation and screening of judicial applicants to achieve lower costs. In that case, the Council's funding request would be as follows:

Travel	Council members' travel to one meeting		5,500
Contractual	Printing, mailing, survey hosting, data analysis, advertising, miscellaneous		7,900
Commodities	Paper		100
		Total	13,500

An average superior court judge serves for twelve years. Costs associated with filling these positions in the future are amortized over the next twelve years.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: HB 133
() Publish Date

Identifier (file name)HB133-DOA-OPA-2-19-11
Title: An Act increasing the number of superior court judges.....
Sponsor: House Rules Committee
Requester: House Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	181.7		181.7	181.7	181.7	181.7	181.7
Travel	4.1		4.1	4.1	4.1	4.1	4.1
Services	30.2		30.2	30.2	30.2	30.2	30.2
Commodities	3.0		3.0	3.0	3.0	3.0	3.0
Capital Outlay	13.4		1.3	1.3	1.3	1.3	1.3
Grants							
Miscellaneous							
TOTAL OPERATING	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	232.4		220.3	220.3	220.3	220.3	220.3
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**2.0**		2	2	2	2	2
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Rachel Levitt, Acting Director
Division: Office of Public Advocacy
Approved by: John Cramer, Deputy Commissioner
Department of Administration

Phone: 907 269-3504
Date/Time: 2/19/11, 9:15 a.m.
Date: 2/19/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 133
2011 LEGISLATIVE SESSION

Analysis

This bill will create two new Superior Court judge positions in the Third Judicial District. These two new judges will be handling Anchorage Child in Need of Aid matters. Currently, there are ten Anchorage Superior Court judges handling CINA matters. The addition of two new Superior Court judges will considerably increase the number of CINA cases heard on a weekly basis.

The Office of Public Advocacy currently has five (full time equivalent) staff attorneys in Anchorage who represent parents in CINA matters. The addition of two more judges will greatly increase the demands on these attorneys and their support staff to prepare for and appear in court for CINA matters. In order to adequately address the increased demands on the agency, the agency will need one additional attorney and one additional law office assistant.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: HB133
() Publish Date

Identifier (file name) HB133-DOA-PDA-2-19-11
Title: An Act increasing the number of superior court judges.....
Sponsor: House Rules Committee
Requester: House Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	181.7		181.7	181.7	181.7	181.7	181.7
Travel	4.1		4.1	4.1	4.1	4.1	4.1
Services	30.2		30.2	30.2	30.2	30.2	30.2
Commodities	3.0		3.0	3.0	3.0	3.0	3.0
Capital Outlay	13.4		1.3	1.3	1.3	1.3	1.3
Grants							
Miscellaneous							
TOTAL OPERATING	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	232.4		220.3	220.3	220.3	220.3	220.3
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**232.4**	**0.0**	**220.3**	**220.3**	**220.3**	**220.3**	**220.3**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	2.0		2	2	2	2	2
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Quinlan Steiner, Director
Division: Public Defender Agency
Approved by: John Cramer, Deputy Commissioner
Department of Administration

Phone: 907 334-4414
Date/Time: 2/19/11 9:45AM
Date: 2/19/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 133

Analysis

This bill provides for two new superior court judges in Anchorage. These positions are expected to handle a civil caseload of Child in Need of Aid (CINA) matters. The additional judicial positions are expected to increase weekly court room appearances and will increase the workload associated with all civil cases as the Agency attempts to prepare its cases in a timely manner to meet the demand of increased court hearings.

The civil division has six attorneys who are required to appear before the current ten superior court judges handling CINA matters. The Agency anticipates the need for two additional positions, one attorney position in the civil division and one law office assistant to meet the anticipated workload increase.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB 133**
() Publish Date: 1/31/2011

Identifier (file name) HB133-DOC-OC-02-22-11
Title: "An Act increasing the number of superior court judges
Sponsor: Rules Committee
Requester: Rules by Request

Dept. Affected: DOC
Appropriation: Population Management
Allocation: Statewide Probation & Parole
OMB Component Number: 2826

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (Inter-Agency)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time: 2/22/11 9:00 AM
Approved by: Joseph D. Schmidt, Commissioner — Date: 2/22/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 133

Analysis

The legislation adds two new civil superior court judges to the third judicial district.

This legislation does not have any fiscal impact on the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB 133**
() Publish Date 1/31/2011

Identifier (file name) HB133-DOC-OC-02-18-11
Title "An Act increasing the number of superior court judges
Sponsor Rules Committee
Requester House Judiciary Committee

Dept. Affected DOC
Appropriation Population Management
Allocation Statewide Probation & Parole
OMB Component Number 2826

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	85.4		85.4	85.4	85.4	85.4	85.4
Travel	0.5		0.5	0.5	0.5	0.5	0.5
Services	15.3		15.3	15.3	15.3	15.3	15.3
Commodities	10.2		10.2	10.2	10.2	10.2	10.2
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**111.4**	**0.0**	**111.4**	**111.4**	**111.4**	**111.4**	**111.4**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	111.4	0.0	111.4	111.4	111.4	111.4	111.4
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (Inter-Agency)							
TOTAL	**111.4**	**0.0**	**111.4**	**111.4**	**111.4**	**111.4**	**111.4**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time	**1**	0	1	1	1	1	1
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by Leslie Houston, Director
Division Dept. of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone 465-3339
Date/Time 2/18/11 4:00 PM
Date 2/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 133

Analysis

The legislation adds two new superior court judges to the third judicial district. The fiscal impact to the department primarily will be in the Division of Probation & Parole, due to the increased workload surrounding felony pre-sentence investigations (PSI) and pre-sentence report (PSR) production for the superior court.

Should this legislation pass the Department of Corrections will require the addition of one full-time Adult Probation Officer II to handle up to 12 reports each month.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB133**
() Publish Date

Identifier (file name) HB133-DPS-DET-02-18-11
Title: "An act increasing the number of superior court judges."
Sponsor: Rules by request
Requester: House Judiciary

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	91.6		91.6	91.6	91.6	91.6	91.6
Travel	8.1		8.1	8.1	8.1	8.1	8.1
Services	9.4		9.4	9.4	9.4	9.4	9.4
Commodities	8.2		8.2	8.2	8.2	8.2	8.2
Capital Outlay	18.1						
Grants							
Miscellaneous							
TOTAL OPERATING	**135.4**	**0.0**	**117.3**	**117.3**	**117.3**	**117.3**	**117.3**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	135.4		117.3	117.3	117.3	117.3	117.3
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**135.4**	**0.0**	**117.3**	**117.3**	**117.3**	**117.3**	**117.3**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Lt. Rodney Dial
Division: Alaska State Troopers
Phone: 907-247-4480
Date/Time: 2/18/11 4:15PM

Approved by: Joseph Masters, Commissioner
Department of Public Safety
Date: 2/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB133

Analysis

This bill amends AS 22.10.120 by increasing superior court judges by two to a new total of 42. The new positions are to be located in Anchorage to handle Child in Need of Aid (CINA) cases and domestic relations cases. It is the department's understanding that there will be an additional two court rooms added in Anchorage.

Passage of this legislation will require one additional Court Service Officer (CSO).

Court Service Officers are responsible for the transportation of prisoners from correctional facilities to court appearances, medical care, other transportation centers and to communities within the State of Alaska. In addition, Court Services Officers serve documents in accordance with instructions from the courts and agency standard operating procedures, to include subpoenas, summons, writs, orders, complaints and other notices.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB133**
() Publish Date

Identifier (file name): HB133-LAW-CIV-02-17-11
Dept. Affected: Law
Title: An Act increasing the number of superior court judges designated for the third judicial district; and providing for an effective date.
Appropriation: Civil
Allocation: Child Protection
Sponsor: Rules
Requester: (H) Judiciary
OMB Component Number: 2961

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	192.3		192.3	192.3	192.3	192.3	192.3
Travel	1.1		1.1	1.1	1.1	1.1	1.1
Services	26.7		26.7	26.7	26.7	26.7	26.7
Commodities	4.0		4.0	4.0	4.0	4.0	4.0
Capital Outlay	0.9		0.9	0.9	0.9	0.9	0.9
Grants							
Miscellaneous							
TOTAL OPERATING	**225.0**	**0.0**	**225.0**	**225.0**	**225.0**	**225.0**	**225.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	225.0		225.0	225.0	225.0	225.0	225.0
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**225.0**	**0.0**	**225.0**	**225.0**	**225.0**	**225.0**	**225.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	**1.0**		1	1	1	1	1
Part-time	0.5		0.5	0.5	0.5	0.5	0.5
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager
Phone: 465-5427
Division: Administrative Services
Date/Time: 2/17/11 3:30 PM
Approved by: John J. Burns, Attorney General
Date: 2/17/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB133

Analysis

This bill adds two new civil judges in Anchorage. Currently a significant portion of cases before the Anchorage judges are CINA (child in need of aid) cases. The addition of two new judges would increase the capacity of the court system to handle CINA cases, but would require an additional attorney in the Anchorage Child Protection Section to utilize the improved capacity to reduce delays inherent in the current system. To the extent the judges increase the capacity of the court system to process criminal cases, the criminal division of the department would similarly experience increased workloads. The Child Protection Section would need at least 1 FTE attorney position and a .5 support position to meet the increased demand on time and resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB133**
() Publish Date

Identifier (file name) HB133-OOG-DOE-2-18-11
Dept. Affected: OOG
Title: "An Act increasing the number of superior court judges designated for the third judicial district.."
Appropriation: Elections
Allocation: Elections
Sponsor: Rules Committee
Requester: House Judiciary Committee
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 2/18/2011, 3:31pm
Approved by: Linda Perez, Administrative Director — Date: 2/18/2011
Office of the Governor

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB133

Analysis

This legislation has no fiscal impact for the Division of Elections.

HB 150

<TARGET><BILL>HB 150</BILL><SUBJECT>HB 150</SUBJECT><COMM>HJUD27</COMM></TARGET>

STATE OF ALASKA
DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

SEAN PARNELL, GOVERNOR

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February 10, 2011

The Honorable Carl Gatto, Chair
House Judiciary Committee
State Capitol Room 118
Juneau, AK 99801

Dear Representative Gatto:

The Department of Health and Social Services respectfully requests a hearing in the House Judiciary Committee on House Bill 150, "An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; amending Rule 12(h), Alaska Rules of Criminal Procedure; amending Rule 45(a), Alaska Rules of Criminal Procedure; amending Rule 65, Alaska Rules of Civil Procedure; amending Rule 17, Alaska Rules of Probate Procedure; amending Rule 9, Alaska Rules of Administration; and providing for an effective date."

The bill strengthens the laws against financial exploitation and enhances the ability to obtain emergency protection orders for seniors. It improves the ability of those investigating reports of harm to obtain vital information in a timely manner, and will lead to better services and safety for vulnerable adults who are abused, neglected or exploited and unable to protect their own interests.

A copy of Governor Parnell's transmittal letter providing additional information on the bill and the associated fiscal note should be on file with the committee.

Your favorable consideration of this request will be appreciated.

Sincerely,

William J. Streur

William J. Streur
Commissioner

cc: Heather Brakes, Legislative Director, Office of the Governor

SECTIONAL ANALYSIS

HB 150, "An Act relating to the protection of property of persons under disability and minor; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; amending Rule 12(h), Alaska Rules of Criminal Procedure; amending Rule 45(a), Alaska Rules of Criminal Procedure; amending Rule 65, Alaska Rules of Civil Procedure; amending Rule 17, Alaska Rules of Probate Procedure; amending Rule 9, Alaska Rules of Administration; and providing for an effective date."

Section 1 makes the knowing violation or attempted violation of a financial protective order (introduced in section 7 of this legislation to protect vulnerable adults and elders) a crime.

Section 2 amends the definition of protective orders found in AS 11.56.740 to include financial protective orders being introduced with this legislation to protect the financial security of vulnerable adults and elders.

Section 3 makes the fact that a defendant knowingly directed criminal conduct at a person 65 years of age or older an aggravating factor at sentencing.

Section 4 adds being a victim of fraud as a basis for appointing a conservator by amending AS 13.26.165(2)(a). This will allow courts to protect individuals who may not be suffering from any mental deficiency but are victims of financial abuse.

Section 5 adds attorneys, caregivers, and the Department of Health and Social Services as entities who may petition for conservatorship for an individual. These additions widen the net of

individuals who can help protect victims to include entities who likely have first-hand knowledge of the abuse.

Section 6 creates a procedure for requesting the appointment of a temporary conservator in a conservatorship petition by adding a new subsection to AS 13.26.180. Currently, there is no statutory basis for appointing a conservator on a temporary basis. Under this section, a temporary conservator may be requested if it appears that the respondent's property will be wasted or dissipated during the pendency of the conservatorship proceedings.

Section 7 adds two new statutes. The first provides the statutory basis for temporary conservators to protect the victims of fraud and financial abuse and to ensure that funds are obtained to meet the needs of the respondent and respondent's dependents. Procedurally, this proposed statute parallels the existing statute AS 13.26.140 which deals with temporary guardians. The second statute creates a process for obtaining financial protective orders to immediately stop suspected financial abuse of the elderly and vulnerable adults. An initial 20-day protective order may be obtained ex parte, without notice to the respondent. The protective order may be extended for up to six months, after notice and a hearing at which the respondent may be heard.

Section 8 adds a definition of fraud (which is already found in the statutes creating the Office of Elder Fraud and Assistance) to conservatorship statutes.

Section 9 excludes the crime of violating a financial protective order from the crimes subject to warrantless arrest.

Sections 10 and 11 add financial protective order to the registry of protective orders maintained by the Department of Public Safety and updated by law enforcement officers.

Section 12 adds the concept of undue influence to the list of reportable harms to a vulnerable adult. Employees of nursing homes, residential care or health care facilities and the staff of educational institutions are added to the list of mandated reporters.

Section 13 clarifies information that may be contained in a report of harm to include contact information regarding the vulnerable adult and information regarding any undue influence.

Section 14 adds "undue influence" to the list of reportable harms.

Section 15 adds "undue influence" to the list of reportable harms and clarifies that a mandatory reporter is not prohibited from reporting harm in their non-occupational capacity. It also clarifies that no person is prohibited from making a report of harm.

Section 16 requires mandated reporters to contact law enforcement in situations where they believe the vulnerable adult is at imminent risk of serious physical harm and it is not possible to contact the department. "Undue influence" is added as one of the reportable harms. Law enforcement is required to contact the department within 24 hours of receiving the report.

Section 17 adds "undue influence" and "abandonment" to the list of harms that can be reported regarding a vulnerable adult residing in an out-of-home care facility.

Section 18 adds two new subsections. The first subsection states that a mandatory reporter is not relieved of the obligation to report to the department by reporting to their supervisor or another employee. The second subsection makes an individual who willfully or recklessly makes a false report liable for civil damages.

Section 19 adds" undue influence" to the list of reportable harms regarding vulnerable adults 60 years of age or older residing in an out-of-home care facility. The department is required to transfer these reports to the long term care ombudsman.

Section 20 adds "undue influence" to the list of reportable harms the department is required to investigate regarding individuals under 60 years of age living in out-of-home facilities.

Section 21 clarifies that the department and the long term care ombudsman must provide the results of their actions or investigations to the office of the department that handles adult protective services.

Section 22 adds "undue influence" to the list of reportable harms included in the reports sent to the department by the long term care ombudsman. It is clarified that these reports are sent to the office of the department that handles adult protective services.

Section 23 adds "undue influence" to the list of reportable harms the department is required to investigate.

Section 24 adds "undue influence" to the list of reported harm that applies to an alleged perpetrator.

Section 25 adds seven new subsections. These subsections

- Require individuals and entities to provide the department access to health and financial records of a vulnerable adult as part of its investigation;
- Prohibit anyone from interfering in an investigation;
- Allow the department to file an ex parte order for access to records if necessary if no petition for guardianship or conservatorship has been filed;
- Allow adult protective services access to any departmental information necessary to assist in the case;
- Allow the department to audio or video tape an interview of a vulnerable adult with their consent;
- Require the department to provide training to investigators and
- Define "financial records".

Section 26 adds an attorney-in-fact, a surrogate for health care decisions and a trustee as individuals who may serve as a surrogate decision maker for the purpose of consenting to the receipt of protective services for a vulnerable adult. It also deletes the requirement that in order for a spouse to be a surrogate decision maker, the spouse and vulnerable adult may not be living

in separate domiciles.

Section 27 adds an allegation of "undue influence" to the allegations that would disqualify an individual from being selected as a surrogate decision maker.

Section 28 requires the department to discontinue protective services if a vulnerable adult who has regained the cognitive ability to make their own decisions refuses services. Services may be continued only if the adult consents.

Section 29 adds attorney-in-fact, surrogate for health care decisions and a trustee as individuals who may consent to the provision of protective services to a vulnerable adult and adds undue influence to the list of potential reports of harm.

Section 30 adds family members, trustees and conservators to the list of individuals who may be restrained by a court injunction from interfering with the provision of protective services to a vulnerable adult.

Section 31 adds "undue influence" to the types of harm contained in confidential reports and adds trustee to the list of individuals who may consent to release a confidential report.

Section 32 clarifies that a person is not considered to be unduly influenced if they choose to consent to treatment by spiritual means only.

Section 33 redefines "abuse" to include the infliction of emotional distress or fear, including coercion and intimidation.

Section 34 redefines "caregiver" to include someone who is an employee of a business that provides care in an adult's home.

Section 35 defines "informed decision" as a decision made free from undue influence.

Section 36 redefines "exploitation" to include acts by a person in a position of trust with a vulnerable adult who obtains profit or advantage through undue influence, deception, intimidation or breach of fiduciary duty.

Section 37 redefines neglect to include the willful or reckless failure by a caregiver to provide access to services or to carry out a treatment plan necessary to the health of a recipient. "Essential care or services are defined as food, clothing, shelter, medical care and supervision.

Section 38 expands the definition of protective services to include services that obtain basic health care needs, financial assistance services, and protection from abuse, obtaining basic food, shelter and clothing, among others. Undue influence is added to the list of types of harm.

Section 39 amends the definition of "unable to consent" by adding the concept of "undue influence" and that the inability to consent includes a person's inability to perceive a loss of income or assets, eviction, and physical or mental harm.

Section 40 amends the definition of a vulnerable adult by more clearly defining what constitutes a physical or mental impairment.

Section 41 adds definitions for the following terms:

- Deception
- Fiduciary duty
- Financial institution
- Person who stands in a position of trust or confidence
- Undue influence

Section 42 amends the uncodified law. Under Alaska Rules of Criminal Procedure, the court, when considering a motion for continuance of a trial date, will be required to consider whether the victim is vulnerable due to advanced age and what effect the delay would have on the victim. In addition, trials in which the victim is vulnerable due to advanced age will be added to cases that will be given preference for scheduling.

Section 43 amends Indirect Court Rules in three areas. First, amending Rule 17, Alaska Rules of Probate Procedure, to allow ex parte orders to be issued to protect persons from financial exploitation. Second, amending Rule 9, Alaska Rules of Administration, by not requiring filing fees for an ex parte protective order. Third, amending Rule 65, Alaska Rules of Civil Procedure, by allowing ex parte orders to be issued to access records related to the investigation of a report of harm.

Section 44 amends the uncodified law by indicating that Section 1, 2, 3, and 42 apply to offenses committed on or after the effective date of the Act.

Section 45 amends the uncodified law regarding the number of votes required to enact Sections 7 and 25 of this bill.

Section 46 amends the uncodified law by adding revisor's instructions.

Section 47 provides for an effective date.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: HB 150
() Publish Date

Identifier (file name) 11 HB150-ACS-TC-2-22-11
Title: Protection of Vulnerable Adults/Minors
Sponsor: House Rules Committee
Requester: Governor

Dept. Affected
Appropriation: Alaska Court System
Allocation: Trial Courts
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Doug Wooliver, Administrative Attorney
Division: Alaska Court System
Phone: 907-463-4750
Date/Time: 2-22-2011 @ 2:00 pm

Approved by: Christine Johnson, Administrative Director, by Doug Wooliver
Alaska Court System
Date: 2/22/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 150
2011 LEGISLATIVE SESSION

Analysis

House Bill 150 makes several changes to the statutes that govern guardianships. Two of those changes will likely impact the court system, though the extent of the impact is too speculative to support a fiscal note and, in any event, may not be felt immediately.

Sections 6 and 7 allow for temporary conservators to be appointed within 72 hours of the filing of the petition and section 7 allows for ex parte protective orders when a person believes that an order is necessary to protect a vulnerable person from fraud.

The court's current experience with temporary guardianships (AS 13.26.140), and ex parte protective orders issued in other contexts suggests that the passage of this bill will result in more cases being filed that must be heard on short notice. If that increase becomes significant, and it likely will in the future, the court system may need to return to the legislature for additional funding. At this point, however, the number of conservatorship peitions filed each year is not great enough to warrant a fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 150
(H) Publish Date: 2/9/11

Identifier (file name): 1722-DHSS-SDSA-02-08-2011
Title: Adult Protective Services
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Health and Social Services
Appropriation: Senior and Disabilities Services
Allocation: Senior and Disabilities Services Admin
OMB Component Number: 2663

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost: 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Duane Mayes, Director — Phone 269-2083
Division: Senior and Disabilities Services — Date/Time 2/8/11 1:00 PM
Approved by: Alison Elgee, Assistant Commissioner — Date 2/8/2011
DHSS Finance & Management Services

(Revised 1/27/2011 OMB)

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FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 150

Analysis:

This legislation provides additional protections to seniors and other vulnerable adults. The proposed changes in the vulnerable adult statutes add the concept of undue influence as a potential harm. This bill provides additional legal and investigatory tools to the department in order to respond to reports of harm and establish protective services to individuals who need them. There is no fiscal impact anticipated.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 150
(H) Publish Date: 2/9/11

Identifier (file name) LL1722-DOA-OPA-2-8-11
Title: An Act relating to the protection of property of persons under disability . . . .
Sponsor: Rules by Request
Requester: Governor

Dept. Affected: DOA
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Rachel Levitt, Acting Director
Division: Office of Public Advocacy
Approved by: John Cramer, Deputy Commissioner
Department of Administration

Phone: 907-269-3504
Date/Time: 2/8/2011, 10:30 am.
Date: 2/8/2011

(Revised 1/27/2011 OMB)

COMMITTEE COPY

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 150

Analysis

This bill will enhance the legal protections against fraud and financial abuse available to elders and vulnerable adults. The Office of Public Advocacy wishes to highlight two portions of the bill that will provide new emergency procedures to protect vulnerable adults who may be served by the agency's Elder Fraud or Probate practices.

In section 7, this bill creates two emergency judicial proceedings to stop and prevent financial exploitation of vulnerable adults. The first is a process for the appointment of temporary conservators. This will allow the court to impose emergency conservatorships to assist vulnerable individuals with their financial affairs to prevent imminent waste or fraudulent dissipation of their estates.

The second creates a process for the imposition of financial protective orders. Individual victims and other concerned parties will be able to apply for the protections of 20 day ex parte protective orders to stop or prevent financial exploitation. The initial ex parte order may be extended for up to six months after notice and a hearing at which the respondent may be heard.

The bill also provides for expanded reporting of financial abuse and enhanced penalties in criminal cases when there is an elderly victim. Additionally, the bill criminalizes violations of the financial protective orders.

The agency does not believe that this will result in significant cost increases to the agency.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 6
Bill Version: HB 150
(H) Publish Date: 2/9/11

Identifier (file name)JU2010201722-DOC-OC-02-08-11
Title: "An Act relating to the protection of property of persons under
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 684

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost **

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time 2/08/11 1:00 p.m.
Approved by: Joseph D. Schmidt, Commissioner — Date 2/8/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

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FISCAL NOTE #6

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 150

Analysis

This legislation creates a new crime of violating protective orders and adds aggravating factors at sentencing for a crime against a victim 65 years or older. Violation of this law could result in incarceration. However, the Department of Corrections is unable to determine the number of future offenders and therefore is unable to determine the fiscal impact of the passage of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number 5
Bill Version HB 150
(H) Publish Date 2/9/11

Identifier (file name) LL1722-DPS-DET-02-08-11
Title "An Act relating to the protection of property of persons under disability and minors;...vulnerable adults..."
Sponsor Rules Committee
Requester Governor

Dept. Affected Public Safety
Appropriation Alaska State Troopers
Allocation AST Detachments
OMB Component Number 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version.

Prepared by Lt Rodney Dial
Division Alaska State Troopers
Approved by Joseph Masters
Commissioner

Phone 907-247-4480
Date/Time 2/8/11 1:30PM
Date 2/8/2011

(Revised 1/27/2011 OMB)

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FISCAL NOTE #5

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 150

Analysis

This bill makes several changes to AS 13.26 and AS 47.24 concerning vulnerable adults. It adds fraud as a reason that might necessitate a conservatorship, and as a basis for seeking an ex parte financial protective order. This bill also adds the concept of undue influence to the list of reportable harms and adds certain individuals as mandatory reporters of harm to vulnerable adults. Finally, this bill expands the investigatory authority of the Adult Protective Services Office.

Passage of this legislation will have no fiscal impact on the division.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HB 150
(H) Publish Date: 2/9/11

Identifier (file name): LL1722-DPS-DSS-02-08-11
Title: "An Act relating to the protection of property...Vulnerable Adults"
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Records & Identification
OMB Component Number: 1190

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel	16.0						
Services	32.0						
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**48.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	48.0						
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**48.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: David Schade
Division: Statewide Services
Approved by: Joseph Masters
Commissioner

Phone: 907-269-0202
Date/Time: 2/8/11 12:00 AM
Date: 2/8/2011

(Revised 1/27/2011 OMB)

COMMITTEE COPY

FISCAL NOTE #4

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 150

Analysis

This bill treats AS 13 protective orders in the same manner as stalking, sexual assault, and domestic violence protective orders under AS 18 and will require the development of new protective order forms with substantial collaboration between DPS, the Alaska Court System, DHSS, the Office of Public Advocacy, and the Department of Revenue. The findings and orders for these new AS 13 protective orders will differ from the AS 18 orders in the existing protection order registry, which address violence and domestic situations.

Once the forms are developed, APSIN programming changes will be required to accommodate new fields and types of information required. A separate version of the APSIN central registry must be developed to accommodate these new orders. Note: these new orders do not meet the necessary criteria for entry into the national registry of protection, stalking and sexual assault orders (NCIC) because they do not necessarily involve physical violence.

Programming and analysis for APSIN changes will require 280 hours of contractual work @ $100/hr to evaluate and make recommendations regarding statewide implementation of new processes and procedures for entering and maintaining these new orders into existing APSIN . Additionally, 40 hours of contractual work (at $100/hr) will be required to integrate these new orders in new APSIN.

Statewide training will then be required on the new forms and APSIN procedures. Statewide training costs are included.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 150
(H) Publish Date: 2/9/11

Identifier (file name): 1722-LAW-CIV-02-03-11
Title: An Act relating to property of persons; crime of violating protective order, aggravating factors at sentencing; protection; amending...
Sponsor: Rules
Requester: Request of the Governor

Dept. Affected: Law
Appropriation: Civil
Allocation: Human Services
OMB Component Number: 2962

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/3/11 4:15 PM
Approved by: John J. Burns, Attorney General, Department of Law — Date: 2/3/2011

(Revised 1/27/2011 OMB)

COMMITTEE COPY

FISCAL NOTE #3

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 150

Analysis

This bill adds a 20-day and six-month ex parte process for financial fraud, and a temporary conservatorship process when the need exists during the pendency of a regular petition for conservatorship. The bill also expands the list of mandatory reporters of harm to a vulnerable adult, adds the harm of undue influence, and expands the investigative powers of the Office of Adult Protective Services, including the authority to seek an ex parte order for access to a vulnerable adult or records regarding an adult. The bill also amends the crime of violating a protective order by adding the crime of violating a protective order issued to protect a vulnerable adult under AS 13.26.180 or 13.26.209. Violating a protective order is a class A misdemeanor.

There is no anticipated fiscal impact to Department of Law.

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 150

Page 6, line 8:

Delete all material and insert:

" (2) theft and related offenses under AS 11.46.100 – 11.46.295;

(3) vehicle theft under AS 11.46.360 and AS 11.46.365;

(4) forgery and related offenses under AS 11.46.500 – 11.46.580;

(5) business and commercial offenses under AS 11.46.600 – 11.46.740;"

Renumber the following paragraph accordingly.

Sec. 08.63.200. Confidentiality of communication.

(a) A person licensed under this chapter may not reveal to another person a communication made to the licensee by a client about a matter concerning which the client has employed the licensee in a professional capacity. This section does not apply to

(1) a case conference or case consultation with other mental health professionals at which the patient is not identified;

(2) the release of information that the client in writing authorized the licensee to reveal;

(3) information released to the board as part of a disciplinary or other proceeding;

(4) situations where the rules of evidence applicable to the psychotherapist-patient privilege allow the release of the information;

(5) a communication to a potential victim or to law enforcement officers where a threat of imminent serious physical harm to an identified victim has been made by a client; or

(6) a disclosure revealing a communication about an act that the licensee has reasonable cause to suspect constitutes unlawful or unethical conduct that would be grounds for imposition of disciplinary sanctions by a person licensed to provide health or mental health services, if the disclosure is made only to the licensing board with jurisdiction over the person who allegedly committed the act, and the disclosure is made in good faith.

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by an elderly person or disabled adult as required by AS 47.24.

vulnerable adult

(c) Information obtained by the board under (a)(3) of this section is confidential and is not a public record for purposes of AS 40.25.110 - 40.25.140.

Add to bill

Department of Commerce, Community, and Economic Development.

* **Sec. 3.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable adult** [AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.

* **Sec. 4.** AS 08.40.120(a) is amended to read:

(a) Each applicant shall be examined to determine the applicant's

(1) ability to understand plans, design specifications, and engineering terms commonly used in the electrical field;

(2) knowledge of electrical installations and wiring;

(3) familiarity with the regulations contained in the National Electrical Code and the National Electrical Safety Code, as approved by the **American National Standards Institute** [AMERICAN STANDARDS ASSOCIATION];

(4) familiarity with other installation and safety regulations approved by the **American National Standards Institute** [AMERICAN STANDARDS ASSOCIATION];

(5) personal skill and ability.

* **Sec. 5.** AS 08.42.060(a) is amended to read:

(a) The department shall examine applicants for an embalmer's license; the examination may include any or all of the following subjects: (1) theory and practice of embalming, (2) anatomy, (3) pathology, (4) bacteriology, (5) hygiene, including sanitation and public health, (6) chemistry, including toxicology, (7) restorative arts, including plastic surgery and demi-surgery, (8) funeral service arts and sciences [,] and funeral service administration, including accounting, funeral law, psychology, funeral principles, directing, and management, (9) Alaska vital statistics law, and (10) the provisions of this chapter and the regulations adopted by the department under this chapter. The department shall examine applicants for a funeral director's license; the examination may include any or all of the subjects included in (8), (9), and (10) of this subsection. The department may use the examination provided by the **International**

NEW TEXT UNDERLINED [DELETED TEXT BRACKETED]

Sarah Munson

From: House Judiciary
Sent: Monday, March 07, 2011 9:50 AM
To: LAA Legal
Subject: Request for CS for HB150 (27-GH1722\A)

Hello,

The House Judiciary Committee would like a CS for HB 150 (27-GH1722\A) that contains the following changes:

- Page 5, line 21: Replace "**person**" with "**party**"
- Page6, line 8: Replace "**theft and related offenses**" with "**offenses against property**"
- Page 9, lines 7-8: Following "**department**" insert "**at the earliest opportunity**"
- Page 14, lines 29-30: Replace "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**anyone**"
- Pages 14, line 31 – Page 15, line 1: Replace "**family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**person**"
- Page 16, line 24: Replace "**means**" with "**includes**"
- Page 16, line 30: Following "**consent;**" insert "**and**"
- Page17, line 3: Following "**deception,**" insert "**fraud,**"
- Page 17, line 17: Following "**protection;**" insert "**and**"
- Page 18, line 9: Following "**loss**" insert "**, waste, or dissipation**"
- Page 19, line 20: Following "**to**" insert "**wrongfully**"
- Page 19, line 21: Delete "**deceptively**"

Please send an electronic copy (along with the hard copy) to this e-mail address when it is complete. The committee has a Work Group session scheduled on Thursday, March 10th at 3:00 pm to discuss this bill and the CS, if it is ready.

Thank you,

Sarah Munson
Committee Aide
House Judiciary Committee
The Office of Representative Gatto
Alaska State Capitol Building, Rm 118
p. 465-4990
f. 465-2381

LEGAL SERVICES

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MEMORANDUM March 10, 2011

SUBJECT: CSHB 150(JUD) (Work Order No. 27-GH1722\M)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Sarah Munson

FROM: Pamela Finley
Revisor of Statutes

Enclosed is the referenced CS with the changes you requested. In addition to minor editorial changes, we have changed "and" to "or" in the amendment to AS 18.65.530 in sec. 11. We also renumbered the new section added by sec. 10 as AS 13.26.324 because AS 13.26.325 is a number that has already been used. Finally, it appears to us that the 72 hour rule in the last sentence of AS 13.26.207(a), added in sec. 9, may be an attempt to change a court rule, specifically Civil Rule 77. If so, the court rule change should be noted. Since this is a governor's bill, perhaps the Department of Law should be consulted on the last point. I am writing this memo because Jean Mischel is temporarily out of the office. Please contact her if you want additional work on this bill.

PF:plm
11-133.plm

Enclosure

27-GH1722\M
Mischel
3/7/11

CS FOR HOUSE BILL NO. 150(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 65, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

* **Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

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

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.180 or 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**[,]

(B) the minor has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;**[,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as

provided in AS 13.26.207 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the

petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The court shall cause a copy of the protective order to be served on the respondent.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or on the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order.

(d) On application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide to the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party shall comply with a protective order issued under this section. A third party who does not comply with a protective order granted under this section

may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

*** Sec. 10.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

*** Sec. 11.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under

AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 12.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 13.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 14.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide;

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 15.** AS 47.24.010(b) is amended to read:

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

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 16.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A

person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 17.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 18.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall [,] at the earliest opportunity **within 24 hours after receiving the report of harm** [,] notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

* **Sec. 19.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

* **Sec. 20.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 21.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 22.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

* **Sec. 23.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this

title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

*** Sec. 24.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 25.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 26.** AS 47.24.015(c) is amended to read:

(c) The department[,] or its designee[,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is

made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

*** Sec. 27.** AS 47.24.015 is amended by adding new subsections to read:

(h) An individual or entity shall cooperate with an investigation initiated by the department under this section. The individual or entity shall permit representatives of the department to obtain and review any health care or financial records related to a vulnerable adult and to interview staff who have had contact with, treated, or observed the vulnerable adult.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) If an entity or other person denies the department access to a vulnerable adult, a vulnerable adult's residence, or the health care or financial records of a vulnerable adult, the department may file a petition with the court for an ex parte order granting access if the department has not filed a petition for guardianship or conservatorship of the vulnerable adult. The court may grant the ex parte order if the petition shows that the department has received a report of harm under AS 47.24.010 and that the order is necessary for access to the adult or that the health care or financial records are relevant to the department's investigation under this section. Notice of the order shall be given to the party denying access as directed by the court.

(k) Notwithstanding any other provision of law, the office of the department

that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(*l*) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(m) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(n) In this section, "financial records" include records related to the vulnerable adult maintained by the following:

(1) the vulnerable adult or a fiduciary for the vulnerable adult;

(2) a financial institution;

(3) a caregiver of a vulnerable adult;

(4) a member of the vulnerable adult's family.

*** Sec. 28.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE

HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce or dissolution proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

* **Sec. 29.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

* **Sec. 30.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

* **Sec. 31.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian, [OR] attorney-in-fact, or **trustee,** a surrogate decision maker selected

under AS 47.24.016, **or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department, or its designee, within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

*** Sec. 32.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 33.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the

vulnerable adult who is the subject of the report or the vulnerable adult's guardian, attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

*** Sec. 34.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

*** Sec. 35.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional[,] or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

*** Sec. 36.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

*** Sec. 37.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

*** Sec. 38.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty;

*** Sec. 39.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional **or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" means food, clothing, shelter, medical care, and supervision**;

*** Sec. 40.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) freezing an account at a financial institution;

(E) petitioning for an ex parte protective order under AS 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 41.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 42.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or**

disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

* **Sec. 43.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a guardian, conservator, trustee, representative payee, or holder of a power of attorney of a vulnerable adult to act for the benefit of the vulnerable adult;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person of trust and confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 44.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In determining cause, the court shall consider whether the victim is vulnerable because of advanced age and the effect the delay would have on that person. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 45.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings, and the trial of defendants in custody **and of cases in which the victim is vulnerable because of advanced age** shall be given preference over other criminal cases. Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.209(a) - (g), enacted by sec. 9 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 9 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.209(a), enacted by sec. 9 of this Act.

(c) AS 47.24.015(j), enacted by sec. 27 of this Act, has the effect of amending Rule 65, Alaska Rules of Civil Procedure, relating to injunctions, by allowing ex parte orders to be issued related to injunctive relief for certain access to persons or records in order to investigate a report of harm under AS 47.24.010 for a vulnerable adult.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 44, and 45 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm;"

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.209(a) - (g), enacted by sec. 9 of this Act,

take effect only if sec. 46(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 9 of this Act, takes effect only if sec. 46(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 47.24.015(j), enacted by sec. 27 of this Act, takes effect only if sec. 46(c) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 50.** This Act takes effect immediately under AS 01.10.070(c).

HB 150 PROTECTION OF VULNERABLE ADULTS/MINORS

House Judiciary Subcommittee Working Group

Progress Report

03/11/10

I. Explanation of changes from Version A to Version M

- Version A: Add revisor's language on Title 8:

Page 1, line 10: Insert two new sections to read:

"***Sec. 1. AS 08.29.200(b) is amended to read:**

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by a vulnerable adult **[AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.**

***Sec. 2. AS 08.63.200(b) is amended to read:**

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by a vulnerable adult **[AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.**"

Renumber the following sections accordingly.

- Version M: Page 1, line 9; Section 1, AS 08.29.200(b): Change made.
- Version M: Page 2, line 2; Section 2, AS 08.63.200(b): Change made.

- Version A: Page 5, line 21; Section 7, 13.26.209(f): Replace "**person**" with "**party**"
  - Version M: Page 6, line 4; Section 9, 13.26.209(f): Change made.
- Version A: Page 6, line 8; Section 8, 13.26.325(2): Replace "**theft and related offenses**" with "**offenses against property**"
  - Version M: Page 6, line 22; Section 10, 13.26.324(2): Change made, but statute renumbered to 13.26.324 due to 13.26.325 already being used.
- Version A: Page 6, line 20; Section 9, 18.65.530(a)(2): Legal Services determined that the use of "**and**" was not appropriate and replaced it with "**or**"
  - Version M: Page 7, line 3; Section 11, 18.65.530(a)(2): Change made.
- Version A: Page 9, lines 7-8; Section 16, 47.24.010(e): Following "**department**" insert "**at the earliest opportunity**"
  - Version M: Page 9, lines 22-23; Section 18, 47.24.010(e): Change made.
- Version A: Page 14, lines 29-30; Section 30, 47.24.019(c): Replace "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**anyone**"
  - Version M: Page 15, line 14; Section 32, 47.24.019(c): Change made using phrase "**any person**"
- Version A: Pages 14, line 31 – Page 15, line 1; Section 30, 47.24.019(c) : Replace "**family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**person**"
  - Version M: Page 15, line 16; Section 32, 47.24.019(c): Change made.
- Version A: Page 16, line 24; Section 35, 47.24.900(4): Replace "**means**" with "**includes**"
  - Version M: Page 17, line 11; Section 37, 47.24.900(4): Change made.
- Version A: Page 16, line 30; Section 36, 47.24.900(7)(A): Following "**consent;**" insert "**and**"
  - Version M: Page 17, line 17; Section 38, 47.24.900(7)(A): Change made.
- Version A: Page 17, line 3; Section 36, 47.24.900(7)(B): Following "**deception,**" insert "**fraud,**"
  - Version M: Page 17, line 21; Section 36, 47.24.900(7)(B): Change made, but Legal Services wondered if it needed to be added elsewhere. Sarah will check.

- Version A: Page 17, line 17; Section 38, 47.24.900(11)(A): Following "**protection;**" insert "**and**"
  - Version M: Page 18, lines 1-15; Section 40, 47.24.900(11): Legal Services redrafted this section and removed the need for the change.
- Version A: Page 18, line 9; Section 39, 47.24.900(15)(D): Following "**loss**" insert "**, waste, or dissipation**"
  - Version M: Page 18, line 26; Section 41, 47.24.900(15)(D): Change made.
- Version A: Page 19, line 20; Section 41, 47.24.900(21): Following "**to**" insert "**wrongfully**"
  - Version M: Page 20, lines 5-9; Section 43, 47.24.900(21): Change made, but it should be noted that Legal Services redrafted this section to fit their drafting standards.
- Version A: Page 19, line 21; Section 41, 47.24.900(21): Delete "**deceptively**"
  - Version M: Page 20, lines 5-9; Section 43, 47.24.900(21): Change made, but it should be noted that Legal Services redrafted this section to fit their drafting standards.
- Version A: Page 6, line 20; Section 9, 18.65.530(a)(2): Legal Services determined that the used of "**and**" was not appropriate and replaced it with "**or**"
  - Version M: Page 7, line 3; Section 11, 18.65.530(a)(2): Change made.

II. Conceptual Amendments to Version M (03/10/11):

1. Page 4, lines 17-18; Section 9, 13.26.207(a): the 72-hour instructions to the court regarding temporary conservator requests may be a change to the court rules, specifically Civil Rule 77
2. Page 5, line 4; Section 9, 13.26.209(a): following "**protective order.**" insert "**A third-party filing for an ex parte order under this section on behalf of a proposed protected person shall certify to the court in writing that a copy of the petition has been actually served upon the proposed protected person or the proposed protected person's legal representative or certify the reasons why providing such service would cause immediate threat of harm to the best interests of the proposed protected person. The court shall cause a copy of any order, including any order setting a hearing on the application for ex parte relief, to be served upon the proposed protected person or legal representative. A proposed protected person filing for ex parte relief under this section either in person or through counsel of record is exempt from the requirements of this section.**"
3. Page 20, line 5; Section 43, 47.24.900(21): following "**person**" insert "**who stands in a postion**" and replace "**and**" with "**or**"
4. Page 4, line 17; Section 9, 13.26.207(a): following "**attorney**" insert "**and other persons as may be ordered by the court**"
5. Page 6, line 22; Section 10, 13.26.324(2): make 44.21.415(g)(1)(B) conform to the language here in Title 13
   - Page 7, line 13: insert

"*** Sec. 13. AS 44.21.415(g) is amended to read:**

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED OFFENSES] offenses against property **under AS 11.46.100 - 11.46.740; or**

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older."

- Renumber the following bill sections accordingly.

6. Page 13, line 15; Section 27, 47.24.015(n): replace "**the following:**" with "**any person.**" and delete the remainder of the section
7. Page 13, line 24; Section 28, 47.24.016(a): following "**guardian**" insert "**conservator**"
8. Page 14, lines 2-3; Section 28, 47.24.016(a)(1): replace "**divorce or dissolution proceedings;**" with "**divorce, dissolution, or legal separation proceedings;**"
9. Page 14, line 31; Section 31, 47.24.017(a): following "**guardian**" insert "**conservator**"
10. Page 16, line 1; Section 33, 47.24.050(b): following "**guardian**" insert "**conservator**"
11. Page 16, line 26; Section 35, 47.24.900(2)(A): following "**the [WILFUL,]**" insert "**, knowing**" and following "**intentional**" reinsert "**,**"
12. Page 17, line 30; Section 39, 47.24.900(9): replace "**means**" with "**includes**"
13. Page 17, line 24; Section 39, 47.24.900(9): following "**intentional**" insert "**, knowing,**"
14. Page 18, line 8; Section 40, 47.24.900(11): remove (D) and replace with "**(D) staying financial transactions;**"
15. Page 19, lines 8-10; Section 43, 47.24.900(18): remove (18) and replace with "**(18) "fiduciary duty" means the duty of a third-party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interests of that person;**"

III. Additional Amendments to Version M:

1. Page 5, line 30; Section 9, 13.26.209(f): replace "**A third party shall comply with a protective order issued under this section.**" with "**A third party who has received actual or legal notice of a protective order issued under this section shall comply with that order. Actual and legal notice of a protective order issued under this section is effective upon the third-party receiving a copy of the order by means of delivery, mail or fax transmission at the nearest residence or place of business of the third-party. Actual and legal notice of a protective order issued under this section is also effective upon all persons upon that order being recorded with the State Recorder.**"
2. Page 12, lines 14-18 and page 12, lines 22-30; Section 27, 47.24.015(h) & (j): Kelly will rewrite.
3. Page 13, lines 5-8; Section 27, 47.24.015(*l*): Kelly will broaden.
4. Page 17, line 21; Section 38, 47.24.900(7): Sarah will ask Legal Services what their issue was with inserting "**fraud**".
5. Page 20, lines 10-31; Sections 44 & 45, Direct Court Rule Amendments: Annie and Doug will discuss and solve.
6. Page 21 lines 1-14; Section 46, Indirect Court Rule Amendments: Legal Services will redraft when the rest of the bill is complete.
7. Page 21, lines 19-28; Section 48, Revisor's Instructions: Legal Services will redraft when the rest of the bill is complete.
8. Page 22, line 9; Section 50, Effective Date: All affected agencies will discuss and solve.

HB 150 PROTECTION OF VULNERABLE ADULTS/MINORS

House Judiciary Subcommittee Working Group

Progress Report

03/16/10

I. Explanation of changes from Version A to Version M

- Version A: Add revisor's language on Title 8:
  Page 1, line 10: Insert two new sections to read:

"***Sec. 1. AS 08.29.200(b) is amended to read:**

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by a vulnerable adult **[AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.**

***Sec. 2. AS 08.63.200(b) is amended to read:**

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by a vulnerable adult **[AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.**"

Renumber the following sections accordingly.

  - Version M: Page 1, line 9; Section 1, AS 08.29.200(b): Change made.
  - Version M: Page 2, line 2; Section 2, AS 08.63.200(b): Change made & subsequent sections renumbered.
- Version A: Page 5, line 21; Section 7, 13.26.209(f): Replace "**person**" with "**party**"
  - Version M: Page 6, line 4; Section 9, 13.26.209(f): Change made.
- Version A: Page 6, line 8; Section 8, 13.26.325(2): Replace "**theft and related offenses**" with "**offenses against property**"
  - Version M: Page 6, line 22; Section 10, 13.26.324(2): Change made, but statute renumbered to 13.26.324 due to 13.26.325 already being used.
- Version A: Page 6, line 20; Section 9, 18.65.530(a)(2): Legal Services determined that the use of "**and**" was not appropriate and replaced it with "**or**"
  - Version M: Page 7, line 3; Section 11, 18.65.530(a)(2): Change made.
- Version A: Page 9, lines 7-8; Section 16, 47.24.010(e): Following "**department**" insert "**at the earliest opportunity**"
  - Version M: Page 9, lines 22-23; Section 18, 47.24.010(e): Change made.
- Version A: Page 14, lines 29-30; Section 30, 47.24.019(c): Replace "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**anyone**"
  - Version M: Page 15, line 14; Section 32, 47.24.019(c): Change made using phrase "**any person**"
- Version A: Pages 14, line 31 – Page 15, line 1; Section 30, 47.24.019(c) : Replace "**family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**person**"
  - Version M: Page 15, line 16; Section 32, 47.24.019(c): Change made.
- Version A: Page 16, line 24; Section 35, 47.24.900(4): Replace "**means**" with "**includes**"
  - Version M: Page 17, line 11; Section 37, 47.24.900(4): Change made.
- Version A: Page 16, line 30; Section 36, 47.24.900(7)(A): Following "**consent;**" insert "**and**"
  - Version M: Page 17, line 17; Section 38, 47.24.900(7)(A): Change made.
- Version A: Page 17, line 3; Section 36, 47.24.900(7)(B): Following "**deception,**" insert "**fraud,**"

- Version M: Page 17, line 21; Section 36, 47.24.900(7)(B): Change made, but Legal Services wondered if it needed to be added elsewhere. Sarah and Legal Services determined that it did not.

- Version A: Page 17, line 17; Section 38, 47.24.900(11)(A): Following "**protection;**" insert "**and**"
  - Version M: Page 18, lines 1-15; Section 40, 47.24.900(11): Legal Services redrafted this section and removed the need for the change.
- Version A: Page 18, line 9; Section 39, 47.24.900(15)(D): Following "**loss**" insert "**, waste, or dissipation**"
  - Version M: Page 18, line 26; Section 41, 47.24.900(15)(D): Change made.
- Version A: Page 19, line 20; Section 41, 47.24.900(21): Following "**to**" insert "**wrongfully**"
  - Version M: Page 20, lines 5-9; Section 43, 47.24.900(21): Change made, but it should be noted that Legal Services redrafted this section to fit their drafting standards.
- Version A: Page 19, line 21; Section 41, 47.24.900(21): Delete "**deceptively**"
  - Version M: Page 20, lines 5-9; Section 43, 47.24.900(21): Change made, but it should be noted that Legal Services redrafted this section to fit their drafting standards.
- Version A: Page 6, line 20; Section 9, 18.65.530(a)(2): Legal Services determined that the used of "**and**" was not appropriate and replaced it with "**or**"
  - Version M: Page 7, line 3; Section 11, 18.65.530(a)(2): Change made.

II. Conceptual Amendments to Version M (03/10/11):

1. Page 4, lines 17-18; Section 9, 13.26.207(a): the 72-hour instructions to the court regarding temporary conservator requests require a change to the court rules, specifically Civil Rule 77
2. Page 5, line 4; Section 9, 13.26.209(a): following "**protective order.**" insert "**A third-party filing for an ex parte order under this section on behalf of a proposed protected person shall certify to the court in writing that a copy of the petition has been actually served upon the proposed protected person or the proposed protected person's legal representative or certify the reasons why providing such service would cause immediate threat of harm to the best interests of the proposed protected person. The court shall cause a copy of any order, including any order setting a hearing on the application for ex parte relief, to be served upon the proposed protected person or legal representative. A proposed protected person filing for ex parte relief under this section either in person or through counsel of record is exempt from the requirements of this section.**"
3. Page 20, line 5; Section 43, 47.24.900(21): following "**person**" insert "**who stands in a position**" and replace "**and**" with "**or**"
4. Page 4, line 17; Section 9, 13.26.207(a): following "**attorney**" insert "**and other persons as may be ordered by the court**"
5. Page 6, line 22; Section 10, 13.26.324(2): make 44.21.415(g)(1)(B) conform to the language here in Title 13
   - Page 7, line 13: insert

"*** Sec. 13. AS 44.21.415(g) is amended to read:**

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED OFFENSES] <u>offenses against property</u> **under AS 11.46.100 - 11.46.740; or**

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older."

- Renumber the following bill sections accordingly.

6. Page 13, line 15; Section 27, 47.24.015(n): replace "**the following:**" with "**any person.**" and delete the remainder of the section
7. Page 13, line 24; Section 28, 47.24.016(a): following "**guardian**" insert "**conservator**"
8. Page 14, lines 2-3; Section 28, 47.24.016(a)(1): replace "**divorce or dissolution proceedings;**" with "**divorce, dissolution, or legal separation proceedings;**"
9. Page 14, line 31; Section 31, 47.24.017(a): following "**guardian**" insert "**conservator**"
10. Page 16, line 1; Section 33, 47.24.050(b): following "**guardian**" insert "**conservator**"
11. Page 16, line 26; Section 35, 47.24.900(2)(A): following "**the [WILFUL,]**" insert "**, knowing**" and following "**intentional**" reinsert ","
12. Page 17, line 30; Section 39, 47.24.900(9): replace "**means**" with "**includes**"
13. Page 17, line 24; Section 39, 47.24.900(9): following "**intentional**" insert "**, knowing,**"
14. Page 18, line 8; Section 40, 47.24.900(11): remove (D) and replace with "**(D) staying financial transactions;**"
15. Page 19, lines 8-10; Section 43, 47.24.900(18): remove (18) and replace with "**(18) "fiduciary duty" means the duty of a third-party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interests of that person;**"

III. Additional Amendments to Version M:

- Page 5, line 30; Section 9, 13.26.209(f): replace "**A third party shall comply with a protective order issued under this section.**" with "**A third party who has received actual or legal notice of a protective order issued under this section shall comply with that order. Actual and legal notice of a protective order issued under this section is effective upon the third-party receiving a copy of the order by means of delivery, mail or fax transmission at the nearest residence or place of business of the third-party. Actual and legal notice of a protective order issued under this section is also effective upon all persons upon that order being recorded with the State Recorder.**"
- Page 12, lines 14-18 and page 12, lines 22-30; Section 27, 47.24.015(h) & (j): Delete (h) and (j) and replace with "**(h) In conducting its investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.**" Re-letter the following subsections accordingly.
- Page 13, lines 5-8; Section 27, 47.24.015(*l*): Rep. Gruenberg or Gretchen will draft an amendment if they feel this section still needs work.
- Page 17, line 21; Section 38, 47.24.900(7)(B): Following "**duty;**" insert "**in this subsection, "fraud" has the meaning given in AS 13.26.324(1) and (2);**"
- Page 20, lines 10-31; Sections 44 & 45, Direct Court Rule Amendments: Annie and Doug will discuss and solve.
- Page 21 lines 1-14; Section 46, Indirect Court Rule Amendments: Legal Services will redraft when the rest of the bill is complete.
- Page 21, lines 19-28; Section 48, Revisor's Instructions: Legal Services will redraft when the rest of the bill is complete.

- Page 22, line 9; Section 50, Effective Date: replace "**immediately under AS 01.10.070(c).**" with "**July 1, 2011.**"

IV. Explanation of changes from Version M to Version B

- (4) Version M: Page 4, line 17; Section 9, 13.26.207(a): following "**attorney**" insert "**and other persons as may be ordered by the court**"
  - Version B: Page 4, line 18; Section 9, 13.26.207(a): Change made.
- (1) Version M: Page 4, lines 17-18; Section 9, 13.26.207(a): the 72-hour instructions to the court regarding temporary conservator requests require a change to the court rules, specifically Civil Rule 77
  - Version B: Page 21, lines 21-23; Section 47, Indirect Court Rule Amendments: Change made in (c).
- (2) Version M: Page 5, line 4; Section 9, 13.26.209(a): following "**protective order.**" insert "**A third-party filing for an ex parte order under this section on behalf of a proposed protected person shall certify to the court in writing that a copy of the petition has been actually served upon the proposed protected person or the proposed protected person's legal representative or certify the reasons why providing such service would cause immediate threat of harm to the best interests of the proposed protected person. The court shall cause a copy of any order, including any order setting a hearing on the application for ex parte relief, to be served upon the proposed protected person or legal representative. A proposed protected person filing for ex parte relief under this section either in person or through counsel of record is exempt from the requirements of this section.**"
  - Version B: Page 4, line 31-page 5, line 3 and Page 5, lines 11-12; Section 9, 13.26.209(a): Change made with different language. See Legal Services memo.
- Version M: Page 5, line 30; Section 9, 13.26.209(f): replace "**A third party shall comply with a protective order issued under this section.**" with "**A third party who has received actual or legal notice of a protective order issued under this section shall comply with that order. Actual and legal notice of a protective order issued under this section is effective upon the third-party receiving a copy of the order by means of delivery, mail or fax transmission at the nearest residence or place of business of the third-party. Actual and legal notice of a protective order issued under this section is also effective upon all persons upon that order being recorded with the State Recorder.**"
  - Version B: Page 6, lines 5-15; Section 9, 13.26.209(f): Change made with new language. See Legal Services memo. May require correction…
- (5) Version M: Page 7, line 13: insert new section (and renumber the following bill sections accordingly) to read:

"*** Sec. 13. AS 44.21.415(g) is amended to read:**

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED OFFENSES] offenses against property **under AS 11.46.100 - 11.46.740; or**

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older."

    - Version B: Page 7, line 30; Section 14, 44.21.415(g): Change made as a new section 14.
- Version M: Page 12, lines 14-18; Section 27, 47.24.015(h): delete (h) and replace with "**(h) In conducting its investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.**"
    - Version B: Page 13, lines 5-8; Section 28, 47.24.015(h): Change made.
- Version M: Page 12, lines 22-30; Section 27, 47.24.015(j): delete (j) and re-letter the following subsections accordingly
    - Version B: Page 13, line 12; Section 28, 47.24.015(j): Change made and caused a change to the indirect court rules on page 21 (removed the original (c), which was later replaced by Court Rule 77).
- (6) Version M: Page 13, line 15; Section 27, 47.24.015(n): replace "**the following:**" with "**any person.**" and delete the remainder of the section
    - Version B: Page 13, line 27; Section 28, 47.24.015(m): Change made.
- (7) Version M: Page 13, line 24; Section 28, 47.24.016(a): following "**guardian,**" insert "**conservator,**"
    - Version B: Page 14, line 1; Section 29, 47.24.016(a): Change made.
- (8) Version M: Page 14, lines 2-3; Section 28, 47.24.016(a)(1): replace "**divorce or dissolution proceedings;**" with "**divorce, dissolution, or legal separation proceedings;**"
    - Version B: Page 14, lines 10-11; Section 29, 47.24.016(a)(1): Change made.
- (9) Version M: Page 14, line 31; Section 31, 47.24.017(a): following "**guardian,**" insert "**conservator,**"
    - Version B: Page 15, line 8; Section 32, 47.24.017(a): Change made.
- (10) Version M: Page 16, line 1; Section 33, 47.24.050(b): following "**guardian,**" insert "**conservator,**"
    - Version B: Page 16, line 10; Section 34, 47.24.050(b): Change made.
- (11) Version M: Page 16, line 26; Section 35, 47.24.900(2)(A): following "**the [WILFUL,]**" insert "**, knowing**" and following "**intentional**" reinsert "**,**"
    - Version B: Page 17, line 3; Section 36, 47.24.300(2)(A): Change made.
- Version M: Page 17, line 21; Section 38, 47.24.900(7)(B): following "**duty;**" insert "**in this subsection, "fraud" has the meaning given in AS 13.26.324(1) and (2);**"
    - Version B: Page 17, line 31 - page 18, line 1; Section 39, 47.24.900(7)(B): Change made.
- (13) Version M: Page 17, line 24; Section 39, 47.24.900(9): following "**intentional**" insert "**, knowing,**"
    - Version B: Page 18, line 3; Section 40, 47.24.900(9): Change made.
- (12) Version M: Page 17, line 30; Section 39, 47.24.900(9): replace "**means**" with "**includes**"
    - Version B: Page 18, line 9; Section 40, 47.24.900(9): Change made.
- (14) Version M: Page 18, line 8; Section 40, 47.24.900(11): delete (D) and replace with "**(D) staying financial transactions;**"
    - Version B: Page 18, line 18; Section 41, 47.24.900(11)(D): Change made.
- (15) Version M: Page 19, lines 8-10; Section 43, 47.24.900(18): delete (18) and replace with "**(18) "fiduciary duty" means the duty of a third-party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interests of that person;**"
    - Version B: Page 19, lines 18-20; Section 44, 47.24.900(18): Change made, but the edits cause problems.
- (3) Version M: Page 20, line 5; Section 43, 47.24.900(21): following "**person**" insert "**who stands in a position**"

    - Version B: Page 20, lines15-16; Section 44, 47.24.900(21): Change made.
- (3) Version M: Page 20, line 5; Section 43, 47.24.900(21): replace "**and**" with "**or**"
    - Version B: Page 20, lines15-16; Section 44, 47.24.900(21): Change made.
- Version M: Page 22, line 9; Section 50, Effective Date: replace "**immediately under AS 01.10.070(c).**" with "**July 1, 2011.**"
    - Version B: Page 22, line 15; Section 51, Effective Date: Change made.

HB 150 PROTECTION OF VULNERABLE ADULTS/MINORS

House Judiciary Subcommittee Working Group

Final Report

By Sarah Munson, Committee Aide

03/18/10

1. A- Page 1, line 10: Inserted two new sections to read:

"***Sec. 1. AS 08.29.200(b) is amended to read:**

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by a vulnerable adult **[AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.**

***Sec. 2. AS 08.63.200(b) is amended to read:**

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by a vulnerable adult **[AN ELDERLY PERSON OR DISABLED ADULT] as required by AS 47.24.**"

Renumbered the following bill sections accordingly.

- I- Page 1, line 9; Sec. 1. AS 08.29.200(b)
- I- Page 2, line 2; Sec. 2. AS 08.63.200(b)

2. A- Page 4, line 3; Sec. 7. AS 13.26.207(a): Following "**attorney**" inserted "**and other persons as ordered by the court**"
   - I- Page 4, line 18; Sec. 9. 13.26.207(a)
3. A- Page 4, line 16; Sec. 7. AS 13.26.209(a): Following "**person.**" inserted "**A petition filed on behalf of a protected person by another person must be accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm.**"
   - I- Page 4, line 31-page 5, line 3; Sec. 9. AS 13.26.209(a)
4. A- Page 4, lines 22-23; Sec. 7. AS 13.26.209(a): Replaced "**The court shall cause a copy of the protective order to be served on the respondent.**" with "**The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.**"
   - I-Page 5, lines 10-12; Sec. 9. AS 13.26.209(a)
5. A-Page 5, line 8; Sec. 7. AS 13.26.209(d): Following "**notice to**" inserted "**the protected person and**"
   - I-Page 5, lines 28-29; Sec. 9. AS 13.26.209(d)
6. A-Page 5, lines 16; Sec. 7. AS 13.26.209(f): Replaced "**A third party shall comply with a protective order issued under this section.**" with "**A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order.**"
   - I-Page 6, lines 5-6; Sec. 9. AS 13.26.209(f)
7. A-Page 5, line 21; Sec. 7. AS 13.26.209(f): Replaced "**person**" with "**party**"
   - I-Page 6, line 10; Sec. 9. AS 13.26.209(f)
8. A-Page 5, line 22; Sec. 7. AS 13.26.209(f): Following "**order.**" inserted "**As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party or registering with the Department of Public Safety.**"
   - I-Page 6, lines 12-15; Sec. 9. AS 13.26.209(f)

9. A-Page 6, line 5; Sec. 8. AS 13.26.325: The reference number 13.26.325 was already used, so Legal Services changed it to 13.26.324.
    - I-Page 6, line 29; Sec. 10. AS 13.26.324
10. A-Page 6, line 8; Sec. 8. AS 13.26.325(2): Replaced "**theft and related offenses**" with "**offenses against property**"
    - I-Page 7, line 1; Sec. 10. AS 13.26.324(2)
11. A-Page 6, line 20; Sec. 9. AS 18.65.530(a)(2): Replaced "**and**" with "**or**"
    - I-Page 7, line 13; Sec. 11. AS 18.65.530(a)(2)
12. A-Page 7, line 5; Inserted new section to read:

"*** Sec. ##. AS 44.21.415(g) is amended to read:**

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED OFFENSES] offenses against property **under AS 11.46.100 - 11.46.740; or**

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older."

Renumbered the following bill sections accordingly.

- I-Page 7, line 30-Page 8, line 10; Sec. 14. AS 44.21.415(g)

13. A-Page 9, lines 7-8; Sec. 16. AS 47.24.010(e): Reinserted "**at the earliest opportunity**"
    - I-Page 10, lines 13-14; Sec. 19. AS 47.24.010(e)
14. A-Page 11, line 29-Page 12, line 2; Sec. 25. AS 47.24.015(h): Redrafted (h)
    - I-Page 13, lines 6-9; Sec.28. AS 47.24.015(h)
15. A-Page 12, lines 6-14; Sec. 25. AS 47.24.015(j): Deleted (j) and re-lettered the following subsections accordingly.
    - I-Page 13, line 13; Sec. 28. AS 47.24.015(j): Note that (j) is Version A's (k)
16. A-Page 12, line 30-Page 13, line 3; Sec. 25. AS 47.24.015(n): Replaced "**the following:**" and (1) – (4) with "**any person**"
    - I-Page 13, line 28; Sec. 28. AS 47.24.015(m)
17. A-Page13, line 8; Sec. 26. AS 47.24.016(a): Following "**guardian,**" inserted "**conservator,**"
    - I-Page 14, line 2; Sec. 29. AS 47.24.015(a)
18. A-Page13, lines 17-18; Sec. 26. AS 47.24.016(a)(1): Replaced "**divorce or dissolution**" with "**divorce, [OR] dissolution, or legal separation**"
    - I-Page 14, line 11-12; Sec. 29. AS 47.24.015(a)(1)
19. A-Page 14, line 15; Sec. 29. AS 47.24.017(a): Replaced "**guardian or**" with "**guardian, conservator, [OR]**"
    - I-Page 15, line 9; Sec. 32. AS 47.24.017(a)
20. A-Page 14, lines 29-30; Sec. 30. AS 47.24.019(c): Replaced "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**any person**"
    - I-Page 15, line 23; Sec. 33. AS 47.24.019(c)
21. A-Page 14, line 31-Page 15, line 1; Sec. 30. AS 47.24.019(c): Replaced "**a family member, caregiver, guardian, conservator, attorney-in-fact, trustee, or surrogate decision maker**" with "**person**"
    - I-Page 15, line 25; Sec. 33. AS 47.24.019(c)
22. A-Page 15, line 15; Sec. 31. AS 47.24.050(b): Following "**guardian,**" inserted "**conservator,**"
    - I-Page 16, line 11; Sec. 34. AS 47.24.050(b)

23. NEED TO: I-Page 16, line 14; Sec. 34. AS 47.24.050(b): Following "**guardian,**" INSERT "**conservator,**"
24. A-Page 16, line 9; Sec. 33. AS 47.24.900(2)(A): Following "**intentional,**" inserted "**knowing,**"
    - I-Page 17, line 4; Sec. 36. AS 47.24.900(2)(A)
25. A-Page 16, line 24; Sec. 35. AS 47.24.900(4): Replaced "**means**" with "**includes**"
    - I-Page 17, line 21; Sec. 38. AS 47.24.900(4)
26. A-Page 17, line 3; Sec. 36. AS 47.24.900(7)(B): Following "**deception,**" inserted "**fraud,**"
    - I-Page 17, line 31; Sec. 39. AS 47.24.900(7)(B)
27. A-Page 17, line 4; Sec. 36. AS 47.24.900(7)(B): Following "**duty;**" inserted "**in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);**"
    - I-Page 18, lines 1-2; Sec. 39. AS 47.24.900(7)(B)
28. A-Page 17, line 6; Sec. 37. AS 47.24.900(9): Following "**intentional,**" inserted "**knowing,**"
    - I-Page 18, line 4; Sec. 40. AS 47.24.900(9)
29. A-Page 17, line 11; Sec. 37. AS 47.24.900(9): Replaced "**means**" with "**includes**"
    - I-Page 18, line 10; Sec. 40. AS 47.24.900(9)
30. A-Page 17, lines 13-29; Sec. 38. AS 47.24.900(11): Legal Services reformatted this section, but there was no substantial change
    - I-Page 18, lines 12-26; Sec. 41. AS 47.24.900(11)
31. A-Page 17, line 22; Sec. 38. AS 47.24.900(11)(B)(iv): Replaced "**(iv) freezing an account at a financial institution;**" with "**(D) staying financial transactions;**"
    - I-Page 18, line 19; Sec. 41. AS 47.24.900(11)(B)(D)
32. A-Page 18, line 9; Sec. 39. AS 47.24.900(15)(D): Following "**loss**" inserted "**, waste, or dissipation**"
    - I-Page 19, line 6; Sec. 42. AS 47.24.900(15)(D)
33. A-Page 18, lines 22-24; Sec. 41. AS 47.24.900(18): Redrafted (18)
    - I-Page 19, lines 19-21; Sec. 44. AS 47.24.900(18)
34. A-Page 19, lines 19-20; Sec. 41. AS 47.24.900(21): Replaced " **"undue influence" means a person of trust or confidence uses the person's role, relationship or authority to exploit**" with " **"undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit**"
    - I-Page 20, lines 16-18; Sec. 44. AS 47.24.900(21)
35. A-Page 19, line 21; Sec. 41. AS 47.24.900(21): Deleted "**deceptively**"
    - I-Page 20, line 18; Sec. 44. AS 47.24.900(21)
36. A-Page 19, lines 29-31; Sec. 42. Direct Court Rule Amendments 12(h): Replaced all bold language with "**In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect that delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.**"
    - I-Page 20, lines 26-29; Sec. 45. Direct Court Rule Amendments 12(h)
37. A-Page 20, lines 5-7; Sec. 42. Direct Court Rule Amendments 45(a): Deleted all bold language.
    - I-Page 21, lines 8-9; Sec. 46. Direct Court Rule Amendments 45(a)
38. A-Page 20, line 7; Sec. 42. Direct Court Rule Amendments 45(a): Following "**cases.**" inserted "**The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.**"
    - I-Page 21, line 8; Sec. 46. Direct Court Rule Amendments 45(a)
39. A-Page 20, lines 20-23; Sec. 43. Indirect Court Rule Amendments (c): Due to the deletion of |A-Page 12, lines 6-14; Sec. 25. AS 47.24.015(j)|, deleted (c). Due to |A-Page 4, lines 3-4; Sec. 7. AS 13.26.207(a)|, inserted new (c).
    - I-Page 21, lines 23-25; Sec. 47. Indirect Court Rule Amendments (c)
40. A-Page 21, line 18; Sec. 47, Effective Date: Replaced "**immediately under AS 01.10.070(c).**" with "**July 1, 2011.**"
    - I-Page 22, line 17; Sec. 51. Effective Date

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 16, 2011

SUBJECT: Due process notice (CSHB 150(JUD)
(Work order No. 27-GH1722\B))

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Sarah Munson

FROM: Jean M. Mischel
Legislative Counsel

The new work draft that incorporates the changes you requested is enclosed. With regard to the changes requested pertaining to service of a protective order under AS 13.26.209(e), added by sec. 9 of the bill, I did not understand the requested change that provided

> "Actual and legal notice of a protective order issued under this section is also effective upon all persons upon that order being recorded with the State Recorder."

In order to attempt to avoid a due process challenge resulting from this provision and to clarify what is meant by "State Recorder," I have modified that language and included that with the requirement of delivery of the notice on the affected person. Did you intend to include these orders in the state registry for sexual assault, stalking, and domestic violence protective orders under AS 18.65.540?

Even with this modification, I do not know whether the changes made to AS 13.26.209(a) and (e) pertaining to service of process and mailed or faxed notices will meet due process standards.

If I may be of further assistance, please advise.

JMM:plm
11-155.plm

Enclosure

27-GH1722\B
Mischel
3/15/11

CS FOR HOUSE BILL NO. 150(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

* **Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

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

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.180 or 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor[,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.207 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

* **Sec. 9.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. A petition filed on behalf of a protected person by another person must be

accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or on the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order.

(d) On application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit

the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party or recording with the Department of Public Safety.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

*** Sec. 10.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

*** Sec. 11.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

*** Sec. 12.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

*** Sec. 13.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

*** Sec. 14.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

*** Sec. 15.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of

Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

*** Sec. 16.** AS 47.24.010(b) is amended to read:

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

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

*** Sec. 17.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

*** Sec. 18.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any

other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 19.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall [,] at the earliest opportunity **within 24 hours after receiving the report of harm** [,] notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

*** Sec. 20.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

*** Sec. 21.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the

person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

*** Sec. 22.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

*** Sec. 23.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

*** Sec. 24.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

*** Sec. 25.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a

vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

*** Sec. 26.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

*** Sec. 27.** AS 47.24.015(c) is amended to read:

(c) The department[,] or its designee[,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer

the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

*** Sec. 28.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(*l*) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

*** Sec. 29.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's consent to receive the services because the vulnerable adult is unable to consent or

lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce, dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 30.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 31.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this section **or AS 13.52.030** if the department determines that the vulnerable adult has

become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

*** Sec. 32.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

*** Sec. 33.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 34.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult filed under this chapter are confidential and are not

subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

*** Sec. 35.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious organization" in AS 05.15.690.

* **Sec. 36.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the **knowing** [WILFUL], intentional, or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

* **Sec. 37.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

* **Sec. 38.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

* **Sec. 39.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has

the meaning given in AS 13.26.324(1) and (2);

*** Sec. 40.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the **knowing,** intentional**, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

*** Sec. 41.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for an ex parte protective order under AS 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 42.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of

undue influence, abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 43.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 44.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who is in a position of trust or confidence with another person, including a vulnerable adult, with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 45.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In determining cause, the court shall consider whether the victim is vulnerable because of advanced age and the effect the delay would have on that person. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings**,** and the trial of defendants in custody **and of cases in which the victim is vulnerable because of advanced age** shall be given preference over other criminal cases. Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.209(a) - (g), enacted by sec. 9 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 9 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.209(a), enacted by sec. 9 of this Act.

(c) AS 13.26.207, enacted by sec. 9 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 45, and 46 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm;"

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

*** Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.209(a) - (g), enacted by sec. 9 of this Act, take effect only if sec. 47(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 9 of this Act, takes effect only if sec. 47(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 51.** This Act takes effect July 1, 2011.

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3/17/11

CS FOR HOUSE BILL NO. 150(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; making conforming amendments; amending Rules 12(h) and 45(a), Alaska Rules of Criminal Procedure, Rule 77, Alaska Rules of Civil Procedure, Rule 17, Alaska Rules of Probate Procedure, and Rule 9, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 08.29.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY

PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 2.** AS 08.63.200(b) is amended to read:

(b) Notwithstanding (a) of this section, a person licensed under this chapter shall report incidents of

(1) child abuse or neglect as required by AS 47.17;

(2) harm or assaults suffered by **a vulnerable** [AN ELDERLY PERSON OR DISABLED] adult as required by AS 47.24.

*** Sec. 3.** AS 11.56.740(a) is amended to read:

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

(1) issued or filed under AS 18.66 and containing a provision listed in AS 18.66.100(c)(1) - (7) and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order; [OR]

(2) issued under AS 18.65.850, 18.65.855, or 18.65.860 and knowingly commits or attempts to commit an act that violates or would violate a provision listed in AS 18.65.850(c)(1) - (3)**; or**

(3) issued under AS 13.26.180 or 13.26.209 and knowingly commits or attempts to commit an act with reckless disregard that the act violates or would violate a provision of the protective order.

*** Sec. 4.** AS 11.56.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180.

*** Sec. 5.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

*** Sec. 6.** AS 13.26.165 is amended to read:

Sec. 13.26.165. Protective proceedings. Upon petition and after notice and hearing in accordance with the provisions of AS 13.26.165 - 13.26.315, the court may appoint a conservator or **issue another** [MAKE OTHER] protective order for cause as follows:

(1) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that

(A) a minor owns money or property that requires management or protection **that** [WHICH] cannot otherwise be provided**;**

(B) the minor [,] has or may have business affairs **that** [WHICH] may be jeopardized or prevented by the status of being a minor**;** [,] or

(C) [THAT] funds are needed for the minor's support and education and [THAT] protection is necessary or desirable to obtain or provide funds;

(2) appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that

(A) the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, **fraud,** confinement, detention by a foreign power, or disappearance; and

(B) the person has property **that** [WHICH] will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care**,** and welfare of the person or those entitled to be supported by the person and [THAT] protection is necessary or desirable to obtain or provide funds.

*** Sec. 7.** AS 13.26.180(a) is amended to read:

(a) The person to be protected, **a person's attorney or other legal representative,** any person who is interested in the estate, affairs**,** or welfare of the person to be protected, including a parent, guardian, [OR] custodian, **or caregiver, the Department of Health and Social Services,** or any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected, may petition for the appointment of a conservator or for other appropriate protective order.

*** Sec. 8.** AS 13.26.180 is amended by adding a new subsection to read:

(c) The petition may include a request for temporary conservatorship as provided in AS 13.26.207 if it appears that the respondent's property is likely to be wasted or dissipated during the pendency of the conservatorship proceeding. A request for temporary conservatorship must specify the facts that cause the petitioner to believe that a temporary conservatorship is necessary.

*** Sec. 9.** AS 13.26 is amended by adding new sections to read:

Sec. 13.26.207. Temporary conservators. (a) If, during the pendency of an initial petition for conservatorship, it appears that the respondent is in need of a protective order to protect the respondent against waste or dissipation of funds or property, or to obtain funds that are needed for the immediate support, care, and welfare of the respondent or persons entitled to be supported by the respondent, and the respondent is not capable of protecting the respondent's funds or property or obtaining the funds that are needed to support the respondent or persons whom the respondent is required to support, the petitioner may request the appointment of a temporary conservator to authorize the protection or to obtain the necessary funds. The request must state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney and other persons as ordered by the court. The court shall conduct a hearing within 72 hours after the filing.

(b) If the court determines that a temporary conservator should be appointed, it shall make the appointment and grant to the temporary conservator only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary conservator to provide the protection or authority necessary to protect the respondent from waste or dissipation of funds or property or to obtain the funds necessary for support.

(c) The temporary conservatorship expires at the time of the appointment of a full or partial conservator or on the dismissal of the petition for conservatorship.

Sec. 13.26.209. Ex parte protective orders; forms for petitions and orders; fees. (a) A person who is allowed to file a petition for a protective order under AS 13.26.180(a) may file a petition for an ex parte protective order against another person. A petition filed on behalf of a protected person by another person must be

accompanied by proof of service of the petition on the protected person or the person's attorney unless service would cause an immediate threat of harm to the best interests of the protected person and the petition includes a written explanation of the harm. If the court finds that the petition establishes probable cause that the respondent is financially defrauding the petitioner or a person for whose benefit the petitioner filed the petition and that, because of the fraud, there has been or is an immediate threat of a waste or dissipation of the proposed protected person's funds or other property, the court shall ex parte and without notice to the respondent issue a protective order. The petitioner shall certify to the court in writing any effort that the petitioner made to provide notice to the respondent. The court shall cause a copy of the protective order, any related orders, and a scheduling order, if any, to be served on the respondent and the protected person.

(b) An ex parte protective order under this section may

(1) grant any protection described in AS 13.26.200;

(2) supersede an existing power of attorney;

(3) prohibit the respondent from having any direct or indirect contact with the petitioner or other person for whose benefit the petitioner filed the petition; and

(4) prohibit the respondent from taking any act with respect to the funds or other property of the petitioner or other person for whose benefit the petitioner filed the petition.

(c) An ex parte protective order expires 20 days after it is issued, at the end of a six-month extension if granted by the court under (d) of this section, or on the appointment of a temporary or permanent conservator or dismissal of the petition for the ex parte order.

(d) On application filed with the court before the expiration of the 20-day ex parte protective order, the court shall schedule a hearing on whether to extend the protective order for up to six months. The court shall provide to the protected person and the respondent at least 10 days' notice of the hearing and the respondent's right to appear and be heard. If the court finds by a preponderance of the evidence that the respondent has committed fraud against the petitioner or the person for whose benefit

the petition was filed, regardless of whether the respondent appears at the hearing, the court may extend the ex parte protective order for up to six months.

(e) A protective order issued under this section is in addition to any other civil or criminal remedy.

(f) A third party that has received actual or legal notice of a protective order issued under this section shall comply with the order. A third party who does not comply with a protective order granted under this section may be liable in a civil action to the protected person or the protected person's heirs, assigns, or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the protective order. A third party who does not comply with a protective order granted under this section may also be criminally liable under AS 11.56.740 for violating a protective order. As used in this section, "actual or legal notice" means delivery by mail or facsimile at the most recently known place of residence or business of the third party or registering with the Department of Public Safety.

(g) The Alaska Court System, after consulting with the Department of Health and Social Services, the office of public advocacy, the office of elder fraud and assistance, the long term care ombudsman, and other interested persons and organizations, shall prepare forms for petitions and protective orders and instructions for use of the forms by a person seeking a protective order under this section. The forms must conform to the Alaska Rules of Probate Procedure and Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. The office of the clerk of each superior and district court shall make available to the public the forms a person seeking a protective order under this section may need and instructions for the use of the forms. The clerk shall provide assistance in completing and filing the forms.

(h) Filing fees may not be charged for a petition under this section.

* **Sec. 10.** AS 13.26 is amended by adding a new section to article 4 to read:

Sec. 13.26.324. Definitions. In AS 13.26.165 - 13.26.324, unless the context requires otherwise, "fraud" means

(1) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(2) offenses against property under AS 11.46.100 - 11.46.740; or

(3) exploitation of another person or another person's resources for personal profit or advantage if no significant benefit accrues to the person who is exploited.

* **Sec. 11.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of **AS 11.56.740(a)(1) or (2)** [AS 11.56.740];

(3) violated a condition of release imposed under AS 12.30.016(e) or (f) or 12.30.027.

* **Sec. 12.** AS 18.65.540(a) is amended to read:

(a) The Department of Public Safety shall maintain a central registry of protective orders issued by or filed with a court of this state under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.870**,** or AS 18.66.100 - 18.66.180. The registry must include**,** for each protective order**,** the names of the petitioner and respondent, their dates of birth, and the conditions and duration of the order. The registry shall retain a record of the protective order after it has expired.

* **Sec. 13.** AS 18.65.540(b) is amended to read:

(b) A peace officer receiving a protective order from a court under **AS 13.26.180, 13.26.209,** AS 18.65.850 - 18.65.855, **or** AS 18.66.100 - 18.66.180, a modified order issued under AS 18.65.860 or AS 18.66.120, or an order dismissing a protective order **shall** [, MUST] take reasonable steps to ensure that the order, modified order, or dismissal is entered into the central registry within 24 hours after being received.

* **Sec. 14.** AS 44.21.415(g) is amended to read:

(g) In this section,

(1) "fraud" means

(A) robbery, extortion, and coercion under AS 11.41.500 - 11.41.530;

(B) [THEFT AND RELATED] offenses **against property** under AS 11.46.100 - 11.46.740; or

(C) exploitation of another person or another person's resources for personal profit or advantage with no significant benefit accruing to the person who is exploited;

(2) "older Alaskan" means a person residing in the state who is 60 years of age or older.

* **Sec. 15.** AS 47.24.010(a) is amended to read:

(a) Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults **in the office of the department that handles adult protective services**:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11) and including a marital and family therapist licensed under AS 08.63;

(3) a pharmacist;

(4) an administrator **or employee** of a nursing home, residential care, or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Department of

Administration for the provision of services to older Alaskans, the Department of Health and Social Services, or the Council on Domestic Violence and Sexual Assault;

(12) an employee of a personal care or home health aide program;

(13) an emergency medical technician or a mobile intensive care paramedic;

(14) a caregiver of the vulnerable adult;

(15) a certified nurse aide**;**

(16) an educator or administrative staff member of a public or private educational institution.

* **Sec. 16.** AS 47.24.010(b) is amended to read:

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

(1) the name and **contact information** [ADDRESS] of the vulnerable adult;

(2) information relating to the nature and extent of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect;

(3) other information that the reporting person believes might be helpful in an investigation of the case or in providing protection for the vulnerable adult.

* **Sec. 17.** AS 47.24.010(c) is amended to read:

(c) The department or its designees shall report to the Department of Law any person required by (a) of this section to report who fails to comply with this section. A person listed in (a) of this section who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.

* **Sec. 18.** AS 47.24.010(d) is amended to read:

(d) This section does not prohibit a person listed in (a) of this section, or any

other person, from reporting cases of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that have come to the person's attention **in the person's nonoccupational capacity. This section does not prohibit any other person from reporting a harm under this section**.

*** Sec. 19.** AS 47.24.010(e) is amended to read:

(e) If a person making a report under this section believes that immediate action is necessary to protect the vulnerable adult from imminent risk of serious physical harm due to **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and the reporting person cannot immediately contact the department's central information and referral service for vulnerable adults, the reporting person **shall** [MAY] make the report to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the vulnerable adult and shall [,] at the earliest opportunity **within 24 hours after receiving the report of harm** [,] notify the department. A person may not bring an action for damages against a police officer, **a** village public safety officer, the state, or a political subdivision of the state based on a decision under this subsection to take or not to take immediate action to protect a vulnerable adult. If a decision is made under this subsection to take immediate action to protect a vulnerable adult, a person may not bring an action for damages based on the protective actions taken unless the protective actions were performed with gross negligence or intentional misconduct; damages awarded in the action may include only direct economic compensatory damages for personal injury.

*** Sec. 20.** AS 47.24.010(f) is amended to read:

(f) A person listed in (a) of this section who reports to the long term care ombudsman under AS 47.62.015, or to the Department of Health and Social Services, that a vulnerable adult has been **unduly influenced, abandoned,** exploited, abused, or neglected in an out-of-home care facility is considered to have met the duty to report under (a) of this section.

*** Sec. 21.** AS 47.24.010 is amended by adding new subsections to read:

(i) A person required to report under this section who makes the report to the person's job supervisor or to another individual

working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

(j) A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.

* **Sec. 22.** AS 47.24.013(a) is amended to read:

(a) If a report received under AS 47.24.010 **pertains to** [REGARDS] the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is 60 years of age or older that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility, including a facility licensed under AS 47.32, in which the vulnerable adult resides, the department shall transfer the report for investigation to the long term care ombudsman under AS 47.62.015.

* **Sec. 23.** AS 47.24.013(b) is amended to read:

(b) The department shall investigate a report received under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult who is less than 60 years of age that is alleged to have been committed by or to have resulted from the negligence of the staff or a volunteer of an out-of-home care facility in which the vulnerable adult resides.

* **Sec. 24.** AS 47.24.013(c) is amended to read:

(c) Upon receipt of a report under (a) or (b) of this section, the long term care ombudsman and the department shall

(1) conduct an investigation as appropriate under AS 47.62.015 or this title, respectively;

(2) coordinate and cooperate in their responses to and investigations of the report if their jurisdictions overlap;

(3) provide the results of their actions or investigations to the central information and referral service of the **office of the** department **that handles adult protective services** within 60 days after the receipt of the report.

* **Sec. 25.** AS 47.24.013(d) is amended to read:

(d) If the long term care ombudsman receives directly a report regarding the

undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult in an out-of-home care facility, the ombudsman shall provide the report, and the results of the ombudsman's actions or investigations regarding the report, to the central information and referral service of the **office of the** department **that handles adult protective services**. The department may investigate the report as described in AS 47.24.015 if the department determines that action is appropriate.

* **Sec. 26.** AS 47.24.015(a) is amended to read:

(a) Upon the department's receipt of a report under AS 47.24.010 that is not transferred under AS 47.24.013, the department, or its designee, shall promptly initiate an investigation to determine whether the vulnerable adult who is the subject of the report suffers from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect. The department, or its designee, shall conduct a face-to-face interview with the subject of the report unless that person is unconscious or the department, or its designee, has determined that a face-to-face interview could further endanger the vulnerable adult.

* **Sec. 27.** AS 47.24.015(c) is amended to read:

(c) The department[,] or its designee[,] shall immediately terminate an investigation under this section upon the request of the vulnerable adult who is the subject of the report made under AS 47.24.010. However, the department or its designee may not terminate the investigation if the investigation to that point has resulted in probable cause to believe that the vulnerable adult is in need of protective services and the request is made personally by the vulnerable adult and the vulnerable adult is not competent to make the request on the adult's own behalf, or the request is made by the vulnerable adult's guardian, attorney-in-fact, or surrogate decision maker and that person is the alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. If the department has probable cause to believe that the vulnerable adult is in need of protective services,

(1) the department may petition the court as set out in AS 47.24.019;

(2) the department or its designee may refer the report made to the department under AS 47.24.010 to a police officer for criminal investigation; or

(3) in cases involving fraud, the department or its designee may refer the report made to the department under AS 47.24.010 to the office of public advocacy for investigation; in this paragraph, "fraud" has the meaning given in **AS 13.26.324** [AS 44.21.415].

*** Sec. 28.** AS 47.24.015 is amended by adding new subsections to read:

(h) In conducting an investigation under this section, the department may issue subpoenas, conduct interviews, and examine any health care or financial records related to a vulnerable adult. The department may seek a court order to enforce a subpoena.

(i) A person may not interfere with the department in the performance of its investigation under this section, including interfering with the department's access to the vulnerable adult.

(j) Notwithstanding any other provision of law, the office of the department that handles adult protective services shall have access to any information compiled or retained by other divisions in the department, regardless of the nature of the information or whether the information is considered confidential, to assist in administering the provisions of this chapter.

(k) The department may audiotape or videotape an interview of a vulnerable adult if the adult has the capacity to consent and gives that consent. The department shall document the consent in its investigative file. The department may not audiotape or videotape an interview of a vulnerable adult who lacks the capacity to consent.

(l) The department shall provide for the training of investigators who investigate reports of harm under this section. Training must include instruction in federal, state, and local laws and policies of the department related to vulnerable adults, and in investigative techniques. The department may require other appropriate training.

(m) In this section, "financial records" include financial records related to the vulnerable adult that are maintained by any person.

*** Sec. 29.** AS 47.24.016(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services, but the department cannot obtain the vulnerable adult's

consent to receive the services because the vulnerable adult is unable to consent or lacks decision making capacity, and has no guardian**, conservator,** [OR] attorney-in-fact**, trustee, or surrogate for health care decisions under AS 13.52.030** to serve as the vulnerable adult's surrogate decision maker, the department may select from the following list, in the order of priority listed, an individual who is willing to be the vulnerable adult's surrogate decision maker for the purpose of deciding whether to consent to the vulnerable adult's receipt of protective services:

(1) the vulnerable adult's spouse, unless

[(A) THE VULNERABLE ADULT AND THE SPOUSE HAVE SEPARATE DOMICILES; OR

(B)] the vulnerable adult or the spouse have initiated divorce**,** [OR] dissolution**, or legal separation** proceedings;

(2) an individual who lives with the vulnerable adult in a spousal relationship or as a domestic partner and who is 18 years of age or older;

(3) a son or daughter of the vulnerable adult who is 18 years of age or older;

(4) a parent of the vulnerable adult;

(5) a brother or sister of the vulnerable adult who is 18 years of age or older; or

(6) a close friend or relative of the vulnerable adult who is 18 years of age or older.

*** Sec. 30.** AS 47.24.016(b) is amended to read:

(b) An individual from the list in (a) of this section may not be selected as a surrogate decision maker if

(1) the department determines that individual does not possess decision making capacity; or

(2) there are allegations that individual is a perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult.

*** Sec. 31.** AS 47.24.016(d) is amended to read:

(d) The department may not continue to provide protective services to a vulnerable adult based on the consent of a surrogate decision maker serving under this

section **or AS 13.52.030** if the department determines that the vulnerable adult has become able to consent or has regained decision making capacity since the surrogate's consent was given. The department may continue protective services to a vulnerable adult who has become able to consent or has regained decision making capacity only if the vulnerable adult consents.

*** Sec. 32.** AS 47.24.017(a) is amended to read:

(a) If the department determines under AS 47.24.015 that a vulnerable adult is in need of protective services and [EITHER] the vulnerable adult, the vulnerable adult's guardian**, conservator,** [OR] attorney-in-fact, **trustee,** [OR] a surrogate decision maker selected under AS 47.24.016**, or a surrogate for health care decisions under AS 13.52.030** consents to receipt of the protective services, and to the extent that resources are available, the department shall ensure that the protective services for the vulnerable adult are provided by the department**,** or its designee**,** within 10 working days after the department received the report under AS 47.24.010 regarding the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of the vulnerable adult. However, if circumstances beyond the control of the department or the department's designee make it impossible to provide the protective services within the 10 working days, the department shall ensure that the services are provided as soon as possible after that time.

*** Sec. 33.** AS 47.24.019(c) is amended to read:

(c) If a vulnerable adult who has consented to receive protective services, or on whose behalf consent to receive protective services has been given, is prevented by **any person** [A CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from receiving those services, the department may petition the superior court for an injunction restraining the **person** [CAREGIVER, GUARDIAN, ATTORNEY-IN-FACT, OR SURROGATE DECISION MAKER] from interfering with the provision of protective services to the vulnerable adult.

*** Sec. 34.** AS 47.24.050 is amended to read:

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-

neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, **under** [IN ACCORDANCE WITH] this chapter and regulations adopted under this chapter, investigation reports may be used by appropriate agencies or individuals inside and outside the state, in connection with investigations or judicial proceedings involving the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult.

(b) The department shall disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult if the vulnerable adult who is the subject of the report or the vulnerable adult's guardian, **conservator,** attorney-in-fact, **trustee,** or surrogate decision maker consents in writing. The department may not disclose a report of the **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult to the vulnerable adult's guardian, attorney-in-fact, **trustee,** or surrogate decision maker if that person is an alleged perpetrator of the **undue influence,** abandonment, exploitation, abuse, or neglect of the vulnerable adult and is being investigated under this chapter. The department shall, upon request, disclose the number of verified reports of **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect of a vulnerable adult that occurred at an institution that provides care for vulnerable adults or that were the result of actions or inactions of a public home care provider.

*** Sec. 35.** AS 47.24.130 is amended to read:

Sec. 47.24.130. Treatment through spiritual means. This chapter may not be construed to mean that a person is **unduly influenced,** abused, neglected, self-neglected, vulnerable, unable to consent, abandoned, exploited, or in need of emergency or protective services for the sole reason that the person relies on or is being furnished treatment by spiritual means through prayer alone **under** [IN ACCORDANCE WITH] the tenets and practices of a church or religious denomination of which the person is a member or adherent, **if** [PROVIDED THAT] the person consents to the treatment through spiritual means only and the treatment is administered by an accredited practitioner of the church or religious denomination. In this section, "church or religious denomination" has the meaning given to "religious

organization" in AS 05.15.690.

* **Sec. 36.** AS 47.24.900(2) is amended to read:

(2) "abuse" means

(A) the [WILFUL,] intentional, **knowing,** or reckless nonaccidental [,] and nontherapeutic infliction of physical pain, injury, [OR] mental **or emotional** distress**, or fear, including coercion and intimidation**; or

(B) sexual assault under AS 11.41.410 or 11.41.420;

* **Sec. 37.** AS 47.24.900(3) is amended to read:

(3) "caregiver" means

(A) a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed **some or all** responsibility for the care of a vulnerable adult voluntarily, by contract, **as an employee of a business that provides care in an adult's home,** or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

* **Sec. 38.** AS 47.24.900(4) is amended to read:

(4) "decision making capacity" means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision; **in this paragraph, "informed decision" includes a decision made by the vulnerable adult that is free from undue influence;**

* **Sec. 39.** AS 47.24.900(7) is amended to read:

(7) "exploitation"

(A) means unjust or improper use of another person or another person's resources for one's own profit or advantage**, with or without the person's consent; and**

(B) includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud,

intimidation, or breach of fiduciary duty; in this paragraph, "fraud" has the meaning given in AS 13.26.324(1) and (2);

*** Sec. 40.** AS 47.24.900(9) is amended to read:

(9) "neglect" means the intentional**, knowing, or reckless** failure by a caregiver to provide essential care or services **or access to essential care or services or to carry out a prescribed treatment plan** necessary to maintain the physical and mental health of the vulnerable adult **when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf; in this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision**;

*** Sec. 41.** AS 47.24.900(11) is amended to read:

(11) "protective services" means services that are intended to prevent or alleviate harm resulting from **undue influence,** abandonment, exploitation, abuse, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; **in this paragraph, "services"** ["PROTECTIVE SERVICES"] includes

(A) protective placement;

(B) applying for or obtaining public benefits;

(C) obtaining health care services and supplies;

(D) staying financial transactions;

(E) petitioning for an ex parte protective order under AS 13.26.209;

(F) assisting with personal hygiene;

(G) obtaining food and clothing;

(H) protection from physical and emotional abuse;

(I) obtaining representative payee services; and

(J) coordinating protective services;

*** Sec. 42.** AS 47.24.900(15) is amended to read:

(15) "unable to consent" means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect;

(C) of dependency on the perpetrator of **undue influence,** abandonment, exploitation, abuse, or neglect for services, care, or support; or

(D) of an inability to perceive that refusal to consent results in an imminent and substantial danger of **loss, waste, or dissipation of income or assets, eviction, physical or mental harm to self or others, or** death [OR IRREPARABLE HARM TO SELF OR OTHERS];

*** Sec. 43.** AS 47.24.900(16) is amended to read:

(16) "vulnerable adult" means a person 18 years of age or older who, because of **incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance** [PHYSICAL OR MENTAL IMPAIRMENT], is unable to meet the person's own needs or to seek help without assistance.

*** Sec. 44.** AS 47.24.900 is amended by adding new paragraphs to read:

(17) "deception" means creating, reinforcing, or failing to correct a false impression or preventing another person from acquiring information that would affect the person's judgment regarding a transaction;

(18) "fiduciary duty" means the duty of a third party who stands in a position of trust or confidence with another person, including a vulnerable adult, to act with due regard for the benefit and interest of that person;

(19) "financial institution" means an institution subject to state or federal banking or financial regulations, including

(A) a broker-dealer;

(B) a commercial bank;

(C) a savings bank;

(D) a credit union;

(E) a premium finance company;

(F) a small loan company;

(G) a bank holding company;

(H) a financial holding company;

(I) a trust company;

(J) a savings and loan association;

(K) a deferred deposit advance licensee;

(L) an investment bank;

(M) an insurance company subject to regulation by AS 21;

(N) a licensee subject to regulation by AS 21; and

(O) an investment adviser;

(20) "person who stands in a position of trust or confidence" means a person who

(A) is a relative by blood or marriage;

(B) is a joint tenant or tenant in common;

(C) has a legal or fiduciary relationship; or

(D) is a person who has been entrusted with or has assumed responsibility for the use or management of the vulnerable adult's assets or income;

(21) "undue influence" means the use by a person who stands in a position of trust or confidence of the person's role, relationship, or authority to wrongfully exploit the trust, dependency, or fear of a vulnerable adult to gain control over the decision making of the vulnerable adult, including decision making related to finances, property, residence, and health care.

*** Sec. 45.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 12(h), Alaska Rules of Criminal Procedure, is amended to read:

(h) **Continuance of Trial.** A motion for continuance of a trial date will be granted by the court only for cause shown. **In deciding whether to grant the motion, the court shall consider the victim's circumstances and the effect the delay would have on the victim, particularly a victim of advanced age or extreme youth. The court shall place its findings on the record.** The presiding judge of a judicial district may require that a visiting or pro tem judge obtain approval from the presiding judge before granting any continuance of trial.

*** Sec. 46.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Priorities in Scheduling Criminal Cases.** The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. **The court shall consider the circumstances of the victim, particularly a victim of advanced age or extreme youth, in setting the trial date.** Trial dates in criminal cases in the superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

*** Sec. 47.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.26.209(a) - (g), enacted by sec. 9 of this Act, have the effect of amending Rule 17, Alaska Rules of Probate Procedure, relating to conservatorships and protective proceedings, by allowing ex parte orders to be issued related to protecting the assets of a person otherwise subject to AS 13.26.165 from financial exploitation.

(b) AS 13.26.209(h), enacted by sec. 9 of this Act, has the effect of amending Rule 9, Alaska Rules of Administration, by requiring that filing fees may not be charged for a petition for an ex parte protective order under AS 13.26.209(a), enacted by sec. 9 of this Act.

(c) AS 13.26.207, enacted by sec. 9 of this Act, has the effect of amending Rule 77, Alaska Rules of Civil Procedure, by requiring a hearing within 72 hours of the filing of a petition for the appointment of a temporary conservator.

*** Sec. 48.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 3 - 5, 45, and 46 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 49.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the catch line of

(1) AS 47.24.010 from "Reports of harm" to "Persons required to report; reports of harm";

(2) AS 47.24.013 from "Reports of abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities" to "Reports of undue influence, abandonment, exploitation, abuse, neglect, or self-neglect of vulnerable adults in out-of-home care facilities."

* **Sec. 50.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 13.26.209(a) - (g), enacted by sec. 9 of this Act, take effect only if sec. 47(a) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 13.26.209(h), enacted by sec. 9 of this Act, takes effect only if sec. 47(b) of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 51.** This Act takes effect July 1, 2011.

Gretchen Staft

From: Sterling, Scott A (DOA) [scott.sterling@alaska.gov]
Sent: Thursday, March 17, 2011 12:47 PM
To: Sarah Munson; Gretchen Staft; Henriksen, Kelly E (LAW); Gibbens, Joanne C (HSS); Levitt, Rachel E (DOA); Laughlin, Wilda J (HSS)
Subject: Fiduciary Duty Definition Case Citation
Attachments: image001.jpg

The case citation for the definition of fiduciary duty is *Paskvan v. Mesich, 455 P.2d 229, 232 and fn.5 (Alaska 1969).* The relevant portion reads as follows:

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *[FN5] Twelve Hundred 'L' St. Corp. v. Inlet Co., 438 P.2d 708, 709 (Alaska 1968); Swenson v. Wintercorn, 92 Ill.App.2d 88, 234 N.E.2d 91, 97 (1968).*

Please let me know of any questions thanks. Scott

Scott A. Sterling

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455 P.2d 229
(Cite as: 455 P.2d 229)

Supreme Court of Alaska.
Thomas J. PASKVAN, Jr., Appellant,
v.
Drago MESICH et al., Appellees.
Drago MESICH et al., Appellants,
v.
Paul DRAZENOVICH, Appellee.

Nos. 913, 921.
June 4, 1969.

Will contest in which appeals were taken from a decision of the Superior Court, Fourth Judicial District, Warren William Taylor, J. The Supreme Court, Dimond, J., held, inter alia, that evidence required finding that at time of execution of 1952 will testator did not have sufficient mental capacity to understand the nature and extent of his property, the natural or proper objects of his bounty, and the nature of his testamentary act, and finding to the contrary was clearly erroneous.

Affirmed in part, reversed and remanded for further proceedings in part.

West Headnotes

[1] Appeal and Error 30 ⚿1008.1(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(5) k. Clearly erroneous findings. Most Cited Cases
(Formerly 30k1008(1))

Clear error will not be found unless reviewing court is convinced on whole record that mistake has been committed. Rules of Civil Procedure, rule 52(a).

[2] Fraud 184 ⚿7

184 Fraud
1841 Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 k. Fiduciary or confidential relations. Most Cited Cases

A "confidential or fiduciary relationship" exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to interests of the one imposing the confidence.

[3] Wills 409 ⚿166(2)

409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k162 Evidence
409k166 Weight and Sufficiency
409k166(2) k. Personal, confidential, or fiduciary relations in general. Most Cited Cases

Evidence supported finding that a confidential relationship existed between testator and his business partner where, inter alia, testator gave partner power of attorney so that partner could act and speak for testator, testator executed his will in favor of partner so that there would be a basis for their partnership venture, and testator conveyed a one-half interest in restaurant and bar to partner.

[4] Wills 409 ⚿163(2)

409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k162 Evidence
409k163 Presumptions and Burden of Proof
409k163(2) k. Personal, confidential, or fiduciary relations in general. Most Cited Cases

Initial burden is on will contestant to establish undue influence, and existence of a confidential rela-

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tionship alone does not suffice to raise a presumption that undue influence was present.

[5] Wills 409 ⚿163(4)

409 Wills
409IV Requisites and Validity
409IV(F) Assent of Testator
409k162 Evidence
409k163 Presumptions and Burden of Proof
409k163(4) k. Devise or bequest to person drawing or assisting in execution of will. Most Cited Cases

When the principal or sole beneficiary under a will, who had a confidential relationship with testator, participated in drafting of will, a presumption of undue influence arises which requires beneficiary to come forward with a satisfactory explanation for his actions.

[6] Wills 409 ⚿400

409 Wills
409V Probate or Contest of Will
409V(P) Review
409k393 Review of Decisions in Actions Relating to Wills or Probate
409k400 k. Scope and mode of review. Most Cited Cases

Finding that testator's 1946 will, executed in favor of his business partner, was a product of undue influence was not clearly erroneous where confidential relationship existed between testator and his partner, partner participated in procurement of the will, he became sole beneficiary under the will, he possessed will after its execution, and will seemed to have been executed so that partner could utilize it in order to obtain a real estate loan.

[7] Wills 409 ⚿43

409 Wills
409II Testamentary Capacity
409k43 k. Use and effect of drugs. Most Cited Cases

Wills 409 ⚿44

409 Wills
409II Testamentary Capacity
409k44 k. Intoxication and delirium tremens. Most Cited Cases

Wills 409 ⚿45

409 Wills
409II Testamentary Capacity
409k45 k. Illness or debility. Most Cited Cases

Wills 409 ⚿50

409 Wills
409II Testamentary Capacity
409k50 k. Sufficiency of testator's understanding as to his property, persons to whom it may be given, and mode of disposition. Most Cited Cases

Disease, great weakness, use of alcohol and drugs, and approaching death do not alone render testator incompetent to make will; question is always whether in spite of these things he had sufficient mental capacity to understand nature and extent of his property, natural or proper objects of his bounty, and nature of his testamentary act.

[8] Wills 409 ⚿400

409 Wills
409V Probate or Contest of Will
409V(P) Review
409k393 Review of Decisions in Actions Relating to Wills or Probate
409k400 k. Scope and mode of review. Most Cited Cases

Trial court's decision as to testamentary capacity will not be reversed unless reviewing court finds it to be clearly erroneous.

[9] Wills 409 ⚿35

409 Wills
409II Testamentary Capacity
409k33 Insane Persons
409k35 k. Effect of adjudications as to mental incapacity and guardianship. Most Cited Cases

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Incompetency to make will is not necessarily established by fact that one has been adjudged an incompetent in a guardianship proceeding, but such fact is evidence to be considered, along with other evidence on issue of testamentary capacity.

[10] Wills 409 52(1)

409 Wills
409II Testamentary Capacity
409k51 Evidence
409k52 Presumptions and Burden of Proof
409k52(1) k. In general. Most Cited Cases

Will contestant has burden of showing lack of testamentary capacity.

[11] Wills 409 52(1)

409 Wills
409II Testamentary Capacity
409k51 Evidence
409k52 Presumptions and Burden of Proof
409k52(1) k. In general. Most Cited Cases

Statement of witness under oath that will was signed by testator in her presence and in presence of other subscribing witnesses, that testator declared the instrument was his last will and testament, and that at time of execution testator was of sound and disposing mind and not acting under duress, menace, fraud and undue influence or misrepresentation, established a prima facie case of testamentary capacity, after which burden was cast upon contestants to show that testamentary capacity was lacking.

[12] Appeal and Error 30 994(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k994 Credibility of Witnesses
30k994(1) k. In general. Most Cited Cases

Credibility of witnesses is for trier of fact, and reviewing court may not reverse decision thereon unless it is clearly erroneous.

[13] Appeal and Error 30 1008.3(3.1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.3 Where Evidence Was in Writing
30k1008.3(3) Particular Writings
30k1008.3(3.1) k. In general. Most Cited Cases
(Formerly 30k1008.3(3), 30k1008(3))

Where none of several witnesses testifying on testamentary capacity testified before lower court, trial judge had no greater opportunity than reviewing court to judge their credibility, since his only contact with such witnesses was through typed transcript of their testimony before probate master, and in such situation reviewing court was in as good a position as trial judge to make a determination of fact based upon such testimony.

[14] Wills 409 55(1)

409 Wills
409II Testamentary Capacity
409k51 Evidence
409k55 Weight and Sufficiency
409k55(1) k. In general. Most Cited Cases

Wills 409 400

409 Wills
409V Probate or Contest of Will
409V(P) Review
409k393 Review of Decisions in Actions Relating to Wills or Probate
409k400 k. Scope and mode of review. Most Cited Cases

Evidence required finding that at time of execution of 1952 will testator did not have sufficient

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mental capacity to understand the nature and extent of his property, the natural or proper object of his bounty, and the nature of his testamentary act, and finding to the contrary was clearly erroneous. Rules of Civil Procedure, rules 52(a), 53(d) (2).

***231** Millard F. Ingraham, Fairbanks, for Thomas J. Paskvan, Jr.

Mike Stepovich, Fairbanks, Peter A. Schwabe, Portland, Or., for Drago Mesich, and another.

Sherman A. Noyes, Fairbanks, for Paul Drazenovich.

Before NESBETT, C. J., and DIMOND and RABINOWITZ, JJ.

DIMOND, Justice.

This is a dispute among three parties over a dead man's property.

Thomas Paskvan, Jr. claims the property as sole beneficiary under a will executed by decedent, Pete Mesich, on September 18, 1946. The probate master, after a hearing, found that this will was a product of undue influence exercised by Paskvan and was not entitled to probate, a finding which was concurred in by the superior court on appeal from the master's findings. Paskvan has appealed to this court from the superior court's order rejecting the 1946 will.

Paul Drazenovich claims the property as sole beneficiary under a will executed by decedent on August 25, 1952. The probate master found that decedent was incompetent at the time of the execution of this will and that it was not entitled to probate as decedent's last will and testament. The master's findings were rejected by the superior court. After a hearing at which evidence was introduced, the superior court found that decedent was competent to make the 1952 will, that there was no proof of undue influence in connection with its execution, and that it was entitled to be admitted to probate.

Certain relatives of decedent, consisting of five nieces and two grandnephews, claim the property as decedent's heirs, such claim being based on the contention that neither of the two wills was valid and that decedent died intestate. The heirs, Drago Mesich, et al, have appealed from the superior court's judgment recognizing as valid and admitting to probate the will of August 25, 1952.

The Paskvan Will.

The probate master found that a confidential relationship existed between Paskvan and Mesich, that the evidence raised an inference that Mesich's will of September 18, 1946 leaving all his property to Paskvan was a product of undue influence exercised by the latter, and that Paskvan had not produced evidence sufficient to overcome that inference. The superior court accepted and adopted these findings of the master.[FN1]

> FN1. Civ.R. 53(d)(2) provides in part:
>
> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.

***232** [1] Since the findings of a master, to the extent that the superior court adopts them, are considered as findings of the court,[FN2] Civil Rule 52(a) applies and we may not set aside such findings unless we determine them to be clearly erroneous.[FN3] Clear error will not be found unless we are convinced on the whole record that a mistake has been committed.[FN4]

> FN2. Civ.R. 52(a) provides in part:
>
> The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.
>
> FN3. Civ.R. 52(a) provides in part:
>
> Findings of fact shall not be set aside unless clearly erroneous * * *.
>
> 2B Barron & Holtzoff, Federal Practice and Procedure ss 1136, 1170, at 555, 607 (1961).
>
> FN4. Knox v. Pickles, 451 P.2d 347, 349 (Alaska 1969).

[2] A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests

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of the one imposing the confidence.[FN5]

FN5. Twelve Hundred 'L' St. Corp. v. Inlet Co., 438 P.2d 708, 709 (Alaska 1968); Swenson v. Wintercorn, 92 Ill.App.2d 88, 234 N.E.2d 91, 97 (1968).

Mesich was the owner of the Arctic Hotel in Fairbanks. In the spring of 1946 he and Paskvan formed a partnership for the operation of the hotel, with Paskvan to get 50 percent of the revenue from the hotel. There is no evidence that Paskvan invested any money in this enterprise. On the same day the will was executed September 18, 1946, Mesich executed a general power of attorney in favor of Paskvan. Paskvan testified that the purpose of the power of attorney was to enable him to handle Mesich's affairs as to the Arctic Hotel-to 'act for him' and 'to speak for him and everything'. Paskvan was the managing partner.

Also in the spring of 1946 Paskvan and Mesich decided to develop some property on Second Avenue in Fairbanks where they built a combination restaurant and bar called the Elbow Room. Paskvan invested $10,000 in the venture which he had obtained as a loan from the Veteran's Administration. Mesich worked on the project and invested several thousand dollars in it. Mesich's contribution came in part from his share of the revenues from the operation of the Arctic Hotel.

Mesich's will, leaving all his estate to Paskvan, was executed in September 1946. Paskvan testified that the will was executed 'so that we could go ahead and develop this property (the Elbow Room property on Second Avenue) so that there would be * * * some basis for starting the the (sic) business partnership.' The property belonged to Mesich. Paskvan used the will as evidence of his interest in the property when he attempted to secure a veteran's loan with respect to the property, but he was told that the will was not the answer to being able to borrow money. He was told that he had to be a part owner of the property in order to borrow money on it. Paskvan then went to Mesich and had him convey to Paskvan a half interest in the property by deed. After this conveyance, Paskvan obtained a veteran's loan on the property.

[3] In the light of these facts we cannot say that the probate master was mistaken in finding that a confidential relationship existed between Mesich and Paskvan. Mesich's actions in making Paskvan the managing partner in the Arctic Hotel enterprise, in giving Paskvan his power of attorney so that Paskvan could act and speak for Mesich, in executing his will in favor of Paskvan so that there would be a basis for their partnership venture, and in conveying to Paskvan a one-half interest in the Elbow Room property shows quite clearly that Mesich trusted Paskvan and reposed confidence in him-that he relied upon Paskvan to act in Mesich's best interests in handling his affairs.

[4][5] The remaining question is whether the probate master was clearly mistakenin*233 finding that, because of the confidential relationship and other factors, the will was a product of undue influence exercised by Paskvan. The initial burden is on the contestant of a will to establish undue influence, and the existence of a confidential relationship alone does not suffice to raise a presumption that undue influence was present.[FN6] But when the principal or sole beneficiary under a will, who had a confidential relationship with the testator, participated in the drafting of the will, then a presumption of undue influence arises. It requires the beneficiary to come forward with a satisfactory explanation for his actions. He must show that he did not take advantage of the confidential relationship in influencing the testator to execute the will in his favor.[FN7]

FN6. Yribar v. Fitzpatrick, 91 Idaho 105, 416 P.2d 164, 166 (1966).

FN7. Cline v. Larson, 234 Or. 384, 383 P.2d 74, 85 (1963); Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110, 115 (1965).

Such a presumption arises in this case. A fiduciary or confidential relationship existed between Mesich and Paskvan, and the evidence shows that Paskvan participated in the execution of the will. Paskvan testified that the will was prepared by an attorney, the it took about three days conferring with the attorney to get the will prepared, that at several meetings in the attorney's office Paskvan was present with Mesich, and that Paskvan was present when the will was executed. Paskvan indicated his interest in having the will made at one point by saying, in answer to the question of why he had gone to the attorney's office with Mesich: 'Well, Pete (Mesich) was the one that uh wanted to draw this thing up, because we had planned on developing this property * * *.' (Emphasis added.) At another point in his testimony Paskvan

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said:

Well, I suppose we uh-I know we both went up there and uh told him exactly what uh we wanted, and Mr. Hurley took his notes down in-in longhand * * *. (Emphasis added.)

The presumption that undue influence existed is strengthened by other factors. Mesich was a Croatian who emigrated to the United States in 1902. At the time he executed the Paskvan will in 1946 he was 65 years old. He was unable to read or write the English language and spoke English with a heavy Slavic accent. In 1942 he was attacked by an unknown assailant who hit him on the head with a heavy instrument, inflicting serious wounds. He was required to be hospitalized for 42 days during much of which time he was unconscious or semiconscious. There was considerable testimony that after this blow to his head Mesich deteriorated mentally, had difficulty communicating with people, did not seem aware of what was going on around him, and was not competent to handle his business affairs.

Paskvan did not carry his burden of overcoming the presumption of undue influence. It is true that he testified that Mesich had made the will in his favor as a reward for Paskvan's willingness to help Mesich-because Mesich was happy with the way Paskvan did things and thought Paskvan was worthy of his consideration. But this was not enough. The presumption of undue influence was a strong one because of the age and mental condition of Mesich, the fiduciary or confidential relationship that existed between Mesich and Paskvan, Paskvan's opportunity to exercise undue influence because of his partner', the fact that Paskvan appeared to be the dominant party in their partner', the fact that Paskvan appeared relationship, Paskvan's participation in the procurement of the will, the fact that Paskvan became the sole beneficiary under the will, [FN8] Paskvan's possession of the will after its execution, and the fact that the will seemed to have been executed so that Paskvan could utilize it in order to obtain a real estate loan.

FN8. See Dean v. Jordan, 194 Wash. 661, 79 P.2d 331, 336 (1938).

***234** [6] The totality of these circumstances points to a situation where Paskvan took advantage of a trust and confidence that Mesich had in him in order to acquire all of Mesich's property upon his death. Paskvan had no satisfactory explanation for his actions in this regard. He did not show that in regard to the confidential relationship between him and Mesich he had acted with entire good faith and with due regard to the interests of Mesich. In the absence of such a showing, the presumption of undue influence prevails, and therefore the probate master and the superior court were not clearly erroneous in finding that the 1946 will was a product of undue influence.

The only other time we have had occasion to consider the subject of undue influence as it pertains to the execution of a will was in 1962 when we decided the case of In re Estate of Kraft.[FN9] We said there:

FN9. 374 P.2d 413, 417 (Alaska 1962).

Appellant has failed to sustain her burden of proving that by reason of influence exercised by another, the testator was virtually compelled to make a will which he would not have made had he been left to the free exercise of his own judgment and wishes.

In that case we approached that problem from the standpoint of the testator's freedom of will. We thought in terms of coercion and duress which would act as a dominating power over the mind and act of a testator, because in that case it had been argued that the testator had been induced to execute a last will and testament which in reality was not his will but another person's will substituted for that of the testator. Here we are not concerned with whether there have been acts to overbear the will of a testator. Unlike the situation in Kraft, we are concerned here with whether the beneficiary under a will has by his conduct and his relationship with the testator taken advantage of the latter by means which reasonable and moral men would regard as improper, in order to obtain some benefit or profit.[FN10] If he has, the will is a product of undue influence even in the absence of coercion and duress acting as a dominating power over the mind and act of the testator.

FN10. In re Estate of Reddaway, 214 Or. 410, 329 P.2d 886, 890 (1958).

The Drazenovich Will.

On August 25, 1952 Mesich executed a will leaving all his property to Paul Drazenovich. The probate master found that Mesich was not competent to make this will. He based this holding on what he

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determined to be a presumption of incompetency arising from the appointment of a guardian of the estate and property of Mesich on April 9, 1951, which presumption the probate master held was not rebutted. The superior court rejected the master's findings and heard testimony regarding Mesich's competency to execute the 1952 will. The court found that at the time of execution Mesich knew the nature and extent of his property, was aware of the natural objects of his bounty, knew that he was making a will, and was aware of the nature and consequences of his act. The court also found that the will was executed voluntarily and was not the product of undue influence, and that it was entitled to probate.

[7][8] In the case of In re Estate of Kraft[FN11] we spoke on the subject of testamentary capacity as follows:

FN11. Id. at 415-416.

Disease, great weakness, the use of alcohol and drugs, and approaching death do not alone render a testator incompetent to make a will. The question is always whether, in spite of these things, he had sufficient mental capacity to understand the nature and extent of his property, the natural or proper objects of his bounty, and the nature of his testamentary act.

We also said in that case that the trial court's decision as to testamentary capacity would not be reversed unless we found it ***235** to be clearly erroneous. [FN12] That is the question here-whether the superior court's finding that Mesich possessed testamentary capacity when he executed the 1952 will was or was not clearly erroneous. In order to make this determination, we must consider the evidence that touches upon the testamentary capacity of Mesich in 1952.

FN12. Id. at 416.

Mrs. Dorothy Clark, one of the two subscribing witnesses to the 1952 will, testified that she never had any difficulty communicating with Mesich before, at or after the witnessing of the will, that Mesich appeared to know what he was doing, and that she never had any reason to think that Mesich was not of sound mind. On the other hand, when Mrs. Clark was asked whether she could say that she had any reason to believe that Mesich was of sound mind in her limited relations with him, she answered: 'Well, I don't know why I should say whether he's sane or insane. I mean, who am I to judge?' Mrs. Clark described her relationship with Mesich as a casual acquaintance.

The other subscribing witness to the will, Charles Burtchin, who was then Mrs. Clark's husband, did not testify in person. In answer to interrogatories he said: 'The testator, Pete Mesich, as far as my recollection goes was quite normal and appeared to know what he was doing in signing the will.' Drazenovich owned the property where Mrs. Clark and Burtchin were living at the time.

Other witnesses who appeared on behalf of Drazenovich, most of whom had had business contacts with Mesich from time to time, testified varyingly that Mesich was 'probably as normal as most of us', that there was no trouble in understanding Mesich and that he appeared to be rational, that it was no more difficult to understand Mesich after 1942, the year he suffered the blow to his head, than it was before that year, that Mesich seemed rational, not abnormal and capable of carrying on his business, that there was no noticeable change in his personality, that in conversations with Mesich he appeared to understand what the other person was talking about, that Mesich engaged in conversations with people and recognized them, and that Mesich never performed any antisocial acts.

Of these witnesses for Drazenvoich, eight in number, one testified that he had 'very limited contact' with Mesich and that his memories were 'quite vague' about the business relationships he had had with Mesich. Another testified that she did not recall Mesich very clearly, and that her relationship with Mesich ended in 1948-four years prior to the execution of the Drazenovich will. Another testified that he never saw Mesich after 1951. Another testified that she saw Mesich only once or twice a year and that the conversations with him were very casual. Another witness admitted that her acquaintance with Mesich was a very casual one, and another said that she really could not have a conversation with Mesich because of his broken English.

Dr. Jack Petajan, a neurologist, testified on behalf of Drazenovich. He had not examined Mesich. But he testified, on the basis of certain assumptions posed in a hypothetical question, that recent memory loss alone would not be a sufficient basis to say that judgment was impaired, that he thought that Mesich would

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know his relatives and whom he wished to favor, that Mesich could probably have remembered what property he had owned for a long time prior to his memory loss, and that Mesich probably would have had at least an understanding that a will conveyed away property.

However, Dr. Petajan did not have an opinion to a reasonable medical certainty as to whether Mesich had been competent at the time he executed the will. In addition, it is questionable as to whether all of the assumptions in the hypothetical question were supported by the evidence. For example, one of the assumptions made in the hypothetical question was that in 1951 a ***236** guardian had been appointed for Mesich on the ground that he could not read and write the English language. There is nothing in the record to show whether a guardian had been appointed for that reason or because Mesich simply was not competent to handle his own affairs. Another assumption was that Mesich had properly executed the 1952 will 'before witnesses of his own choice.' The evidence shows that the witnesses to the execution of his will were chosen by Drazenovich. Another assumption was that Mesich had had no record of unusual social responses or an unsteady course of behavior. There was evidence, which we shall refer to in more detail, from witnesses who appeared on behalf of Mesich's heirs who were contesting the will, that Mesich's course of behavior may well have been unsteady and his social responses unusual. Finally, although Dr. Petajan testified that Mesich would have been able to remember property he had owned for a long time prior to his memory loss, he probably would not be able to give a detailed account of property he had acquired recently after the memory loss.

There was other evidence relating to Mesich's competency to make the 1952 will. Blazo Bigovich was appointed guardian of Mesich's estate in 1951. Bigovich testified that Mesich could not talk about any business matters, that he 'didn't understand' even when Bigovich spoke to Mesich in his own Slavic language, that Mesich did not know what property he had 'deeded away', that 'he would sign his own death certificate, he didn't know any different', that Bigovich tried to explain business matters to Mesich but he could not figure out how things had happened, that Mesich seemed to have very little understanding about things if any, that during a law suit where Mesich was involved 'he didn't know what was happening any more than the man in the moon', and that this was Mesich's condition from the time Bigovich was appointed his guardian until about 1953 when Mesich had a stroke.

A Fairbanks attorney, Warren Taylor, had done legal work for Mesich from 1945 up to the 1950's. Taylor testified that he never could get a lucid story out of Mesich at an interview or on the witness stand in court, that during most of the time he knew Mesich his mind was so confused that he could not grasp the significance of questions even when put to him in his native language, and that in a law suit involving some of Mesich's property, Mesich was almost of no help in determining how much property he owned.

Andrew Miscovich testified that after the 1942 blow to Mesich's head, he could not remember present things, could not carry on a conversation, was unable to carry on his business, and was easily influenced. However, Miscovich on cross-examination stated that his conclusions about Mesich being easily influenced were based on things he had been told. In addition, Miscovich said that he had only seen Mesich during the winters about once a month.

George Bojanich testified that he first met Mesich in 1912 and maintained contact until 1915, and then did not renew the acquaintance again until 1941. He said that in 1945 he was called to be an interpreter in a law suit where Mesich was the defendant. Bojanich attempted to speak Slav to Mesich but was unable to even make Mesich understand the questions. This witness was not cross-examined.

Arthur Nerland testified that he knew Mesich because he supplied paint and other materials for him. He described Mesich as being a quiet kind of man prior to 1942. He said that after 1942 Mesich became even more quiet, impossible to communicate with, and he seemed to get worse over the years. Nerland testified that he did not think that Mesich was competent to handle his business affairs, and based his testimony on seeing Mesich about once a month over the years.

Everett Russell testified that he first met Mesich in 1937, saw him until 1941, and that after he had come back from the service in 1947 he saw Mesich occasionally until 1951. Russell said that after 1947 Mesich appeared irrational, that he did not recognize Russell, and that Russell ***237** had been unable to conduct a conversation with Mesich. Russell also

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testified that in May or June of 1952 he saw Mesich six or eight times, and that Mesich was not aware of what was transpiring in the conversations around him. Russell also said that Mesich would always say 'hello' if anyone else said 'hello', but in Russell's opinion Mesich did not recognize anybody.

John Butrovich testified that he first met Mesich in 1941. He said that after the 1942 blow to Mesich's head he slowed down and that he shuffled around after that time. Butrovich said that he was unable to communicate with Mesich after he had suffered the blow to his head and he described Mesich as a 'vegetable'. Butrovich did not feel that Mesich was competent to handle his business after 1942. Finally Butrovich testified that he felt that Mesich did not know what was going on when he spoke to him in English after that time. The cross-examination of Butrovich was very brief.

Robert Lavery first met Mesich in the late 1930's when Mesich came into his grocery and meat market. Lavery testified that after 1942 he did not think that Mesich recognized anybody, and that he just said 'hello', 'hi', or made a grunting sound. Lavery did not think that Mesich was capable of handling his business affairs after 1942. He said that he made many attempts to engage Mesich in conversation from the period 1943 to 1954 but was unable to do so.

Louis Krize said that he first met Mesich in 1940 and that at that time Mesich was asked many questions which he handled very well. Krize contacted Mesich again in 1943 and described him then as changed, unable to carry on a conversation, and unable to recognize Krize. Krize stressed the fact that from 1940 to 1943 the mental condition of Mesich continued to get worse. Krize was asked only one question on cross-examination.

Dr. Arthur Schaible treated Mesich for the 1942 blow to his head. Dr. Schaible described Mesich's injury and condition. He said that he had opportunities to observe Mesich over a 10 year period from 1942 to 1953, and that he thought that Mesich's mental condition deteriorated during that time. He noticed disorientation and lapse of memory at times. It was Dr. Schaible's impression that Mesich was incompetent and that he would have a hard time taking care of his daily affairs. He said that by 'certain standards' Mesich was not mentally competent.

Dr. Paul Haggland also treated Mesich for the 1942 injury. Dr. Haggland said he saw Mesich again in 1951 when he was brought in to have his competency determined. The doctor read into evidence the report he made at the time. In this report he stated that Mesich could not supply him with a satisfactory history of himself, that he had a definite pathology in his brain, resulting from the 1942 injury to his head, and that his memory for old events was good but for recent events was poor. Dr. Haggland testified that it was his belief at the time he examined Mesich that he should have a guardian.

Paul Drazenovich, the proponent of and beneficiary under the 1952 will, testified at the master's hearing but not at the hearing held by the superior court. On the issue of testamentary capacity Drazenovich said that Mesich knew what he was doing when he executed the will, that Mesich was 'all right in (the) mind', that there was never a time when Mesich did not recognize Drazenovich, that Mesich's '(m)ind was perfect', and that when he and Mesich went to see an attorney to have the will drawn up Mesich did most of the talking.

Drazenovich's testimony is of questionable value. Under cross-examination it was brought out that in 1953 Drazenovich had appeared as a witness in the suit brought in the Territorial District Court by Mesich, through his guardian, against the father of Thomas Paskvan, Jr. Drazenovich had testified as a witness for the plaintiff, Mesich. It is apparent from ***238** the following excerpts from Drazenovich's 1953 testimony in the district court that he did not at that time believe that Mesich was mentally competent. He was asked for his opinion of Mesich's condition after he had suffered the blow to his head in 1942:

Q. How was Pete's condition after he got out of the hospital? How has it been since then?

A. Sometimes he don't hardly recognize me. Sometimes he comes to see me at my cabin and sometimes when I go to see him in the cabin he said, 'Get out.' I say, 'What is the matter, Pete?' Then he comes and starts kissing me. 'I am sorry,' he said. 'I thought it was somebody else.' He does that right along, so far as I know.

Q. How does he talk?

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A. Talk, sometimes tells what was happening most in childhood. He can stay all night telling me the same story over and over, but whatever is happening now he can tell me nothing.

Q. Do you know whether he is mentally competent?

A. I know he isn't.

Q. You know he isn't?

A. Sure.

Q. Did you see Pete in the summer or fall of 1949?

A. I seen him, sure.

Q. Did he know what he was talking about then? Did he act rationally in 1949?

A. He didn't act right no time since he got hurt. So far as I know, he didn't act right.

Q. Didn't you say sometimes his mind is clear and sometimes it isn't? Isn't that the way it is?

A. No, so far as I can see I would ask him something and he can't remember nothing and then he tries to tell me old story over and over what happened in childhood.

Q. Don't ramble. Isn't it true that sometimes his mind is working all right and sometimes it isn't?

A. Not very much of the time.

Q. Not very much?

A. So far as I can see, no. I feel so because I know him pretty well, before he talk nice to me, advice and everything, but now it is different entirely.

Q. He give you advice?

A. Before he got hurt he gave me advice but now he doesn't know nothing * * *.

In that case the district court made a specific finding that at all time since the 1942 injury to Mesich's head he was mentally incompetent to attend to his business affairs.[FN13]

FN13. The district court entered judgment in favor of Mesich and against Paskvan, Sr. which judgment was affirmed on peal. Paskvan v. Mesich, 227 F.2d 646, 16 Alaska 1, (9th Cir. 1955).

[9] Finally, on the issue of testamentary capacity, there was the appointment of a guardian for Mesich in 1951. Since the proceedings relating to the appointment of the guardian were not included in the record on appeal, we do not know specifically on what basis the guardian was appointed. But we do know, from the statute relating to the appointment of guardians, that at least it must have been found that Mesich was 'incapable of conducting his affairs.' [FN14] We recognize the rule that incompetency to make a will is not necessarily established by the fact that one has been adjudged an incompetent in ***239** a guardianship proceeding.[FN15] But this fact is evidence to be considered, along with other evidence, on the issue of testamentary capacity. [FN16]

FN14. AS 20.05.080 provides:

The court may appoint a guardian to take care, custody, and management of the estate of an insane person and any other person who is incapable of conducting his affairs and maintaining his family and the education of his children.

FN15. In re Estate of Jamison, 41 Cal.2d 1, 256 P.2d 984, 990 (1953); In re Estate of Bottger, 14 Wash.2d 676, 129 P.2d 518, 526-527 (1942); 1 Page on Wills s 12.42, at 651 (Bowe-Parker ed. 1960).

FN16. Lynn v. ADA Lodge No. 146 of Ind. Order of Odd Fellows, 398 P.2d 491, 496 (Okl.1965); In re Estate of Wolf, 174 Cal.App.2d 144, 344 P.2d 37, 40 (1959); Succession of Schmidt, 219 La. 675, 53 So.2d 834, 837 (1951).

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[10] As to the burden of proof on testamentary capacity there is divergence of authority. Some courts hold that the proponent of the will has the burden of establishing that the testator possessed testamentary capacity at the time he executed his will.[FN17] Other courts, and apparently the majority, hold that the contestant of a will has the burden of showing lack of testamentary capacity.[FN18] We adopt this latter view.

FN17. In re Estate of Andersen, 192 Or. 441, 235 P.2d 869, 871 (1951); Houghton v. Jones, 418 S.W.2d 32, 39 (Mo.1967).

FN18. In re Estate of O'Connor, 74 Ariz. 248, 246 P.2d 1063, 1069 (1952); In re Estate of Goetz, 253 Cal.App.2d 107, 61 Cal.Rptr. 181, 185 (1967); In re Estate of Perez, 206 So.2d 58, 59 (Fla.App.1968); In re Estate of Roberts, 258 Iowa 880, 140 N.W.2d 725, 730 (1966); Succession of Papa, 192 So.2d 854, 858 (La.App.1966); In re Estate of Jeruzal, 269 Minn. 183, 130 N.W.2d 473, 482 (1964); In re Estate of Lacy, 431 P.2d 366, 368 (Okl.1967); In re Estate of Ekker, 19 Utah 2d 414, 432 P.2d 45, 47 (1967); In re Estate of Morton, 428 P.2d 725, 729 (Wyo.1967).

[11] Along with the petition for probate of the 1952 will Drazenovich filed the affidavit of Mrs. Clark, one of the subscribing witnesses to the will. This witness stated under oath that the will was signed by Mesich in her presence and the presence of the other subscribing witness, the Mesich then declared that the instrument was his last will and testament, and that at the time of execution of the will Mesich was of sound and disposing mind and was not acting under duress, menace, fraud, undue influence or misrepresentation. This was evidence that established a prima facie case of testamentary capacity; the burden was then cast upon the contestants of the will to show that testamentary capacity was lacking.[FN19] The question here is whether Mesich's heirs, as contestants of the 1952 will, met that burden.

FN19. In re Estate of Lacy, 431 P.2d 366, 368 (Okl.1967). See cases cited in note 18 supra.

[12] Most of the witnesses testifying both for and against testamentary capacity, who were seen and heard by the superior court, had only casual contacts with Mesich and had not been associated with him on any sustained basis. If the testimony of these witnesses were all that had to be considered, we would not reverse the court's determination that Mesich possessed testamentary capacity because of our duty to give due regard to the court's function in determining the credibility of witnesses. As we said in In re Estate of Kraft:[FN20]

FN20. 374 P.2d 413, 416 (Alaska 1962).

A decision of the issue as to testamentary capacity depended largely, if not entirely, on oral testimony given by witnesses seen and heard by the trial judge. It was his province to judge their credibility, and we may not reverse his decision unless we find it to be clearly erroneous.

But there were other witnesses, not seen and heard by the trial judge, whose testimony on the issue of testamentary capacity was of greater value because of the nature and extent of their association with Mesich. Attorney Taylor, who had done legal work for Mesich from 1945 up to the 1950's, testified that he never could get a lucid story out of Mesich at an interview or on the witness stand in court, that during most of the time he knew Mesich the latter's mind was so confused that he could not grasp the significance of questions even when put to him in his native language, and that in a law suit involving ***240** some of Mesich's property, Mesich was almost of no help in determining how much property he owned.

Blazo Bigovich, who was appointed guardian of Mesich's estate in 1951, testified that Mesich could not talk about any business matters, that he did not understand even when Bigovich spoke to him in his own Slavic language, the Mesich did not know what property he had deeded away, that Mesich could not figure out how things had happened, that he seemed to have very little understanding about things, that during a law suit where Mesich was involved Mesich 'didn't know what was happening any more than the man in the moon', and that this was Mesich's condition from the time Bigovich was appointed guardian in 1951 until about 1953 when Mesich had a stroke.

Dr. Schaible, who had treated Mesich for the 1942 injury to his head, and who had observed Misich

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over a 10 year period from 1942 to 1953, said that he thought that Mesich's mental condition deteriorated during that time, that he had lapses of memory and was disoriented, and that he was not mentally competent.

George Bojanich, who was called to be an interpreter for Mesich in a law suit where Mesich was the defendant, said that he attempted to speak the Slavic language to Mesich, but was unable to make Mesich understand the questions.

Finally, there was the testimony of Drazenovich in the 1953 suit in the Territorial District Court, which we have already referred to, where Drazenovich made it clear that in his opinion Mesich was mentally incompetent after he suffered the 1942 injury to his head.

[13] None of these witnesses were seen or heard by the trial judge. They had testified only before the probate master and not at the hearing held by the superior court. The superior court judge had no greater opportunity than we to judge their credibility, since his only contacts with these witnesses was through the typed transcript of their testimony before the probate master. In this situation we are in as good a position as the trial judge to make a determination of fact based upon such testimony.[FN21]

FN21. Fairbanks Publishing Co. v. Pitka, 445 P.2d 685, 687-688 (Alaska 1968).

[14] We consider this evidence more important than the testimony of the other witnesses that the trial judge did see and hear. From such evidence in particular, and along with other evidence in the record, we are left with the definite and firm conviction that the trial judge was mistaken in finding that Mesich possessed testamentary capacity at the time of the execution of the 1952 will. It is our determination that at that time Mesich did not have sufficient mental capacity to understand the nature and expent of his property, the natural or proper objects of his bounty, and the nature of his testamentary act.[FN22] Our conviction that such a mistake has been made means that the trial judge's finding that the testamentary capacity existed in 1952 is clearly erroneous.[FN23] In view of this determination it is unnecessary for us to pass upon the court's finding that this will was not the product of undue influence.

FN22. In re Estate of Kraft, 374 P.2d 413, 415-416 (Alaska 1962).

FN23. Fairbanks Publishing Co. v. Pitka, 445 P.2d 685, 687-688 (Alaska 1968); Perkins v. Willacy, 431 P.2d 141, 142 (Alaska 1967).

The judgment of the superior court rejecting and denying probate of the Paskvan will of September 18, 1946 is affirmed. The judgment admitting to probate the Drazenovich will of August 25, 1952 is reversed. The case is remanded to the superior court for further proceedings not inconsistent with the views expressed in this opinion.

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February 22, 2011

The Honorable Carl Gatto, Chair
House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, AK 99801-1182

RE: HB 150 (Governor Parnell)--Support

Dear Chair Gatto:

On behalf of the members of AARP in Alaska, we encourage you and your colleagues on the House Judiciary Committee to support HB 150, sponsored by the House Rules Committee at the request of Governor Parnell.

The aging of Alaska's population, particularly the growth in the numbers of our citizens over age 75, presents unique challenges for our criminal justice system.

The National Center on Elder Abuse indicates that 23.4% of substantiated reports of mistreatment of older adults were financial exploitation, another 17% was physical abuse, and 32.5% was caregiver neglect. Emotional/verbal/psychological abuse accounted for 23.6% of the substantiated reports and sexual abuse/other accounted for 3.6%.

Elder abuse occurs without reference to race, religion, income, education, place of residence, or living arrangement. It is real and, unfortunately, all too common.

Detecting and preventing elder abuse involves increasing awareness among the general public and professionals.

Although HB 150 addresses the problems of abuse and exploitation on minors, we will focus on the benefits that we perceive will help older Alaskans.

The bill identifies "mandated reporters." This is very significant and will undoubtedly stop people from "looking the other way" and will also protect them from reporting incidents that might involve supervisory staff over them.

HB 150 also creates vehicles for new emergency procedures to allow courts to immediately protect individuals from financial abuse with temporary conservators and financial protective orders.

Unfortunately there are incidents of trusted advisors like guardians, agents under durable power of attorney, and other fiduciaries who have also committed elder abuse. Adding the concept of "undue influence" should help address this issue.

HB 150 also requires cooperation with Adult Protective Services, DHSS training of investigators, and mandates release of relevant financial and health records necessary for an investigation.

Will HB 150 prevent all elder abuse? No. But it will go a long way in preventing it and punishing those who commit it. It's a strong bill that will help vulnerable older Alaskans, younger Alaskans with disabilities, and minors.

AARP requests an "AYE" vote on HB 150.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Thank you for your consideration.

Sincerely,

Marie Darlin

Marie Darlin, Coordinator
AARP Capital City Task Force
415 Willoughby Avenue, Apt. 506
Juneau, AK 99801
586-3637 (voice)
463-3580 (fax)

CC: Vice-Chair Steve Thompson
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes
Governor Sean Parnell

HB 153

<TARGET><BILL>HB 153</BILL><SUBJECT>HB 153</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Interim:
50 Front Street, Suite 203
Ketchikan, AK 99901
Phone: (907) 247-4672
Fax: (907) 225-7157

Session:
State Capitol, Room 114
Juneau, AK 99801-1182
Phone: (907) 465-3424
Fax: (907) 465-3793

Representative Kyle Johansen
House District 1

received
02/25/11 11:00am

DATE: February 25, 2011

TO: Rep Carl Gatto, Chair, House Judiciary Committee

FROM: Rep. Kyle Johansen

RE: Hearing request for HB 153, "An Act relating to the scheduling and rescheduling of certain substances as controlled substances."

I kindly request a hearing for HB 153 in the House Judiciary Committee. Additionally, I request that the Ketchikan LIO be teleconferenced for the hearing.

Alaska State Legislature

Interim:
50 Front Street, Suite 203
Ketchikan, AK 99901
Phone: (907) 247-4672
Fax: (907) 225-7157

Session:
State Capitol, Room 114
Juneau, AK 99801-1182
Phone: (907) 465-3424
Fax: (907) 465-3793

Representative Kyle Johansen
House District 1

HB 153 – "An Act relating to the scheduling and rescheduling of certain substances as controlled substances."

HB 153 updates and strengthens Alaska's anti-drug laws. Specifically, this legislation adds **Salvia divinorum** (**Salvinorin A**) to the list of Schedule IIA drugs, and moves **buprenorphine** from a Schedule VA up to a Schedule IIIA drug.

Salvia is a psychoactive plant which can induce dissociative effects and is a potent producer of "visions" and other hallucinatory experiences. It is banned in several countries and 24 states as of September 2010. The classification of Salvia as a Schedule IIA drug places it in the same group as other hallucinogens.

Buprenorphine is a semi-synthetic opioid that, like methadone, is used to treat opioid addiction in higher dosages and to control moderate pain in non-opioid tolerant individuals in lower dosages. Like methadone and other opioids, its use as a recreational drug can lead to dependence. The reclassification of this drug as a Schedule IIIA will place it in a group that has a higher potential for abuse and will increase enforceability against violators.

These proposed changes to statute make these substances harder to obtain and abuse for recreational purposes. The reclassification creates or increases the penalties for their abuse, creating additional deterrents.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB153**
Fiscal Note Number
Publish Date

Identifier (file name)	HB153-DPS-LAB-01-11-12	Dept. Affected	Public Safety
Title	"An Act relating to the scheduling and rescheduling of certain substances as controlled substances."	Appropriation	Statewide Support
		Allocation	Laboratory Services
Sponsor	Representative Johansen		
Requester	(H) JUD	OMB Component Number	527

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by	Orin Dym, Laboratory Manager	Phone	(907) 269-5743
Division	Scientific Crime Detection Laboratory	Date/Time	1/11/12 10:15 AM
Approved by	Joe Masters, Commissioner	Date	
	Department of Public Safety		

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB153

Analysis

This legislation would amend AS 11.71.150 through the addition of Salvia Divinorum and Salvia A (Divinorin A) to the Schedule IIA list of controlled substances.

Passage of the bill could expand the responsibilities of the Alaska Scientific Crime Detection Laboratory through an increase in submissions to the controlled substance section of the crime lab.

The laboratory does not estimate the increase would cause fiscal impact.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 153**
Fiscal Note Number
Publish Date

Identifier (file name) HB153-LAW-CRIM-12-07-11
Title An Act relating to the scheduling and rescheduling of certain substances as controlled substances.
Sponsor Representative(s) Johansen
Requester (H) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by John J. Burns, Attorney General
Department of Law

Phone 465-5427
Date/Time 12/07/11 3:20PM
Date 12/7/2011

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 153

Analysis

This bill adds two controlled substances to Schedule IIA and one controlled substance to Schedule IIIA of Alaska Controlled Substances act.

There is no fiscal impact to the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB153**
() Publish Date

Identifier (file name) HB153-DPS-DET-03-04-11
Title "An Act relating to the scheduling of certain substances as controlled substances."
Sponsor Representative Johansen
Requester House Judiciary

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Lt. Rodney Dial
Division Alaska State Troopers
Approved by Joseph Masters, Commissioner
Department of Public Safety

Phone (907) 247-4480
Date/Time 3/4/11 10:30 AM
Date 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB153

Analysis

This legislation would amend AS 11.71.150 by adding Salvia Divinorum and Salvia A (Divinorin A) as schedule IIA controlled substances.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: HB153 \A
() Publish Date

Identifier (file name): HB153-LAW-CRIM-03-04-11
Dept. Affected: Law
Title: An Act relating to the scheduling and rescheduling of certain substances as controlled substances.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Representative(s) JOHANSEN
Requester: (H) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager
Phone: 465-5427
Division: Administrative Services
Date/Time: 3/4/11 2:00 PM
Approved by: John J. Burns, Attorney General
Department of Law
Date: 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 153

Analysis

This bill adds two controlled substances to Schedule IIA and one controlled substance to Schedule IIIA of Alaska Controlled Substances act.

There is no fiscal impact to the Department of Law.

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
(907) 465-3908 fax
research@legis.state.ak.us

March 9, 2010

Memorandum
TO: Representative Kyle Johansen
FROM: Patricia Young, Manager
RE: State Laws Regulating *Salvia Divinorum*
LRS Report 10.201

You asked for information on state regulation of *salvia divinorum*. According to a recent compilation by the National Conference of State Legislatures (NCSL), at least 17 states criminalize some aspect of the use, possession, or distribution of this substance. We include this document as Attachment A.

Attachment B is a copy of "The Legal Status of *Salvia Divinorum*," by Daniel Siebert, an independent researcher who closely follows this issue. Mr. Siebert's article, last updated on March 4, 2010, identifies 19 states with laws addressing the legality of *salvia divinorum*. This article also provides further discussion of pending bills and passed legislation in states as well as in 20 countries that prohibit some aspect of the possession, sale, or use of the substance. For your convenience, we insert a table from Mr. Siebert's article here:

US States with Laws Prohibiting Salvia	**Other Countries with Laws Prohibiting Salvia**
Illegal (Schedule I)	**Illegal to Possess or Sell**
Delaware	Australia
Florida	Belgium
Hawaii	Croatia
Illinois	Denmark
Kansas	Germany
Mississippi	Italy
Missouri	Japan
Nebraska	Latvia
North Dakota	Lithuania
Ohio	Poland
Oklahoma	Romania
South Dakota	South Korea
Virginia	Sweden
Only Legal When Not Intended for Human Consumption	**Illegal to Sell, but Legal to Possess**
Louisiana	Chile
North Carolina	Spain
Tennessee	**Illegal to Grow or Sell, but Legal to Possess**
Legal for Adults, but Illegal To Sell to Minors	Russia
California	**Treated as a Medicinal Herb that Requires a Doctor's Prescription**
Maine (possession by minors also illegal)	Estonia
Illegal to Manufacture, Deliver, or Sell Salvinorin A, but Legal to Possess	Finland
Wisconsin	Iceland
	Norway
Source: Daniel Siebert, "The Legal Status of Salvia Divinorum," updated, March 4, 2010.	

We hope this information is useful. If you have questions or need additional information, please let us know.

Attachment A

National Conference of State Legislatures, "State Laws on *Salvia Divinorum*," March 2010

State Laws on Salvia Divinorum

In recent years, the drug Salvia Divinorum, or Salvia, has gained the attention of state legislators. Since 2006, at least 17 states have passed laws regulating or controlling the drug.

Salvia is an herb related to mint that is known for its psychoactive effects. The plant is native to parts of Mexico, where historically it has been used as part of indigenous religious rituals. Common methods of ingestion include infusing leaves into a tea; smoking dried herbs; and chewing. In the United States, use of Salvia is most common among 18-25 year olds and to a much lesser extent among adolescents (see chart below).

Percentages and Standard Errors (SE) of Past Year Hallucinogen Use among Persons Aged 12 or Older, by Age Group: 2006

	12 or Older		12 to 17		18 to 25		26 or Older	
Hallucinogen	Percent	SE	Percent	SE	Percent	SE	Percent	SE
LSD	0.3%	0.02	0.4%	0.05	1.2%	0.10	0.1%	0.02
PCP	0.1%	0.02	0.2%	0.04	0.2%	0.04	0.0+%	0.02
Ecstasy	0.9%	0.04	1.2%	0.09	3.8%	0.19	0.3%	0.04
Ketamine	0.1%	0.02	0.1%	0.03	0.2%	0.04	0.1%	0.02
DMT/AMT/Foxy	0.0+%	0.01	0.1%	0.02	0.2%	0.05	0.0+%	0.01
Salvia divinorum	0.3%	0.02	0.6%	0.06	1.7%	0.12	0.0+%	0.01

Source: Substance Abuse and Mental Health Services Administration, Office of Applied Studies. (February 14, 2008). *The NSDUH Report - - Use of Specific Hallucinogens: 2006.* Rockville, MD. http://www.oas.samhsa.gov/2k8/hallucinogens/hallucinogens.htm

Effects of Salvia

Salvia originally became popular as a legal alternative to marijuana. However, the effects are markedly different. The effects of Salvia are hallucinogenic and vary based on method of ingestion. For example, smoking Salvia can lead to strong, instantaneous effects, whereas chewing or drinking tea can lead to longer lasting scenarios, but less intense. Some common effects include uncontrollable laughter, visions, dysphoria, experiencing multiple realities, and loss of physical coordination. So far, there has been limited study into the long-term effects of Salvia or its potential for addiction or abuse or its potential medicinal benefits. Initial studies have found that since Salvia increases dopamine levels in the brain, it contains potential as an addictive substance. Other studies, though, have found that Salvia could have potential as a treatment for gastrointestinal disorders.

Legal Status

No Federal statutes control or regulate distribution of Salvia. So far, at least 17 states have felt the need to act, passing laws ranging from banning possession or sale for minors to outright bans. Some states have classified Salvia as a Schedule 1 substance, modeled after the federal Controlled Substances Act, where Schedule 1 substances are considered to have a high potential for dependency and no accepted

medical use.

State Laws Regulating Salvia Divinorum (Current as of March 2010)	
California Penal Code Section 379	Every person who sells, dispenses, distributes, furnishes, administers, gives, or offers to sell, dispense, distribute, furnish, administer, or give Salvia divinorum or Salvinorin A, or any substance or material containing Salvia divinorum or Salvinorin A, to any person who is less than 18 years of age, is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or by both that fine and imprisonment.
Delaware 16 Del.C. § 4714	Lists Salvia as a Schedule I controlled substance.
Florida Annotated Title XLVI, Crimes Chapter 893. Drug Abuse Prevention and Control 893.03.	Lists Salvia as a Schedule I controlled substance.
Illinois Illinois Compiled Statutes Annotated, Chapter 720. Criminal Offenses, Act 570. Illinois Controlled Substances Act, Article II. Schedules of Controlled Substances	Lists Salvia as a Schedule I controlled substance.
Kansas Statute 61-4104. Controlled Substances	Lists Salvia as a Schedule I controlled substance.
Louisiana Louisiana Revised Statutes, Title 40—Public Health and Safety. Chapter 4—Food and Drugs. Part X. §989.1	Lists Salvia as a Schedule I controlled substance.
Maine Maine Revised Statute Title 17: CRIMES. Chapter 70: Salvia Divinorum	A person may not transfer Salvia divinorum to a minor. A minor may not Purchase, possess or use Salvia divinorum
Mississippi Miss. Code Ann. § 41-29-113	Lists Salvia as a Schedule I controlled substance.
Missouri Missouri Revised Statutes, Chapter 195, Drug Regulations, Section 195.017	Lists Salvia as a Schedule I controlled substance.
North Dakota CHAPTER 19-03.1, UNIFORM CONTROLLED SUBSTANCES ACT	Lists Salvia as a Schedule I controlled substance.
Nebraska Nebraska Revised Statutes 28-405	Lists Salvia as a Schedule I controlled substance.
North Carolina North Carolina General Statutes Annotated 90-401.23	(a) It shall be unlawful for any person to knowingly or intentionally manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver Salvia divinorum or Salvinorin A. (b) It shall be unlawful for any person to knowingly or intentionally possess Salvia

	divinorum or Salvinorin A.
Ohio Ohio Revised Code Title 37. Chapter 3719.41. Controlled substance schedules.	Lists Salvia as a Schedule I controlled substance.
Oklahoma Oklahoma Statutes Citationized Title 63. Public Health and Safety Chapter 2 - Uniform Controlled Dangerous Substances Act, Article 2 - Standards and Schedules. Section 2-204 - Schedule I	Lists Salvia as a Schedule I controlled substance.
South Dakota South Dakota Codified Laws 22-42-22	Possession of Salvia divinorum or salvinorin A prohibited--Felony or misdemeanor. No person may knowingly possess Salvia divinorum or salvinorin A. It is a Class 1 misdemeanor to possess two ounces or less of Salvia divinorum or salvinorin A. It is a Class 6 felony to possess more than two ounces of Salvia divinorum or salvinorin A.
Tennessee Tennessee Code Annotated 39-17-438	(a) It is an offense to knowingly produce, manufacture, distribute, possess or possess with intent to produce, manufacture, or distribute the active chemical ingredient in the hallucinogenic plant Salvia divinorum A. (b) The provisions of this section shall not apply to the possession, planting, cultivation, growing, or harvesting of the hallucinogenic plant strictly for aesthetic, landscaping, or decorative purposes. (c) The provisions of this section shall not apply to any dosage form that is legally obtainable from a retail establishment without a prescription and is recognized by the Federal Food and Drug Administration as a homeopathic drug. (d) A violation of subsection (a) is a Class A misdemeanor.
Wisconsin Wisconsin Statute 941.318	Except as provided in sub. (3), whoever manufactures, distributes, or delivers salvinorin A with intent that it be consumed by an individual may be fined not more than $10,000. (3) (a) Subsection (2) does not apply to the manufacture of any dosage form of salvinorin A that may be obtained from a retail establishment without a prescription and that is recognized by the U.S. Food and Drug Administration as a homeopathic drug. (b) Subsection (2) does not apply to the distribution or delivery to an individual who is 18 years of age or older of any dosage form of salvinorin A that may be obtained from a retail establishment without a prescription and that is recognized by the U.S. Food and Drug Administration as a homeopathic drug.

For more information, contact

Matthew Gever
Policy Specialist
Forum for State Health Policy Leadership
National Conference of State Legislatures
444 North Capitol Street, NW, Suite 515
Washington, DC 20001
Ph: 202.624.3576
Fax: 202.737.1069

Attachment B

Daniel Siebert, "The Legal Status of *Salvia Divinorum*," Updated March 4, 2010;
www.sagewisdom.org/legal *status.html*

THE LEGAL STATUS OF *SALVIA DIVINORUM*

(This page was last updated on March 4, 2010)

is created and maintained by
Daniel Siebert

Legal Status

Salvia divinorum is a valuable medicinal herb. Because it produces profoundly introspective states of awareness, it is intrinsically unsuitable for recreational use (i.e., it is not a "party drug"). It is not habit-forming, not addictive, and does not present a significant risk to public health or safety. Because it is a powerful consciousness-altering herb, some regulation of sales is sensible and appropriate. It is reasonable to require that vendors provide detailed safety information and guidelines for responsible use. It also makes sense to limit the salvinorin A content of extracts sold in bulk form—extremely potent extracts should only be sold in pre-measured individual doses. It is appropriate to prohibit delivery to minors. It is also appropriate to prohibit reckless use, such as driving a vehicle while inebriated. There are many already-existing non-drug-specific laws that can be enforced against reckless salvia users (e.g., laws that prohibit public endangerment, public intoxication, reckless driving, etc.). Legislation should only penalize irresponsible use, not all use. Legislation that imposes punishment for possession of *Salvia divinorum* is neither useful nor humane. The idea of making any species illegal is absurd—after all, every species is a precious and irreplaceable part of our natural heritage. A sensible approach would be to regulate *Salvia divinorum* in a similar manner as alcohol and tobacco. Another sensible option would be to regulate it as a prescription medication, as some US states have done with cannabis. Certainly, physicians and psychiatrists should be able to prescribe salvia to patients who might benefit from it. It should also remain available for use in psychotherapy.

Decisions regarding the regulation of *Salvia divinorum* (or any substance) should always be based on science. The evidence shows that this herb is relatively safe and non-addictive. The pharmacology of its primary active constituent, salvinorin A, is unique and shows great promise as a lead compound for the development of useful medications. Excessively restrictive regulation would seriously impede further scientific research. For a well-reasoned, scientifically informed, perspective on the relative safety of *Salvia divinorum* and its importance in medical research, I encourage you to read by Dr. Roland Griffiths and Dr. Matthew Johnson of Johns Hopkins University School of Medicine, which were presented as testimony opposing efforts to make salvia a Schedule I controlled substance in the state of Maryland. I also encourage you to read my which I have sent to legislators in several states.

Unfortunately, several countries have enacted laws that prohibit possession and/or sale of *Salvia divinorum*. In some cases, the penalties for violating these laws are quite severe. There are some countries that do not prohibit possession or sale, but do prohibit importation. The following listing describes all of the laws, regulations, and proposed legislation pertaining to *Salvia divinorum* that I am currently aware of. Because of the controversial nature of vision-inducing substances in general, it is probable that the legal status of *Salvia divinorum* will continue to change in the future. To stay abreast of changes in the legal status of *Salvia divinorum*, I encourage you to subscribe to my free email newsletter.

If you are aware of any attempts to prohibit *Salvia divinorum* in countries or states not listed below, please to send me an email.

US States with Laws Prohibiting Salvia	Other Countries with Laws Prohibiting Salvia
Illegal (Schedule I) Delaware Florida Hawaii Illinois Kansas Mississippi Missouri Nebraska North Dakota Ohio Oklahoma South Dakota Virginia Only Legal When Not Intended for Human Consumption Louisiana North Carolina Tennessee [illegible] California Maine (possession by minors also illegal) Illegal to Manufacture, Deliver, or Sell Salvia Knowingly, but Legal to Possess Wisconsin	Illegal to Possess or Sell Australia Belgium Croatia Denmark Germany Italy Japan Latvia Lithuania Poland Romania South Korea Sweden Illegal to Sell, but Legal to Possess Chile Spain Illegal to Grow or Sell, but Legal to Possess Russia [illegible] Estonia Finland Iceland Norway

Australia

Australia was the first country to prohibit *Salvia divinorum* and salvinorin A. The committee responsible for the ban has admitted that there is "no evidence of a major public health hazard." The ban went into effect June 1, 2002. Anyone living in Australia or its territories who is considering being involved with this plant is urged to first obtain professional legal advice. Readers are urged *not* to ship *Salvia divinorum,* or products made from it, to Australia or its territories because the person who receives the shipment could face severe criminal penalties. Please go [illegible] for more details on this recent action by Australia's government and to learn what you can do to fight it.

Denmark

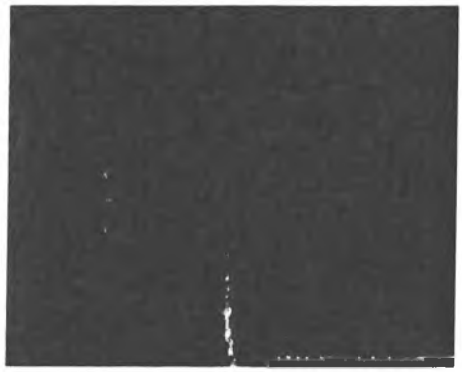
Salvia divinorum and salvinorin A have been placed in category B of the Danish list of controlled substances. Category B includes psilocybin mushrooms, cocaine, amphetamine, and several others substances that are only legal for medicinal and scientific purposes. Possession of *Salvia divinorum* in Denmark now carries a penalty of up to 2 years in prison. The law

Drug Fact Sheet

AboutDrugs DEA

FOR MORE DRUG FACTS, VISIT www.GetSmartAboutDrugs.com/facts

Salvia Divinorum



Overview

Salvia Divinorum is a perennial herb in the mint family that is abused for its hallucinogenic effects.

Street names

Maria Pastora, Sally-D, Salvia

Looks like

Spade-shaped variegated green leaves that look similar to mint. The plants themselves grow to more than 3 feet high, have large green leaves, hollow square stems, and white flowers with purple calyces.

Methods of abuse

Chewed or smoked.

Affect on mind

Psychic effects include perceptions of bright lights, vivid colors, shapes, and body movement, as well as body or object distortions. Salvia divinorum may also cause fear and panic, uncontrollable laughter, a sense of overlapping realities, and hallucinations. Salvinorin A, also called Divinorin A, is believed to be the ingredient responsible for the psychoactive effects of Salvia divinorum.

Affect on body

Adverse physical effects may include loss of coordination, dizziness, and slurred speech.

Drugs causing similar effects

When Salvia divinorum is chewed or smoked, the hallucinogenic effects elicited are similar to those induced by ketamine, mescaline, and psilocybin.

Overdose effects

It is not possible to overdose from Salvia divinorum.

Legal status in the United States

Neither Salvia Divinorum or Salvinorin A has an approved medical use in the United States, but neither are controlled under the Controlled Substances Act (CSA). Salvia divinorum is, however, controlled by a number of states. Click here to find which states have controlled Salvia, and where legislation is pending <http://www.deadiversion.usdoj.gov/drugs_concern/salvia_d/salvia_d.htm>. Since Salvia is not controlled by the CSA, some online botanical companies and drug promotional sites have advertised Salvia as a legal alternative to other plant hallucinogens, like mescaline.

Common places of origin

Salvia is native to certain areas of the Sierra Mazaleca region of Oaxaca, Mexico. It is one of several plants that are used by Mazatec Indians for rituals and healing. Salvia Divinorum plants can be grown successfully outside of this region. They can be grown indoors and outdoors, especially in humid semitropical climates.

This content came from a United States Government, Drug Enforcement Administration (DEA) website.

Intelligence Bulletin:
Buprenorphine: Potential for Abuse

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This bulletin addresses the use of buprenorphine, a drug recently approved for use in opiate addiction therapy. It examines the drug's effects, advantages of traditional treatment options, and vulnerability to diversion and abuse.

Diversion

Buprenorphine is a synthetic opiate and produces the euphoric effects sought by opiate abusers; therefore, it is susceptible to abuse in both of the forms approved for treating opiate addiction. Subutex, the form that does not contain naloxone, is more vulnerable to abuse because it can be crushed and injected or snorted without causing withdrawal symptoms in the abuser. The FDA recommends that physicians limit the use of Subutex to supervised administration sessions; however, physicians are not required to do so, creating opportunities for Subutex diversion. Subutex has been prescribed legally for years in some foreign countries, where its diversion for illicit use is common. There are lucrative black markets for diverted Subutex in Germany, New Zealand, and the United Kingdom. In France, India, and Scotland, where buprenorphine is far more common in opiate addiction therapy than methadone, many individuals are addicted to Subutex. Suboxone is not available in these countries.

Suboxone also can be diverted and abused; however, it is more likely to be abused by individuals who are addicted to low doses of opiates since it can precipitate withdrawal symptoms in high doses. The naloxone in Suboxone guards against abuse by causing withdrawal symptoms in abusers who crush and either inject or snort the drug; however, law enforcement and pharmacist reporting indicates that Suboxone is being abused successfully when snorted.

Using buprenorphine and heroin in combination does not produce increased effects, but if buprenorphine and methadone are abused together, the effects of both drugs are enhanced.

Consequently, diverted buprenorphine may be attractive to patients currently using methadone for opiate addiction therapy.

Despite controls designed to make buprenorphine diversion-proof, there have been reports of buprenorphine diversion throughout the United States, primarily in the Northeast region.

- **Chittenden County, Vermont**. A pharmacist in this area reports that Suboxone is being diverted and sold for $25 per 8-milligram tablet. Abusers are grinding the tablets and snorting them.

- **Washington County, Maine**. The Washington County Sheriff's Office reports that buprenorphine is being diverted in that area and sold for $50 per tablet. The size of the tablet is unknown, and it is unclear whether Subutex or Suboxone tablets are being diverted in this case.

- **Pennsylvania**. The Pennsylvania Department of Health reports that diverted Subutex and Suboxone are being illegally distributed on the street. Specific locations have not been identified.

Outlook

It is unlikely that buprenorphine will render methadone therapy obsolete because it is not as effective in patients who require large doses of opiates in maintenance therapy. However, buprenorphine can provide opiate addiction therapy to individuals addicted to lower doses of opiates, to those in rural areas with inadequate access to treatment, and to those in areas where methadone clinics have reached full capacity. With more physicians obtaining certification to prescribe buprenorphine every day, this form of therapy has the potential to become as common as methadone therapy.

Because of its ceiling effect and ability to precipitate withdrawal symptoms if taken in high doses, buprenorphine is more susceptible to abuse by individuals who are addicted to low doses of opiates or individuals in the early stages of opiate addiction. The drug also can be abused in combination with methadone, making buprenorphine diversion more problematic in areas where heroin abuse and methadone therapy are common, such as the Northeast region. As buprenorphine therapy becomes more widespread, the potential for increased diversion of Subutex and Suboxone should be closely monitored.

Buprenorphine

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This drug is a semi-synthetic narcotic derived from thebaine and is currently being investigated for the treatment of narcotic addiction. Like methadone and LAAM, buprenorphine is potent (30 to 50 times the analgesic potency of morphine), has a long duration of action, and does not need to be injected. The buprenorphine products under development are sublingual tablets. Unlike the other treatment drugs, buprenorphine produces far less respiratory depression and is thought to be safer in overdose. Buprenorphine is currently available in the United States as an injectable Schedule III narcotic analgesic (Buprenex®) for human and veterinary use.

proposed judgment, is harmless error. **Jefferson v. Greater Anchorage Area Borough,** Op. No. 536, 451 P2d 730 (Alaska 1969).

It is not the intent of this rule to delegate to counsel for the successful party the trial judge's primary duty of finding the facts under Rule 52. **Fairbanks Builders, Inc. v. Morton DeLima, Inc.,** Op. No. 682, 483 P2d 194 (Alaska 1971).

Where a defendant's motion for relief from judgment alleges they were denied the opportunity to object to the judgment, such motion is not based on an error of law. It therefore need not be brought within 30 days from entry of the judgment. **Alaska Placer Co. v. Lee,** Op. No. 840, 502 P2d 128 (Alaska 1972).

A judgment is not illegal if it is signed in chambers rather than rendered in open court. **Jefferson v. City of Anchorage,** Op. No. 930, 513 P2d 1099 (Alaska 1973).

Where the court announces its decision regarding the main issue in a case on June 8th, where the plaintiff submits on June 27th proposed findings, which the defendant objects to where the proposed partial judgment is entered on August 1st, and where findings of fact, conclusions of law, and final judgment are entered on January 12th, the defendant is not denied the five-day period within which to object to the proposed findings, even though he receives the findings of fact and conclusions of law with respect to the final judgment on January 9th. The court is merely acting within its authority to modify documents which had earlier been submitted to it. **Moran v. Kenai Towing and Salvage, Inc.,** Op. No. 1056, 523 P2d 1237 (Alaska 1974).

The trial court's failure to hold a hearing on appellant's objections to appellee's proposed findings and conclusions is not error; such a hearing is discretionary. **Urban Development Co. v. Dekreon,** Op. No. 1083, 526 P2d 325 (Alaska 1974).

Provision in this rule for written objections to findings of fact is discretionary. **Frontier Saloon, Inc. v. Short,** Op. No. 1345, 557 P2d 779 (Alaska 1976).

Defendant did not waive right to challenge judgment where it did not object under Civil Rule 78(b) but filed timely Rule 59(f) motion to amend judgment. **Beech Aircraft Corp. v. Harvey,** Op. No. 1338, 558 P2d 879 (Alaska 1976).

A trial court is entitled to adopt findings and conclusions prepared by counsel so long as they reflect the court's independent view of the weight of the evidence. **Industrial Indemnity Co. v. Wick Const. Co.,** Op. No. 2791, 680 P2d 1100 (Alaska 1984).

When judgment is entered on a secured note, the note merges with judgment, and any further proceedings will be to enforce the judgment rather than the note. **Moening v. Alaska Mut. Bank,** Op. No. 3274, 751 P2d 5 (Alaska 1988).

A judgment recovered upon a promissory note secured by a deed of trust did not merge the deed of trust nor operate as a discharge, abandonment, or release of the deed of trust; in essence, the judgment creditor ended up with a secured judgment. **Moening v. Alaska Mut. Bank,** Op. No. 3274, 751 P2d 5 (Alaska 1988).

Although trial court could have canceled promissory note after entering judgment on the note, conditionally canceling the note was not an abuse of discretion. **Moening v. Alaska Mut. Bank,** Op. No. 3274, 751 P2d 5 (Alaska 1988).

Rule 79. Costs—Taxation and Review.

(a) **Allowance to Prevailing Party.** Unless the court otherwise directs, the prevailing party is entitled to recover costs allowable under paragraph (f) that were necessarily incurred in the action. The amount awarded for each item will be the amount specified in this rule or, if no amount is specified, the cost actually incurred by the party to the extent this cost is reasonable.

(b) **Cost Bill.** To recover costs, the prevailing party must file and serve an itemized and verified cost bill, showing the date costs were incurred, within 10 days after the date shown in the clerk's certificate of distribution on the judgment. Failure of a party to file and serve a cost bill within 10 days, or such additional time as the court may allow, will be construed as a waiver of the party's right to recover costs. The prevailing party must have receipts, invoices, or other supporting documentation for each item claimed. This documentation must be available to other parties for inspection and copying upon request and must be presented to the clerk upon request. Documentation may be filed only if requested by the clerk or in response to an objection.

(c) **Objection and Reply.** A party may object to a cost bill by filing and serving an objection within 7 days after service of the cost bill. The prevailing party may respond to an objection by filing and serving a reply within 5 days after service of the objection.

(d) **Taxing of Costs by Clerk.** Promptly upon expiration of the time for filing objections, or if an objection is filed, the time for filing a reply, the clerk shall issue an itemized award of costs allowable under this rule. No cost bill hearing will be held unless requested by the clerk. If a hearing is held, it will be limited to issues identified by the clerk in the notice of hearing. The clerk may deny costs requested by the prevailing party on grounds that

(1) the cost is not allowed under paragraph (f);

(2) the party failed to provide an adequate description or adequate supporting documentation following a request by the clerk or another party; or

(3) the amount claimed by the prevailing party is unreasonable.

The clerk may not deny costs on grounds that the costs were not necessarily incurred in the action. If a party objects on this basis, the party must seek review under paragraph (e) of the clerk's action in awarding the cost.

(e) **Review by Court.** A party aggrieved by the clerk's action in awarding costs may file a motion for review of the clerk's award. The motion must be filed and served within five days after the date shown on the clerk's certificate of distribution on the award. The motion must particularly designate each ruling of the clerk to which objection is made. Matters not so designated will not be considered by the court. Costs awarded by the clerk are presumed to be reasonable.

(f) **Allowable Costs.** The following items are the only items that will be allowed as costs:

(1) the filing fee;

(2) fees for service of process allowable under Administrative Rule 11 or postage when process is served by mail;

(3) other process server fees allowable under Administrative Rule 11;

(4) the cost of publishing notices required by law or by these rules;

(5) premiums paid on undertakings, bonds, or security stipulations where required by law, ordered by the court, or necessary to secure some right accorded in the action;

(6) the cost of taking and transcribing a deposition allowed by Civil Rule 30(a) or 31(a) (including a deposition that is ordered by the court or agreed to by the parties under those rules), as follows:

(A) the court reporter's fee and travel expenses to communities where a local court reporter is not available;

(B) expenses allowed by Civil Rule 30.1(e) for recording, editing, or using an audio or audio-visual deposition; and

(C) the cost of the original plus one copy of the transcript;

(7) witness fees allowed under Administrative Rule 7;

(8) the fee of an interpreter or translator for a witness when that witness is entitled to a fee under Administrative Rule 7;

(9) travel costs allowed under paragraph (g) of this rule;

(10) long distance telephone charges for telephonic participation by an attorney or party at court proceedings, depositions, the meeting of the parties required by Civil Rule 26(f), and interviews of witnesses other than the party;

(11) charges paid by the prevailing party's attorney for computerized legal research;

(12) copying costs for paper copies, photographs, and microfilm, the cost of scanning, imaging, coding, and creating electronic media files, such as computer diskettes or tapes, and the cost of duplicating text files or otherwise copying documents or data in an electronic medium, as follows:

(A) for copies from the court, a copy center, or a person or entity other than the prevailing party's attorney, the amount charged for the copies; and

(B) for copies from the prevailing party's attorney, the amount charged by the attorney or $.15 per copy, whichever is less;

(13) exhibit preparation costs;

(14) the cost of transcripts ordered by the court;

(15) other costs allowed by statute; and

(16) any sales or other taxes necessarily incurred by the party in connection with a cost allowed in this subsection.

(g) **Travel Costs.**

(1) Travel costs will be allowed for

(A) one attorney to attend trial, hearings on dispositive motions, settlement conferences, and the meeting of the parties required by Civil Rule 26(f), but only if no local attorney is present; if more than one out-of-town attorney attends a proceeding at which no local attorney is present, travel costs will be allowed for the attorney who traveled the shortest distance to the trial site;

(B) one attorney to attend depositions, interviews of witnesses who are not deposed, and meetings to review documents produced in the course of discovery;

(C) one legal assistant or investigator to interview witnesses who are not deposed or to review documents produced in the course of discovery; and

(D) witnesses to the extent permitted by Administrative Rule 7.

(2) Travel costs are subject to the following limitations:

(A) air fare is allowed at the coach class fare or the actual fare, whichever is less;

(B) ground transportation, including car rental, is allowed outside the traveler's home city; and

(C) food and lodging is allowed at the same per diem rate allowed for court employees.

(3) In unusually complex cases, the court may allow a prevailing party to recover travel costs for more than one attorney to participate in the activities described in section (g)(1)(A) of this rule. To request travel costs for more than one attorney, the prevailing party must file a motion for court review of the clerk's award as provided in paragraph (e) and must include supporting documentation for each item claimed. These costs should not be included in the cost bill filed with the clerk.

(4) To recover travel costs, the prevailing party must include the following information for each trip: the name of the traveler, whether the traveler is an attorney, legal assistant, or investigator, the reasons for the travel, and the travel dates.

(h) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, costs must be apportioned and awarded according to the provisions of Civil Rule 82(e).

(Adopted by SCO 5 October 9, 1959; amended by SCO 56 effective November 1, 1963; by SCO 258 effective November 15, 1976; by SCO 554 effective April 4, 1983; by SCO 1085 effective January 15, 1992; by SCO 1118 effective July 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1200 effective July 15, 1995; by SCO 1246 effective July 15, 1996; and by SCO 1279 effective July 31, 1997; rescinded and readopted by SCO 1306 effective January 15, 1998; amended by SCO 1340 effective January 15, 1999; and by SCO 1631 effective April 16, 2007.)

Note: AS 25.25.313(c), added by § 6 of ch. 57 SLA 1995 (the Uniform Interstate Family Support Act), has the effect of amending Civil Rule 79 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a support proceeding listed in AS 25.25.301.

Note: In 1997 the legislature enacted AS 18.16.030(m), which provides that a filing fee may not be required of, and court costs may not be assessed against, a minor in a proceeding to bypass parental consent to an abortion. According to ch. 14, § 10 SLA 1997, AS 18.16.030(m) has the effect of amending Administrative Rule 9, Civil Rule 79, and Appellate Rule 508 by prohibiting filing fees and assessment of court costs in certain actions. Instead of amending individual rules to implement AS 18.16.030, the supreme court has adopted a separate rule on judicial bypass proceedings in the superior court and a separate rule on judicial bypass appeals. See Probate Rule 20 & Appellate Rule 220.

Note: Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

Note: Chapter 136 SLA 03 (HB 151) amends Chapters 10 and 45 of Title 9 of the Alaska Statutes relating to claims and court actions for defects in the design, construction, and remodeling of certain dwellings and limits on when certain court actions may be brought. According to Section 4(2) of the Act, AS 09.45.889(b) has the effect of amending Civil Rule 79 by allowing the court to deny costs to a claimant in the situation described in AS 09.45.889(b), even if the claimant is the prevailing party.

Annotations

Cases

Ten-day period for service and filing of a cost bill commenced only at the date of docketing of the formal judgment and not at the date of docketing of the verdict without any direction by the court as to the entry of judgment. **Patterson v. Cushman,** Op. No. 233, 394 P2d 657 (Alaska 1964).

Appellant who did not serve cost bill and notice waived its right to recover costs. **M-B Contracting Company v. Davis,** Op. No. 275, 399 P2d 433 (Alaska 1965).

Taxing of costs rests in the sound discretion of the trial court. **Beaulieu v. Elliott,** Op. No. 443, 434 P2d 665 (Alaska 1968).

Refusal to allow as costs expenses incident to the taking of depositions was no abuse of discretion where in a personal injury case the prevailing plaintiff had failed to point out what depositions were involved, when they were taken, or when the concession of liability was made by the defendant. **Beaulieu v. Elliott,** Op. No. 443, 434 P2d 665 (Alaska 1968).

Failure to contest costs within the time limit of this rule bars raising the issue on appeal. **A.R.C. Industries, Inc. v. State,** Op. No. 1283, 551 P2d 951 (Alaska 1976).

Trial courts award of costs will be affirmed unless there has been a clear abuse of discretion. **Kaps Transport, Inc. v. Henry,** Op. No. 1527, 572 P2d 72 (Alaska 1977).

Where defendant could properly defend in main suit by prosecuting cross-claim, costs for expert witness fees were properly charged to cross-claim defendant. **Kaps Transport, Inc. v. Henry,** Op. No. 1527, 572 P2d 72 (Alaska 1977).

Allowance of costs for unused depositions of key witness who testified at trial was not abuse of discretion. **Kaps Transport, Inc. v. Henry,** Op. No. 1527, 572 P2d 72 (Alaska 1977).

An award of costs to the prevailing parties which included expenses incurred by their attorney for travel, food and lodging was not an abuse of discretion where the attorney had to travel from his office in Juneau to Nome for the proceedings. **Davis v. Hallett,** Op. No. 1772, 587 P2d 1170 (Alaska 1978).

Alaska does not include prejudgment interest among the items allowed as costs. **Guin v. Ha,** Op. No. 1810, 591 P2d 1281 (Alaska 1979).

While attorney's fees are costs, they are not covered by the literal requirements of Civil Rule 79(b). **State v. University of Alaska,** Op. No. 2303, 624 P2d 807 (Alaska 1981).

Trial court did not abuse its discretion in permitting a request for attorney's fees thirteen days after judgment. **State v. University of Alaska,** Op. No. 2303, 624 P2d 807 (Alaska 1981).

The taxing of costs for witness fees is governed by Civil Rule 83 and Administrative Rule 7(e) rather than the general provisions of Civil Rule 79(b). **Miller v. Sears,** Op. No. 2447, 636 P2d 1183 (Alaska 1981).

The premium on a supersedeas bond was properly included in an award of costs. **Isaacson Steel v. Armco Steel,** Op. No. 2466, 640 P2d 812 (Alaska 1982).

Filing of bill of costs prior to entry of judgment violated this rule, but did not constitute a waiver of the right to recover costs. **Isaacson Steel v. Armco Steel,** Op. No. 2466, 640 P2d 812 (Alaska 1982).

Superior court erred in awarding costs at the time judgment was entered because it prevented the losing party from objecting at a hearing on costs before the clerk of the court to the inclusion of specific expenditures in the award, which in turn prevented these objections from being considered on appeal. **Isaacson Steel v. Armco Steel,** Op. No. 2466, 640 P2d 812 (Alaska 1982).

Award of air travel costs incurred by prevailing party to bring its Seattle-based attorneys to Alaska for trial was not abuse of discretion. **Eagle Air v. Corroon, Etc.,** Op. No. 2538, 648 P2d 1000 (Alaska 1982).

Given previous conduct of defendant in removing assets from the state, trial court was justified in appointing an individual to supervise and prevent the removal or destruction of defendant's assets, which were the subject of a prejudgment attachment, and ordering defendant to pay the reasonable cost of the individual's employment. **Eagle Air v. Corroon, Etc.,** Op. No. 2538, 648 P2d 1000 (Alaska 1982).

Refusal to award food costs incurred in the taking of depositions was not abuse of discretion. **Truckweld Equipment Co. v. Swenson Trucking,** Op. No. 2545, 649 P2d 234 (Alaska 1982).

Where the depositions in question were not used solely for discovery purposes, but were used to prepare for and to assert a motion to dismiss, trial court did not abuse its discretion in requiring the losing party to pay for the cost of the depositions. **Gold Bondholders, Etc. v. Atchison, Topeka and Santa Fe Ry. Co.,** Op. No. 2608, 658 P2d 776 (Alaska 1983).

It was within the superior court's discretion to affirm an award of travel expenses necessarily incurred in taking deposition used to prepare for and to assert a pre-trial motion to dismiss. **Gold Bondholders, Etc. v. Atchison, Topeka and Santa Fe Ry. Co.,** Op. No. 2608, 658 P2d 776 (Alaska 1983).

The Civil Rules do not preclude a party from requesting attorney's fees

been reached. **Interior Credit Bureau, Inc., v. Bussing,** Op. No. 1366, 559 P2d 104 (Alaska 1977).

Trial court did not err in holding that plaintiff, who was both a doctor and a lawyer, could either represent himself or be represented by counsel, but not both, in his action against hospital for its failure to renew his staff privileges. **Eufemio v. Kodiak Island Hosp.,** Op. No. 3868, 837 P2d 95 (Alaska 1992).

Trial court abused its discretion in denying attorney's properly presented motion to withdraw as counsel. **Devincenzi v. Wright,** Op. No. 4136, 882 P2d 1263 (Alaska 1994).

Rule 82. Attorney's Fees.

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, If Awarded, Prejudgment Interest		Contested With Trial	Contested Without Trial	Non-Contested
First	$25,000	20%	18%	10%
Next	$75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or in reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118am effective July 15, 1993; amended by SCO 1195 effective July 15, 1995; by SCO 1200 effective July 15, 1995; by SCO 1241 effective July 15, 1996; by SCO 1246 effective July 15, 1996; by SCO 1281 effective August 7, 1997; by SCO 1340 effective January 15, 1999; by SCO 1455 effective July 15, 1993; and by SCO 1670 effective July 1, 2009)

Note to SCO 1118am: By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, **see, e.g., Anchorage Daily News v. Anchorage School Dist.**, 803 P.2d 402, 404 (Alaska 1990); **City of Anchorage v. McCabe**, 568 P.2d 986, 993-94 (Alaska 1977); **Gilbert v. State**, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. **See, e.g., Malvo v. J.C. Penney Co.**, 512 P.2d 575, 588 (Alaska 1973); **Demoski v. New**, 737 P.2d 780, 788 (Alaska 1987).

Note: AS 25.25.313(c), added by § 6 of ch. 57 SLA 1995 (the Uniform Interstate Family Support Act), has the effect of amending Civil Rule 82 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a support proceeding listed in AS 25.25.301.

RABINOWITZ, Justice dissenting.

I dissent from the court's adoption of the amendments to Civil Rule 82 called for in [SCO 1118am.] In my view no compelling case has been made demonstrating the need for these changes. *1* Further, my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflected in (b)(3)(A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court. *2*

1 In this regard I note that the Alaska Judicial Council is scheduled to conduct an in depth empirical study of the workings of Civil Rule 82. My preference is to await the results of the Council's study before deciding whether any of the current provisions of Rule 82 should be amended. Such a study should position this court to make a more informed assessment as to whether the current rule operates in a fashion which unjustly denies access to our courts. I further note that our Civil Rules Committee recently surveyed the Alaska Bar membership on discrete aspects of Civil Rule 82. A clear majority of those responding to the committee's questionnaire indicated: that Civil Rule 82 does not deter people of moderate means from filing valid claims; that the rule does not put excessive pressure on moderate income people to settle valid claims; and that the rule is needed to discourage frivolous litigation.

2 Any attorney worth his or her salt will, pursuant to the expansive provisions of (b)(3)(A) through (K), request variations from the attorney's fees awards called for under either the monetary recovery schedule provisions of (b)(1), or the provisions of (b)(2) which apply where no money judgment is recovered by the prevailing party.

Note to SCO 1281: In 1997 the legislature amended AS 09.30.065 concerning offers of judgment. According to ch. 26, sec. 52, SLA 1997, the amendment to AS 09.30.065 has the effect of amending Civil Rules 68 and 82 by requiring the offeree to pay costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating provisions relating to interest, and by changing provisions relating to attorney fee awards. According to sec. 55 of the session law, the amendment to AS 09.30.065 applies "to all causes of action accruing on or after the effective date of this Act." However, the amendments to Civil Rule 68 adopted by paragraph 5 of this order are applicable to all cases filed on or after August 7, 1997. See paragraph 17 of this order.

Note: Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

Note: Chapter 136 SLA 03 (HB 151) amends Chapters 10 and 45 of Title 9 of the Alaska Statutes relating to claims and court actions for defects in the design, construction, and remodeling of certain dwellings and limits on when certain court actions may be brought. According to Section 4(1) of the Act, AS 09.45.889(b) has the effect of amending Civil Rule 82 by allowing the court to deny attorney fees to a claimant in the situation described in AS 09.45.889(b), even if the claimant is the prevailing party.

Note (effective July 1, 2009): Chapter 92 SLA 2008 (HB 65) added a new chapter to AS 45 relating to security of personal information, effective July 1, 2009. According to section 6(b) of the Act, AS 45.48.200(a), 45.48.480(b), 45.48.560, and 45.48.750(d), enacted by section 4, have the effect of changing Civil Rule 82 by changing the criteria for determining the amount of attorney fees to be awarded to a party in an action under AS 45.48.200(a), 45.48.480(b), 45.48.560, or 45.48.750(d).

Annotations

Cases

I. In General.
II. Prevailing Party.
III. Review.
A. Standard.
B. Abuse of Discretion or Error.
IV. Fee Schedule.

I. In General.

The common law did not permit allowance of attorney's fees as costs to the prevailing party, but in Alaska such allowance is of relatively ancient

HB 161

<TARGET><BILL>HB 161</BILL><SUBJECT>HB 161</SUBJECT><COMM>HJUD27</COMM></TARGET>

Rec'd. 2-27-12
WL

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us

Session:
Alaska State Capitol #108
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
Toll Free: (800) 870-4391

Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

February 27, 2012

To: Representative Carl Gatto, Chair
House Judiciary Committee

Fr: Representative Bob Lynn BL

Re: HB 161 Version 27-LS0555\A – Certain Candidate Info is Public Record

---

I respectfully request a hearing on HB 161 "Certain Candidate Info is Public Record" at your earliest convenience. Attached are the following documents:

- Bill History
- HB 161 Version A
- Sponsor Statement *updated*
- Hearing Minutes 2/3/2011
- Sample Candidacy Forms

The House State Affairs Committee heard and moved Version A last session. Any questions or concerns can be directed to my staffer, Nancy Manly at 465-2794 or nancy_manly@legis.state.ak.us.

Thank you in advance for your consideration.

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

A Communication From
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Fax: (907) 269-0207

Sponsor Statement
HB 161
"An Act requiring that all information in a declaration of candidacy, letter of intent, or nominating petition…is open to public inspection."

HB 161 makes the information on Division of Elections filing forms for partisan, "no-party," and write-in candidates a matter of public record. If voters are going to evaluate candidates and make an informed choice, they must be allowed to confirm the candidate's name, physical address, and other personal information on the declaration of candidacy. HB 161 makes this information public for all candidates for public office, regardless of the confidentiality preferences they indicated when registering to vote.

The Division of Elections testified on this bill that "there is no authority for the division to treat a candidate differently from any other voter in regard to having the right to make a residential address confidential." Voters should enjoy any and all confidentiality afforded them by the law. Nothing in HB 161 would change that. Candidates for office, however, should be held to a higher standard of public scrutiny than the average voter.

Candidates for office are already required to disclose personal information above and beyond the average voter. HB 161 takes the common-sense next step and makes this personal information available to the public. I respectfully ask that you join me in supporting this change.

For more information, contact Nancy Manly at 465-2794 nancy_manly@legis.state.ak.us

ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE
February 3, 2011
8:05 a.m.

DRAFT

MEMBERS PRESENT

Representative Bob Lynn, Chair
Representative Wes Keller, Vice Chair
Representative Paul Seaton
Representative Peggy Wilson
Representative Max Gruenberg
Representative Pete Petersen
Representative Kyle Johansen

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

OVERVIEW(S): DIVISION OF ELECTIONS

WITNESS REGISTER

GAIL FENUMIAI, Executive Director
Division of Elections
Office of the Lieutenant Governor
Juneau, Alaska
POSITION STATEMENT: Presented an overview of the Division of Elections.

SARAH FELIX, Assistant Attorney General
Labor and State Affairs Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska

POSITION STATEMENT: Answered questions during the Division of Elections overview.

9:38:37 AM

MS. FENUMIAI, in response to Chair Lynn, confirmed that voters have the right to keep their residence address confidential, as long as they are able to provide the division with a different mailing address. In response to a follow-up question, she stated her assumption that people who have been victims of domestic violence and police officers may not want others to know where they live.

9:42:30 AM

MS. FELIX noted that AS 15.07.195 gives the right to keep ones residential address confidential. In response to Representative Seaton, she said currently there is no authority for the division to treat a candidate differently from any other voter in regard to having the right to make a residential address confidential.

9:44:15 AM

MS. FELIX, in response to Representative Seaton, stated that the subject of a voter's residential address was not an issue that arose during Edgmon v. Moses.

Please Find the Following Blank Forms Attached:

Political Party Candidates Declaration of Candidacy (*AS 15.25.030*)

- U.S. Congress
- Governor or Lt. Governor
- State Senator or Representative

"No-Party" Candidates Filing Notification and Nominating Petition Forms (*AS 15.25.180*)

- U.S. Congress
- Governor
- Lt. Governor
- State Senator or Representative

Write-In Candidate Letter of Intent (*AS 15.25.105*)

- U.S. Congress
- Governor or Lt. Governor
- State Senator or Representative

STATE OF ALASKA DECLARATION OF CANDIDACY
U.S. CONGRESS

Please check: ___ My **$100 filing fee** accompanies this Declaration of Candidacy
Please check: ___ I acknowledge that I am responsible for contacting the Federal Election Commission for federal reporting requirements: 999 E St. NW, Washington, DC 20463

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law and declare myself to be a resident of Alaska and a candidate for the office of (check one):

_____ UNITED STATES SENATOR - or - _____ UNITED STATES REPRESENTATIVE

I request that my name be placed on the **2012 Primary Election** ballot. I am registered under and am a candidate of the

_____ political party.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD /YY). I have been a resident of Alaska since ____/____/____ (MM / DD /YY).

My mailing address: _____ (Mailing Address) _____ (City) _____ (State) _____ (Zip)

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City) _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the ballot in the following manner:

_____ (Last Name) _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this *Declaration of Candidacy* is true and complete, and that I meet the specific residency and citizenship requirements of this office. I further certify that I shall meet the age requirements upon taking the oath of office, if elected. I am not a candidate for any other office to be voted upon at the Primary election, nor am I a candidate for this office under any other *Declaration of Candidacy* or *Nominating Petition*. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the election.

Subscribed and sworn to before me this

_____ day of _____, 20_____.

_____ (Signature of Notary Public)

My commission expires: _____

NOTARY SEAL

_____ (Candidate's Signature)

_____ (Home Phone) _____ (Work Phone)

To assist staff in verifying candidate/voter identification, please provide one of the following:

SSN, ADL, Voter # or DOB _____

A23 (Rev 01/10/11)

STATE OF ALASKA DECLARATION OF CANDIDACY
GOVERNOR or LIEUTENANT GOVERNOR

Please check: ___ My **$100 filing fee** accompanies this Declaration of Candidacy

Please check one: My **Financial Disclosure Statement** is (1)___ Enclosed **OR** (2)___ On file with the Alaska Public Offices Commission. **NOTE:** Candidates selecting option 2, are encouraged to contact APOC prior to filing to ensure they have a current *Public Officials Financial Disclosure Statement* on file with APOC.

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law and declare myself to be a resident of Alaska and a candidate for the office of:

_____ GOVERNOR - or - _____ LIEUTENANT GOVERNOR

I request that my name be placed on the **August 24, 2010 Primary Election** ballot. I am registered under and

am a candidate of the _____ political party.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD /YY). I have been a resident of Alaska since ____/____/____ (MM / DD /YY).

My mailing address: _____ (Mailing Address) _____ (City) _____ (State) _____ (Zip).

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City) _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the ballot in the following manner:

_____ (Last Name) _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this *Declaration of Candidacy* is true and complete, and that I meet the specific residency and citizenship requirements of this office. I further certify that I shall be at least 30 years of age on the first Monday in December following the election. I am not a candidate for any other office to be voted upon at the Primary election, nor am I a candidate for this office under any other *Declaration of Candidacy* or *Nominating Petition*. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the election.

Subscribed and sworn to before me this

_____ day of _____, 20____.

_____ (Signature of Notary Public)

My commission expires: _____

NOTARY SEAL

_____ (Candidate's Signature)

_____ (Home Phone) _____ (Work Phone)

To assist staff in verifying candidate/voter identification, please provide one of the following:

SSN, ADL, Voter # or DOB _____

A24 (Rev. 12/12/07)

STATE OF ALASKA DECLARATION OF CANDIDACY
STATE SENATOR or STATE REPRESENTATIVE

Please check: ___ My **$30 filing fee** accompanies this Declaration of Candidacy

Please check one: My **Financial Disclosure Statement** is (1)___ Enclosed **OR** (2)___ On file with the Alaska Public Offices Commission. **NOTE:** Candidates selecting option 2, are encouraged to contact APOC prior to filing to ensure they have a **current** *Public Officials (Non-incumbents) or Legislative (Incumbents) Financial Disclosure Statement* on file.

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter and declare myself to be a resident of Alaska and of the District for which I declare my candidacy for the office of (check one and write the district race):

__ STATE SENATOR for District _____ - or - __ STATE REPRESENTATIVE for District _____

I request that my name be placed on the **2012 Primary Election** ballot. I am registered under and am a candidate of the

_____ political party.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD / YY). Previous address if you have lived at your current address less than one year:

_____ (Previous Residence Address) _____ (City), AK _____ (Zip).

I have been a resident of Alaska since ____/____/____ (MM / DD / YY), and a resident of the Election District filed for since ____/____/____ (MM / DD / YY).

My mailing address is: _____ (Mailing Address) _____ (City), _____ (State) _____ (Zip).

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City) _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the ballot in the following manner:

_____ (Last Name), _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this *Declaration of Candidacy* is true and complete, and that I meet the specific residency and citizenship requirements of this office. If I am filing for State Representative, I further certify that I shall be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election. If I am filing for State Senate, I further certify that I shall be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election. I am not a candidate for any other office to be voted upon at the Primary election, nor am I a candidate for this office under any other *Declaration of Candidacy* or *Nominating Petition*. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the election.

Subscribed and sworn to before me this

_____ day of _____, 20_____.

_____ (Candidate's Signature)

_____ (Signature of Notary Public)

_____ (Home Phone) _____ (Work Phone)

My commission expires: _____

To assist staff in verifying candidate/voter identification, please provide one of the following:

SSN, ADL, Voter # or DOB _____

A25 (Rev. 02/08/11)

STATE OF ALASKA FILING NOTIFICATION
NOMINATING PETITION CANDIDATE FOR U.S. CONGRESS

Please check: ___ I acknowledge that the Nominating Petition form and Subscribers pages are due by **5:00pm, August 24, 2010**

Please check: ___ I acknowledge that I am responsible for contacting the Federal Election Commission for federal reporting requirements: 999 E St. NW, Washington, DC 20463

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law and declare myself to be a resident of Alaska and a candidate by petition for the _____ political group (if any), for the office of:

Check one: _____ **UNITED STATES SENATOR** OR _____ **UNITED STATES REPRESENTATIVE**

I will accept this nomination and request that my name be placed on the **November 2, 2010 General Election** ballot if my petition is certified.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD /YY). I have been a resident of Alaska since ____/____/____ (MM / DD /YY).

My mailing address: _____ (Mailing Address) _____ (City), _____ (State) _____ (Zip)

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City), _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the General Election ballot in the following manner:

_____ (Last Name), _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this Filing Notification is true and complete, and that I meet the specific residency and citizenship requirements of this office. I further certify that I shall meet the age requirements upon taking the oath of office, if elected. I am not a candidate for any other office to be voted upon at the Primary or General election, nor am I a candidate for this office under any other Declaration of Candidacy or Nominating Petition. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the General election. I will accept this nomination and will serve if elected.

Subscribed and sworn to before me this

_____ day of _____, 20_____.

_____ (Signature of Notary Public)

My commission expires: _____

NOTARY SEAL

_____ (Candidate's Signature)

_____ (Home Phone) _____ (Work Phone)

To assist staff in verifying candidate/voter identification, please provide one of the following:

SSN, ADL, Voter # or DOB: _____

STATE OF ALASKA FILING NOTIFICATION
NOMINATING PETITION CANDIDATE FOR GOVERNOR

Please check: ___ I acknowledge that the Nominating Petition Form and Subscribers' pages must be filed by **5:00pm, August 24, 2010**

Please check one: My **Financial Disclosure Statement** is (1)___ Enclosed **OR** (2)___ On file with the Alaska Public Offices Commission. **NOTE:** Candidates selecting option 2, are encouraged to contact APOC prior to filing to ensure they have a current *Public Officials Financial Disclosure Statement* on file with APOC.

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law, and declare myself to be a resident

of Alaska and a candidate by petition for the _____ political group (if any), for the office of:

GOVERNOR

The name of the candidate running jointly with me for Lt. Governor is _____
[AS 15.25.180(a)(17)]

I will accept this nomination and request that my name be placed on the **November 2, 2010** General Election ballot if my petition is certified.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD /YY). I have been a resident of Alaska since ____/____/____ (MM / DD /YY).

My mailing address: _____ (Mailing Address) _____ (City), _____ (State) _____ (Zip).

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City) _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the General Election ballot in the following manner:

_____ (Last Name) _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this Filing Notification is true and complete, and that I meet the specific residency and citizenship requirements of this office. I further certify that I shall be at least 30 years of age on the first Monday in December following the election. I am not a candidate for any other office to be voted upon at the Primary or General Election, nor am I a candidate for this office under any other Declaration of Candidacy or Nominating Petition. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the General election. I will accept this nomination and will serve if elected.

Subscribed and sworn to before me this

_____ day of _____, 20____.

_____
(Signature of Notary Public)

My commission expires: _____

NOTARY SEAL

_____
(Candidate's Signature)

_____ (Home Phone) _____ (Work Phone)

To assist staff in verifying candidate/voter identification, please provide one of the following:

SSN, ADL, Voter # or DOB: _____

A20 (Rev 11/19/07)

STATE OF ALASKA FILING NOTIFICATION
NOMINATING PETITION CANDIDATE FOR LIEUTENANT GOVERNOR

Please check: ___ I acknowledge that the Nominating Petition Form and Subscribers' pages must be filed by **5:00pm, August 24, 2010**

Please check one: My **Financial Disclosure Statement** is (1)___ Enclosed **OR** (2)___ On file with the Alaska Public Offices Commission. **NOTE:** Candidates selecting option 2, are encouraged to contact APOC prior to filing to ensure they have a current *Public Officials Financial Disclosure Statement* on file with APOC.

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law, and declare myself to be a resident of Alaska and a candidate by petition for the _____ political group (if any), for the office of:

LIEUTENANT GOVERNOR

The name of the candidate running jointly with me for Governor is _____
[AS 15.25.180(a)(17)]

I will accept this nomination and request that my name be placed on the **November 2, 2010 General Election** ballot if my petition is certified.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD /YY). I have been a resident of Alaska since ____/____/____ (MM / DD /YY).

My mailing address: _____ (Mailing Address) _____ (City), _____ (State) _____ (Zip).

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City), _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the General Election ballot in the following manner:

_____ (Last Name), _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this Filing Notification is true and complete, and that I meet the specific residency and citizenship requirements of this office. I further certify that I shall be at least 30 years of age on the first Monday in December following the election. I am not a candidate for any other office to be voted upon at the Primary or General Election, nor am I a candidate for this office under any other Declaration of Candidacy or Nominating Petition. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the General election. I will accept this nomination and will serve if elected.

Subscribed and sworn to before me this

_____ day of _____, 20____.

_____
(Signature of Notary Public)

My commission expires: _____

_____
(Candidate's Signature)

_____ (Home Phone) _____ (Work Phone)

To assist staff in verifying candidate/voter identification, please provide one of the following:

SSN, ADL, Voter # or DOB: _____

A21 (Rev 11/19/07)

STATE OF ALASKA FILING NOTIFICATION
NOMINATING PETITION CANDIDATE FOR STATE SENATOR OR STATE REPRESENTATIVE

Please check: ___ I acknowledge that the Nominating Petition form and Subscribers' pages are due by **5:00pm, August 24, 2010**

Please check one: My **Financial Disclosure Statement** is (1)___ Enclosed **OR** (2)___ On file with the Alaska Public Offices Commission. **NOTE:** Candidates selecting option 2, are encouraged to contact APOC prior to filing to ensure they have a current *Public Officials (Non-incumbents) or Legislative (Incumbents)* Financial *Disclosure Statement* on file with APOC.

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law and declare myself to be a resident

of Alaska and candidate by petition for the _____ political group (if any), for the office of (check one and write district race):

__STATE SENATOR for DISTRICT ____ OR **__STATE REPRESENTATIVE for DISTRICT ____**

I will accept this nomination and request that my name be placed on the **November 2, 2010 General Election** ballot if my petition is certified.

RESIDENCY INFORMATION

My current Alaska residence address is: _____ (Use street #, mile post, or other physical location description) _____ (City), AK _____ (Zip).

I have lived at this address since ____/____/____ (MM / DD / YY). Previous address if you have lived at your current address less than one year:

_____ (Previous Residence Address) _____ (City), AK _____ (Zip).

I have been a resident of Alaska since ____/____/____ (MM / DD / YY), and a resident of the Election District filed for since ____/____/____ (MM / DD / YY).

My mailing address is: _____ (Mailing Address) _____ (City), _____ (State) _____ (Zip).

Mailing address and phone number for correspondence and the Division of Elections' web site listing:

_____ (Official Candidate Mailing Address) _____ (City), _____ (State) _____ (Zip) _____ (Phone)

I request that my name appear on the General Election ballot in the following manner:

_____ (Last Name), _____ (First Name) _____ (MI) _____ (*Nickname and/or Suffix)

*The Director of Elections may not include on the ballot as part of candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate. [AS 15.15.030(4)]

CERTIFICATION

I, the undersigned, certify that the information in this Filing Notification is true and complete, and that I meet the specific residency and citizenship requirements of this office. If I am filing for State Representative, I further certify that I shall be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election. If I am filing for State Senate, I further certify that I shall be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election. I am not a candidate for any other office to be voted upon at the Primary or General election, nor am I a candidate for this office under any other Declaration of Candidacy or Nominating Petition. I also acknowledge that should I choose to withdraw my candidacy, my withdrawal must be received by the Director of Elections in writing over my signature at least 48 days before the general election. I will accept this nomination and will serve if elected.

Subscribed and sworn to before me this

_____ day of _____, 20_____.

_____ (Signature of Notary Public)

My commission expires: _____

_____ (Candidate's Signature)

_____ (Home Phone) _____ (Work Phone)

To assist staff in verifying candidate/voter identification, please provide one of the following: Last 4 SSN, State ID # SSN, ADL, Voter # or DOB: _____

A22 (Rev. 1/21/09)

STATE OF ALASKA NOMINATING PETITION FORM
NOMINATING PETITION CANDIDATE FOR U.S CONGRESS

We, the attached named subscribers, support the candidacy of

_____,
(Name of Candidate)

representing the _____ political group (if any)
(Name of political group if any, if none write "none")

for the office of (check one):

___ U.S. SENATOR

OR

___ U.S. REPRESENTATIVE

We request that our candidate's name be placed on the ballot for the November ____, 20___ General Election as a candidate by petition of the above named political group (if any).

The signatures supporting this candidate are attached. The candidate's Filing Notification form was filed by the June 1, 2010 deadline.

_____ _____
(Signature of Candidate or Contact Person Representing the Candidate) (Date)

_____
(Printed Name of Contact Person)

_____ _____ _____ _____
(Mailing Address for Contact Person) (City) (State) (Zip Code)

_____ _____ _____
(Email Address for Contact Person) (Home Phone) (Work Phone)

Note: Please attach all Subscribers' pages (signature pages) to this form.

DIVISION OF ELECTIONS - OFFICE USE ONLY

Number of signature pages attached _____ Approximate Number of signatures _____

Place of filing: DO RI RII Mat-Su RIII RIV Received by: MAIL IN PERSON

Processed by: _____

A19a (Rev. 1/21/09)

STATE OF ALASKA NOMINATING PETITION FORM
NOMINATING PETITION CANDIDATE FOR GOVERNOR

We, the attached named subscribers, support the candidacy of

_____,
(Name of Candidate)

representing the _____ political group (if any)
(Name of political group if any, if none write "none")

for the office of:

GOVERNOR

We request that our candidate's name be placed on the ballot for the November ____, 20___ General Election as a candidate by petition of the above named political group (if any).

The signatures supporting this candidate are attached. The candidate's Filing Notification form was filed by the June 1, 2010 deadline.

_____ _____
(Signature of Candidate or Contact Person Representing the Candidate) (Date)

_____
(Printed Name of Contact Person)

_____ _____ _____ _____
(Mailing Address for Contact Person) (City) (State) (Zip Code)

_____ _____ _____
(Email Address for Contact Person) (Home Phone) (Work Phone)

Note: Please attach all Subscribers' pages (signature pages) to this form.

DIVISION OF ELECTIONS - OFFICE USE ONLY

Number of signature pages attached _____ Approximate Number of signatures _____

Place of filing: DO RI RII Mat-Su RIII RIV Received by: MAIL IN PERSON

Processed by: _____

A20a (Rev. 1/28/09)

STATE OF ALASKA NOMINATING PETITION FORM
NOMINATING PETITION CANDIDATE FOR LIEUTENANT GOVERNOR

We, the attached named subscribers, support the candidacy of

_____,
(Name of Candidate)

representing the _____ political group (if any)
(Name of political group if any, if none write "none")

for the office of:

LIEUTENANT GOVERNOR

We request that our candidate's name be placed on the ballot for the November ____, 20___ General Election as a candidate by petition of the above named political group (if any).

The signatures supporting this candidate are attached. The candidate's Filing Notification form was filed by the June 1, 2010 deadline.

_____ _____
(Signature of Candidate or Contact Person Representing the Candidate) (Date)

_____
(Printed Name of Contact Person)

_____ _____ _____ _____
(Mailing Address for Contact Person) (City) (State) (Zip Code)

_____ _____ _____
(Email Address for Contact Person) (Home Phone) (Work Phone)

Note: Please attach all Subscribers' pages (signature pages) to this form.

DIVISION OF ELECTIONS - OFFICE USE ONLY

Number of signature pages attached _____ Approximate Number of signatures _____

Place of filing: DO RI RII Mat-Su RIII RIV Received by: MAIL IN PERSON

Processed by: _____

A21a (Rev. 1/21/09)

STATE OF ALASKA NOMINATING PETITION FORM
NOMINATING PETITION CANDIDATE FOR STATE SENATOR OR STATE REPRESENTATIVE

We, the attached named subscribers, support the candidacy of

_____,
(Name of Candidate)

representing the _____ political group (if any)
(Name of political group if any, if none write "none")

for the office of (check one):

___ STATE SENATOR representing DISTRICT _____

OR

___ STATE REPRESENTATIVE representing DISTRICT _____

We request that our candidate's name be placed on the ballot for the November ____, 20___ General Election as a candidate by petition of the above named political group (if any).

The signatures supporting this candidate are attached. The candidate's Filing Notification form was filed by the June 1, 2010 deadline.

_____ _____
(Signature of Candidate or Contact Person Representing the Candidate) (Date)

_____
(Printed Name of Contact Person)

_____ _____ _____ _____
(Mailing Address for Contact Person) (City) (State) (Zip Code)

_____ _____ _____
(Email Address for Contact Person) (Home Phone) (Work Phone)

Note: Please attach all Subscribers' pages (signature pages) to this form.

DIVISION OF ELECTIONS - OFFICE USE ONLY

Number of signature pages attached _____ Approximate Number of signatures _____

Place of filing: DO RI RII Mat-Su RIII RIV Received by: MAIL IN PERSON

Processed by: _____

A22a (Rev. 1/21/09)

STATE OF ALASKA LETTER OF INTENT
WRITE-IN CANDIDATES FOR U.S. CONGRESS

Please check: ____ I acknowledge that I am responsible for contacting the Federal Election Commission for federal reporting requirements: 999 E St., N.W., Washington, DC 20463

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law, a resident of Alaska, and a candidate for the office of (check one):

_____ UNITED STATES SENATOR OR _____ UNITED STATES REPRESENTATIVE

I am a write-in candidate for the **November 2, 2010 General Election** ballot.

I am registered under and am a candidate of the _____ political party **OR**
(Party Name)

I am a candidate of the _____ political group **OR** ____ (Please Check) I am not affiliated with a political group or party
(Group Name)

RESIDENCY INFORMATION

My current Alaska residence address is: _____ _____, AK _____
(Use street #, mile post, or other physical location description) (City) (Zip)

I have lived at this address since _____, _____. I have been a resident of Alaska since _____, _____.
(MM/DD) (YY) (MM/DD) (YY)

My mailing address: _____ _____ _____ _____
(Mailing Address) (City) (State) (Zip)

I am requesting voters to write my name as follows:

_____, _____ _____ _____
(Last Name) (First Name) (MI) (Nickname and/or Suffix)

CERTIFICATION

I, the undersigned, certify that the information in this *Letter of Intent* is true and complete, and that I meet the specific residency and citizenship requirements of this office. I further certify that I shall meet the age requirements upon taking the oath of office, if elected. I am not a candidate for any other office to be voted upon at the General Election, nor am I a candidate for this office under any other *Declaration of Candidacy* or *Nominating Petition*.

_____ _____
(Candidate's Signature) (Date)

_____ _____
(Home Phone) (Work Phone)

To assist staff in verifying candidate / voter identification, please provide one of the following:
SSN, ADL, Voter # or DOB: _____

THE DIVISION OF ELECTIONS MUST RECEIVE THIS FORM NO LATER THAN THURSDAY, OCTOBER 28, 2010
RETURN THIS FORM TO: DIVISION OF ELECTIONS, PO BOX 110017, JUNEAU, AK 99811-0017

A33 (Rev. 1/21/09)

STATE OF ALASKA LETTER OF INTENT
WRITE-IN CANDIDATES FOR GOVERNOR AND LIEUTENANT GOVERNOR

Candidate for **Governor** Check one: My **Financial Disclosure Statements** is (1) ____ Enclosed **OR** (2)____ On file with APOC.
Candidate for **Lt. Governor** Check one: My **Financial Disclosure Statements** is (1) ____ Enclosed **OR** (2)____ On file with APOC.
NOTE: Candidates selecting option 2, are encouraged to contact the Alaska Public offices commission prior to filing to ensure they have a current Public *Officials Financial Disclosure Statement* on file with APOC.

GENERAL INFORMATION (Please print or type)

I, _____, declare myself to be a qualified voter as required by law, a resident of Alaska, and candidate for the office of: **GOVERNOR**

I, _____, declare myself to be a qualified voter as required by law, a resident of Alaska, and candidate for the office of: **LIEUTENANT GOVERNOR**

We are write-in candidates for the **November 2, 2010 General Election** ballot.

We are registered under and are candidates of the _____political party **OR** We are candidates of the

_____ political group **OR** _____ (Please Check) We are not affiliated with any political group or party.
(Group Name)

RESIDENCY INFORMATION – CANDIDATE FOR GOVERNOR

My current Alaska residence address is: _____ _____, AK _____
(Use street #, mile post, or other physical location description) (City) (Zip)

I have lived at this address since _____, _____. I have been a resident of Alaska since _____, _____.
(MM/DD) (YY) (MM/DD) (YY)

My mailing address: _____ _____ _____ _____
(Mailing Address) (City) (State) (Zip)

RESIDENCY INFORMATION – CANDIDATE FOR LIEUTENANT GOVERNOR

My current Alaska residence address is: _____ _____, AK _____
(Use street #, mile post, or other physical location description) (City) (Zip)

I have lived at this address since _____, _____. I have been a resident of Alaska since _____, _____.
(MM/DD) (YY) (MM/DD) (YY)

My mailing address: _____ _____ _____ _____
(Mailing Address) (City) (State) (Zip)

CONTACT INFORMATION

Contact's Name: _____Contact's Phone Number _____

Mailing address: _____ _____ _____ _____
(Mailing Address) (City) (State) (Zip)

We are requesting voters to write our names as follows:

_____, _____ _____ _____
(For Governor - Last Name) (First Name) (MI) (Nickname and/or Suffix)

_____, _____ _____ _____
(For Lt. Governor - Last Name) (First Name) (MI) (Nickname and/or Suffix)

CERTIFICATION

We, the undersigned, certify that the information in this *Letter of Intent* is true and complete, and that we meet the specific residency and citizenship requirements of this office. We further certify that we shall be at least 30 years of age on the first Monday in December following the election. We are not candidates for any other office to be voted upon at the General Election in Alaska, nor are we candidates for this office under any other means of declaring candidacy.

Please provide one of the following for candidate/voter identification:

_____ _____ _____ _____ _____
(Candidate for Governor Signature) (Date) (Home Phone) (Work Phone) (SSN#, ADL#, Voter# or DOB)

_____ _____ _____ _____ _____
(Candidate for Lt. Governor Signature) (Date) (Home Phone) (Work Phone) (SSN#, ADL#, Voter# or DOB)

THE DIVISION OF ELECTIONS MUST RECEIVE THIS FORM NO LATER THAN THURSDAY, OCTOBER 28, 2010
RETURN THIS FORM TO: DIVISION OF ELECTIONS, PO BOX 110017, JUNEAU AK 99811-0017

A35 (12/12/07)

STATE OF ALASKA LETTER OF INTENT
WRITE-IN CANDIDATES FOR STATE SENATOR or STATE REPRESENTATIVE

Check one: My **Financial Disclosure Statement** is (1) ____ Enclosed **OR** (2)____ On file with the Alaska Public Offices Commission
NOTE: Candidates selecting option 2, are encouraged to contact APOC prior to filing to ensure they have a current *Public Officials (Non-incumbents) or Legislative (Incumbents)* Financial *Disclosure Statement* on file with APOC.

GENERAL INFORMATION (Please print or type)

I, _____, am a qualified voter as required by law and declare myself to be a resident of Alaska and of the District for which I declare my candidacy for the office of (check one):

__ STATE SENATOR for District ____ - OR - __ STATE REPRESENTATIVE for District ____

I am a write-in candidate for the **November 2, 2010 General Election** ballot.

I am registered under and am a candidate of the _____ political party **OR**
(Party Name)

I am a candidate of the _____ political group **OR** _____ (Please Check) I am not affiliated
(Group Name) with a political group or party

RESIDENCY INFORMATION

My current Alaska residence address is: _____ _____, AK _____
(Use street #, mile post, or other physical location description) (City) (Zip)

I have lived at this address since _____, _____.
(MM/DD) (YY)

Previous address if you have lived at your current address less than one year:

_____ _____, Alaska _____
(Previous Residence Address) (City) (Zip)

I have been a resident of Alaska since _____, _____, and a resident of the Election District for which I am seeking office since:
(MM/DD) (YY)

_____, _____. My mailing address is: _____ _____ _____ _____
(MM/DD) (Year) (Mailing Address) (City) (State) (Zip)

I am requesting voters to write my name as follows:

_____, _____ _____ _____
(Last Name) (First Name) (MI) (Nickname and/or Suffix)

CERTIFICATION

I, the undersigned, certify that the information in this *Letter of Intent* is true and complete, and that I meet the specific residency and citizenship requirements of this office. If I am filing for State Representative, I further certify that I shall be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election. If I am filing for State Senate, I further certify that I shall be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election. I am not a candidate for any other office to be voted upon at the General Election, nor am I a candidate for this office under any other *Declaration of Candidacy* or *Nominating Petition*.

_____ _____
(Candidate's Signature) (Date)

_____ _____
(Home Phone) (Work Phone)

To assist staff in verifying candidate / voter identification please provide one of the following:
SSN, ADL, Voter # or DOB: _____

THE DIVISION OF ELECTIONS MUST RECEIVE THIS FORM NO LATER THAN THURSDAY, OCTOBER 28, 2010
RETURN THIS FORM TO: DIVISION OF ELECTIONS, PO BOX 110017, JUNEAU, AK 99811-0017

A32 (Rev. 1/21/09)

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" RepBobLynnBlog.com

Session:
Alaska State Capitol #108
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
Toll Free: (800) 870-4391

Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

received 03/10/11 12:40 pm SM

March 10, 2011

To: Representative Carl Gatto, Chair
House Judiciary Committee

Fr: Representative Bob Lynn

Re: HB 161 (Version 27-LS0555\A) "Making certain candidate information public"

I am requesting a hearing for HB 161, "*An Act requiring that all information in a declaration of candidacy...is open to public inspection*" at your earliest convenience.

I have attached supporting documentation.

The House State Affairs Committee has heard the bill, and moved HB 161 out of committee with a unanimous "do pass" recommendation.

Any questions or concerns can be directed to my staffer, Thomas Reiker, at 465-4965 or thomas_reiker@legis.state.ak.us .

Thank you in advance for your consideration.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB 161**
() Publish Date

Identifier (file name) HB161-OOG-DOE-3-3-11
Title: "An Act requiring that all information in a declaration of candidacy, letter of intent, ... is open to public inspection..."
Sponsor: Representative Lynn
Requester: House State Affairs Committee

Dept. Affected: Office of the Governor
Appropriation: Elections
Allocation: Elections
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone 465-2644
Division: Division of Elections — Date/Time 3/3/2011, 10:08am
Approved by: Linda Perez, Administrative Director — Date 3/3/2011
Office of the Governor

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 161
2011 LEGISLATIVE SESSION

Analysis

This legislation has no fiscal impact for the Division of Elections.

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" RepBobLynnBlog.com

Session:
Alaska State Capitol #108
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
Toll Free: (800) 870-4391

Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

Sponsor Statement
HB 161
"An Act requiring that all information in a declaration of candidacy, letter of intent, or nominating petition…is open to public inspection."

HB 161 makes the information on Division of Elections filing forms for partisan, "no-party," and write-in candidates a matter of public record. If voters are going to evaluate candidates and make an informed choice, they must be allowed to confirm the candidate's name, physical address, and other personal information on the declaration of candidacy. HB 161 makes this information public for all candidates for public office, regardless of the confidentiality preferences they indicated when registering to vote.

In a recent House State Affairs Committee hearing, the Division of Elections testified that "there is no authority for the division to treat a candidate differently from any other voter in regard to having the right to make a residential address confidential." Voters should enjoy any and all confidentiality afforded them by the law. Nothing in HB 161 would change that. Candidates for office, however, should be held to a higher standard of public scrutiny than the average voter.

Candidates for office are already required to disclose personal information above and beyond the average voter. HB 161 takes the common-sense next step and makes this personal information available to the public. I respectfully ask that you join me in supporting this change.

For more information, contact **Thomas Reiker** at **907-465-4965** or **thomas_reiker@legis.state.ak.us**

HB 167

<TARGET><BILL>HB 167</BILL><SUBJECT>HB 167</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Interim:
50 Front Street, Suite 203
Ketchikan, AK 99901
Phone: (907) 247-4672
Fax: (907) 225-7157

Session:
State Capitol, Room 114
Juneau, AK 99801-1182
Phone: (907) 465-3424
Fax: (907) 465-3793

Representative Kyle Johansen
House District 1

received
02/25/11 11:00am SM

DATE: February 25, 2011

TO: Rep Carl Gatto, Chair, House Judiciary Committee

FROM: Rep. Kyle Johansen

RE: Hearing request for HB 167, "An Act relating to the sale of products containing dextromethorphan."

I kindly request a hearing for HB 167 in the House Judiciary Committee. Additionally, I request that the Ketchikan LIO be teleconferenced for the hearing.

Alaska State Legislature

Interim:
50 Front Street, Suite 203
Ketchikan, AK 99901
Phone: (907) 247-4672
Fax: (907) 225-7157

Session:
State Capitol, Room 114
Juneau, AK 99801-1182
Phone: (907) 465-3424
Fax: (907) 465-3793

Representative Kyle Johansen
House District 1

HB 167 - "An Act relating to the sale of products containing dextromethorphan."

HB 167 makes the sale of products containing **dextromethorphan** (**DXM** or **DM**) to persons under the age of 18 or without a prescription illegal. It also requires retailers to mark the product as for sale to persons 18 or older or by prescription or limit the access of the public to the product by its placement behind the counter or similar means.

Dextropethorphan is an antitussive (cough suppressant) medication; it is one of the active ingredients in many over-the-counter cold and cough medicines. DXM is safe when taken in recommended doses. However, when taken at doses higher than medically recommended, DXM acts as a dissociative psychedelic drug. Effects of a high dose of DXM include distortions of the visual field and bodily perception, feelings of dissociation, euphoria or excitement, as well as a loss of comprehension of time.

Over-the-counter products that contain DXM often also contain other ingredients such as acetaminophen and chlorpheniramine. Large doses of acetaminophren can cause liver damage and large doses of chlorpheniramine can cause increased heart rate and seizures.

Adolescents are the primary abusers of DXM, likely because it is inexpensive and relatively easy to obtain. Compounding the problem is that few parents know about the potential for abuse of the drug.

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
(907) 465-3908 fax
research@legis.state.ak.us

November 6, 2009

Memorandum

TO: Representative Kyle Johansen
FROM: Daniel Lesh, Legislative Analyst DDL
RE: Regulation of Over-The-Counter Medications Containing Dextromethorphan
LRS Report 10.073

You asked about state regulations limiting the sale of commonly-abused over-the-counter medications containing the chemical dextromethorphan. Specifically, you wanted to know if any such limitations have been proposed in Alaska, or in other states. You also wanted to know of any over-the-counter medical products that the state of Alaska does not allow to be sold to minors or does not allow to be sold in large quantities.

As you may know, dextromethorphan is a drug included in many common cough medications, including cough syrups and cough pills. Individuals sometime abuse these medications by consuming many times the recommended dose, with dissociative, psychedelic effects. Dextromethorphan abuse has numerous negative side effects, but is not generally considered addictive or lethal. The most serious side effects, which can include death, are caused by consuming medications with other active ingredients besides dextromethorphan, such as acetaminophen, according to information we reviewed.

Alaska

It appears that no limitations on the sale of products containing dextromethorphan have been proposed in Alaska. No bills or resolutions introduced between 1983 and 2009—years for which electronic records are available—mention the word dextromethorphan. In addition, J. Kate Burkhart, executive director, Advisory Board on Alcoholism and Drug Abuse, Department of Health and Social Services, is not familiar with any such proposals, nor is she aware of any chronic misuse of these types of products in Alaska.[1]

According to Ms. Burkhart, the only over-the-counter medications with limitations on their sale in Alaska are those containing pseudoephedrine, ephedrine, and phenylpropanolamine—three drugs that are commonly used in the manufacture of methamphetamine.[2] These limitations are the result of federal and state law. The relevant federal law, the Combat Methamphetamine Epidemic Act of 2005, requires that retail establishments limit access to products containing these drugs; verify purchaser identity; keep a log of all purchases of products containing these drugs; and enforce daily and 30-day limits on the sale of these products to any one individual, among other requirements. A state law (AS 17.30.090) passed shortly after the Combat Methamphetamine Epidemic Act of 2005 mirrors and references that federal law. No other over-the-counter medical products in Alaska are limited in their sale by volume or by age of purchaser, according to Ms. Burkhart.

[1] Ms. Burkhart can be reached at (907) 465-8920. Rather than dextromethorphan, Ms. Burkhart highlighted oxycontin abuse as one of the major concerns facing the Alaska drug abuse prevention community.

[2] An example of an over-the-counter product containing pseudoephedrine is Sudafed.

Other States

It appears that no state regulates the sale of over-the-counter medications containing dextromethorphan, though proposals to do so have been introduced in a number of states. Similarly, proposals have been introduced in Congress, but never passed. However, one state (Illinois; 720 ILCS 570/218) does regulate the sale of pure, unfinished dextromethorphan.[3] Please see Table 1 for a list of relevant state and federal legislation located via *lexis.com* and *thomas.gov* searches.

It is important to note that many major pharmacies have voluntarily installed restrictions of the type you asked about. We were unable to locate a comprehensive list of which stores in which locations have imposed which restrictions. However, a list posted on a website that appears targeted at drug users provides a description of how easy it is to buy dextromethorphan-containing medications in 23 states.[4] The list suggests that in 19 of those states, "some stores" or "large chain stores" do not allow sales of dextromethorphan-containing medications to those less than 18 years of age.[5] The list also names three states (Arkansas, Colorado, and Iowa) where no stores are allowed to sell dextromethorphan to those under 18; however, a search of those states' statutes and regulations did not reveal any such laws.

[3] Unfinished dextromethorphan is already illegal to distribute under general FDA laws regarding packaging and labeling requirements, but state and federal laws have been introduced—and passed in Illinois—to clarify that distribution of unfinished dextromethorphan is illegal.

[4] This list was found on a website called Vaults of Erowid, located at *http://www.erowid.org/chemicals/dxm/dxm_law.shtml*.

[5] Names of stores listed as requiring purchasers to be at least 18 years of age include Wal-Mart, Dillons, Target, Walgreens, Meijers, and Rite-Aid.

Table 1: State and Federal Legislation to Regulate the Sale of Products Containing Dextromethorphan, 2005-2009			
State	2005-2006	2007-2008	2009
California	S.B. 307: Requires a prescription for sale to a person under 18 years of age		
Maryland	S.B. 450: Requires a prescription for sale to a person under 18 years of age. Requires vendors to verify identity of purchasers and keep a log of all sales of products containing dextromethorphan		
Massachusetts		H.B. 3742: Prohibits sale to those under 18 years of age; Requires inventories to be kept by pharmacies and retail providers; allows retail providers to limit consumers to certain quantities	
Michigan		S.B. 1538: Prohibits sale of products containing dextromethorphan to individuals under 18 years of age	
New Jersey	A.B. 4279 and S.B. 2709: Prohibits sale of products containing dextromethorphan to minors under 18 years of age	A.B. 2695 and S.B. 2251: Prohibits sale of products containing dextromethorphan to minors under 18 years of age	A.B. 3676: Prohibits sale of products containing dextromethorphan to minors under 18 years of age; A.B. 3837: Regulates the sale of dextromethorphan *see Attachment A for bill text*
New York	A.B. 4743 and S.B. 499: Makes it unlawful to give, sell or cause to be given or sold 2 or more containers of medicine containing dextromethorphan to any person under the age of 18	A.B. 7509 and S.B. 3444: Makes it unlawful to give, sell or cause to be given or sold 2 or more containers of medicine containing dextromethorphan to any person under the age of 18	A.B. 8276 and S.B. 5606: Requires placement behind the pharmacy or only accessible through the manager of a retail establishment *see Attachment B for bill text*
Oklahoma		S.B. 1794: Requires a valid ID; prohibits minors from purchasing such products; prohibits the sale and distribution of any product containing unfinished dextromethorphan without a license; revises legislative intent to include drug abuse education	

Table 1: State and Federal Legislation to Regulate the Sale of Products Containing Dextromethorphan, 2005-2009, continued			
State	2005-2006	2007-2008	2009
Pennsylvania	H.B. 1289: Provides for the registration and reporting of certain noncontrolled substances including Dextromethorphan		H.B. 1616: Provides that the chemical dextromethorphan be subject to registration *see Attachment C for bill text*
Rhode Island	S.B. 561: Prohibit the sale, without a prescription, of any solid oral product which contains more than twenty (20) milligrams of dextromethorphan either alone or in combination with other drugs	S.B. 635: Defines prohibited acts, and penalties for trafficking in dextromethorphan	S.B. 128 and S.B. 1071: Makes possession of one gram or more of pure dextromethorphan by a person other than a medical facility, medical practice, pharmacist or licensed pharmacy illegal *see Attachment D for bill text*
Virginia	H.B. 875: Restricts access to over the counter medications containing the drug Dextromethorphan		S.B. 952: Makes the sale of over-the-counter medicines containing dextromethorphan on school property a Class 1 misdemeanor *see Attachment E for bill text*
U.S. Congress	109th Congress: H.R. 5280: Prohibits the distribution of unfinished dextromethorphan, expect to certain registered entities	110th Congress: S. 2274: Requires a prescription for sale to a person under 18 years of age. H.R. 970: Prohibits the distribution of unfinished dextromethorphan, expect to certain registered entities	111th Congress: S. 1383: Requires a prescription for sale to a person under 18 years of age. *see Attachment F for bill text* H.R. 1259: Prohibits the distribution of unfinished dextromethorphan, expect to certain registered entities *see Attachment G for bill text*
Notes: Descriptions of bills are based on summary language provided by *lexis.com*. None of these bills were adopted as law. **Source:** State bills located via a 50-state search of *Lexis.com* for the term "dextromethorphan" in State Net Bill Tracking, All States, 2005-2009. Federal bills located via a *Thomas.gov* search for "dextromethorphan."			

I hope this information is useful. Please contact our office if you have additional questions.

New
The DAWN Report
Issue 32, 2006R
DRUG ABUSE WARNING NETWORK

Emergency Department Visits Involving Dextromethorphan

In Brief

According to the Drug Abuse Warning Network (DAWN) for 2004:

- An estimated 16,858 emergency department (ED) visits involved pharmaceuticals containing dextromethorphan (DXM). This was just under 1 percent of all drug-related ED visits.
- The rate of ED visits resulting from nonmedical use of DXM for those aged 12 to 20 was 8.0 visits per 100,000 population, compared with 2.5 visits or fewer per 100,000 for other age groups.
- ED patients aged 12 to 20 accounted for about half (51%) of the ED visits resulting from nonmedical use of DXM, compared with 33 percent of DXM-related ED visits overall.
- The rate of ED visits resulting from any type of use of DXM among those aged 12 to 20 was 14.7 per 100,000 population, compared with 5.7 visits per 100,000 for the population overall.
- Alcohol was implicated in 41 percent of ED visits involving nonmedical use of DXM for those aged 18 to 20 and in 13 percent of visits for those aged 12 to 17.

Dextromethorphan (DXM) is a cough suppressant approved by the Food and Drug Administration (FDA) that is found in many over-the-counter cough and cold remedies.[1] It is generally safe when taken at recommended doses. When taken in large amounts, though, DXM can produce hallucinations and a "high" similar to psychotropic drugs, such as phencyclidine (PCP). Dangerous side effects may include blurred vision, loss of physical coordination, abdominal pain, and rapid heartbeat. Side effects may be worsened if the ingested product also contains other pharmaceutical ingredients— such as acetaminophen, pseudoephedrine, antihistamines, or expectorants, which are commonly found in cough and cold medicines—or alcohol.[2]

In recent years DXM has become available, primarily over the Internet, in bulk powdered form, and concern has grown over the nonmedical use of DXM by teenagers. In May 2005, the FDA issued a warning about the dangers of DXM abuse involving over-the-counter products and DXM obtained from illicit sources.[3]

The Drug Abuse Warning Network (DAWN) collects data from a national sample of short-term, general, non-Federal hospitals[4] and publishes estimates of emergency department (ED) visits involving illicit drugs and nonmedical use of pharmaceuticals. This issue of *The DAWN Report* examines the characteristics of ED visits that involve DXM and products containing DXM.

The DAWN Report is published periodically by the Office of Applied Studies (OAS), Substance Abuse and Mental Health Services Administration (SAMHSA). This issue was written by Judy K. Ball, Ph.D., M.P.A., and David Skellan (SAMHSA/OAS). All material in this report is in the public domain and may be reproduced or copied without permission from SAMHSA. Citation of the source is appreciated.

Included are findings on the age of ED patients who used DXM and the reason for their visit to the ED. Also provided are the rates of DXM-related ED visits per 100,000 population for different age groups and the frequency with which DXM products are found in combination with alcohol. The ED visits considered here exclude the small number of patients who go to the ED to obtain admission to the hospital's detoxification or substance abuse treatment unit.

Overview

During 2004, there were about 106 million ED visits to short-term, general, non-Federal hospitals in the United States.[5] Of those, DAWN estimates that just over 2.5 million were drug related, with just under a half million involving nonmedical use of pharmaceuticals. Nearly 17,000, or just under 1 percent, of all drug-related ED visits in 2004 involved DXM or products containing DXM.

Reasons for ED visits

Nonmedical use of DXM products accounted for 5,962 (35%) of the estimated 16,858 DXM-related ED visits in 2004, and about half (51%) of these nonmedical visits involved patients aged 12 to 20 (Table 1).[6] The rate of ED visits resulting from nonmedical use of DXM products was 8.0 visits per 100,000 population for those aged 12 to 20, while the rate for other age groups was 2.5 or less (Table 1 and Figure 1).

Medical use of DXM included ED visits attributed to adverse reactions that occured when DXM products were used as prescribed (or according to directions for over-the-counter products). About 31 percent of all DXM-related ED visits in 2004 were a result of adverse reactions. Children aged 0 to 11 are the most likely to experience adverse reactions to DXM. Their rate of ED visits was higher than that for any other age group (3.9 per 100,000 population), and they constitute 36 percent of all ED visits involving adverse reactions to DXM.

About 16 percent of DXM-related ED visits involve accidental ingestion. As with adverse reactions, children aged 0 to 11 are also the most likely to accidentally ingest DXM or DXM-containing products. The rate of ED visits for accidental ingestion of DXM is 5.2 visits per 100,000 population, and over 95 percent of ED visits for accidental ingestion of DXM involve children in this age range.

Suicide attempts involving DXM products accounted for 17 percent of DXM-related ED visits. Patients

Table 1. ED visits involving DXM, by age and reason for visit

Age category	Estimated ED visits	Percent of visits[a]	ED visits per 100,000 population
Nonmedical use (35% of total)			
0-11	42	1%	0.1
12-20	3,016	51%	8.0
12-17	1,938	33%	7.6
18-20	1,078	18%	8.7
21-34	1,451	24%	2.5
35+	1,448	24%	1.0
Medical use (adverse reaction) (31% of total)			
0-11	1,879	36%	3.9
12-20	744	14%	2.0
12-17	701	13%	2.8
18-20	43	1%	0.4
21-34	682	13%	1.2
35+	1,890	36%	1.3
Accidental ingestion (15% of total)			
0-11	2,478	96%	5.2
12-20	—	0%	0.0
12-17	—	0%	0.0
18-20	—	0%	0.0
21-34	—	0%	0.0
35+	109	4%	0.1
Suicide attempt (17% of total)			
0-11	—	0%	0.0
12-20	1,610	55%	4.3
12-17	1,154	40%	4.5
18-20	456	16%	3.7
21-34	527	18%	0.9
35+	778	27%	0.5
Total[b]			
All ages	16,858	100%	5.7
0-11	4,399	26%	9.2
12-20	5,556	33%	14.7
12-17	3,970	24%	15.6
18-20	1,586	9%	12.8
21-34	2,662	16%	4.7
35+	4,236	25%	2.8

[a] Percentages may not sum to 100 percent due to rounding.

[b] This total includes only the four types of ED visits shown. This excludes patients who go to the ED to obtain admission to a hospital's detoxification or substance abuse treatment unit.

Note: — Estimates less than 30 are suppressed.

Source: Office of Applied Studies, SAMHSA, Drug Abuse Warning Network, 2004 (03/2008 update).

aged 12 to 20 are more likely than patients in other age groups to use DXM products in a suicide attempt. This group has a rate of 4.3 DXM-related ED visits per 100,000 population, compared with rates of 0.0 for those aged 0 to 11 and less than 1.0 for those aged 21 or older.

Alcohol involvement

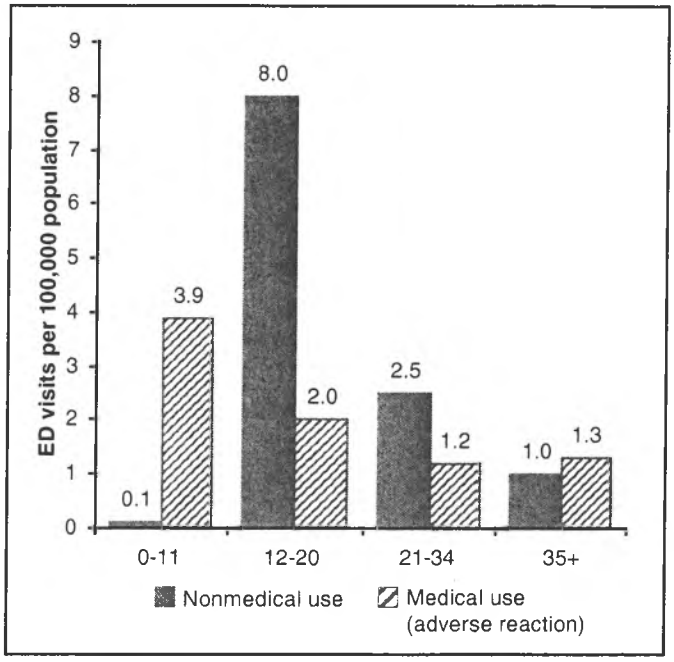
Alcohol was involved in about 13 percent of ED visits resulting from nonmedical use of DXM products for those aged 12 to 17 and in 41 percent of such visits for those aged 18 to 20 (Figure 2). Patients aged 35 to 54 had the highest involvement of alcohol (61%). For the youngest (aged 0 to 11) and oldest (aged 55 or older) patients, alcohol involvement was lower (0% and 2%, respectively).

Alcohol is also an ingredient in some cough medications. Some common products (e.g., NyQuil®) contain a mixture of DXM and up to 10 percent alcohol. In these cases, alcohol may play a role in the ED visit without being specifically documented in the ED medical record. Therefore, these findings may understate the involvement of alcohol and its contribution to the side effects leading to ED visits.

Notes

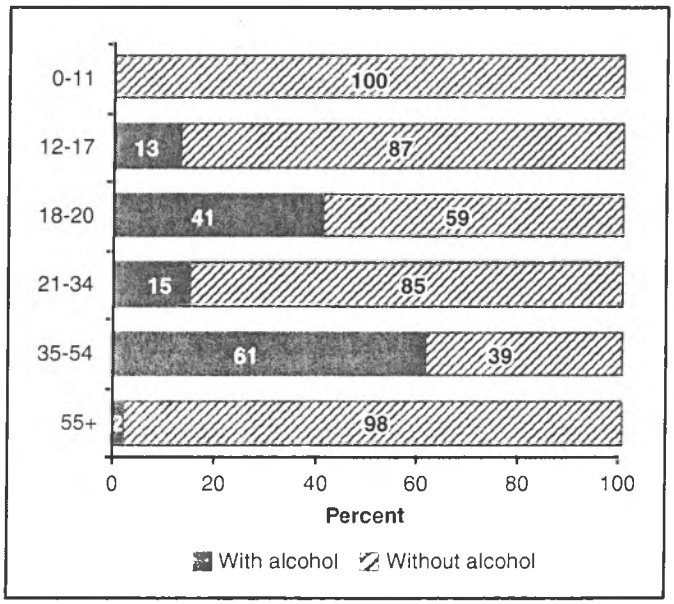
1. U.S. National Library of Medicine, National Institutes of Health. (2003, April 1). *Dextromethorphan.* Retrieved September 26, 2006, from http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a682492.html
2. National Institute on Drug Abuse. (2001, March). *Hallucinogens and dissociative drugs* (NIH Publication No. 01-4209). Retrieved September 29, 2006, from http://www.drugabuse.gov/ResearchReports/Hallucinogens/halluc4.html
3. Food and Drug Administration. (2005, May 20). *FDA warns against abuse of dextromethorphan (DXM)* (Talk Paper T05-23). Rockville, MD: National Press Office. Retrieved September 29, 2006, from http://www.fda.gov/bbs/topics/ANSWERS/2005/ANS01360.html
4. Specialty hospitals, including children's hospitals, are excluded from the DAWN sample.
5. American Hospital Association (AHA) Annual Survey Database, Fiscal Year 2003. Health Forum LLC, Copyright 2003, One North Franklin Street, Chicago, IL 60606.
6. Nonmedical use of DXM includes taking more than a prescribed or recommended dose and other forms of drug misuse or abuse.

Figure 1. Rates of ED visits for nonmedical and medical use of DXM, by age



Source: Office of Applied Studies, SAMHSA, Drug Abuse Warning Network, 2004 (03/2008 update).

Figure 2. ED visits involving nonmedical use of DXM and alcohol, by age



Source: Office of Applied Studies, SAMHSA, Drug Abuse Warning Network, 2004 (03/2008 update).

For change of address, corrections, or to be removed from this list, please e-mail: shortreports@samhsa.hhs.gov.

The DAWN Report — Emergency Department Visits Involving Dextromethorphan

In Brief

According to the Drug Abuse Warning Network (DAWN) for 2004:

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- Alcohol was implicated in 41 percent of ED visits involving nonmedical use of DXM for those aged 18 to 20 and in 13 percent of visits for those aged 12 to 17.

The **Drug Abuse Warning Network (DAWN)** is a public health surveillance system that monitors drug-related morbidity and mortality. DAWN uses a probability sample of hospitals to produce estimates of drug-related emergency department (ED) visits for the United States and selected metropolitan areas annually. DAWN also produces annual profiles of drug-related deaths reviewed by medical examiners or coroners in selected metropolitan areas and States.

Any ED visit or death related to recent drug use is included in DAWN. All types of drugs—licit and illicit—are covered. Alcohol is included for adults when it occurs with another drug. Alcohol is always included for minors. DAWN's method of classifying drugs was derived from the Multum *Lexicon*, Copyright © 2008, Multum Information Services, Inc. The Multum Licensing Agreement can be found in DAWN annual publications and at http://www.multum.com/license.htm.

DAWN is one of three major surveys conducted by the Substance Abuse and Mental Health Services Administration's Office of Applied Studies (SAMHSA/OAS). For information on other OAS surveys, go to http://www.oas.samhsa.gov. SAMHSA has contracts with Westat (Rockville, MD) and RTI International (Research Triangle Park, NC) to operate the DAWN system and produce publications.

For publications and additional information about DAWN, go to http://DAWNinfo.samhsa.gov.

msnbc.com

FDA looks to curb abuse of cough medicine

Misuse of Robitussin, NyQuil and others sends 8,000 to the ER each year

By MATTHEW PERRONE

Associated Press

updated

WASHINGTON— Federal health regulators are weighing restrictions on Robitussin, NyQuil and other cough suppressants to curb cases of abuse that send thousands of people to the hospital each year.

The Food and Drug Administration on Tuesday posted its review of dextromethorphan, an ingredient found in more than 100 over-the-counter medications that is sometimes abused for its euphoric effects. The practice, dubbed "robotripping," involves taking more than 25 times the recommended dose of a cold medicine and is mainly associated with teenagers.

At high doses the drug causes increased blood pressure, heart rate and fever. Abusers can also suffer side effects from other ingredients mixed in cough medicines, such as acetaminophen, which can cause liver damage.

"Because of the drug's perceived safety, ease of availability, and desired psychoactive effects, it is sought after by those seeking to alter their mental state," states the FDA review.

Misuse tied to 8,000 ER visits a year

According to the FDA, inappropriate use of the ingredient was linked to nearly 8,000 emergency room visits in 2008. That was up more than 70 percent from reports in 2004.

An FDA analysis concluded that dextromethorphan is abused less often than the popular painkiller codeine but more often than pseudophedrine, a cold medicine ingredient that can be processed into methamphetamine.

The FDA has agreed to reconsider how it regulates the drug at the behest of the Drug Enforcement Agency, which has raised concerns about increasing abuse among adolescents.

Later this month the FDA will ask a panel of outside experts whether dextromethorphan should be available only as a prescription. The agency is not required to follow the group's advice, though it often does.

Mandating a prescription for the drug would deal a major blow to over-the-counter drug makers, which use the drug in dozens of

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combination cold medicines. Popular brands containing dextromethorphan include Wyeth's Dimetapp, Bayer's Alka Seltzer Flu Plus and Procter & Gamble's Vicks cough medicines. The drug is available in pills, gel caps, liquids and other forms.

Most industry observers don't expect the FDA to mandate a prescription on those products due to the enormous workload it would create for doctors and pharmacists.

Drugs could be placed behind counter

One alternative could involve placing the drugs behind the counter, though the FDA's review did not discuss specific proposals.

The over-the-counter medicine industry supports prohibiting sales of the medicines to people under age 18. Such age restrictions require legal changes, and the industry's trade association has lobbied on the issue at the state and federal levels.

A spokeswoman for the Consumer Healthcare Products Association said the group has been working since 2003 to reduce abuse through educational campaigns targeting parents, teenagers and school nurses.

"It's really about trying to take this multifaceted approach to inform parents that while these medicines are safe and effective, they are also vulnerable to abuse," said spokeswoman Elizabeth Funderburk. The group represents Pfizer, Johnson & Johnson and most other over-the-counter drug companies.

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HB

168

<TARGET><BILL>HB 168</BILL><SUBJECT>HB 168</SUBJECT><COMM>HJUD27</COMM></TARGET>

REPRESENTATIVE
ERIC FEIGE
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

TO: Representative Carl Gatto, Chairman

House Judiciary Committee

FROM: Representative Eric Feige

DATE: March 9, 2011

RE: Hearing Request for HB 168 Injunction Security: Industrial Operation

I respectfully request that House Bill 168, Injunction Security: Industrial Operation, be scheduled for a hearing in the House Judiciary Committee. Please feel free to contact me, or my aide, Linda Hay, with questions or thoughts at 465-3715.

Attached you will find the contents as requested by the committee. This includes the current version of the bill, a sponsor statement, sectional analysis, and pertinent background information.

Thank you for your consideration.

Rep. Eric Feige

E-Mail: Representative.Eric.Feige@legis.state.ak.us

Representative
Eric Feige
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
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Fax (907) 465-3799
1-888-465-4859

Sponsor Statement for HB 168

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

Over the past years there have been several cases where courts have issued injunctions or stays against companies engaged in the development of resource extraction and other construction projects. These court actions have had the effect of delaying worthwhile projects and curtailing employment within the state of Alaska. Thousands of jobs have not come to fruition and economic development of the states resources have been hindered. More often than not, the litigation has failed or had an extremely limited effect in hand with the stated objectives of the original suit. The overall objective is not often what is stated in the suit but merely to delay a project or prevent it from coming to fruition.

HB 168 seeks to impose a penalty on frivolous suits. By requiring a bond to be posted in the event of a stay or injunction, the cost to the party bringing the suit is increased. Under current law the cost to bring a public litigant lawsuit against a project is in effect zero. There is very little risk in bringing a suit. All the risk currently is borne by the defendants. This bill seeks to level the legal playing field without infringing on any parties right to bring a legitimate issue to court.

E-Mail: Representative.Eric.Feige@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 28, 2011

SUBJECT: Security for injunction (HB 168, Work Order No. 27-LS0395\B)

TO: Representative Eric Feige
Co-Chair of the House Resources Committee
Attn: Linda Hay

FROM: Dennis C. Bailey
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Applies to a court considering the amount of security that must be provided by a person seeking an injunction or order vacating or staying the operation of a permit that affects an industrial operation. The court's consideration of the costs that an industrial operation may incur if the operation is wrongly enjoined must include an amount for payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation.

Defines an industrial operation to include a construction, energy, or timber activity and oil, gas, and mineral exploration, development and production.

Does not prohibit a person who is wrongly enjoined from other relief or otherwise limit the amount that a person may recover in the action.

DCB:ljw
11-144.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB 168 \B**
() Publish Date

Identifier (file name) HB 168-DFG-HAB-03-21-11
Title: Injunction Security: Industrial Operation
Sponsor: Representative Eric Feige
Requester: House Judiciary Committee

Dept. Affected: Fish and Game
Appropriation: Habitat
Allocation: Habitat
OMB Component Number: 486

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Becky Nelson, Administrative Officer — Phone 465-1852
Division: Habitat — Date/Time 3/21/11 8:49 AM
Approved by: Kevin Brooks, Aministrative Services Director — Date 3/21/2011
Department of Fish & Game

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 168 \B

Analysis

HB 168 would amend AS 09.40.230 by adding language that would require that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits to contractors and subcontractors.

The Department of Fish and Game anticipates a zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB168 \B**
() Publish Date

Identifier (file name): HB168-LAW-CIV-03-21-11
Title: An Act requiring injunction security to include an amount for payment lost if the industrial operation is wrongfully enjoined.
Sponsor: Representative(s) Feige
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Oil, Gas & Mining
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 3/21/11 9:30 AM
Approved by: John J. Burns, Attorney General — Date 3/21/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB168 \B

Analysis

HB 168 would amend existing Statutes to add a requirement that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits and payment to contractors and subcontractors.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB168**
() Publish Date

Identifier (file name) HB168-DNR-MLD-03-18-11
Title INJUNCTION SECURITY: INDUSTRIAL OPERATION
Sponsor Rep. Feige
Requester HJUD

Dept. Affected Natural Resources
Appropriation Resource Development
Allocation Mining and Land Development
OMB Component Number 2460

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time	0	0	0	0	0	0	0
Part-time	0	0	0	0	0	0	0
Temporary	0	0	0	0	0	0	0

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Wyn Menefee, Acting Director
Division Mining, Land & Water
Approved by Daniel S. Sullivan
Department of Natural Resources

Phone 269-8501
Date/Time 3/18/11 1:00 PM
Date 3/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB168

Analysis

HB 168 requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by the court for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained. This security would include an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

There will be no anticipated fiscal impact to the Department of Natural Resources.

High Country News
For people who care about the West

Return to this article

'Firebrand ways'

by Tony Davis 12/21/2009 Issue

Twenty years ago, they were Earth Firsters, living in tepees, trying to save spotted owls and grafting together a shoestring budget from their unemployment checks. Today, the Center for Biological Diversity has a budget of $7 million, 62 full-time staffers and 15 offices nationally, in locations from Washington, D.C., to Silver City, N.M. By filing 600 lawsuits and countless petitions against the federal government, the center has won the listing of 380 species as threatened or endangered. It also says it has secured 110 million acres of critical habitat and proposed another 130 million acres. CBD has won a reputation as the country's most militant large environmental group, one that seldom shrinks from controversy.

From its Tucson headquarters, it's expanded its species-saving tactics to protect rivers, stop sprawl, battle overgrazing and even tackle climate change. Last year, the group helped get the polar bear listed as a threatened species. Here, one of CBD's founders, 45-year-old director Kieran (pronounced Keer-Onh) Suckling, looks back at how the group got where it is and explains how it differs from the "Big 10" green groups.

HIGH COUNTRY NEWS How did your group get its start? What were your roots?

KIERAN SUCKLING I was in grad school at SUNY Stonybrook, working on a Ph.D. in philosophy, with my dissertation on the relationship between species extinction and language extinction. I came out West for the 1989 Earth First! Rendezvous in northern New Mexico.

There, I chained myself across a road, blocking access to a timber sale. The timber industry in the Southwest was about to make a radical change in its practices. It had logged off the mesas and now they planned to go in and log steep slope canyons.

I got arrested in the process, along with a woman named Sherie. We fell in love while in jail, and she said, "I'm working for this guy, Peter Galvin, doing Mexican spotted owl surveys on the Gila National Forest (in southwest New Mexico) for the Forest Service. Why don't I see if I can get you a job?" Peter hired me, out of a VW van. One day, one of our survey crew got lost and wandered into Water Canyon, where a timber sale was going on, and found a spotted owl.

HCN The Mexican spotted owl at that point was on the Forest Service's "sensitive species" list. (It was federally listed as threatened in 1993.) What happened after your surveyor found the owl?

SUCKLING First, the Forest Service stopped the sale, then let it resume, saying the company had a contract. We had signed contracts saying we wouldn't divulge owl locations, but we went the next day to the *Silver City Daily Press*, with a map that told our story. We were fired within seconds. That was the start of us becoming full-time activists, starting as the Greater Gila Biodiversity Project.

HCN What made you decide to found your own group?

SUCKLING We were riled up. The government wasn't playing by the rules. The best way to save endangered species wasn't going to work inside the government. I was studying endangered species as part of my Ph.D. research. I realized, Oh my God, this owl species is going extinct. I couldn't keep studying patterns of extinction while letting extinction go on.

HCN What was your first major victory?

SUCKLING A Mexican wolf reintroduction lawsuit in 1990, our first. The Fish and Wildlife Service had formally declared the Mexican wolf unrecoverable. The Audubon Society and the Defenders of Wildlife had formed a wolf coalition to fight this. But they had no legal strategy beyond telling the government, "Pretty please." A study had been done showing a viable wolf recovery population could be introduced at White Sands Missile Range. They spoke to the general in charge of the range and he had no interest in wolves -- he shut them down. The strategy of the wolf coalition was to wait for the general to retire. We decided, let's just sue instead. It got settled with the Service agreeing to do a wolf study, which led to reintroduction.

That was the moment when we looked at it and said, "Wow." The environmental movement spent a decade going to meetings and demanding action and getting nothing done. They were asking powerful people for something from a position of no power. We realized that we can bypass the officials and sue, and that we can get things done in court.

HCN What role do lawsuits play in your strategy to list endangered species?

SUCKLING They are one tool in a larger campaign, but we use lawsuits to help shift the balance of power from industry and government agencies, toward protecting endangered species. That plays out on many levels. At its simplest, by obtaining an injunction to shut down logging or prevent the filling of a dam, the power shifts to our hands. The Forest Service needs our agreement to get back to work, and we are in the position of being able to powerfully negotiate the terms of releasing the injunction.

New injunctions, new species listings and new bad press take a terrible toll on agency morale. When we stop the same timber sale three or four times running, the timber planners want to tear their hair out. They feel like their careers are being mocked and destroyed -- and they are. So they become much more willing to play by our rules and at least get something done. Psychological warfare is a very underappreciated aspect of environmental campaigning.

HCN Were you hindered by not having science degrees?

SUCKLING No. It was a key to our success. I think the professionalization of the environmental movement has injured it greatly. These kids get degrees in environmental conservation and wildlife management and come looking for jobs in the environmental movement. They've bought into resource management values and multiple use by the time they graduate. I'm more interested in hiring philosophers, linguists and poets. The core talent of a successful environmental activist is not science and law. It's campaigning instinct. That's not only not taught in the universities, it's discouraged.

HCN How democratic is your group? Does the buck stop with you or is there a collective?

SUCKLING The buck stops with our leadership team: Me, Peter Galvin, our conservation director, and Sarah Bergman, our assistant director. Over our 20 years, we have gone through agonizing debates and battles over consensus decision-making and about a hierarchical organization and social structure. Ten years ago, it settled into this structure of strong leadership, where we give tremendous deference and

latitude to our activists to pick battles, tactics and strategy. It's extremely non-hierarchical, but not consensus-based.

HCN Did you plan all along to become a national group?

SUCKLING Not at all. Our initial vision was to protect the Greater Gila Ecosystem -- the Gila, Apache and part of the Cibola national forests, about 10 million acres. We got dragged onto the national stage against our will. It didn't take us long to realize that power politics that determine species protection do not occur in the Gila: They happen in Phoenix, Albuquerque and Washington, D.C. We decided first to be the Southwest Center for Biological Diversity, and deal with the whole Southwest. Then, other, grassroots environmental groups started calling us from around the country and asking, "How do I replicate this?" At their request, we started opening offices around the country.

HCN Has your mission changed since you went national?

SUCKLING It's still the same. Our national status came to clarify what drove us. Before, we focused on that 10 million acres, and we were doing that through timber sales, listing petitions, etc., all based in these species. As we've grown, the species focus continues to be the case. Our attachment is to species, not to the particular place.

HCN What about your global warming campaign -- what does that have to do with species protection?

SUCKLING It's driven by the need to protect plants and animals. Our global warming goals must be enough to save the polar bear. We need to cut emissions to 40 to 50 percent of 1990 levels by 2020. We need a net negative emissions policy by 2050 -- less than zero.

HCN How would you deal with conflicts between renewable energy projects and endangered species? After all, solar panels in the desert can harm sensitive species like the desert tortoise.

SUCKLING We strongly support a rapid ramp-up of solar energy and have mapped out 100,000 acres of degraded public and private lands in the Mojave Desert where solar development would not conflict with endangered species or wilderness. We've also advocated placing solar developments in burned-out state, private and federal lands along Interstate 10 between Tucson and Phoenix. With so many highly degraded, biologically fragmented lands available, good planning should be able to avoid conflicts between solar energy and endangered species. It's a no-brainer. But unfortunately, many developers have proven to have less than no brain.

HCN Contrast yourself with the "Big 10" environmental groups. What do you see as their strengths and weaknesses?

SUCKLING The environmental movement is strongest when it has a clear vision and is willing to be way out in front of political leaders, and is willing to cause controversy, which is absolutely necessary to change the status quo. I think it's weakest when it too closely follows the Democratic party instead of playing an aggressive nonpartisan position.

Climate change is a really great example. The national environmental movement has articulated no bottom line on climate reductions. It has let the Democratic leadership completely define climate solutions, so every climate bill has been weak. That's why Copenhagen collapsed. National environmental groups did not ask Congress to do anything creative. They waited for Pelosi and Reid to take the lead.

HCN In 10 years, would you like the Center for Biological Diversity to be as big as the Natural Resources Defense Council (NRDC) and other mainstream national groups?

SUCKLING Yes. At one point we thought we could do our jobs here in the West at a moderate size and rely on the big nationals' political muscle to carry our message in D.C. Now, after years of seeing the built-up political power of so many groups being squandered in D.C., we decided we need to have that political power ourselves.

Plus, there are endangered species in all 50 states, and we feel a responsibility to keep growing and reaching out until all of them are fully protected. We are in the midst of the sixth and possibly the greatest mass extinction crisis in the planet's 4 billion-year history. We have to do everything in our power, and increase our power, to stop it.

HCN Can you do that without growing corpulent?

SUCKLING I'm more than aware of the risks, but I do have confidence that we can be as big as big nationals and retain our firebrand ways. We have to. Otherwise, what's the point? There already is an NRDC. There's no need for another one.

Tony Davis reports for the Arizona Daily Star in Tucson.

© High Country News

27-LS0395\B.2
Bailey
3/29/11

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 168

Page 1, line 10:

Delete "determined by the court"

Insert "the court considers proper"

Montana Code Annotated 1995

MCA Contents **Search** **Part Contents**

27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, L. 1979; amd. Sec. 1, Ch. 575, L. 1995.

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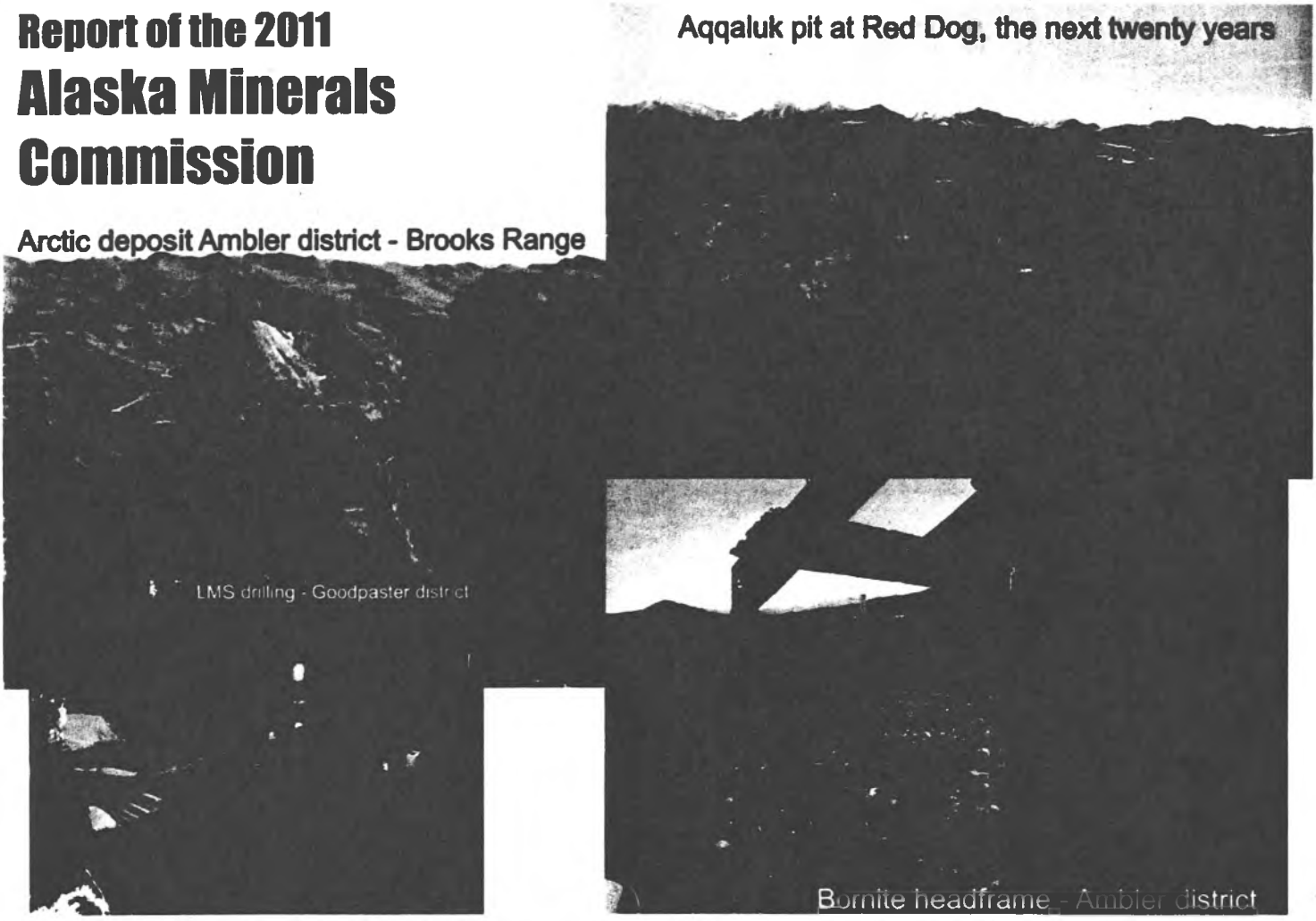
25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

Previous Section **Help** **Next Section**

Provided by Montana Legislative Services

Report of the 2011 Alaska Minerals Commission



ACTION ITEMS

1. **Provide support for permitting agencies instead of wasting state resources on an ill-timed Pebble study.**
2. **Implement reforms to prevent public litigant and third-party lawsuits from stifling development.**
3. **Build a road to Western Alaska that includes access to Brooks Range mineral deposits.**
4. **Support efforts to communicate the benefits that mining brings to Alaska and its communities.**
5. **Bring energy infrastructure to western Alaska to support communities and mining projects in the region.**

Mining provides the necessary building blocks of our society. The mining industry has demonstrated its ability to help diversify Alaska's economy and to provide wide-ranging employment opportunities in both rural and urban areas, all while operating to the highest environmental standards. In an industry controlled by global economic conditions, Alaska mineral development must be competitive while developing a sustainable industry. To this end, there are actions that the Governor and Legislature should take now in order for the mining industry to be able to grow and to continue to contribute to our society in the future for the prosperity of Alaska.

The Alaska Minerals Commission presents this 2011 report with the 5 specific action items identified above, thereby fulfilling the Commission's statutory mandate to make recommendations annually to the Governor and Legislature on ways to mitigate constraints on the development of minerals in Alaska.

CRITICAL SUPPORT FOR PERMITTING AGENCIES

Spending $750,000 on a poorly timed and misguided "study" aimed at Pebble is a waste of State resources. Alaska's interest would be better served by spending the money to augment the State's technical review of the project if and when one is proposed.

Funding a study of Pebble now would be a waste of State resources because there is no specific project to evaluate and the study lacks a specific scope or objective. Such a study could only be a sham, with the appearance of a predetermined outcome, as it would have no choice but to conjecture about potential project configurations and would have no way to evaluate what actually might be proposed by the company, including any mitigative measures that might be included. Such a small sum of money could never hope to improve upon the years of field work and the over one hundred million dollars that have been spent to understand the environment in the region. With no specific project to review and no way to better understand the local environment, such a study is doomed to irrelevancy compared to the multi-year, multi-million dollar environmental review process that surely awaits the actual project.

Spending this sum now would also impair the investment climate for the entire mining industry in Alaska, as unfortunately it would demonstrate that the project review process in Alaska is political rather than science based.

RECOMMENDATION

A better use of limited public funds would be to invest in technical support for the State Large Mine Permitting team. These funds could augment the team with experienced staff and third party technical experts to critically evaluate the project once a definitive proposal that warrants review is received. In fact, the State should critically review its financial support for all regulatory agencies to ensure that a core of competent staff are available to timely review all development projects in Alaska, not just at Pebble.

An alternative use of the funds would be for the legislature to study the entire permitting process to see if there are ways to make the process more efficient while still maintaining Alaska's high environmental standards.

LITIGATION REFORM

Resource development in Alaska must comply with one of the most stringent environmental jurisdictions in North America, yet public litigant and third-party lawsuits are further delaying and stifling development. Beyond the adverse impact on industries and investment in Alaska, the information requests for "discovery purposes" are further paralyzing the agencies by consuming their budgets and diverting limited staff from completing their constitutionally and legislatively assigned tasks. The following administrative and legislative support is required to limit the negative impact from this obstructionist legal maneuvering:

RECOMMENDATION

- Require bonds from organizations initiating legal actions;
- Continue to enjoin suits as an affected party in other states if an adverse decision in that case will become a precedent that may be applied in Alaska;
- Continue to enjoin suits filed in Alaska if an adverse decision in that case will adversely affect the state's ability to financially benefit from its natural resources;
- Support budgets to hire legal expertise needed in natural resource development cases;
- Require plaintiffs to pay legal fees for all portions of the rulings against their position;
- Support budgets that will enable the Attorney General to evaluate previous litigation reform in court rulings to develop a game plan for meaningful reform; and Work with other states to petition U.S. Congress to remove the "Tax Exempt" status from these litigious organizations.

TRANSPORTATION INFRASTRUCTURE

The Commission would like to thank the Governor's office and the legislature for support for the Western Alaska Access Project and for the Ambler Mining District Access studies. We encourage ongoing support to complete these critical projects.

RECOMMENDATION

- Build a road from Fairbanks to Nome that includes access to the Brooks Range mineral deposits in the Ambler Mining District through the Roads to Resources program.
- Investigate transportation corridors in southwest Alaska that would facilitate mineral development and also lower the cost of living and provide more affordable energy.

FINDINGS

- Transportation infrastructure related to mineral development has played a critical role in rural areas of the state, supporting lower cost energy and a lower cost of living. With the current upswing in commodity prices and interest in minerals development, Alaska can capitalize on leveraging private sector development with statewide goals and rural needs in public-private partnerships.
- The increase in activity in the Arctic for shipping, energy, and mineral development is necessitating an increased presence by the U.S. Coast Guard in the Arctic. The need for deep water ports in the Arctic associated with this increased presence provides an opportunity to coordinate roads to potential ports with mineral development projects.
- We also recommend that any transportation plan grow from the regional and project need in concert with statewide planning. Local support will be key for any projects to advance, hence the need for local support. Again a good example is the growing interest in roads in Northwest Alaska from the local levels and the coordination of the Department of Transportation working with industry and the communities for viable projects with local support.

MARKETING AND EDUCATION

The State of Alaska must very actively market itself to the rest of the world and demonstrate that it is open for business in resource development. Legislators and Alaskans in general need to understand the great benefits that mining brings to the State and its communities.

RECOMMENDATION

- Expand budget for marketing presence domestically and in foreign countries
- Encourage elected officials to participate in mine tours provided through the Council of Alaska Producers
- Increase funding for Alaska Resource Education (ARE) to $150,000 annually
- Provide funding for a statewide Minerals Education & Promotion Program
- Provide funding to make the UAF College of Engineering and Mines the premier mining and geology program in the United States
- Support state and federal programs to train and educate workers for the mining industry

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ENERGY

Invest in low-cost energy capacity on the existing grid. On a regional basis, expand energy distribution infrastructure and generation capacity using the least costly, most available resource whether that is coal, wind, solar, hydro, geothermal, or small scale nuclear.

RECOMMENDATION

- Bring energy infrastructure to western and southwestern Alaska to support communities and mining projects in the region.
- Expand low-cost base load energy on the existing electrical grid.

The Alaska Minerals Commission was created by the 14th Legislature and signed into law on June 6, 1986. The enabling legislation instructs the Commission to make recommendations to the Governor and Legislature on ways to mitigate constraints, including governmental constraints, on the development of minerals, including coal, in the state.

This publication was released by the Department of Commerce, Community, and Economic Development. Its purpose is to report the findings and recommendations of the Alaska Minerals Commission to the Governor and to the Legislature of Alaska. It was produced at a cost of $1.13 per copy and printed in Anchorage, Alaska. This publication is required by Chapter 98, Session Laws of Alaska, as amended by Chapter 4, Session Laws of Alaska, 1993.

rules after the trial or hearing of the action has commenced, then any other judge of the court, assigned by the presiding judge of the judicial district where the action is pending or by the chief justice of the supreme court, may perform those duties, as if such other judge had been present and presiding from the commencement of such trial or hearing; provided, however, that from the beginning of the taking of testimony at such trial or hearing a stenographic or electronic recording of the proceedings shall have been made so that the judge so continuing may become familiar with the previous proceedings.

(c) **After Verdict, etc.** If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge of the court, assigned by the presiding judge of the judicial district where the action has been tried or by the chief justice of the supreme court, may perform those duties; but if that judge is satisfied that that judge cannot perform those duties because the judge did not preside at the trial or for any other reason, that judge may grant a new trial.

(Adopted by SCO 5 October 9, 1959; amended by SCO 1153 effective July 15, 1994)

Annotations

Cases

The termination of an interim U.S. District Court for the District (Territory) of Alaska and the trial judge's office there under is a "disability." **Pollastrine v. Severance,** Op. No. 108, 375 P2d 528 (Alaska 1962).

A successor judge held not to have authority to file findings of fact. **Pollastrine v. Severance,** Op. No. 108, 375 P2d 528 (Alaska 1962).

Filing of transcript of the trial judge's oral opinion satisfied the requirements of filed findings of fact and conclusions of law under Civ. R. 63(c), and a successor judge had authority to enter a final decree. **Pollastrine v. Severance,** Op. No. 108, 375 P2d 528 (Alaska 1962).

Record did not disclose that trial judge who had disqualified himself, notified his presiding superior court judge of his disability to hear the cause. **Nelson v. Fitzgerald,** Op. No. 293, 403 P2d 677 (Alaska 1965).

Although a judge should do so only for the most compelling reasons, a superior court judge may sua sponte disqualify himself from hearing any matter that may come before him. **Nelson v. Fitzgerald,** Op. No. 293, 403 P2d 677 (Alaska 1965).

Unless the trial judge becomes disabled, he should be the person who makes all fact based rulings concerning the case that he tried. **United Bank Alaska v. Dischner,** Op. No. 2835, 685 P2d 90 (Alaska 1984).

Absent compelling circumstances, a case should normally be assigned on remand to the same judge who conducted the original trial. **United Bank Alaska v. Dischner,** Op. No. 2835, 685 P2d 90 (Alaska 1984).

If a party acquiesces to the authority of a successor judge by failing to make a timely objection to that judge's authority, the party has waived any objection he or she may have to challenge that authority. **Moffitt v. Moffitt,** Op. No. 3261, 749 P2d 343 (Alaska 1988).

The record clearly established that husband in divorce action waived any objection to successor judge's authority to enter new findings of fact and conclusions of law which differed from those initially entered but not finalized by the preceding judge. **Moffitt v. Moffitt,** Op. No. 3261, 749 P2d 343 (Alaska 1988).

Successor judge's vacation of orders and judgment that had been signed by her was not abuse of discretion since she erred in signing them when judge who heard case on merits was still available. **Gallagher v. Gallagher,** Op. No. 4041, 866 P2d 123 (Alaska 1994).

PART X. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of Person or Property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law existing at the time the remedy is sought. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by law the remedy is ancillary to an action or must be obtained by an independent action.

(Adopted by SCO 5 October 9, 1959)

Annotations

Cases

This rule does not create any remedy. **Aleut Corp. v. Arctic Slope Regional Corp.,** 424 FS 397 (USDC Alaska 1976).

Rule 65. Injunctions.

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) **Temporary Restraining Order—Notice—Hearing—Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes,

the method for obtaining, and the timing of, temporary restraining orders.

Cross References

CROSS REFERENCE: AS 09.40.230

Annotations

Cases

Consent of a party to an extension of a temporary restraining order does not deprive the consenting party of his right to seek review of the issuance of the restraining order in the first instance. **Miller v. Atkinson,** Op. No. 49, 365 P2d 550 (Alaska 1961).

Where the state had already appropriated private property for a public purpose in mistaken reliance on an invalid patent reservation and property owner had brought an action inaccurately framed as "trespass action" for damages whereupon the state counterclaimed on the ground of "inverse condemnation," the issue then remaining before the court was the award of a just compensation, and a permanent injunction prohibiting the state from entering upon or appropriating the property, meaning that the state must first initiate a condemnation before utilizing the property, was unrealistic and unnecessary and was dissolved. **State v. Crosby,** Op. No. 322, 410 P2d 724 (Alaska 1966).

This rule, dealing with injunctions, is inapplicable to proceedings before the district judge court, but where in connection with a garnishee proceeding the district judge restrained an employer from applying wages to other obligations, the district judge did not proceed under Rule 65 but exercised an authority conferred to him by Civil Rule 89 (f)(6). **Anchorage Helicop. Serv., Inc. v. Anchorage W. Hotel,** Op. No. 361, 417 P2d 903 (Alaska 1966).

The requirement of this rule that an order granting an injunction set forth reasons for its issuance applies to every type of preliminary injunction. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

A preliminary injunction which is granted without setting forth the reasons for the issuance of the injunction and without findings of fact and conclusions of law which articulate grounds for the issuance of the preliminary injunction as required by this rule is procedurally defective and will be vacated. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

Strict compliance with provisions of this rule requiring findings of fact and conclusions of law and setting out reasons for the issuance of a preliminary injunction is required particularly in circumstances where the trial court is enjoining enforcement of an administrative regulation or statute. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

The supreme court will vacate rather than remand where a preliminary injunction is procedurally defective and where a hearing has been held in a motion for permanent injunction and where a decision on the merits of the permanent injunction is anticipated in the near future. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

In considering whether to grant a stay pending appeal, the lower court must consider criteria much the same as it would in determining whether to grant a preliminary injunction. **Powell v. Anchorage,** Op. No. 1167, 536 P2d 1228 (Alaska 1975).

Where precise information as to time and courtroom for hearing on motion for restraining order was unavailable, notice to opposing counsel that the motion would be made in Fairbanks Superior Court at "approximately 3:00" on November 3rd complied with this rule when the motion was actually filed at 3:17 p.m. on November 3rd. **Knaebel v. Heiner,** Op. No. 2513, 645 P2d 201 (Alaska 1982).

A party who initially obtains a temporary restraining order is not entitled to receive its benefits indefinitely by not proceeding to request a preliminary injunction hearing. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 1986).

Issuance of a temporary restraining order pending determination of a for preliminary injunction did not have the effect of a preli injunction, thus the temporary restraining order expired within 10 da issuance. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 19

Any extension of a temporary restraining order must be approved court. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 1986).

A temporary restraining order automatically expires within 10 under this rule and the party against whom it is served is und obligation to take any further legal action to verify its expiration. **Ostr Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 1986).

Where a court intends to supplant a temporary restraining order a preliminary injunction of unlimited duration pending a final de on the merits or further order of the court, it should issue an order saying so; and where it has not done so, a party against whom a temp restraining order has issued may reasonably assume that the order has ex within the time limits imposed by this rule. **Ostrow v. Higgins,** Op. 3085, 722 P2d 936 (Alaska 1986).

Where deed of trust issued to secure promissory note for purcha property required the purchaser to maintain fire insurance on the prop the sellers were the sole beneficiaries of all insurance proceeds payable the deed of trust and automatically deserved those proceeds, thus conti acceptance of the insurance payments, by the sellers after issuance temporary restraining order against foreclosure did not constitute an im agreement on the part of the sellers to an extension of the tempo restraining order. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Al 1986).

As a general rule, when the court's findings of fact and conclusions of are sufficient to warrant injunctive relief under CR 52(a), they, almos necessity, also state reasons for the injunction's issuance that are sufficien satisfy this rule. **Dunlap v. Bavarian Village Condominium Ass'n,** No. 3511, 780 P2d 1012 (Alaska 1989).

Civil Rule 65, rather than Civil Rule 4, determines when pe becomes bound by domestic violence protective order. **MacDonald v. St** Op. No. 1665, 997 P2d 1187 (Alaska 2000).

Defendant, who had actual knowledge of domestic violence protec order, was bound by order even though he was not formally served w written copy of order. **MacDonald v. State,** Op. No. 1665, 997 P2d 1 (Alaska 2000).

Conviction of defendant for violation of ex parte domestic viole protective order did not violate his constitutional right to due proc where defendant had not been served with written copy of order but have actual knowledge that order had been issued against him. **MacDon v. State,** Op. No. 1665, 997 P2d 1187 (Alaska 2000).

The decision to consolidate a preliminary injunction hearing with a on the merits per Subsection (a)(2) of this rule is reviewed for abus discretion. **Haggblom v. City of Dillingham,** Op. No. 12358, 191 P 991 (Alaska 2008).

Courts will uphold consolidation of proceedings under Subsection (a) of this rule when the preliminary injunction hearing was sufficie thorough to remove any risk of prejudice, and sufficiency of proceedings is determined on a case by case basis. **Haggblom v. Cit Dillingham,** Op. No. 12358, 191 P.3d 991 (Alaska 2008).

Superior court did not err in consolidating a hearing on prelimi injunctive relief with trial on the merits under Subsection (a)(2) of this where superior court heard arguments from both parties, ruled on all of issues before it, and litigant filed to show that she suffered preju because she was denied a chance to present evidence that would allow to prevail at trial. **Haggblom v. City of Dillingham,** Op. No. 12358, P.3d 991 (Alaska 2008).

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 21, 2011

SUBJECT: Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

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[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

DCB:med
11-026.med

HB 169

<TARGET><BILL>HB 169</BILL><SUBJECT>HB 169</SUBJECT><COMM>HJUD27</COMM></TARGET>

Sent to Sen. Wielechowski 4/12/12

HB169 fixes a loop-hole in the law of two minor problems with Legislative review of agency regulations.

Currently, those who can request a review of regulations from Legal Services and those whom Legal Services is allowed to notify of the results of the review are NOT the same.

- HB 169 allows those who request a review to receive the results.

Additionally, Legal Services can only notify if the regulations FAIL TO MEET the statutory standards.

- HB 169 allows Legal Services to notify the requester that the regulations MEET the statutory standards (A "no problems" phone call).

Finally, if regulations implement newly enacted legislation, HB 169 allows Legal Services to consult with and notify the Prime Sponsor (if still in the legislature).

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
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REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

TO: Senator Johnny Ellis, Chairman
Senate Rules Committee

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

Melanie Lesh for Rep. Gatto

DATE: April 11, 2012

RE: Request for scheduling of HB 169

Enclosed is the packet for HB 169, "*an Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date*" also called "LAA Review of Proposed Regulations." This bill has made it through both bodies unamended. I have included a sponsor statement, the original version of the bill, and a memo from Legal Services. Senator Wielechowski will carry the bill for Rep. Gatto.

I would appreciate if you would schedule this bill, pending referral from the Senate State Affairs Committee, (the Senate Judiciary Committee waived the bill hearing), for a hearing in Senate Floor at your earliest convenience. I appreciate your time and look forward to passage.

Please contact my staff member, Melanie Lesh at 465-4990, with any questions or comments regarding this request.

Thank you for your consideration.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

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JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

HB 169
Sponsor Statement

"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."

HB 169 closes gaps in the regulation review statutes. The Legislative Affairs Agency (LAA) attorneys review proposed regulations, including those from newly enacted legislation and at the request of a standing committee, the Administrative Regulations Review Committee, and the Legislative Council. However, if the attorney finds that the proposed regulations fail to meet statutory standards, the only legislative entities they are allowed to notify are the Administrative Regulation Review Committee, the Speaker of the House, and the President of the Senate. Additionally, LAA cannot currently notify anyone if the regulation meets statutory standards.

HB 169 allows LAA to notify the committee or council that requested the review that the regulations do not meet statutory standards. In addition, if the proposed regulation implements newly passed legislation, LAA would be able to consult with and notify the prime sponsor of that legislation, if the prime sponsor is still a sitting legislator. Finally, HB 169 allows LAA to notify the requester of the review if the attorney determines that the regulations meet statutory standards.

HB 169 is a simple fix to two minor problems in an otherwise functioning review system. It will give the benefits of the review process to those who need it most. If you have any questions, please contact Melanie Lesh, Judiciary Committee Aide, at 465-4990.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 169**
Fiscal Note Number: 2
(S) Publish Date: 4/10/12

Identifier (file name): HB 169-LEG-COU-01-18-2012
Title: "LAA Review of Proposed Regulations"
Sponsor: House Judiciary Committee
Requester: House Judiciary Committee

Dept. Affected: Legislature
Appropriation: Legislative Council
Allocation: Legal and Research Services
OMB Component Number: 2028

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Jessica Geary, Finance Manager — Phone 465-6626
Division: Legislative Affairs Agency — Date/Time 1/18/12 10:31 AM
Approved by: Pamela Varni, Executive Director — Date 1/18/2012
Legislative Affairs Agency

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA **BILL NO.** HB 169
2012 LEGISLATIVE SESSION

Analysis

This Legislation has zero fiscal impact on the Legislative Affairs Agency.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM February 18, 2011

SUBJECT: Review of Proposed Regulations by the Legislative Affairs Agency (Work Order No. 27-LS0559\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft of a bill you requested to "fix some flaws" in AS 24.20.105, as we discussed after the meeting of the Administrative Regulation Review Committee (ARRC) on Tuesday.[1]

Section 1. This section of the bill accomplishes several things:

(1) The new language on page 1 allows the reviewing attorney in LAA to consult with the prime sponsor of the relevant bill if the attorney is reviewing proposed regulations that implement newly enacted legislation. You only asked specifically for the prime sponsor to get copies of memos denoting possible legal flaws determined in these kinds of reviews, but I thought it was probably in keeping with your goal to also add this consultation aspect as well. Let me know if I erred in this regard and I can remove the language. Also, please note that I have limited this consultation requirement to situations when the prime sponsor is still a member of the legislature. In addition to the logistics that may be difficult when the prime sponsor is no longer a member, it seems to me in keeping with the confidential nature of these reviews that only sitting legislators be included in the review process under AS 24.20.105.

(2) The first two lines on page 2 allow LAA review memos to be sent to a standing committee or to the Legislative Council if they have requested a review of some proposed regulations because of their "major policy implications." Under current law,

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[1] Although I drafted the enclosed bill, Lisa Kirsch's name appears in the upper right-hand corner of page 1. This has been done so that, if you introduce the bill, legislators and staff will have a full-time attorney to call with questions or amendments related to the bill. As I mentioned at the ARRC meeting, I am only half-time. Lisa Kirsch reviewed proposed regulations under AS 24.20.105 for most of the past three years, and is knowledgeable about the issues addressed in this bill draft. Feel free to call either one of us about the draft.

these entities can request a review and that request is given priority status under AS 24.20.105(b)(2), but the law, through an oversight in the original legislation, does not allow them to get the memo that could result from the review. Current law allows these memos to go only to the Department of Law, the state agency proposing the regulations, the ARRC, the senate president, and the speaker of the house. (See AS 24.20.105(e) and the restriction on LAA's disclosure under AS 24.20.105(g).)

(3) Lines 3 - 7 on page 2 allow LAA review memos to be sent to the prime sponsor of the relevant legislation if a review of proposed regulations that implement newly enacted legislation shows legal problems of the type described in AS 24.20.105(d). As with the consultation requirement for prime sponsors described above in (1), I have limited this memo-sharing requirement to prime sponsors who are still sitting legislators.

(4) Lines 7 - 10 on page 2 require LAA to communicate to a standing committee or the Legislative Council the results of a review that was requested by either of them in situations where the reviewer has not found legal flaws. Currently, AS 24.20.105 only allows LAA to communicate with respect to reviews where legal flaws are perceived, and that makes sense with respect to the vast number of reviews, as the relevant entities would normally be interested only if the reviewing attorney sees problems. However, with respect to a review requested under AS 24.20.105(b)(2), it seems to me that it would make sense for LAA to be able to respond that a review has been completed but that no problems were found. I have deliberately not required this communication to be in writing so that a phone call could suffice; the requester, of course, could always request that the "no problems" response be in writing.

Sec. 2. This section clarifies that the new provisions of section 1 apply to any reviews ongoing in LAA at the time the bill takes effect even if the notice of proposed regulations was issued before the effective date of the bill.

Sec. 3. This section gives the bill an immediate effective date. There are no impediments I can think of that would keep LAA from immediately being able to implement any of the new provisions of section 1.

TML:LMK:ljw
11-115.ljw

Enclosure

Sec. 24.20.105. Review of proposed regulations.

(a) The Legislative Affairs Agency may review each proposed regulation that is subject to AS 44.62.010 - 44.62.300 (Administrative Procedure Act). A review of proposed regulations under this section must be conducted by an attorney employed by that agency.

(b) Reviews shall be conducted under (a) of this section in the following order of priority:

(1) proposed regulations that would implement newly enacted legislation;

(2) proposed regulations requested in writing to be reviewed by a standing committee, the Administrative Regulation Review Committee, or the legislative council as implicating major policy development.

(c) Under AS 44.62.190(a)(7), the notice of proposed action, along with a copy of the proposed regulation, shall be furnished electronically by the state agency to the

(1) Legislative Affairs Agency;

(2) chairs of the standing committees with jurisdiction over the subject of the proposed regulation;

(3) Administrative Regulation Review Committee;

(4) legislative council.

(d) Within available staff resources and priorities set by the legislative council, the Legislative Affairs Agency shall assign one or more attorneys to conduct a review of proposed regulations. The review shall evaluate

(1) the legality and constitutionality of the proposed regulation;

(2) whether the state agency has statutory authority to adopt the proposed regulation to implement, interpret, make specific, or otherwise carry out a statute; and

(3) whether the proposed regulation is consistent with the applicable statutes.

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. If the assigned attorney determines that the proposed action fails to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives.

(f) In addition to the review specified in (d) of this section, the assigned attorney shall notify the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives of any provision of the proposed regulation that may be inconsistent with legislative intent and appropriate for additional legislative oversight as a result.

(g) Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

(h) The process of review of a proposed regulation under this section does not affect a state agency's authority to complete its proposed action regarding the regulation. Suggestions for changes to a proposed regulation made by the Legislative Affairs Agency are not binding on a state agency.

(i) No action may be brought for the failure of the Legislative Affairs Agency to conduct a legal review under this section.

(j) The provisions of (b) - (i) of this section do not apply to proposed regulations of the Board of Game or the Board of Fisheries.

(k) In this section, "proposed regulation" means a proposed adoption, amendment, or repeal of a regulation.

History -

(Sec. 2 ch 164 SLA 2004)

Cross References -

For provision exempting written notification provided under (e) of this section from the general right to inspect public records, see AS 40.25.120(a)(11).

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: HB 169
() Publish Date

Identifier (file name): HB169-LEG-COU-03-10-2011
Title: "LAA Review of Proposed Regulations"
Sponsor: House Judiciary Committee
Requester: House State Affairs & House Judiciary Committees

Dept. Affected: Legislature
Appropriation: Legislative Council
Allocation: Legal and Research Services
OMB Component Number: 2028

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Initial Version

Prepared by: Shane Miller, Finance Manager — Phone: 465-6626
Division: Administrative Services Division — Date/Time: 3/10/11 1:22 PM
Approved by: Pamela Varni, Executive Director — Date: 3/10/2011
Legislative Affairs Agency

(Revised 12/29/2010 OMB)

Analysis

This fiscal note has zero impact on the Legislative Affairs Agency.

For the record, HB169 presented by Rep Gattis, Chair Rep Costello

To contrast with your last bill — HB169 is unopposed and not controversial

Mr. Chairman and members of the committee, thank you for hearing this bill today. This bill is a simple fix to two minor problems in an otherwise functioning review system. We have ~~Terry Lauterbach and/or~~ Lisa Kirsch, from Legal Services, online to answer the more technical questions. ~~Let me give you an~~ Here is a quick overview of the bill:

- Statutes covering Legislative Legal Services' review of proposed agency regulations - AS 24.20.105 (e) ((those subject to the Administrative Procedures Act AS 44.62)) currently lists those who can request a review of regulations from Legal Services:
  - A standing committee
  - The Administrative Regulation Review Committee
  - Legislative Council
- Same statute also limits those who Legal Services is allowed to notify of the results of the review:
  - The Administrative Regulation Review Committee
  - President of the Senate
  - Speaker of the House
- These lists do not match.
- Additionally, Legal Services can only notify if the regulations FAIL TO MEET the statutory standards.

SSTA 4/3/12 had to leave early

What this bill does:

1. HB 169 adds "the committee or council that requested the review" to the list of those who can receive notice.
2. If the regulation implements newly enacted legislation, Legal Services may consult with and notify the Prime Sponsor (if still in the legislature)
3. Finally, it allows Legal Services to notify the requester that the regulations MEET the statutory standards.

Article 1. Legislative Council.

Section		Section	
10.	Legislative council established	70.	Revision of statutes
20.	Membership	80.	Intergovernmental cooperation
30.	Term of membership	90.	Assignment of projects
40.	Vacancies	100.	Research and drafting services for legislators
50.	Executive director and staff	105.	Review of proposed regulations
55.	Information systems	110.	Meetings
60.	Powers	120.	Reports
61.	Administrative services for legislature	130.	Budgets
62.	Legislative internship program	132.	Legislative budget and expenses
65.	Examination of regulations and opinions	140.	Appropriations

Sec. 24.20.010. Legislative council established. The Alaska Legislative Council is established as a permanent interim committee and service agency of the legislature. The establishment of the council recognizes the need of the legislature for full-time technical assistance in accomplishing the research, reporting, bill drafting, and examination and revision of statutes, and general administrative services essential to the development of sound legislation in the public interest. (§ 1 ch 17 SLA 1960)

Cross references. — For related constitutional provisions, see Alaska Const., art. II, § 11.

NOTES TO DECISIONS

Named defendants. — Where neither the original nor the amended complaint gave any indication that the governor named the legislative council as a defendant in its limited capacity as a service agency, and where the complaints asserted no particular service-related acts or functions as a basis for proceeding against the council or its individual legislator-members, the action came within the originally intended scope of Alaska Const., Art. 3, § 16's prohibition. Legislative Council v. Knowles, 988 P.2d 604 (Alaska 1999).

Cited in State v. Haley, 687 P.2d 305 (Alaska 1984); Keller v. French, 205 P.3d 299 (Alaska 2009).

Sec. 24.20.020. Membership. The legislative council is composed of the president of the senate and six other senators appointed by the president, and the speaker of the house of representatives and six other representatives appointed by the speaker. The membership from each house shall include at least one member from each of the two major political parties. The appointing authority in each house shall make and announce the appointment or reappointment of members of the council within 15 days after the convening of the first regular session of each legislature. (§ 2 ch 17 SLA 1960; am § 57 ch 69 SLA 1970; am § 1 ch 1 SLA 1973; am § 1 ch 1 SLA 1975)

Sec. 24.20.030. Term of membership. (a) Members serve for the duration of the legislature during which they are appointed.

(b) When a member of the council files a declaration of candidacy for an elective office other than that of member of either house of the legislature, and the member has not resigned from membership on the council, the member's council membership terminates on the date of filing. (§ 3 ch 17 SLA 1960; am § 1 ch 11 SLA 1975; am § 1 ch 146 SLA 1984)

Sec. 24.20.040. Vacancies. When a vacancy occurs in the statutory or appointive membership of the council, the presiding officer of the house incurring the vacancy shall fill the vacancy within 30 days. If the office of the president of the senate or speaker of the house of representatives becomes vacant and a vacancy occurs among the appointed members of the council, the remaining council members from the house incurring the vacancy shall appoint a new member. A legislator appointed to fill a vacancy shall be a member of the same political party as the member vacating the seat, when possible. (§ 4 ch 17 SLA 1960; am § 36 ch 53 SLA 1973; am § 2 ch 11 SLA 1975)

Sec. 24.20.065. Examination of regulations and opinions. (a) The legislative council shall annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law, and final decisions adopted under AS 44.62 (Administrative Procedure Act) that rely on state statutes or the common law of the state to determine if

(1) the courts and agencies are properly implementing legislative purposes;

(2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;

(3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;

(4) the courts have modified or revised the common law of the state.

(b) The legislative council shall prepare a comprehensive report of the annual examination with recommendations and, at the start of each regular session, notify the legislature that the report is available. (§ 1 ch 72 SLA 1963; am § 1 ch 19 SLA 1989; am § 46 ch 21 SLA 1995)

Sec. 24.20.070. Revision of statutes. (a) The legislature may direct the council to revise the laws of the state in the form of a bulk formal revision. At the direction of the legislature and within the limit of appropriations made, the council may enter into contracts for the printing, annotating, indexing, and distribution of a revision of the laws of the state. The council receives sufficient copies of a revision for exchange with other states and jurisdictions. A revision prepared by the council under authority of this section shall be referred to the legislature for enactment or adoption.

(b) Statute revision is a continuing responsibility of the council. The general and permanent acts of each regular and special session of the legislature shall be integrated with and published as annual supplements to or replacement pamphlets for the Alaska Statutes. (§ 7 ch 17 SLA 1960; am § 5 ch 100 SLA 1963)

NOTES TO DECISIONS

Cited in Employment Sec. Comm'n v. Wilson, 461 P.2d 425 (Alaska 1969).

Sec. 24.20.075. Alaska Code Revision Commission. [Repealed, § 33 ch 23 SLA 1995.]

Sec. 24.20.080. Intergovernmental cooperation. The council may encourage and arrange conferences with officials of other states and nations and of other units of government and propose cooperation between this state and other states and nations. The council constitutes the Alaska Commission on Interstate Cooperation in participating in and carrying out the programs of the Council of State Governments as they apply to Alaska. The chairman of the council serves as chairman of the commission. (§ 8 ch 17 SLA 1960; am § 6 ch 126 SLA 1966; am § 1 ch 6 SLA 1972)

Sec. 24.20.090. Assignment of projects. The council may be assigned projects or subjects for study, reporting, or drafting. Assignment shall be by resolution. The council may determine a schedule of priorities for these and other assignments or requests based on feasibility, time, and the availability of funds and staff. (§ 9 ch 17 SLA 1960)

Sec. 24.20.100. Research and drafting services for legislators. Members of the legislature may utilize the research and bill drafting services of the Legislative Affairs Agency. Requests by members of the legislature are confidential. Staff services for members of the legislature shall be accomplished subject only to the priority of assignments determined by the council. (§ 10 ch 17 SLA 1960)

Sec. 24.20.105. Review of proposed regulations. (a) The Legislative Affairs Agency may review each proposed regulation that is subject to AS 44.62.010 — 44.62.300

(Administrative Procedure Act). A review of proposed regulations under this section must be conducted by an attorney employed by that agency.

(b) Reviews shall be conducted under (a) of this section in the following order of priority:

(1) proposed regulations that would implement newly enacted legislation;

(2) proposed regulations requested in writing to be reviewed by a standing committee, the Administrative Regulation Review Committee, or the legislative council as implicating major policy development.

(c) Under AS 44.62.190(a)(7), the notice of proposed action, along with a copy of the proposed regulation, shall be furnished electronically by the state agency to the

(1) Legislative Affairs Agency;

(2) chairs of the standing committees with jurisdiction over the subject of the proposed regulation;

(3) Administrative Regulation Review Committee;

(4) legislative council.

(d) Within available staff resources and priorities set by the legislative council, the Legislative Affairs Agency shall assign one or more attorneys to conduct a review of proposed regulations. The review shall evaluate

(1) the legality and constitutionality of the proposed regulation;

(2) whether the state agency has statutory authority to adopt the proposed regulation to implement, interpret, make specific, or otherwise carry out a statute; and

(3) whether the proposed regulation is consistent with the applicable statutes.

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. If the assigned attorney determines that the proposed action fails to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives.

(f) In addition to the review specified in (d) of this section, the assigned attorney shall notify the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives of any provision of the proposed regulation that may be inconsistent with legislative intent and appropriate for additional legislative oversight as a result.

(g) Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

(h) The process of review of a proposed regulation under this section does not affect a state agency's authority to complete its proposed action regarding the regulation. Suggestions for changes to a proposed regulation made by the Legislative Affairs Agency are not binding on a state agency.

(i) No action may be brought for the failure of the Legislative Affairs Agency to conduct a legal review under this section.

(j) The provisions of (b) — (i) of this section do not apply to proposed regulations of the Board of Game or the Board of Fisheries.

(k) In this section, "proposed regulation" means a proposed adoption, amendment, or repeal of a regulation. (§ 2 ch 164 SLA 2004)

Cross references. — For provision exempting written notification provided under (e) of this section from the general right to inspect public records, see AS 40.25.120(a)(11).

Sec. 24.20.110. Meetings. The legislative council may meet during sessions of the legislature and during intervals between sessions at such times and places inside the state as the chairman may determine. The council shall meet immediately after the appointment of its membership at the first regular session of each legislature for

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

DATE: April 5, 2012

RE: Request for scheduling of HB 169

Enclosed is the packet for HB 169, "*an Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date*" also called "LAA Review of Proposed Regulations." I have included a sponsor statement, the original version of the bill, and a memo from Legal Services.

I would appreciate if you would schedule this bill, pending referral from the Senate State Affairs Committee, for a hearing in Senate Judiciary Committee at your earliest convenience. I appreciate your time and look forward to a hearing.

Please contact my staff member, Melanie Lesh at 465-4990, with any questions or comments regarding this request.

Thank you for your consideration.

1. HB169 Bill Packet Contents
2. HB169 Sponsor Statement 03-08-11
3. HB169 Version A 02-23-11
4. HB169 Relevant Statutes 24.20.105
5. HB169 Fiscal Note-LEG-COU 03-10-2011
6. HB169 Supporting Documents-Memo Legal Services 02-18-11

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
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JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

TO: Senator Bill Wielechowski, Chair
Senate State Affairs Committee

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

DATE: January 18, 2012

RE: Request for a hearing of HB 169

Enclosed is the committee packet for HB 169, "*an Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date*" also called "LAA Review of Proposed Regulations." I have included a sponsor statement, the original version of the bill, and a memo from Legal Services.

I would appreciate a hearing before the State Affairs Committee at your earliest convenience. I appreciate your time and look forward to your reply.

Please contact my staff member, Melanie Lesh at 465-4990, with any questions or comments regarding this request.

Thank you for your consideration.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
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Sponsor Statement
HB 169

"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."

HB 169 closes gaps in the regulation review statutes. The Legislative Affairs Agency (LAA) attorneys review proposed regulations, including those from newly enacted legislation and at the request of a standing committee, the Administrative Regulations Review Committee, and the Legislative Council. However, if the attorney finds that the proposed regulations fail to meet statutory standards, the only legislative entities they are allowed to notify are the Administrative Regulation Review Committee, the Speaker of the House, and the President of the Senate. Additionally, LAA cannot currently notify anyone if the regulation meets statutory standards.

HB 169 allows LAA to notify the committee or council that requested the review that the regulations do not meet statutory standards. In addition, if the proposed regulation implements newly passed legislation, LAA would be able to consult with and notify the prime sponsor of that legislation, if the prime sponsor is still a sitting legislator. Finally, HB 169 allows LAA to notify the requester of the review if the attorney determines that the regulations meet statutory standards.

HB 169 is a simple fix to two minor problems in an otherwise functioning review system. It will give the benefits of the review process to those who need it most.

Sarah Munson
(907) 465-4990
27-LS0559\A
03/08/11

HOUSE BILL NO. 169

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/23/11
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."

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

*** Section 1.** AS 24.20.105(e) is amended to read:

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. **With respect to proposed regulations that implement newly enacted legislation as described in (b)(1) of this section, the assigned attorney may also consult with [the] prime sponsor of the legislation [if the prime sponsor] is a member of the legislature at the time of the review.** If the assigned attorney determines that the proposed **regulations fail** [ACTION FAILS] to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the

senate, [AND] the speaker of the house of representatives**, and the committee or council, if any, that requested the review under (b)(2) of this section. If the review involves proposed regulations that implement newly enacted legislation as described in (b)(1) of this section and [the] [any] prime sponsor of that legislation is a member of the legislature at the time of the review, the assigned attorney shall also notify [the] [that] prime sponsor, in writing, if the proposed regulations fail to meet the standards set out in (d) of this section. If, after performing a review requested under (b)(2) of this section, the assigned attorney determines that the proposed regulations meet the standards set out in (d) of this section, the assigned attorney shall communicate that determination to the requester**.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to review of proposed regulations under AS 24.20.105 pending with the Legislative Affairs Agency on the effective date of this Act for which the public comment period has not expired, regardless of when the notice of proposed regulations was received by the Legislative Affairs Agency.

*** Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

Sec. 24.20.065. Examination of regulations and opinions. (a) The legislative council shall annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law, and final decisions adopted under AS 44.62 (Administrative Procedure Act) that rely on state statutes or the common law of the state to determine if

(1) the courts and agencies are properly implementing legislative purposes;

(2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;

(3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;

(4) the courts have modified or revised the common law of the state.

(b) The legislative council shall prepare a comprehensive report of the annual examination with recommendations and, at the start of each regular session, notify the legislature that the report is available. (§ 1 ch 72 SLA 1963; am § 1 ch 19 SLA 1989; am § 46 ch 21 SLA 1995)

Sec. 24.20.070. Revision of statutes. (a) The legislature may direct the council to revise the laws of the state in the form of a bulk formal revision. At the direction of the legislature and within the limit of appropriations made, the council may enter into contracts for the printing, annotating, indexing, and distribution of a revision of the laws of the state. The council receives sufficient copies of a revision for exchange with other states and jurisdictions. A revision prepared by the council under authority of this section shall be referred to the legislature for enactment or adoption.

(b) Statute revision is a continuing responsibility of the council. The general and permanent acts of each regular and special session of the legislature shall be integrated with and published as annual supplements to or replacement pamphlets for the Alaska Statutes. (§ 7 ch 17 SLA 1960; am § 5 ch 100 SLA 1963)

NOTES TO DECISIONS

Cited in Employment Sec. Comm'n v. Wilson, 461 P.2d 425 (Alaska 1969).

Sec. 24.20.075. Alaska Code Revision Commission. [Repealed, § 33 ch 23 SLA 1995.]

Sec. 24.20.080. Intergovernmental cooperation. The council may encourage and arrange conferences with officials of other states and nations and of other units of government and propose cooperation between this state and other states and nations. The council constitutes the Alaska Commission on Interstate Cooperation in participating in and carrying out the programs of the Council of State Governments as they apply to Alaska. The chairman of the council serves as chairman of the commission. (§ 8 ch 17 SLA 1960; am § 6 ch 126 SLA 1966; am § 1 ch 6 SLA 1972)

Sec. 24.20.090. Assignment of projects. The council may be assigned projects or subjects for study, reporting, or drafting. Assignment shall be by resolution. The council may determine a schedule of priorities for these and other assignments or requests based on feasibility, time, and the availability of funds and staff. (§ 9 ch 17 SLA 1960)

Sec. 24.20.100. Research and drafting services for legislators. Members of the legislature may utilize the research and bill drafting services of the Legislative Affairs Agency. Requests by members of the legislature are confidential. Staff services for members of the legislature shall be accomplished subject only to the priority of assignments determined by the council. (§ 10 ch 17 SLA 1960)

Sec. 24.20.105. Review of proposed regulations. (a) The Legislative Affairs Agency may review each proposed regulation that is subject to AS 44.62.010 — 44.62.30

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Sec. 24.20.110. Meeti
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Article 4. Committees.

Section
182. Review of administrative regulations by standing committees of the legislature
184. Termination of interim committee membership

Sec. 24.05.182. Review of administrative regulations by standing committees of the legislature. (a) A standing committee of the legislature furnished notice of a proposed action under AS 44.62.190 shall review the proposed regulation, amendment of a regulation, or repeal of a regulation before the date the regulation is scheduled by the department or agency to be adopted, amended, or repealed.

(b) A standing committee conducting a review of a regulation under (a) of this section shall determine whether the regulation properly implements legislative intent.

(c) A standing committee shall conduct preliminary reviews under this section while the legislature is in session and during the interim between legislative sessions.

(d) If a standing committee determines that a regulation, amendment to a regulation, or repeal of a regulation does not properly implement legislative intent, the standing committee's findings shall be transmitted to the Administrative Regulation Review Committee. (§ 4 ch 1 SLA 1982)

Revisor's notes. — Enacted as AS 24.99.001. Renumbered as AS 24.37.010 in 1982. Renumbered again in 1985.

Cross references. — For provisions related to the Administrative Regulation Review Committee, see AS 24.20.400 — 24.20.460.

Sec. 24.05.184. Termination of interim committee membership. When a member of the legislature who serves on a committee created during a between-session interim by either house or its presiding officers, the legislative council or the Legislative Budget and Audit Committee, files a declaration of candidacy for an elective office other than that of member of either house of the legislature, and the member has not resigned from membership on the interim committee, the member's interim committee membership terminates on the date of filing. (§ 5 ch 11 SLA 1975)

Revisor's notes. — Formerly AS 24.05.087. Renumbered in 1985.

Article 5. Legislative Space.

Section
190. Control of legislative space

Sec. 24.05.190. Control of legislative space. (a) The state capitol, with the exception of the capitol space now occupied by the Office of the Governor, and space occupied in any other state building by the legislature or its agencies is under the control of and subject to assignment by the Legislative Affairs Agency as directed by the legislature. The Legislative Affairs Agency is responsible for the equitable allocation of parking spaces at the capitol according to the needs of the legislature and other agencies occupying capitol offices.

(b) Access to legislative space during sessions is generally governed by the uniform rules of the legislature and by (a) of this section. During a session of the legislature a person not a member or an authorized employee of the legislature or its agencies may not, without the invitation of the presiding officer or the house, enter upon the floor of either house while it is sitting, or enter upon the floor of either house during a recess or when adjourned for the day, without the invitation of a member of that house. (§ 21 ch 157 SLA 1959; am § 5 ch 47 SLA 1961; am § 3 ch 126 SLA 1966; am § 1 ch 10 SLA 1976)

Sec. 24.05.200. [Renumbered as AS 24.20.061.]

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 23, 2011

SUBJECT: Confidential memos and the Alaska Rules of Professional Conduct (HB 169; Work Order No. 27-LS0559\A)

TO: Representative Max Gruenberg

FROM: Lisa Moritz Kirsch
Legislative Counsel

At the hearing in the House State Affairs Committee yesterday, you requested a legal opinion on the effect of the changes proposed in HB 169 on attorney-client confidentiality required by the Alaska Rules of Court. After reviewing the Rules of Professional Conduct contained in the Alaska Rules of Court, I continue to hold the opinion I expressed at the hearing, that the passage of HB 169 would not require a court rule change.

HB 169 adds new recipients to the list of legislators who may receive certain confidential written analyses of proposed regulations from legislative legal. This list currently appears in AS 24.20.105(e), the existing statute governing review of proposed regulations by legislative counsel.[1] The new recipients would be legislators who sponsored recently enacted legislation being implemented by the proposed regulations or members of a standing committee or the Legislative Council if that committee or council requested a review of proposed regulations.[2] In the bill, the amended subsection AS 24.20.105(e) reads:

> (e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or

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[1] The legislators and executive agencies currently on the list of recipients for these regulation review memos are: the Department of Law, the agency that proposed the regulations, the members of the Administrative Regulations Review Committee, the President of the Senate, and the Speaker of the House.

[2] These new recipients would only receive a memo if the review was conducted under AS 24.20.105. In the situation Representative Johansen raised yesterday, where an individual legislator made a request for an opinion on proposed regulations under AS 24.20.100, the resulting opinion would only go to the legislator who requested it, and the fact that a particular legislator requested an opinion would remain confidential and legislative legal could not alert the sponsor of any newly enacted statute.

council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. **With respect to proposed regulations that implement newly enacted legislation as described in (b)(1) of this section, the assigned attorney may also consult with the prime sponsor of the legislation if the prime sponsor is a member of the legislature at the time of the review.** If the assigned attorney determines that the proposed **regulations fail** [ACTION FAILS] to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the senate, [AND] the speaker of the house of representatives**, and the committee or council, if any, that requested the review under (b)(2) of this section. If the review involves proposed regulations that implement newly enacted legislation as described in (b)(1) of this section and the prime sponsor of that legislation is a member of the legislature at the time of the review, the assigned attorney shall also notify the prime sponsor, in writing, if the proposed regulations fail to meet the standards set out in (d) of this section. If, after performing a review requested under (b)(2) of this section, the assigned attorney determines that the proposed regulations meet the standards set out in (d) of this section, the assigned attorney shall communicate that determination to the requester**.

The applicable court rule that applies to the keeping of confidences by attorneys appears in the Rules of Professional Conduct. It reads:

Rule 1.6. Confidentiality of Information.
(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.
(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain:
(A) death;
(B) substantial bodily harm; or

> (C) wrongful execution or incarceration of another;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (6) to comply with other law or a court order.
> (c) A lawyer must act competently to safeguard a client's confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. When transmitting a communication that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.

Under existing AS 24.20.105(g), legislative legal is generally required to keep review information confidential. It reads:

> (g) Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

The specific exceptions to this general rule of confidentiality in the existing and proposed statute do two things. First, the exceptions in AS 24.20.105(e) trigger the exception in Rule 1.6 of the Rules of Professional Conduct. Under Rule 1.6(b)(6), an attorney may release a document to comply with other law or a court order. Second, the exceptions of AS 24.20.105(e) act as a narrowly defined waiver of the attorney-client confidentiality between legislative legal counsel and the legislators. For these reasons, HB 169 does not conflict with the Rules of Professional Conduct in the Alaska Rules of Court, and the bill will not necessitate a court rule change.

I contacted Steve Van Goor, Bar Counsel at the Alaska Bar Association, and he concurred with my analysis of this issue. He added that the rule on organizations as clients, Rule 1.13 of the Rules of Professional Responsibility, also supports this position. He argued that the legislature is analogous to an organization, and legislators could be

considered the duly authorized officers of the legislative body with authority to waive confidentiality by legislation.

If you have further questions, feel free to contact us.

LMK:ljw
11-188.ljw

streamlining — NOTIFICATIONS—

Mr. Chairman and members of the committee, thank you for hearing this bill today. This bill is a simple fix to two minor problems in an otherwise functioning review system. We have Lisa Kirsch, from Legal Services, here to answer the more technical questions. Let me give you an overview of the bill:

- The statute currently enumerates those who can request a review of regulations from Legal Services:
  - A standing committee
  - The Administrative Regulation Review Committee
  - Legislative Council
- The statute also enumerates those whom Legal Services is allowed to notify of the results of the review:
  - The Administrative Regulation Review Committee
  - President of the Senate
  - Speaker of the House
- These lists do not match.
- Additionally, Legal Services can only notify if the regulations FAIL TO MEET the statutory standards.

What this bill does:

1. HB 169 adds "the committee or council that requested the review" to the list of those who can receive notice.
2. If the regulation implements newly enacted legislation, Legal Services may consult with and notify the Prime Sponsor (if still in the legislature)
3. Finally, it allows Legal Services to notify the requester that the regulations MEET the statutory standards.

27-LS0559\A
Kirsch
2/15/11

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."

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

* **Section 1.** AS 24.20.105(e) is amended to read:

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. **With respect to proposed regulations that implement newly enacted legislation as described in (b)(1) of this section, the assigned attorney may also consult with the prime sponsor of the legislation if the prime sponsor is a member of the legislature at the time of the review.** If the assigned attorney determines that the proposed **regulations fail** [ACTION FAILS] to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the

senate, [AND] the speaker of the house of representatives**, and the committee or council, if any, that requested the review under (b)(2) of this section. If the review involves proposed regulations that implement newly enacted legislation as described in (b)(1) of this section and the prime sponsor of that legislation is a member of the legislature at the time of the review, the assigned attorney shall also notify the prime sponsor, in writing, if the proposed regulations fail to meet the standards set out in (d) of this section. If, after performing a review requested under (b)(2) of this section, the assigned attorney determines that the proposed regulations meet the standards set out in (d) of this section, the assigned attorney shall communicate that determination to the requester**.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to review of proposed regulations under AS 24.20.105 pending with the Legislative Affairs Agency on the effective date of this Act for which the public comment period has not expired, regardless of when the notice of proposed regulations was received by the Legislative Affairs Agency.

*** Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

TO: Representative Bob Lynn, Chair
House State Affairs Committee

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

DATE: March 8, 2011

RE: Request for a hearing of HB 169

Enclosed is the committee packet for HB 169, "*an Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date*" also called "LAA Review of Proposed Regulations." I have included a sponsor statement, the original version of the bill, and a memo from Legal Services.

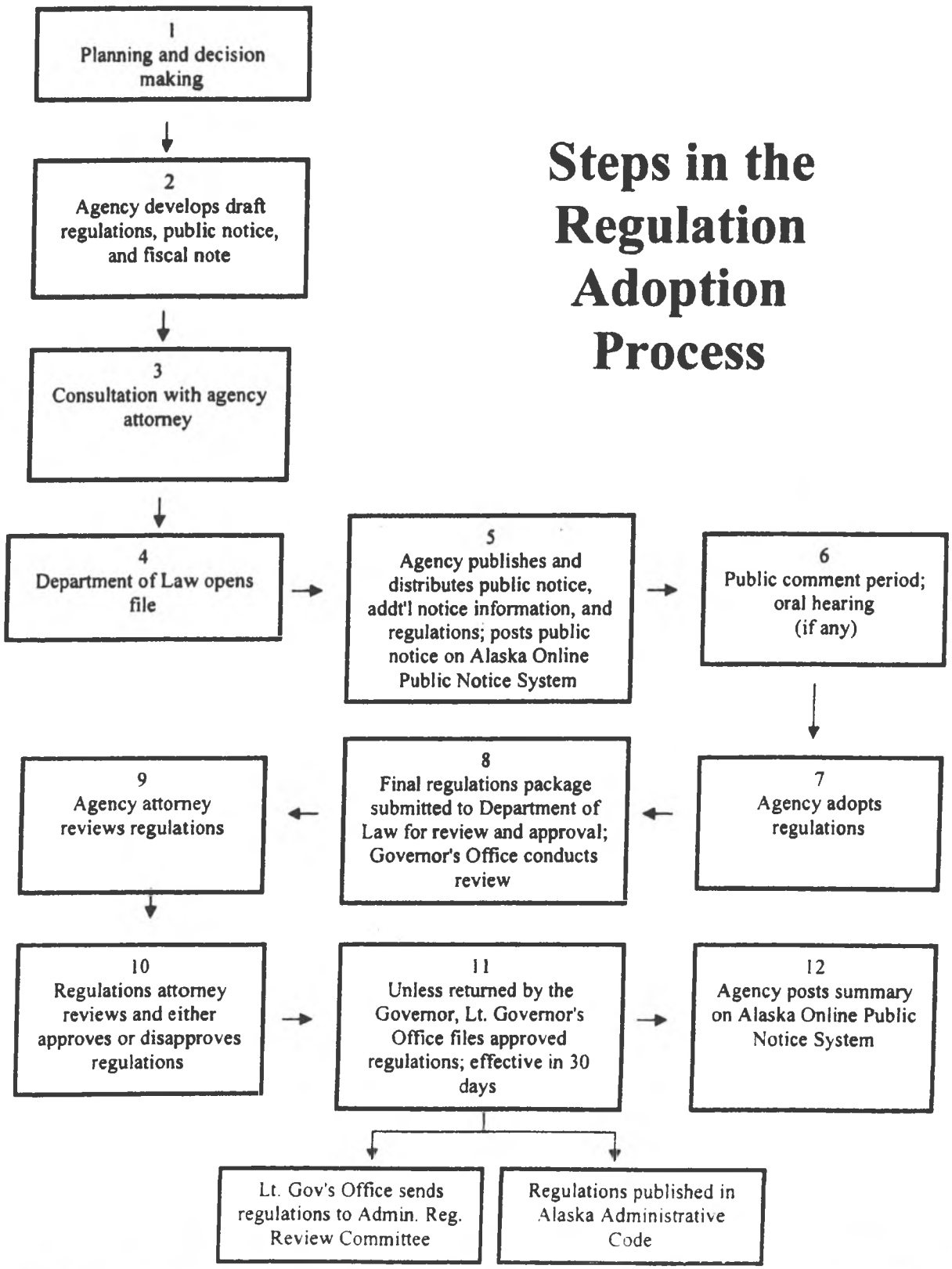
I would appreciate a hearing before the State Affairs Committee at your earliest convenience. I appreciate your time and look forward to your reply.

Please contact my staff member, Sarah Munson at 465-4990, with any questions or comments regarding this request.

Thank you for your consideration.

* * * *

Steps in the Regulation Adoption Process



HB

171

<TARGET><BILL>HB 171</BILL><SUBJECT>HB 171</SUBJECT><COMM>HJUD27</COMM></TARGET>

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

TO: Representative Carl Gatto
Judiciary Chair

CC: Sarah Munson
Judiciary Committee Aide

FROM: Representative Cathy Muñoz

DATE: March 9, 2011

RE: HB 171 Hearing Request

Please schedule HB 171 – Misdemeanor Arrests in House Judiciary for hearing at your earliest convenience.

Attached to this memo please find the following documents

- HB 171 – Misdemeanor Arrests
- Sponsor Statement
- Correspondence from Department of Law
- Legislative Research Report
- Support Letters
- Expected Testimony
  - Mark Mew, Chief of Police, Anchorage Police Department
  - Greg Browning, Chief of Police, Juneau Police Department
  - Laren Zager, Chief of Police, Fairbanks Police Department
  - Tom Clemons, Chief of Police, Seward Police & President of the State Chiefs
- Office Contact: Kendra Kloster, 465-4712, Kendra_kloster@legis.state.ak.us

Thank You.

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-3744 • FAX (907) 465-2213
REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

REPRESENTATIVE CATHY MUÑOZ

HB171: Misdemeanor Arrest

Alaska law allows a peace officer to arrest for a felony without a warrant and to make mandatory arrests in any circumstance involving domestic violence, violation of a protective order and violations of conditions of release. However, not all criminal actions fit into these categories in which quick actions by peace officers are allowed.

Many scenarios surrounding criminal acts against a person, listed under AS 11.41 including assault and sexual assault, do not happen within sight of a peace officer. In the circumstance of a misdemeanor assault committed outside of the peace officer's presence where probable cause for an arrest is determined, an officer may not arrest without first obtaining a warrant from the district attorney. We trust peace officers to protect and serve the community, and in certain circumstances barriers are put forth which do not allow peace officers to remove individuals from the scene who bring immediate harm to others.

This legislation was brought to my attention at the request of the Juneau Police Department and has received support from police departments across the state. HB171 will expand the protections for individuals by allowing a peace officer to arrest for misdemeanor crimes against a person not committed in their presence if probable cause can be determined.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB171**
() Publish Date

Identifier (file name) HB171-DPS-DET-03-04-11
Title "An Act relating to arrests without warrants by peace officers for certain misdemeanors."
Sponsor Representative Munoz
Requester House Judiciary

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Lt. Rodney Dial
Division Alaska State Troopers
Approved by Joseph Masters, Commissioner
Department of Public Safety

Phone (907) 247-4480
Date/Time 3/7/11 3:00 PM
Date 3/8/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB171
2011 LEGISLATIVE SESSION

Analysis

This legislation would amend AS 12.25.030(b) by allowing a peace officer to arrest for a misdemeanor crime against a person listed under AS 11.41; not committed in their presence.

While this legislation will likely result in more arrests, it will not increase the number of reports generated, and / or referrals made to the department of law. Additionally, the increase in arrests may be offset by a decrease in the number of subpoenas and warrants served.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB171\B**
() Publish Date

Identifier (file name) HB171-DOA-PDA-3-24-11
Title An Act relating to arrests without warrants by peace officers...
Sponsor Representative Munoz by request
Requester House Judicial

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	****	****	****	****	****	****	****

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 3/24/11 10:45 AM
Date 3/24/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB171\B
2011 LEGISLATIVE SESSION

Analysis

This bill amends A.S. 12.25.030 to permit a warrantless arrest for all misdemeanor cases under A.S. 11.41. This bill is expected to impact the review and investigation preceding arrest decisions in these cases. It is anticipated that this will impact the number of arrests , though it is not possible to reliably predict the fiscal impact. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB171**
() Publish Date 2/25/2011

Identifier (file name) HB171-DOC-OC-03-18-11
Title "An Act relating to arrests without warrants by peace officers for
Sponsor Representative Munoz
Requester House Judiciary Committee

Dept. Affected DOC
Appropriation Administration & Support
Allocation Office of the Commissioner
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by Leslie Houston, Director
Division Dept. of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone 465-3339
Date/Time 3/19/11 12:00 PM
Date 3/19/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB171

Analysis

HB 171 amends AS 12.25.030(b) by allowing a peace officer to make an arrest for misdemeanor offenses against persons listed under AS 11.41; not committed in the presence of the peace officer.

Passage of this legislation would result in an increase in arrests and therefore an increase in booking and housing of individuals at Dept of Corrections pretrial facilities, community and regional jails.

Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of actual violations that will occur.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB171 \B**
() Publish Date

Identifier (file name): HB171-LAW-CRIM-03-25-11
Title: An act relating to arrests without warrants by peace officers for certain misdemeanors.
Sponsor: REPRESENTATIVE(S) MUNOZ
Requester: (H) JUD

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 3/25/11 9:00 AM
Approved by: John J. Burns, Attorney General — Date 3/25/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB171 \B

Analysis

HB 171 allows law enforcement officers to arrest persons with probable cause but without an arrest warrant for offenses against a person occurring outside their presence that are misdemeanors. For most misdemeanors, law enforcement must obtain an arrest warrant if the offense occurred outside their presence or summons the person to court. More debatable cases will proceed to court without being screened out by the court through the warrant process or by the DA through the summons process.

Thus, the fiscal impact is indeterminate to Department of Law.

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF LAW
CRIMINAL DIVISION

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste. 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

February 7, 2011

Representative Cathy Muñoz
State Capitol, Room 409
Juneau, Alaska 99801

Dear Representative Muñoz:

I am writing in response to your request for "feedback" on a proposal to change Alaska statute AS 12.25.030 to allow police officers to arrest a person for a misdemeanor offense not occurring in an officer's presence. I am also writing to make a suggestion for an alternative approach that may answer your concerns without making a fundamental change in Alaska law. Such a change, without additional limitations, would be a modification of the law existing in Alaska since the United States took legal jurisdiction over the territory of Alaska.

You request that the Department of Law comment on two scenarios – first, allowing peace officers in Alaska to make a warrantless arrest for the misdemeanor offense of disorderly conduct, when the conduct is not committed in the presence of the peace officer. The second scenario would allow peace officers to make a warrantless arrest for any misdemeanor not committed in the officer's presence. Both scenarios assume that the peace officer believes that there is probable cause that the person to be arrested committed the misdemeanor. To address these scenarios it is necessary to review some principals of arrest law.

The Alaska and Federal Constitutions are the first places to look for arrest authority. Article I, Section 14 of the Alaska Constitution says:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment to the Constitution of the United States reads exactly the same as Article I, Section 14 of the Alaska Constitution. The key words for the purpose of this analysis are "unreasonable … seizures" and "no warrants shall issue, but upon probable cause…" A "seizure" is an arrest. An arrest occurs when the police use a show of

official authority such that a reasonable person would have believed he or she is not free to leave. *United States v. Edwards,* 242 F. 3d 928, 934 (10 Cir. 2001).

At first look, the language of the Fourth Amendment suggests there must be a warrant for an arrest for all criminal offenses without exception. However, the common law allows police officers to arrest a person for a felony offense without first obtaining a warrant if the officer had "reasonable grounds to believe" that a felony had been committed and that the person being arrested committed the felony. This "reasonable grounds" standard is the constitutional equivalent of the "probable cause" language from the constitution. *Henry v. United States,* 361 U.S. 98 (1959). The United States Supreme Court has said the common law rule of allowing felony arrests without a warrant based on "reasonable grounds" is essentially the same as what is needed for the issuance of an arrest warrant under the Fourth Amendment. The Supreme Court therefore concluded there need not be a warrant for a felony arrest based on probable cause, whether or not the felony occurred in the officer's presence.

The common law, as it relates to misdemeanors, is different. A warrant is required before a person can be arrested on a misdemeanor unless the 1) misdemeanor occurred in the presence of a police officer; 2) the police officer had probable cause to believe a misdemeanor occurred; 3) the police officer had probable cause to believe the person being arrested committed the offense; and 4) the misdemeanor was a breach of the peace. "A breach of the peace" means in essence an act of violence. Over the years this rule has been changed by statutes in all the states including Alaska, by eliminating the requirement of a breach of the peace. Put another way, all states allow a police officer to arrest a person without a warrant for a misdemeanor where there is probable cause and the crime occurred in the officer's presence. Several states have eliminated the "in the presence of the officer" requirement for special crimes or circumstances and five states have eliminated the distinction between felony and misdemeanor arrests.[1]

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[1] Connecticut Conn. Gen State § 54-1f(a), Illinois, Comp Stat. Ch 725 § (1)(c), Louisiana, La. Code Crim. Proc. Ann Art 213 (3), Montana Mont. Code Ann § 46-6-311(1) (1997), Wisconsin Wis. Stat. § 968.07 (1)(d). In your letter Oregon statute ORS 133.310 is quoted in a way that suggests Oregon has eliminated the distinction between felony and misdemeanors. Actually ORS 133.310 reads: Authority of peace officer to arrest without warrant (1) a peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following: (a) a felony, (b) an A misdemeanor (c) an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class C misdemeanor, (d) any other crime committed in the officer's presence. This

The United States Supreme Court has not given a definitive answer to the question of whether the Fourth Amendment requirement of an arrest warrant has the same exception for misdemeanors as for felonies. It is generally believed that the court will find the same exception when and if it decides this issue. *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001), is a case where the misdemeanor of driving with children not using seatbelts occurred in the officer's presence and the mother was arrested. There were two issues before the court. The first issue was whether the "breach of the peace" element of arrest for misdemeanors at common law was required by the Fourth Amendment. The answer to this question is "no". The "no" answer was based on research which showed this element was probably not the common law at the time of the drafting of the Fourth Amendment and hence the authors of the Fourth Amendment would not have understood the "breach of the peace" requirement to be the law in the colonies. The court did not do the historical analysis of the "in the presence" requirement. However, it went out of its way to disclaim any "speculat[ion] whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests". On the other hand the court also quoted Justice Whites' dissenting opinion in *Welsh v. Wisconsin,* 466 U.S. 756 (1984), for the proposition that "the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment". Put-another way, the court suggested it could go either way on this issue. We can speculate that if directly addressed the U.S. Supreme Court will follow the dissent in the *Welsh* case. However, there is no case law on this issue by the Alaska courts so it is difficult to predict how our courts would rule.

This brings up the second issue in *Atwater*: that is, whether the arrest was "reasonable". In a five to four decision the answer to this question was "yes" because the misdemeanor clearly occurred "in the officer's presence." Like for felonies, "reasonableness" was equated to probable case. This issue has never been addressed by an Alaska appellate court.

However, Alaska courts have not hesitated to suppress evidence when a search warrant under the Fourth Amendment or Article I, Section 14 of the Alaska Constitution has been found to be unreasonable. Additionally, the Alaska Constitution has a right of privacy, Article I, section 22, which the U.S. Constitution does not contain. Most people would think that the right to be left alone is more important than a property right and hence, the Alaska courts could conceivably require a broader showing of reasonableness than federal courts. If this were to happen, the proposed law change to allow arrests for

---

means that B misdemeanors like Disorderly Conduct require that the offense occur "in the officers presence" before there can be an arrest without a warrant.

misdemeanors as now exists for felonies, may result in hearings on whether officers acted "reasonably". For example, the question of how much time it would have taken to get a misdemeanor warrant may become a common evidentiary issue to determine "reasonableness". This would mean officers would be required to come to court on an issue that is not litigated today, taking time off the streets, there by, lessening public protection. Likewise, this would entail an increase in the budgets of all parts of the criminal justice system to litigate these issues.

In Alaska, a peace officer may arrest a person for a misdemeanor committed outside the officer's presence without a warrant if there is statutory authority to do so. The legislature has authorized peace officers to make warrantless misdemeanor arrests for conduct outside their presence for several offenses. These include when an officer has probable cause to believe a person is driving under the influence of alcohol (AS 12.25.033); in circumstances where there is no judicial officer within 25 miles and personal or property damage is likely to occur if the arrest is not made immediately (AS 12.25.035); and in minor consuming alcohol cases (AS 12.25.030). In cases involving domestic violence the legislature mandates arrest (AS 18.65.530). These examples generally share a quality of urgency – either that the evidence will dissipate without an immediate arrest or a person is in immediate danger of further injury if an arrest is not made. In adopting these exceptions, the legislature has made a decision that it is "reasonable" to make an arrest because of particular circumstances connected with the offense. If a decision is made to change AS 12.25.030 along the lines of scenario one, the Department of Law strongly recommends that there be legislative findings as to how arrests for disorderly conduct have the same compelling necessity as are presented by other misdemeanors where statutes authorize warrantless arrest.

The second scenario that you describe would allow a peace officer to arrest for any misdemeanor with probable cause but without an arrest warrant. A small minority of states allow this. The vast majority of states, however, are like Alaska in that they allow warrantless arrests in circumstances set out in statute. In general, there are good reasons for the age-old requirement that for misdemeanors, a peace officer should obtain a warrant from a judicial officer before making an arrest for a crime committed outside the officer's presence. These include the following:

- The warrant requirement encourages peace officers to conduct a more thorough investigation of the case before obtaining the warrant. This is important for several reasons. First, it acts as a screening mechanism to weed out weak cases. This screening saves the entire judicial, prosecution and corrections systems from gearing up for a case that will not be prosecuted. Second, and no

disparagement of peace officers is intended, it is simply human nature that an officer who arrests a person for a misdemeanor and takes the person to jail will have less incentive to interview witnesses and make other inquiries that are a part of a thorough investigation. And there are good reasons for this – an officer will likely have more serious felonies to investigate. A felony investigation by its very nature will take priority and it is understandable that a misdemeanor investigation where the defendant has been arrested would be placed nearer to the bottom of the priority list.

- An arrest in Alaska generally starts the running of the speedy trial rule. Criminal Rule 45 requires, with exceptions, that a person be brought to trial within 120 days of a charging document being served upon the defendant. A change in the arrest law may have three unintended consequences: 1) police will need to do more of their own charging documents; 2) there will be more dismissals of cases because of premature arrests; 3) more cases will be lost under the speedy trial rule. The state would strongly urge an amendment to Criminal Rule 45 which would allow a dismissal by the state of a charge until a police investigation is complete without time running against the 120 day rule to get the person to trial.

- Authorizing a warrantless arrest for all misdemeanors would significantly increase the cost every participant in the justice system. Bypassing judicial screening will guarantee that more cases will be screened out by the prosecuting authority, the courts, and ultimately juries. The costs of booking a person into jail and transporting them to an arraignment alone are significant and will increase.

- Other significant costs would result from making an arrest for a charge that the parties later resolve themselves. In is not uncommon for misdemeanors to be settled by the parties. When tempers fade people often conclude the matter informally, by civil means, or decide that the problem no longer justifies any response. For example, there are often civil compromises in cases where people fail to pay cab drivers their fare or a restaurant for a meal that did not come in the time expected. These civil resolutions will be less likely if a person is arrested.

- There would likely be an increase in lawsuits claiming damages from police agencies alleging unlawful arrest.

- Losses will result that are not related to the prosecution itself. For example, a defendant's family will suffer financial loss at least for the time the defendant is in custody and may result in the loss of a job. If an arrest occurs the Office of Children's Services may need to step in to taking temporary custody of children. This is what occurred in the *Atwater* case where the mother was arrested for driving without seatbelts being buckled for the children. There will be social, as well as financial costs if this change occurs.

- Of major concern is the financial implication of a change in the arrest law for misdemeanors. Last fiscal year there were 31,713 misdemeanors offenses filed in Alaska state courts. Studies show that approximately 45% of all cases result in an immediate arrest.[2] This means that 55% of 31,713 misdemeanors can potentially be new arrests. The worst case would be 17,442 new arrests. Corrections estimate a cost of over $100 for simply the booking process to enter a person into a correctional facility. This is an additional potential cost of $1.74 million just for booking. Of greater concern to the Department of Law is whether the criminal prosecutions conducted by the municipalities of Anchorage and Juneau will be discontinued because of the additional costs of incarceration for these communities. Both Anchorage and Juneau have been responsible for prosecution under their city ordinances. However, the state has experienced the withdrawal of communities from the prosecution of criminal cases because of the cost of incarceration. For example, Fairbanks simply repealed all their criminal ordinances in order to save money. Both Anchorage and Juneau have considered ways of reducing correction costs. The City and Borough of Juneau removed from the police department's budget the cost of incarceration and placed the budget item in the municipal attorney's office. Concurrent with the movement of this budget item was the reduction from one million dollars to $500,000

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[2] The 45% arrest rate is from a 10 year old national study. Hence, its implications may not apply to Alaska. Also it is noted that there were 75,552 minor offenses filed in FY 2010. It is unknown how many of the minor offenses are violations compared to misdemeanors.

for the cost of incarceration. The police department had difficulty in operating within its budget. The municipal attorney's office through managing its caseload has kept within the reduced budget. If with this proposed change the city's budget again goes to one million dollars the city may consider repealing ordinances as was done by Fairbanks. This means a choice between no law enforcement or the state picking up the cost. Anchorage and the state have also have had disputes over paying for cost of incarceration. This ended in litigation. If Anchorage and Juneau remove themselves from criminal prosecutions and the state picks up those cases there would need to be an increase in the Department of Law's budget of at least 15 attorneys, five law office assistants, and five paralegals given current municipal staffing. This would be a cost of $3.5 million.

- The Department of Correction will bear the major increase in cost under these proposals and should be contacted for a cost estimate.

The first scenario you describe would allow a peace officer to make a warrantless arrest for disorderly conduct (AS 11.61.110). That statute covers a reasonably broad range of prohibited conduct – from fighting not in self-defense to making an unreasonably loud noise. The department assumes you are mainly concerned with fighting not in self-defense. We agree that there may be some urgency to make an arrest. and you might consider making a statutory change to allow an officer to make an arrest without a warrant for fighting not in self-defense. This could be justified to a certain extent by the urgency of protecting the victim. However, it is important for law enforcement to remember that before a warrantless arrest for this offense, there must be probable cause that the person to be arrested was not acting in self-defense.

There are other considerations that would weigh on the side of waiting to obtain a warrant. The state is concerned that an "arrest them and sort it out later" attitude will grow with amending Alaska's misdemeanor arrest law, resulting in an increase in false arrest and civil litigation. We believe that unless there are special circumstances not described in your letter, on balance it would be better to require the peace officer to investigate the situation and then obtain a warrant from a judicial officer before making an arrest for fighting in violation of AS 11.61.110(a)(6). If a court has made a probable cause finding, officers will be absolved of civil liability. [3]

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[3] A simple hypothetical may be of help: The police are dispatched to a bar; they see two people fighting. They arrest both fighters. They remove the fighters from the bar and put them in separate patrol cars. Officers return to the bar to interview witnesses to

The other provisions of AS 11.61.110 also would, without other circumstances not described in your letter, be better served with an investigation and then a judicial warrant before an arrest – or possibly a citation rather than an arrest at all. For example, AS 12.61.110(a)(1) prohibits making an unreasonably loud noise with the intent to disturb the peace and privacy another person. It is probably better public policy to interview the victim and then either obtain an arrest warrant or cite the perpetrator. There is no urgency at that point that would justify an immediate arrest.

For all the reasons discussed above, the Department of Law has both legal and practical concerns in changing the law for either scenario.

We have, however, some suggestions for legislation that would help law enforcement officers perform their duties in a more efficient manner. The first is to consider the possibility of authorizing a law enforcement officer to obtain an arrest warrant from a judicial officer over the telephone, or by facsimile or over the Internet. This procedure was adopted in 2008 for search warrants (AS 12.35.015), and allows a peace officer to avoid a trip to the court house to obtain a search warrant. Another suggestion is to consider looking at specific misdemeanor offenses or circumstances that may pose an urgent need for an immediate arrest, and propose statutory authority for a peace officer to make an arrest without a warrant for that specific misdemeanor or under particular circumstances.

Another suggestion, although unrelated to the issue of arrest warrants, addresses a serious concern of the Department of Law, that is, the safety of law enforcement officers and other participants in the criminal justice system. It is to protect the personal information of these participants from being placed on the Internet. Arizona has a statute (A.R.S. §13-2401) that addresses this concern, and in pertinent part provides:

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find that either no one is willing to speak or claim to have seen nothing. Unfortunately this is a common occurrence. Both fighters were arrested so they need to be provided their rights under Miranda. Both choose not to speak. What is the officer to do? There is no legal principal that allows for the two people to be un-arrested. There was no probable cause for this arrest because probable cause consists of two parts; did a crime occur- here it probably did. But the second part of the equation is not present, that is, did each person commit the crime. Here the officers have no idea. Was the fight in self-defense, if so, then only one of the two arrestees committed a crime while the other was a victim. Which one? If they were not fighting in self-defense, there is no evidence of this element.

> A. It is unlawful for a person to knowingly make available on the world wide web the personal information of a peace officer, justice, judge, commissioner, public defender or prosecutor if the dissemination of the personal information poses an imminent and serious threat to the peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's safety or the safety of that person's immediate family and the threat is reasonably apparent to the person making the information available to the world wide web to be serious and imminent.
>
> . . .
>
> D.5 "Personal information" means a peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's home address, home telephone number, pager number, personal photograph, directions to the person's home or photographs of the person's home or vehicle.

I look forward to discussing your ideas and these suggestions with you. I hope this information is helpful to you.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Richard A. Svobodny
Deputy Attorney General

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Memorandum

TO: Representative Cathy Muñoz

FROM: Chuck Burnham, Legislative Analyst

DATE: October 7, 2010

RE: Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement
LRS Report 11.051

You asked about warrantless arrests for misdemeanor crimes. Specifically, you wanted to know the misdemeanor offenses in other states for which an offender can be arrested without a warrant even when the crime is committed outside the presence of a law enforcement officer.

As you know, the 4th Amendment to the U.S. Constitution protects citizens from "unreasonable searches and seizures," and requires that "probable cause" must be shown by law enforcement and recognized by a judicial officer through the issuance of warrant before an arrest can be made. Courts have recognized a number of exceptions to this requirement, including when a crime is being committed in the presence of a law enforcement officer, when there is a risk that not making an arrest will result in danger or damage to people or property, or when there is a substantial likelihood that an offender will escape arrest entirely unless action is taken immediately.

We identified 42 states that have relied on these exceptions to craft a variety of statutory exclusions to the requirement for an arrest warrant for misdemeanor offenses committed outside the presence of law enforcement.[1] Most commonly, states narrowly craft these statutes to be directed at crimes—particularly domestic violence of the violation or protective orders—where the risk of violence in the absence of an arrest is relatively high. However, a number of states have laws specifying that warrants are not required for shoplifting and other kinds of theft, when a driver in an accident is suspected of having been driving under the influence of alcohol or a controlled substance, and various other non-violent offenses. At least four states—Nevada, New York, Ohio, and South Dakota—allow warrantless arrests for the most serious misdemeanors. Three others—Colorado, Missouri, and New York—allow such arrests for any misdemeanor violation. Rhode Island statute permits warrantless arrests for any misdemeanor if the arresting officer has reason to believe that the offender poses a continued danger or could not be arrested at a later time.

The attached table provides statutory citations and summarizes the misdemeanors for which warrantless arrest are permitted in the 42 states with applicable statutes. We include copies of all of the statutes cited in the table as Attachment A.

We hope this information is helpful. If you have questions or need additional information, please let us know.

[1] We performed key-word searches of the Lexis database of state statutes to identify applicable laws. Our research did not include reviews of regulations or case law, which may significantly impact how these statutes are applied. Although we believe our research to be thorough, there are likely other statute sections on the topic that we did not locate due to variations in wording and construction. As a result, this report should not be viewed as exhaustive of all relevant statutes.

Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement									
State	**Citation**	**Domestic Violence**	**Battery**	**Warrant Issued but not in Possession**	**Escaped Convict / Parole Violation**	**Violating Court/ Protective Order**	**Theft / Shop-lifting**	**DUI - Related Violation**	**Other/*Notes***
Alabama	CA § 15-10-3	X		X		X			
Alaska	AS § 18.65.530	X			X	X			
Arizona	ARS § 13-3601	X							
	ARS § 25-315					X			
Arkansas	ACA § 16-81-106		X						*Evidence of bodily harm and danger of further violence must be present.*
	ACA § 16-81-113	X							*Arrest must be made within four hours, or 12 hours for cases involving physical injury.*
California	Cal Pen Code § 836	X				X			
	Cal Pen Code § 836.1		X						*Battery on Emergency Response Personnel.*
	Cal Pen Code § 836.3				X				
	Cal Pen Code § 13701	X				X			
Colorado	CRS § 16-3-102	X	X	X	X	X	X	X	Any offense.
	CRS § 18-6-803.6	X							
Connecticut	GSC § 46b-38b	X							

Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement (contd.)									
State	**Citation**	**Domestic Violence**	**Battery**	**Warrant Issued but not in Possession**	**Escaped Convict / Parole Violation**	**Violating Court/ Protective Order**	**Theft / Shop-lifting**	**DUI - Related Violation**	**Other/*Notes***
Delaware	DCA § 1904		X			X	X		Illegal sexual contact or attempt; and Any misdemeanor on school property.
Florida	FS § 741.29	X							
Georgia	OCGA § 17-4-20	X							Abuse of a vulnerable adult.
Hawaii	HRS § 709-906	X							
Idaho	IC § 19-603	X							
Illinois	§ 725 ILCS 5/112A-30								
Indiana	ICA § 35-33-1-1	X	X			X			Certain weapons violations; interference with reporting of certain crimes.
Iowa	IC § 236.12	X	X			X			Commission of crime aboard an aircraft.
Kansas	KSA § 22-2307	X							
	KSA § 22-2401								Any misdemeanor where an officer has probable cause to believe that an offender will not otherwise be apprehended, evidence will be lost, injury or damage has occurred or will occur.
Kentucky	KRS § 431.005	X			X	X		X	Failing to comply with sex offender registry.
Louisiana	LSA-RS § 46:2140	X							

Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement (contd.)									
State	**Citation**	**Domestic Violence**	**Battery**	**Warrant Issued but not in Possession**	**Escaped Convict / Parole Violation**	**Violating Court/ Protective Order**	**Theft / Shop-lifting**	**DUI - Related Violation**	**Other/*Notes***
Maine	MRSA 19-A, § 4012	X							
Maryland	ACM § 2-203 to 2-204	X			X	X			Giving false alarm of fire; indecent exposure; certain weapons violations; prostitution.
Mass.	ALM GL ch. 209A § 6	X				X			
	ALM GL ch. 276 § 28	X	X						
Michigan	MCL § 257.625m			X				X	DUI involving commercial vehicle.
	MCL § 764.15				X		X	X	Commission of a misdemeanor punishable by more than 92 days imprisonment; and misdemeanors on school property.
	MCL § 764.15a-b	X				X			
Mississippi	§ 99-3-7	X		X	X	X			
Missouri	§ 455.085 R.S.Mo.	X				X			
	§ 544.216 R.S.Mo.	X	X	X	X	X	X	X	Any violation of law.
Montana	MCA § 46-6-210			X					
	MCA § 46-6-311	X	X	X	X	X	X	X	Any violation of law *(where circumstances require immediate arrest)* .

Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement (contd.)

State	Citation	Domestic Violence	Battery	Warrant Issued but not in Possession	Escaped Convict / Parole Violation	Violating Court/ Protective Order	Theft / Shop-lifting	DUI - Related Violation	Other/*Notes*
Nebraska	RSN § 29-404.02	X							Any misdemeanor if the officer has reason to believe the offender could not be arrested later, poses a danger, or may destroy evidence.
Nevada	NRSA § 171.124	X	X	X	X	X	X	X	Any Gross Misdemeanor.
	NRSA § 171.137	X							
New Hampshire	RSA § 594:10	X				X			
New Jersey	NJSA § 2C:25-21	X				X			
New York	N.Y. Crim. Proc. Law § 140.10	X	X	X	X	X	X	X	Any crime committed within arresting police officer's jurisdiction.
North Carolina	GSNC § 15A-401	X					X	X	Trespassing in home of former domestic partner; pointing a firearm at a partner/family member; violating a quarantine order.
North Dakota	NDCC § 14-07.1-10	X							
Ohio	ORC § 2935.03	X	X	X	X	X	X	X	Any Class 1 misdemeanor within an officer's jurisdiction where pursuit of the offender has taken place without "unreasonable delay."
Oregon	ORS § 122.055	X							

Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement (contd.)									
State	**Citation**	**Domestic Violence**	**Battery**	**Warrant Issued but not in Possession**	**Escaped Convict / Parole Violation**	**Violating Court/ Protective Order**	**Theft / Shop-lifting**	**DUI - Related Violation**	**Other/*Notes***
Rhode Island	R.I. Gen. Laws § 12-7-3	X	X	X	X	X	X	X	Any misdemeanor if the officer has reason to believe the offender could not be arrested later or poses a danger.
	R.I. Gen. Laws § 12-29-3	X				X			
South Carolina	S.C. Code Ann. § 16-25-70	X							
South Dakota	SDCL § 23A-3-2	X	X	X	X	X	X	X	Any Class 1 misdemeanor.
Tennessee	TCA § 36-3-619	X							
	TCA § 40-7-103	X			X			X	
Utah	UCA § 77-36-2.2	X							
Virginia	Va. Code Ann. § 19.2-81		X	X			X	X	Carrying a weapon on school property; brandishing a firearm; and destruction of commercial property.
Washington	RCWA § 10.31.100	X	X			X	X	X	Theft; threats to people or property; possession of cannabis; minor consuming alcohol; criminal trespass; numerous traffic violations; indecent exposure; interference with a health care facility; and possession of dangerous weapon on school grounds.

Warrantless Arrests: Misdemeanors Committed Outside the Presence of Law Enforcement (contd.)									
State	**Citation**	**Domestic Violence**	**Battery**	**Warrant Issued but not in Possession**	**Escaped Convict / Parole Violation**	**Violating Court/ Protective Order**	**Theft / Shop-lifting**	**DUI - Related Violation**	**Other/*Notes***
Wisconsin	Wis. Stat. § 968.075	X							

Notes and Source: This table was compiled using key-word searches of the *Lexis* database of state statutes and should not be viewed as an exhaustive list of all laws on the topic. We did not review regulations or case law, both of which may impact the manner in which the statute sections listed are applied.

Office of the Attorney General
State of Texas

Opinion No. JM-751

A number of states have enacted statutes authorizing peace officers to make warrantless arrests for misdemeanors committed outside their presence. See, e.g., D.C.Code Ann. s 23-581; Fla.Stat. s 901.15(6) (warrantless arrest if there is probable cause to believe the person has committed an act of domestic violence in violation of injunction); Kan.Code Crim.Proc. s 22-2401; Md.Code Ann. s 27.594(B); Ohio Code Ann. s 2935.03; Wash.Rev.Code Ann. 10.31.100. The courts of some states have dealt with the validity of a warrantless arrest of an individual by a peace officer for a misdemeanor committed outside of his presence. See, e.g., State v. Presley, 458 So.2d 847 (Fla.Dist.Ct.App.1984) (test for warrantless arrest in misdemeanor is whether the officer has a substantial reason to believe arrestee is guilty of a crime); LeBlanc v. State, 382 So.2d 299 (Fla.1980) (provision for warrantless arrest for battery committed upon spouse does not violate equal protection clause); Wilson v. Hunk, 367 N.E.2d 478 (Ill.App.Ct.1977) (warrantless arrest for misdemeanor not committed in officer's presence is not illegal arrest); Lurie v. District Attorney of Kings County, 288 N.Y.S.2d 256 (Sup.Ct.Special Term 1968) (arrest for a misdemeanor not committed in officer's presence violates no state or federal constitutional standard); City of Columbus v. Herrell, 247 N.E.2d 770 (Ohio Ct.App.1969) (statute authorizing peace officer to arrest without a warrant any person he has reasonable cause to believe is guilty of assault and battery, a misdemeanor, does not violate Fourth Amendment); State v. Bryant, 678 S.W.2d 480 (Tenn.Crim.App.1984), cert. denied, 469 U.S. 1192 (1985) (the rule that a police officer has no authority to make misdemeanor arrest for offense committed outside his presence is a common law rule and not constitutionally required). In Kelley v. State, 676 S.W.2d 646 (Tex.App.--Houston [1st Dist.] 1984, pet. ref'd) the court determined that a search was invalid because it was made pursuant to an invalid arrest for a felony. The court stated that the Fourth Amendment of the United States Constitution requires the police to have probable cause to arrest a suspect, and since there was probable cause the federal constitution was not violated in this case. 676 S.W.2d at 648. However, since Texas has imposed greater restraints on police conduct than the federal constitution requires, the arrest was invalid because it violated Texas law. The court reviewed statutes authorizing warrantless arrest, including the provision now codified as article 14.03(a)(2) of the Code of Criminal Procedure, but did not comment on its validity. 676 S.W.2d at 649.

Finally, in Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir.1983), the court determined that Arizona law enforcement officers could arrest for violations of the Immigration and Nationality Act under the following state provision:

A peace officer may, without a warrant, arrest a person:

....

4. When he has probable cause to believe a misdemeanor has been committed and probable cause to believe the person to be arrested has committed the offense....

Ariz.Rev.Stat.Ann. s 13-3883 (1978).

Thus, there is federal and state case law, as well as legal scholarship, which supports the constitutionality of the arrest provisions you inquire about. We should moreover presume that this legislation is constitutional. See United States v. Watson, supra. We therefore do not believe subsections (a)(2) or (a)(3) of article 14.03 are facially unconstitutional.

City of Ketchikan

POLICE DEPARTMENT
361 Main Street
Ketchikan, Alaska 99901
Phone (907) 225-6631
Fax (907) 247-6631

January 27, 2011

Cathy Muñoz
Representative
District 4
State Capitol, Room 403
Juneau, AK 99801-1182

Dear Representative Muñoz:

I would like to take this opportunity to pledge my support for a bill you are sponsoring. The bill, which amends an Act relating to arrests without warrants by peace officers for certain misdemeanors, will greatly assist law enforcement agencies across our State. Having the ability to arrest an individual, who has committed a misdemeanor crime against a person as enumerated under Alaska Statute 11.41 without a warrant, greatly assists peace officers in their mission to protect the public. It has been my experience, in over twenty-three years as a police officer, that an on-scene arrest drastically reduces the chance that officers will respond multiple times to the same address and greatly reduces the likelihood that the victim will suffer any further injury.

I appreciate your willingness to help make our jobs in law enforcement easier. If there is any way I can assist you with the passage of this bill, please do not hesitate to contact me.

Sincerely,

Edward Talik
Chief of Police

Alaska Association of Chiefs of Police

12 January, 2011

Representative Kathy Muñoz
State Capitol Room 409
Juneau AK, 99801

RE: An Act relating to arrests without warrants by peace officer for certain misdemeanors

Dear Representative Muñoz,

For several years the membership of the Alaska Association of Chiefs of Police (AACOP) has been concerned with state statues that severely limit the ability of a law enforcement officer (LEO) investigating a misdemeanor crime to make a 'probable cause' arrest. The restrictions have been demonstrated to place undue responsibility upon crime victims; cause officers, agencies, and prosecutors additional work and; result in inefficiencies in the administration of justice and the protection of our communities.

With the exception of the three incidents that current law allows, or mandates, LEOs to make a misdemeanor arrest based on probable cause, LEOs in Alaska have the same arrest power as citizens have. Here are some specific examples of how this impacts LEOs and their communities:

- If no punches are being thrown when officers arrive at a reported bar fight, they are not able to arrest anyone even though it may be advisable in order to temporarily keep the peace.
- We may respond to an assault in which the victim is uncooperative and the suspect runs from the scene. The responding officer(s) pursue and catch the suspect. However, any force they use to subdue and arrest the suspect will be subjected to serious legal review, as no immediate arrest can be made for the assault. In some communities officers are applying Tasers™ to fleeing suspects in this kind of scenario, only to remove the barbs, get the suspect's name, dust him off, and tell him he'll be hearing from a prosecutor if a complaint is issued.
- Officers respond to a report of a prowler and find a man peeking into a bathroom window of a residence, masturbating. Unless there is a person under the age of 16 who is watching him, we cannot arrest him.

AACOP has reviewed the 11/24/10 Work Draft of your proposed legislation. We support the proposed change, as it would help resolve the three scenarios described above. However, because it will only expand arrest powers to the seven misdemeanors that are violations of AS 11.41, other restrictions will continue to hamper LEOs in protecting their communities. For example:

- Arrest of shoplifters

185 E Nelson Ave, Wasilla, AK 99654 (907) 376-2747

- A burglar is caught in the act by a citizen, just prior to actually making entry or completing a theft or other crime, the offense is now an A Misdemeanor. Once again, we dust off the burglar, take his name and send him on his way.

AACOP members would prefer that arrest powers also be extended to misdemeanors under AS 11.46 as well as AS 11.41. However, we will support your draft legislation and make members available to testify on its behalf.

Please feel free to contact me if you would like additional information or we can assist you in any way.

Respectfully,

Chief Tom Clemons
President, AACOP

SOLDOTNA POLICE DEPARTMENT

44510 Sterling Highway
Soldotna, Alaska 99669

JOHN H. LUCKING, JR.
CHIEF OF POLICE

TEL: (907) 262-4455
FAX: (907) 262-4421

September 23, 2009

The Honorable Representative Cathy Muñoz
Alaska State Capitol Building, Room 409
Juneau, AK 99801

Dear Representative Muñoz,

I am writing this letter in support to your proposed legislation entitled "An act relating to arrests without warrants by peace officers for certain misdemeanors". It is an important step toward improving the abilities of police to expeditiously apprehend persons they have reason to believe have committed crimes. I would however, like to also ask that you consider strengthening the bill even more by not limiting the new arrest authority to crimes against persons, but rather to include all misdemeanor crimes. It seems unfair to make crimes against persons more important than other misconduct.

The legislation you propose will be of benefit to the police and citizens alike. It will serve to simplify the criminal code, and help police protect innocent victims by accelerating the process of misdemeanor arrest in cases where probable cause exists. Thank you for working to assist law enforcement in Alaska. We very much appreciate your efforts in that regard.

Respectfully,

John H. Lucking, Jr.
Chief of Police

Arrests for Misdemeanors Without a Warrant

Western States

Oregon

§ 133.310[1]

Authority of peace officer to arrest without warrant

(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following:

(a) A felony.

(b) A misdemeanor.

(c) An unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class C misdemeanor.

(d) Any other crime committed in the officer's presence.

Arizona

13-3883. Arrest by officer without warrant

A. A peace officer may, without a warrant, **arrest** a person if he has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in his presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28, and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under section 13-3903.

B. A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.

Colorado

16-3-102 - Arrest by peace officer.

(1) A peace officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) Any crime has been or is being committed by such person in his presence; or

(c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

Idaho

19-603.WHEN PEACE OFFICER MAY ARREST. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
5. At night, when there is reasonable cause to believe that he has committed a felony.
6. When upon immediate response to a report of a commission of a crime there is probable cause to believe, that the person arrested has committed a violation of section 18-902 (assault), 18-903 (battery), 18-918 (domestic assault or battery), 18-7905 (first degree stalking), 18-7906 (second degree stalking), 39-6312 (violation of a protection order), or 18-920 (violation of a no contact order).
7. When there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officer upon immediate response to a report of a commission of a crime aboard an aircraft, that the person arrested has committed such a crime.

Washington

RCW 10.31.100

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

California

836.1. When a person commits an assault or battery against the person of a firefighter, emergency medical technician, or mobile intensive care paramedic while that person is on duty engaged in the performance of his or her duties in violation of subdivision (b) of Section 241 or subdivision (b) of Section 243, a peace officer may, without a warrant, arrest the person who commits the assault or battery:

(a) Whenever the peace officer has reasonable cause to believe that the person to be arrested has committed the assault or battery, although the assault or battery was not committed in the peace officer's presence.

(b) Whenever the peace officer has reasonable cause to believe that the person to be arrested has committed the assault or battery, whether or not the assault or battery has in fact been committed.

Nevada

NRS 171.124 Arrest by peace officer or officer of Drug Enforcement Administration.

1. Except as otherwise provided in subsection 3 and NRS 33.070 and 33.320, a peace officer or an officer of the Drug Enforcement Administration designated by the Attorney General of the United States for that purpose may make an arrest in obedience to a warrant delivered to him or her, or may, without a warrant, arrest a person:

(a) For a public offense committed or attempted in the officer's presence.

(b) When a person arrested has committed a felony or gross misdemeanor, although not in the officer's presence.

(c) When a felony or gross misdemeanor has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed it.

(d) On a charge made, upon a reasonable cause, of the commission of a felony or gross misdemeanor by the person arrested.

(e) When a warrant has in fact been issued in this State for the arrest of a named or described person for a public offense, and the officer has reasonable cause to believe that the person arrested is the person so named or described.

2. A peace officer or an officer of the Drug Enforcement Administration designated by the Attorney General of the United States for that purpose may also, at night, without a warrant, arrest any person whom the officer has reasonable cause for believing to have committed a felony or gross misdemeanor, and is justified in making the arrest, though it afterward appears that a felony or gross misdemeanor has not been committed.

3. An officer of the Drug Enforcement Administration may only make an arrest pursuant to subsections 1 and 2 for a violation of chapter 453 of NRS.

Utah

77-7-2. Arrest by peace officers.

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) (a) for any public offense committed or attempted in the presence of any peace officer; and

(b) as used in this Subsection (1), "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

(2) when the peace officer has reasonable cause to believe a felony or a class A misdemeanor has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when the peace officer has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person; or

(4) when the peace officer has reasonable cause to believe the person has committed the offense of failure to disclose identity under Section **76-8-301.5**.

Mid-Western States

Wisconsin

968.07 Arrest by a law enforcement officer.

(1) A law enforcement officer may arrest a person when:

(a) The law enforcement officer has a warrant commanding that such person be arrested; or

(b) The law enforcement officer believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or

(c) The law enforcement officer believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

Illinois

A police officer may make an arrest without a warrant if the officer witnesses a crime being committed. Police may also make an arrest without a warrant if there is **probable cause** that an offense occurred and that the person who would be taken into custody committed the crime. Unless it is an emergency, however, a police officer cannot enter a person's home without a warrant to make an arrest. When a person is arrested, he or she is not necessarily charged with a crime. Some people who are arrested are taken into custody, questioned, possibly put into a lineup, and then released without being charged with an offense.

Michigan

764.9c Arrest without warrant for misdemeanor or ordinance violation; issuance and service of appearance ticket by police officer or specially authorized public servant; exceptions.

Sec. 9c.

(1) Except as provided in subsection (3), if a police officer has arrested a person without a warrant for a misdemeanor or ordinance violation for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both, instead of taking the person before a magistrate and promptly filing a complaint as provided in section 13 of this chapter, the officer may issue to and serve upon the person an appearance ticket as defined in section 9f of this chapter and release the person from custody.

(2) A public servant other than a police officer, who is specially authorized by law or ordinance to issue and serve appearance tickets with respect to a particular class of offenses of less than felony grade, may issue and serve upon a person an appearance ticket if the public servant has reasonable cause to believe that the person has committed an offense.

(3) An appearance ticket shall not be issued to any of the following:

(a) A person arrested for a violation of section 81 or 81a of the Michigan penal code, 1931 PA 328, MCL 750.81 and 750.81a, or a local ordinance substantially corresponding to section 81 of the Michigan penal code, 1931 PA 328, MCL 750.81, if the victim of the assault is the offender's spouse, former spouse, an individual who has had a child in common with the offender, an individual who has or has had a dating relationship with the offender, or an individual residing or having resided in the same household as the offender. As used in this subdivision, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(b) A person subject to detainment for violating a personal protection order.

(c) A person subject to a mandatory period of confinement, condition of bond, or other condition of release until he or she has served that period of confinement or meets that requirement of bond or other condition of release.

Constitutionality Issue

U.S. Supreme Court - "...as long as probable cause exists, arrest warrants are unnecessary, even where there is time to obtain them." *Laasch v Wis.*, 84 Wis.2d 587, 591 (1978) and *Sanders v Wis.*, 69 Wis.2d 242, 255 (1975).]

Amendment #1

A Conceptual Amendment
Page 2, line 5

following "AS 11.41":

Insert "and there is reasonable cause to believe arrest without warrant is a practical necessity to prevent imminent physical harm to the public"

27-LS0219\B.1
Luckhaupt
4/1/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: HB 171

Page 1, lines 1 - 2:

Delete "**certain misdemeanors**"

Insert "**assault in the fourth degree under certain circumstances**"

Page 2, lines 3 - 5:

Delete all material and insert:

"**(D) committed assault in the fourth degree under AS 11.41.230 and the officer has reasonable cause to believe arrest without a warrant is a practical necessity to prevent imminent physical harm to a person;**"

27-LS0219\B.1
Waldo
4/1/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: HB 171

Page 1, lines 1 – 2:

Delete "**certain misdemeanors**"

Insert "**assault in the fourth degree or an ordinance with elements similar to assault in the fourth degree under certain circumstances**"

Page 2, lines 3 – 5:

Delete all material and insert:

"**(D) committed assault in the fourth degree under AS 11.41.230 or an ordinance with elements similar to assault in the fourth degree under AS 11.41.230 and the officer has reasonable cause to believe arrest without warrant is necessary to prevent imminent physical harm to a person;**"

HB 175

<TARGET><BILL>HB 175</BILL><SUBJECT>HB 175</SUBJECT><COMM>HJUD27</COMM></TARGET>

* This bill was absorbed into the Omnibus Crime bill (HB 127) passed last yr.

27-LS0579\A

HOUSE BILL NO. 175

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/28/11
Referred: Judiciary, Finance

Melanie

A BILL

FOR AN ACT ENTITLED

"An Act relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 12.25.150(a) is amended to read:

(a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within **48** [24] hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

*** Sec. 2.** AS 12.70.130 is amended to read:

Sec. 12.70.130. Arrest without warrant. The arrest of a person may also be

received
2-13-12

APOA

ALASKA PEACE OFFICERS ASSOCIATION

This bill was reported out of HJUD on 3/18/11

Business Manager

Joseph Young
Anchorage

Board of Directors
Officers

John Lucking, Jr., President
Soldotna

Kris Sell, Vice President
Juneau

Angella Long, Past President
Wasilla

Marilyn Bailey, Secretary-Treasurer
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Directors
John Waldron, President
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Unalaska

Michele Logan, President
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Anchorage

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Juneau

Brad Johnson, President
Farthest North Chapter
Fairbanks

James Kimura, President
First City Chapter
Ketchikan

Mark Pearson, President
Kenai Peninsula Chapter
Kenai

Bob Griffiths, President
Mat-Su Chapter
Wasilla

Thecla LaLonde, President
Wrangell Chapter
Wrangell

February 20, 2012

2/16/12

Representative Carl Gatto
Judiciary Chair
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Gatto:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for considering HB 175 an act relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date

The APOA Executive Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

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

Sincerely,

John Lucking, Jr.
State President

PO Box 240106
Anchorage AK 99524

t 907 277 0515
f 907 272 5355

Making A Difference In The Last Frontier

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **CSHB 175(JUD)**
Fiscal Note Number
Publish Date

Identifier (file name) CSHB175(JUD)-DOC-OC-01-09-12
Title "An Act relating to an appearance before judicial officer after arrest; relating to penalties for perating a vehicle...
Sponsor Judiciary by Request
Requester House Finance Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)								
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to reflect current fiscal year.

Prepared by Leslie Houston, Director
Division Department of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 01/09/12 1:30pm
Date 1/9/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 175(JUD)

Analysis

This bill provides clarifying changes to statute. The potential impacts of this change was previously identified and accounted for when the original legislation passed in 2010. Therefore, this bill has no additional fiscal imacts to the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 175**
Fiscal Note Number
Publish Date

Identifier (file name) HB175CS(JUD)-LAW-CRIM-12-07-11
Title An Act relating to court appearances; arson; and infractions.
Sponsor House Judiciary Committee
Requester (H) Finance

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by John J. Burns, Attorney General
Department of Law

Phone 465-5427
Date/Time 12/07/11 5:10PM
Date 12/7/2011

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 175

Analysis

HB 175 makes two corrections in the law to conform to the changes in the bail statutes adopted last year. It also makes conforming amendments to statutes that are in conflict with the bail schedules in the court rules.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB175**
Fiscal Note Number
() Publish Date

Identifier (file name)	HB175CS(JUD)-DPS-DET-01-11-12	Dept. Affected	Public Safety
Title	"An Act relating to appearance after arrest, penalties for some offenses, and amending criminal rules."	Appropriation	Alaska State Troopers
		Allocation	AST Detachments
Sponsor	House Judiciary by Request		
Requester	(H) FIN	OMB Component Number	2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by Lt. Rodney Dial — Phone (907) 247-4480
Division Alaska State Troopers — Date/Time 1/11/12 11:55 AM
Approved by Joe Masters, Commissioner — Date 12/15/2011
Department of Public Safety

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB175
2012 LEGISLATIVE SESSION

Analysis

This legislation would do the following:

Amends AS 12.25.150(a) by changing the requirement to bring arrested persons before a judge or magistrate from the current 24 hours to 48 hours.

Amends AS 28.15.131 (License to be carried and exhibited on demand) by adding a new subsection stating that violation of this section is an infraction.

Amends AS 28.22.019(c) (Proof of insurance) by reducing violation of this section to an infraction and requiring a mandatory fine of $500.

Amends AS 41.23.220 by defining penalties; except for conduct that is a violation of AS 11.46.420 (Arson in the third degree).

Amends the Alaska Rules of Criminal Procedures, Rule 5(s)(1), regarding appearance before a judge or magistrate.

Amends the Alaska Rules of Criminal Procedures, Sec. 7, regarding the disposition of violations, and Sec. 8 regarding the applicability of this Act.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste. 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

March 2, 2011

The Honorable Carl Gatto
Chairman
House Judiciary Committee
State Capitol Room 118
Juneau, AK 99801

Re: House Bill 175 – relating to criminal procedures following an arrest

Dear Representative Gatto:

The Department of Law respectfully requests a hearing in the House Judiciary Committee on HB 175, at your earliest convenience. HB 175 is a bill that makes important updates to the existing criminal process that occurs following a person's arrest.

Last year the legislature adopted a major revision to the bail law in our state. One of the important revisions was to change from 24 to 48 hours the deadline for bringing a person who is arrested before a judicial officer. The change last year included the court rule change, but neglected to change the statute. HB 175 corrects this. The bill also corrects inconsistencies in the bail schedules and the statutes for several offenses, including operating a motor vehicle without possessing proof of insurance or possessing a driver's license, and for certain arson offenses.

A sectional analysis is attached that describes each section of the bill. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and Sue Stancliff, Legislative Liaison from the Department of Public Safety to testify regarding this legislation.

Thank you for your consideration of this request.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

Anne D. Carpeneti

By: Anne D. Carpeneti
Assistant Attorney General

HOUSE BILL 175 – BAIL CLEANUP
Sectional Analysis

Section 1 amends AS 12.25.150(a) (relating to arrest) to conform to the provision in the bail reform legislation last year that changed the deadline for bringing a person arrested before a judicial officer from 24 hours to 48 hours of arrest.

Section 2 amends AS 12.70.130 (relating to extraditions) to conform to the provision in the bail reform legislation last year that changed the deadline for bringing a person arrested before a judicial officer from 24 to 48 hours of arrest.

Section 3 changes the penalty for the offense of failure to possess and present upon request to a peace officer a person's driver's license when driving from a misdemeanor, similar to a class B misdemeanor, to an infraction. The offense currently is correctible, and would continue to be correctible. This offense is also currently on the bail schedule (Rule 43.1, Alaska Rules of Administration) at a $50 bail. It is not consistent to have an offense at the same time a misdemeanor, which generally requires a court appearance, and at the same time disposable under the bail schedule for a $50 bail amount. The bill removes this inconsistency.

Section 4 changes the penalty for the crime of failure to carry and present upon request to a peace officer proof of automobile insurance when driving from a class B misdemeanor to an infraction. Current law in statute requires a mandatory fine for this offense of at least $500; at the same time the offense is on the bail schedule for a bail amount of $500. It is correctible under current law and would continue to be correctible under this bill. Again, it is inconsistent to have a class B misdemeanor on the bail schedule for disposition without court appearance. The bill removes the inconsistency, and at the same time retains the bail amount of $500.

Section 5 resolves a similar inconsistency in the penalty for burning a vehicle on the Knik River Public Use Area. In 2006 the legislature created the Knik River Public Use Area. The law authorizes the Department of Natural Resources to adopt regulations governing conduct in the area. AS 41.23.220(a) provides that a person who violates the new law or a regulation under the new law commits a violation. AS 41.23.220(b) requires the Alaska Supreme Court to establish a bail schedule for violations of the statutes and regulations. The law specifically requires that the violations be disposed of without court appearance. One of the regulations adopted prohibits burning a vehicle in the area; the bail was adopted in Supreme Court Order 1711 at $50.

In 2008 the legislature enacted AS 11.46.420, which adopted a new crime, arson in the third degree. This prohibits burning a vehicle on state or municipal land. The penalty for this crime is a class C felony.

These sections correct this inconsistency by excluding burning a vehicle on state land from the prohibitions that are effective in the Knik River Public Use Area.

Section 6 redrafts Rule 5(a)(1), Alaska Rules of Criminal Procedure, to correct a drafting error and to make the rule more readable. The rule was changed last year to extend the deadline from 24 to 48 hours for bringing an arrested person before a judicial officer. This change corrects the drafting error, which currently defines a term that is not used in the rule.

Section 7 notes that the changes included in **Section 5** of the bill have the effect of changing Rule 43.10, Alaska Rules of Administration (the bail schedule) by prohibiting the disposition of cases involving burning a vehicle on state land without a court appearance by mailing to the court a bail amount of $50.

Sections 8 and 9 include applicability and effective date sections.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB175 \A**
() Publish Date

Identifier (file name): HB175-LAW-CRIM-03-04-11
Title: An Act relating to court appearances; arson; and infractions.
Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: House Judicairy Committee
Requester: (H) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager
Phone: 465-5427
Division: Administrative Services
Date/Time: 3/4/11 4:30 PM
Approved by: John J. Burns, Attorney General
Department of Law
Date: 3/4/2011

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 175

Analysis

HB 175 makes two corrections in the law to conform to the changes in the bail statutes adopted last year. It also makes conforming amendments to statutes that are in conflict with the bail schedules in the court rules.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB175**
() Publish Date

Identifier (file name) HB175-DPS-DET-03-04-11
Title: "An Act relating to appearance after arrest, penalties for some some offenses, and amending criminal rules."
Sponsor: Judiciary
Requester: House Judiciary

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Lt. Rodney Dial — Phone: (907) 247-4480
Division: Alaska State Troopers — Date/Time: 3/4/11 11:30 AM
Approved by: Joseph Masters, Commissioner, Department of Public Safety — Date: 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB175
2011 LEGISLATIVE SESSION

Analysis

This legislation would do the following:

Amend AS 12.25.150(a) by changing the requirement to bring arrested persons before a judge or magistrate from the current 24 hours, to 48 hours.

Amends AS 28.15.131 (License to be carried and exhibited on demand) by adding a new subsection stating that violation of this section is an infraction.

Amends AS 28.22.019(c) (Proof of insurance) by reducing violation of this section to an infraction and requiring a mandatory fine of $500.

Amends AS 41.23.220 by defining penalties; except for conduct that is a violation of AS 11.46.420 (Arson Third Degree).

Amends the Alaska Rules of Criminal Procedures, Rule 5(s)(1) regarding appearance before a judge or magistrate.

Amends the Alaska Rules of Criminal Procedures, Sec 7. regarding the disposition of violations, and Sec. 8 regarding applicability of this act.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB175**
() Publish Date

Identifier (file name) HB175-DOC-OC-03-04-11
Title "An Act relating to an appearance before judicial officer after
Sponsor House Judiciary Committee
Requester House Judiciary Committee

Dept. Affected: DOC
Appropriation: Administration & Support
Allocation: Office of the Commissioner
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by Leslie Houston, Director
Division Dept. of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone 465-3339
Date/Time 3/4/11 12:00 PM
Date 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB175

Analysis

This bill provides clarifying changes to statute. The potential impacts of this change was previously identified and accounted for when the orignial legislation passed in 2010. Therefore, this bill has no additional fiscal impact to the Department of Corrections.

Backup - HB 175 #1

jurisdiction is not available, a superior court, district court, or magistrate may designate any other peace officer to serve and execute process. A state peace officer shall serve process in any area that is not within the jurisdiction of a peace officer of a municipality or unincorporated community. A peace officer shall use every reasonable means to serve process issued under this chapter. **A judge may not order a peace officer to serve a petition that has been denied by the court.**

*** Sec. 23.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Appearance Before the Judge or Magistrate.**

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. **Necessary** [UNNECESSARY] delay within the meaning of this paragraph (a) is defined as a period not to exceed **forty-eight** [TWENTY-FOUR] hours after arrest, including Sundays and holidays.

*** Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(2), Alaska Rules of Criminal Procedure, is amended to read:

(2) If

(i) The judge or magistrate commits the arrested person to jail for a purpose other than to serve a sentence, and

(ii) The jail is situated in a different community from the place where the judge or magistrate committed the arrested person to jail, and

(iii) The arrested person is not represented by counsel, and

(iv) The arrested person has not previously had a bail

review, and

(v) The arrested person has no date, time and place established for his or her next court appearance, then the arrested person shall be taken before a judge or magistrate in the community where the jail is located within **forty-eight** [TWENTY-FOUR] hours of the person's detention in that jail

(aa) in order for bail to be reviewed, and

(bb) in order to determine if the person is represented by counsel, and

(cc) in order for [THE] counsel to be appointed, if appropriate.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Admission to Bail.** The defendant in a criminal proceeding is entitled to be admitted to bail pursuant to **AS 12.30.006 - 12.30.080** [AS 12.30.010 -12.30.080].

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(b), Alaska Rules of Criminal Procedure, is amended to read:

(b) **Types of Bonds.** The court may require:

(1) the execution of an unsecured appearance bond in an amount specified, under the criteria set forth in **AS 12.30.011** [AS 12.30.010(a)];

(2) the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash [OR OTHER SECURITY], of a sum not to exceed 10 percent of the amount of the bond;

(3) the execution of a bail bond with sufficient solvent sureties or the deposit of cash; or

(4) the execution of a performance bond in a specified amount and the deposit in the registry of the court of cash [OR OTHER SECURITY].

4.16.160. A license may not display the licensee's ocial security number and is not valid until signed y the licensee. If facilities are not available for the king of the photograph required under this section, the department shall endorse on the license, ie words "valid without photograph."

(b) The department shall provide a method, at the me that an operator's license is issued, by which he owner of a license may make an anatomical gift nder AS 13.52. The method must provide a means y which the owner may cancel the anatomical gift. 'he department shall inform each applicant in writng that, if the applicant executes a gift under AS 3.52 and if the gift is made with the license, the epartment will transmit the information on the icense to a donor registry created under AS 3.50.110. The department shall also direct the pplicant to notify a procurement organization or he department under AS 13.50.140 if the license is lestroyed or mutilated or the gift is revoked under \S 13.52.183. The department shall carry out the equirements of AS 13.50.100 — 13.50.190. (§ 19 ch 78 SLA 1978; am § 2 ch 50 SLA 1993; am § 21 ch 30 SLA 1997; am § 2 ch 40 SLA 2001; am § 7 ch 68 SLA 2004; am § 7 ch 83 SLA 2004; am § 27 ch 24 SLA 2007; am § 34 ch 100 SLA 2008)

Sec. 28.15.120. Expiration. [Repealed, § 19 ch '78 SLA 1978.]

Sec. 28.15.121. Restricted driver's license. a) The department, upon issuing a driver's license, nay for good cause impose restrictions suitable to he licensee's driving ability with respect to special nechanical control devices required on a motor vehicle that the licensee drives. The department nay impose other restrictions applicable to the icensee that it determines to be appropriate to assure the safe operation of a motor vehicle by the icensee.

(b) The department may issue a special restricted icense or may set out restrictions on the usual icense form.

(c) The department may, upon receiving satisfactory evidence of a violation of the restrictions on a icense restricted or issued under this section, suspend the restricted license for a period not to exceed 30 days.

(d) A person may not drive a motor vehicle in violation of the restrictions imposed on a restricted icense. (§ 19 ch 178 SLA 1978)

Sec. 28.15.130. School bus drivers. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.131. License to be carried and exhibited on demand. A licensee shall have the icensee's driver's license in immediate possession at ll times when driving a motor vehicle, and shall present the license for inspection upon the demand of a peace officer or other authorized representative of the Department of Public Safety identified as such to the licensee by the officer or representative. However, a person charged with violating this section may not be convicted if the person produces in court or in the office of the arresting or citing officer, a driver's license previously issued to the person that was valid at the time of the person's arrest or citation. (§ 19 ch 178 SLA 1978; am E.O. No. 99 § 46 (1997))

Sec. 28.15.140. Change of name. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.15.141. Duplicate driver's license. If a valid driver's license issued under this chapter is lost or destroyed, the person to whom the license was issued may, upon payment of the required fee, obtain a duplicate license. A person who recovers an original license for which a duplicate has been issued shall immediately surrender the duplicate to the department. (§ 19 ch 178 SLA 1978)

Sec. 28.15.150. Records. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.151. Records to be kept by the department. (a) The department shall maintain a file of

(1) every driver's license application, license or permit, and duplicate driver's license issued by it;

(2) every license that has been suspended, revoked, canceled, limited, restricted, or denied, and the reasons for those actions;

(3) all accident reports required to be forwarded to the department under this title; and

(4) every disqualification of an individual from operating a commercial motor vehicle.

(b) The department shall also maintain and update within 10 days after receipt by the department a file of all accident reports, abstracts of court records of convictions of vehicle, driver, and traffic offenses, and other information that the department considers necessary to carry out the purposes of this chapter.

(c) The department shall, upon request, subject to the applicable provisions of AS 12.62 and (f) of this section and without charging a fee, furnish (1) a municipal, state, or federal administrative or judicial agency with a certified abstract of the driving record of a driver within 10 days after receipt of the request by the department; and (2) a parent, foster parent, or guardian of a driver who is under 18 years of age and not an emancipated minor an abstract of the driving record of that driver; the department may refuse to release the driver's address to the parent, foster parent, or guardian if the department determines that the release of the driver's address poses a threat to the health or safety of the driver. The abstract must include a listing of accidents in

(9) "season" means one calendar year beginning October 1 and ending September 30;

(10) "snowmobile" means a self-propelled vehicle primarily designed or altered for travel on snow or ice when supported in part by skis, belts, or cleats; "snowmobile" does not include machinery used strictly for the grooming of snowmobile trails or ski slopes. (§ 1 ch 134 SLA 1998)

Chapter 40.

General Provisions.

Sec. 28.40.050. [Renumbered as AS 28.90.010.]

Sec. 28.40.060. [Renumbered as AS 28.90.020.]

Sec. 28.40.070. [Renumbered as AS 28.90.030.]

Sec. 28.40.072. [Renumbered as AS 28.90.035.]

Sec. 28.40.075. [Renumbered as AS 28.90.040.]

Sec. 28.40.100. [Renumbered as AS 28.90.990.]

Sec. 28.40.110. [Renumbered as AS 28.90.995.]

Chapter 90.

General and Miscellaneous Provisions.

Article

1. Miscellaneous Provisions (§§ 28.90.010 — 28.90.040)
2. General Provisions (§§ 28.90.990, 28.90.995)

Article 1.

Miscellaneous Provisions.

Section

10. Penalties for violations of law, regulations, and municipal ordinances
20. Breath test result validity
30. Fines for offenses committed within highway work zones and traffic safety corridors doubled
35. Prohibition of damage claims regarding highway work zone signs
40. Administration of highway safety program

Sec. 28.90.010. Penalties for violations of law, regulations, and municipal ordinances. (a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(b) A person convicted of a misdemeanor for a violation of a provision of this title for which another penalty is not specifically provided is punishable by a fine of not more than $500, or by imprisonment for not more than 90 days, or by both. In addition, the privilege to drive or the registration of vehicles may be suspended or revoked.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordinance does not correspond to a provision of this title, is guilty of an infraction and is punishable by a fine not to exceed $300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the loss of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221 — 28.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

(e) *[Repealed, § 5 ch 85 SLA 1987.]* (§ 50-1-8 ACLA 1949; am § 12 ch 241 SLA 1976; am §§ 22, 23 ch 144 SLA 1977; am § 5 ch 85 SLA 1987)

Sec. 28.90.020. Breath test result validity. Except for an offense under AS 28.35.280, if an offense described under this title requires that a chemical test of a person's breath produce a particular result, and the chemical test is administered by a properly calibrated instrument approved by the Department of Public Safety, the result described by statute is not affected by the instrument's working tolerance. (§ 17 ch 143 SLA 1996)

Sec. 28.90.030. Fines for offenses committed within highway work zones and traffic safety corridors doubled. (a) Whenever a person violates a provision of this title or a regulation adopted under the authority of this title within a highway work zone or traffic safety corridor, notwithstanding the amount of the fine or the maximum fine set under this title, the fine, or maximum fine, is double the amount provided in this title.

(b) Fines imposed and collected under this section for offenses that are committed in a traffic safety corridor shall be separately accounted for under AS 37.05.142.

(c) Notwithstanding the requirements of (b) of this section and AS 37.05.142, the Alaska Court System shall deposit fines collected under this section for offenses committed in a traffic safety corridor in the general fund if the fine is collected at a court location where separate accounting for traffic safety corridor fines is not achievable.

(d) The administrative director of the Alaska Court System shall notify the Department of Administration

Healy	HHL
Hooper Bay (closed)	HHB
Kasigluk (closed)	HKS
McGrath	HMC
Mekoryuk (closed)	HME
Mt. Village (closed)	HMV
Nenana	HNE
Quinhagak (closed)	HQU
Rampart (closed)	HRA
Scammon Bay (closed)	HSB
St. Mary's	HSM
Tanana	HTA
Tok	HTO
Tununak (closed)	HTU

(Adopted by SCO 478 effective August 17, 1981; amended by SCO 541 effective October 1, 1982; by SCO 564 effective April 4, 1983; by SCO 565 effective May 3, 1983; by SCO 617 effective May 15, 1985; by SCO 672 effective June 15, 1986; by SCO 1034 effective June 14, 1990; by SCO 1035 effective nunc pro tunc February 1, 1991; by SCO 1132 effective July 15, 1993; and by SCO 1493 effective September 26, 2002)

Cross References

CROSS REFERENCE: Administrative Bulletins No. 7 and 7.1 (Case Numbering)

Rule 42. Docketing. (Reserved).

Note: Former Rule 42 was deleted and the rule was reserved by SCO 1481, effective October 15, 2002.

Rule 43. Bail Forfeiture Schedules.

(a) **Procedure for Adopting Bail Forfeiture Schedule.** The supreme court will consider adopting a bail forfeiture schedule only when so authorized by statute. The agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director its recommendations for a proposed schedule, listing offenses by number, describing the offenses, and proposing a bail forfeiture amount. The proposed schedule shall be accompanied by commentary explaining the basis for the agency's recommendation, and by a copy of the proposed citation form. The supreme court shall consider the recommendation, and shall determine whether to adopt a bail forfeiture schedule, and if so, shall determine which offenses are amenable to disposition by bail forfeiture and whether the bail forfeiture amounts are appropriate. The administrative director shall notify the agency when an order adopting the schedule is issued.

(b) **Procedures for Amending Bail Forfeiture Schedules.**

(1) By July 1 of each year, each agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director of the Alaska Court System a report and recommendation concerning whether the schedule should be amended to reflect any legislative and regulatory changes, or whether policy considerations warrant revisions. Any proposed amendments shall be accompanied by commentary. The supreme court shall consider the agency's recommendations and determine by October 1 whether to adopt them. If it will be impractical for the court to respond by that date, the administrative director will inform the agency of the date by which the response can be expected. The administrative director shall notify the agency when an order amending the schedule is issued.

(2) In addition to the provisions of paragraph (b)(1), an agency may request a bail forfeiture schedule amendment whenever the need arises.

(3) Any person or agency may request a bail forfeiture schedule amendment at any time by proposing an amendment in writing to the chief justice or to the administrative director.

(Adopted by SCO 651 effective July 1, 1985; amended by SCO 1180 effective July 15, 1995)

Rule 43.1. Traffic Bail Forfeiture Schedule.

Pursuant to AS 28.05.151, the following vehicle and traffic offenses are amenable to disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Effective April 30, 1999, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a highway work zone, as that term is defined in AS 28.90.990 and 13 AAC 40.010(b). Effective May 27, 2006, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a traffic safety corridor, as that term is defined in AS 28.90.990.

Pursuant to AS 28.15.131 and 13 AAC 04.008, a citation for an offense listed as "Corr" must be dismissed (or voided) if proof of correction is presented to an inspection official within the time allowed. If the required repair is not made, the offense may be disposed of without court appearance upon payment and forfeiture of the bail amount listed.

Effective August 27, 1998, as a condition of the disposition of an offense without appearance, the defendant shall pay the surcharge prescribed in AS 12.55.039 in addition to the bail forfeiture amount listed below. A court may allow a defendant who is unable to pay the surcharge to perform community work under AS 12.55.055(e) in lieu of the surcharge. The surcharge must be deposited into the general fund in a separate account designated for such surcharges.

Effective September 1, 2003, pursuant to AS 28.05.151(e), an offense listed on this schedule may not be disposed of without court appearance if the offense is an

#3

Statute or Regulation	Description of Offense	Bail
AS 11.46.462	Unlawful possession of an official traffic control device	$ 200
AS 19.10.300(a)	Commercial vehicle (intrastate): failure to maintain minimum insurance	500
AS 28.05.095(a)	Failure to wear safety belt (age 16 and older: passenger or driver)	15
AS 28.05.095(b)	Failure to provide child safety device. (Note: First charge may be dismissed by court upon proof of correction, but second or subsequent charge is not dismissible)	50
AS 28.05.095(b)	Failure to properly secure child in child safety device	50
AS 28.05.095(d)	Illegal removal of vehicle seatbelt	15
AS 28.10.451	Failure to register vehicle	90
AS 28.10.461	Plates/decals/permits must be properly attached and displayed	75
AS 28.10.461	Failure to carry certificate of registration in vehicle	40
AS 28.10.471	Operating vehicle w/expired registration	90
AS 28.10.471	Operating a vehicle w/suspended/revoked registration	300
AS 28.15.011(b)	Driving with license expired less than one year	75
AS 28.15.021(2)	Driving with out-of-state license after 90 days in state	75
AS 28.15.021(6)	Driving a motor-driven cycle with out-of-state driver's license after 90 days in state	75
AS 28.15.057(b)	Operating a vehicle in violation of a provisional license	200
AS 28.15.131	License to be carried and exhibited on demand	Corr/50
AS 28.15.281(a)	Unlawful use of a driver's license	200
AS 28.22.019	Proof of insurance to be carried and exhibited on demand	Corr/500
AS 28.35.029	Open container of alcoholic beverage in motor vehicle	200
AS 28.35.031(c)	Refusal to submit to a preliminary breath test	100
AS 28.35.135(b)	Failure to notify dept. of change of name/address	25
AS 28.35.140(a)	Obstructing or blocking traffic	75
AS 28.35.140(b)	Turn off required when 5 or more vehicles are behind	100
AS 28.35.145(c)	Ownership of a vehicle which illegally passes a school bus	75
AS 28.35.155	Operating vehicle w/studded/chained tires when prohibited	Corr/50
AS 28.35.180	Disobedience to signal of officer regulating traffic	75
AS 28.35.185(b)(2)	Overtaking and passing a parked emergency vehicle – if no personal injury	150
AS 28.35.235	Unauthorized use of parking reserved for persons with disabilities -First offense -Second or more offense	 125 250
AS 28.35.235	Unauthorized use of parking reserved for persons with disabilities while displaying special license plate or permit -First offense -Second or more offense	 250 500
AS 28.35.251	Contained or confined loads	300
AS 28.35.253	Anti-spray devices required	Corr/60
AS 28.35.261	Low-speed vehicle on highway with limit above 35 mph	100
AS 28.39.010	Operating an unregistered snowmobile	50
AS 28.39.040(e)	Failure to display snowmobile numbered registration decal	50
AS 28.39.040(f)	Failure to carry snowmobile certificate of registration or provide identifying information	50
02 AAC 90.030	School bus driver permit must be carried and displayed upon demand	Corr/50
02 AAC 90.200	Unlawful use of classified license	50
13 AAC 02.005(a)	Disobedience to traffic control devices	100
13 AAC 02.010(a)(1)(A)-(B)	FTY to vehicle in intersection after green signal	150
13 AAC 02.010(a)(1)(A)-(B)	FTY to pedestrian in crosswalk after green signal	150
13 AAC 02.010(a)(3)(A)	Failure to stop for steady red traffic signal	150
13 AAC 02.010(a)(3)(B)	FTY when turning on red signal	150
13 AAC 02.010(a)(3)(B)	Turning on red signal when prohibited	75
13 AAC 02.010(a)(3)(C)	Failure to stop for steady red arrow	150
13 AAC 02.010(b)	Position of vehicle stopping at intersection	75
13 AAC 02.015	Failure to obey pedestrian control signal	10

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Healy	4HE
Hooper Bay (closed)	4HB
Kasigluk (closed)	4KS
McGrath	4MC
Mekoryuk (closed)	4ME
Mt. Village (closed)	4MV
Nenana	4NE
Quinhagak (closed)	4QU
Rampart (closed)	4RA
Scammon Bay (closed)	4SB
St. Mary's	4SM
Tanana	4TA
Tok	4TO
Tununak (closed)	4TU

(Adopted by SCO 478 effective August 17, 1981; amended by SCO 541 effective October 1, 1982; by SCO 564 effective April 4, 1983; by SCO 565 effective May 3, 1983; by SCO 617 effective May 15, 1985; by SCO 672 effective June 15, 1986; by SCO 1034 effective June 14, 1990; by SCO 1035 effective nunc pro tunc February 1, 1991; by SCO 1132 effective July 15, 1993; and by SCO 1493 effective September 26, 2002)

Cross References

CROSS REFERENCE: Administrative Bulletins No. 7 and 7.1 (Case Numbering)

Rule 42. Docketing. (Reserved).

Note: Former Rule 42 was deleted and the rule was reserved by SCO 1481, effective October 15, 2002.

Rule 43. Bail Forfeiture Schedules.

(a) **Procedure for Adopting Bail Forfeiture Schedule.** The supreme court will consider adopting a bail forfeiture schedule only when so authorized by statute. The agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director its recommendations for a proposed schedule, listing offenses by number, describing the offenses, and proposing a bail forfeiture amount. The proposed schedule shall be accompanied by commentary explaining the basis for the agency's recommendation, and by a copy of the proposed citation form. The supreme court shall consider the recommendation, and shall determine whether to adopt a bail forfeiture schedule, and if so, shall determine which offenses are amenable to disposition by bail forfeiture and whether the bail forfeiture amounts are appropriate. The administrative director shall notify the agency when an order adopting the schedule is issued.

(b) **Procedures for Amending Bail Forfeiture Schedules.**

(1) By July 1 of each year, each agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director of the Alaska Court System its written recommendation concerning whether the schedule must be amended to reflect any legislative and regulatory changes, or whether policy considerations warrant revisions. Any proposed amendments shall be accompanied by commentary. The supreme court shall consider the agency's recommendations and determine by October 1 whether to adopt them. If it will be impractical for the court to respond by that date, the administrative director will inform the agency of the date by which the response can be expected. The administrative director shall notify the agency when an order amending the schedule is issued.

(2) In addition to the provisions of paragraph (b)(1), an agency may request a bail forfeiture schedule amendment whenever the need arises.

(3) Any person or agency may request a bail forfeiture schedule amendment at any time by proposing an amendment in writing to the chief justice or to the administrative director.

(Adopted by SCO 651 effective July 1, 1985; amended by SCO 1180 effective July 15, 1995)

Rule 43.1. Traffic Bail Forfeiture Schedule.

Pursuant to AS 28.05.151, the following vehicle and traffic offenses are amenable to disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Effective April 30, 1999, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a highway work zone, as that term is defined in AS 28.90.990 and 13 AAC 40.010(b). Effective May 27, 2006, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a traffic safety corridor, as that term is defined in AS 28.90.990.

Pursuant to AS 28.15.131 and 13 AAC 04.008, a citation for an offense listed as "Corr" must be dismissed (or voided) if proof of correction is presented to an inspection official within the time allowed. If the required repair is not made, the offense may be disposed of without court appearance upon payment and forfeiture of the bail amount listed.

Effective August 27, 1998, as a condition of the disposition of an offense without appearance, the defendant shall pay the surcharge prescribed in AS 12.55.039 in addition to the bail forfeiture amount listed below. A court may allow a defendant who is unable to pay the surcharge to perform community work under AS 12.55.055(c) in lieu of the surcharge. The surcharge must be deposited into the general fund in a separate account designated for such surcharges.

Effective September 1, 2003, pursuant to AS 28.05.151(e), an offense listed on this schedule may not be disposed of without court appearance if the offense is in

#4

property that is damaged must be a building, while under the first degree provision any property can be damaged. However, while the first degree provision requires that a person be placed in danger of injury, a similar requirement does not exist under the second degree statute.

An affirmative defense to arson in the second degree is provided in subsection (b). The defense recognizes that in some instances the most economical method of removing a building is to burn it. Such conduct is exempted from the coverage of the statute if the defendant establishes that no other person had an interest in the property, or if they did, that they consented to the burning, and that the burning was for a lawful purpose. Burning a building to defraud an insurance company would not be a burning for a lawful purpose. Note that a similar defense does not apply to the first degree statute. If the burning recklessly places another person in danger of serious physical injury, the defendant has committed first degree arson even if he acted for a lawful propose.

From 1983 House Journal at 1250 & 1699 (May 10 & June 13, 1983) and 1983 Senate Journal at 106-107 (February 1, 1983):

The [House Judiciary] Committee does not intend that the mere presence at the scene of a fire of a firefighter or other emergency responder would be sufficient in all cases to constitute danger of serious physical injury necessary to establish the crime of arson in the first degree. The existence of the necessary danger will be an issue of fact which must be determined by the trier of fact in each individual case.

CROSS REFERENCES

Definitions of "property," "serious physical injury," "building," "affirmative defense" - AS 11.81.900(b)
Definition of "intentionally," "recklessly" - AS 11.81.900(a)
Criminal mischief - AS 11.46.480 — 11.46.486
Criminal possession of explosives - AS 11.61.240

Original Code Provision - AS 11.20.010; 11.20.020; AS 11.20.030; AS 11.20.040; AS 11.20.060; AS 11.20.070.

TD: III, 69-73.

Sec. 11.46.420. Arson in the third degree. (a) A person commits the crime of arson in the third degree if the person intentionally damages a motor vehicle by starting a fire or causing an explosion while that vehicle is located on state or municipal land.

(b) Arson in the third degree is a class C felony. (§ 1 ch 68 SLA 2008)

Sec. 11.46.427. Criminally negligent burning in the first degree. (a) A person commits the crime of criminally negligent burning in the first degree if the person

(1) violates AS 11.46.430; and

(2) within the preceding 10 years, has been convicted on two separate occasions of violating AS 11.46.400 — 11.46.430 or AS 41.15.150 or a law or ordinance of this or another jurisdiction with elements similar to those offenses.

(b) Criminally negligent burning in the first degree is a class C felony. (§ 15 ch 75 SLA 2008)

Sec. 11.46.430. Criminally negligent burning in the second degree. (a) A person commits the crime of criminally negligent burning in the second degree if with criminal negligence the person damages property of another by fire or explosion.

(b) Criminally negligent burning in the second degree is a class A misdemeanor. (§ 4 ch 166 SLA 1978; am § 16 ch 75 SLA 2008)

COMMENTARY

From Senate Journal Supp. No. 47, at 47 (June 12, 1978):

The crime of criminally negligent burning, a class A misdemeanor, covers the criminally negligent damaging of the property of another by fire or explosion. The person who falls asleep in a hotel bed with a cigarette in his hand, for example, would violate the statute if the bed caught on fire. If physical injury or death results, prosecution would be brought under the Code's homicide or assault statutes.

CROSS REFERENCES

Definition of "property" - AS 11.81.900(b)
Definition of "property of another" - AS 11.46.990
Definition of "criminal negligence" - AS 11.81.900(a)
Arson in the first and second degree - AS 11.46.400, 11.46.410

Original Code Provision - AS 11.15.340

TD: III, 73-74.

Sec. 11.46.450. Failure to control or report a dangerous fire. (a) A person commits the crime of failure to control or report a dangerous fire if the person knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when the person can do so without substantial personal risk, or to give a prompt fire alarm if

(1) the person knows that the person is under an official, contractual, or other legal duty to prevent or combat the fire; or

(2) the fire was started by the person, with the person's consent, or on property in the person's custody or control.

(b) Failure to control or report a dangerous fire is a class A misdemeanor. (§ 4 ch 166 SLA 1978)

COMMENTARY

From Senate Journal Supp. No. 47, at 47-48 (June 12, 1978):

Existing AS 41.15.110(a) creates an affirmative duty on a person to exercise due care to prevent the uncontrolled spread of a fire when he knows of a fire or sets a fire on forest lands, owned, possessed or controlled by him.

Section 4: Lots 9 — 11
Section 5: SW¼SW¼
Section 7: Lot 4, S½NE¼, NE¼SE¼, S½SE¼
Section 8: E½, NE¼NW¼, S½NW¼, SW¼
Section 9: Lots 1 — 2, E½NE¼, SW¼NE¼, W½NW¼, SE¼NW¼, SW¼
W½NE¼SE¼, NW¼SE¼
Section 10: NW¼NW¼
Section 11: Lots 1 — 5
Section 12: Lots 2 — 3
Section 17: NW¼NW¼
Section 18: N½NE¼, SW¼NE¼, W½SE¼NE¼, NE¼SE¼SE¼NE¼, SE¼NW¼
NE¼SW¼, SE¼;
(2) Township 1 North, Range 2 West, Fairbanks Meridian
Section 13: SE¼, E½E½E½SW¼
Section 23: NE¼SW¼, W½SE¼, W½SE¼SE¼, SE¼SE¼SE¼
W½NE¼SE¼SE¼
Section 24: E½
Section 26: W½W½NW¼NW¼
Section 27: N½NE¼NE¼, SE¼NE¼NE¼, E½SW¼NE¼NE¼.
(§ 1 ch 48 SLA 1990; am § 5 ch 9 SLA 1994)

Sec. 41.23.180. Purpose of AS 41.23.180 — 41.23.230. The purpose of AS 41.23.180 — 41.23.230 is to establish the area described in AS 41.23.230 as the Knik River Public Use Area. The Knik River Public Use Area is established to

(1) perpetuate and enhance

(A) general public recreation;

(B) public enjoyment of fish and wildlife;

(2) protect and maintain migratory waterfowl nesting areas; habitats for moose, Dall sheep, and brown bear; and other fish and wildlife habitat so that traditional public use of fish and wildlife populations may continue;

(3) provide an area for the public to enjoy the full spectrum of public uses, including maintenance and enhancement of off-road motorized vehicle and nonmotorized recreational opportunities;

(4) allow

(A) continued motorized access for miners and owners of private property in the Knik River Public Use Area; and

(B) additional public uses of the area determined by the commissioner to be compatible with this section. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.190. Management. (a) The commissioner is responsible for the management of the land and mineral estate within the Knik River Public Use Area consistent with the purposes of AS 41.23.180. After adequate public hearings, the commissioner may designate incompatible uses and shall adopt and may revise a management plan for the Knik River Public Use Area. The management plan must include provisions for the enforcement of the plan and compliance with the requirements of the plan.

(b) The commissioner of fish and game, the Board of Fisheries, and the Board of Game are responsible for the management of fish and game resources and public use of fish and wildlife in the Knik River Public Use Area consistent with the purposes of AS 41.23.180.

(c) The Knik River Public Use Area may not be managed as a unit of the state park system.

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(d) The commissioner shall identify wetland areas within the Knik River Public Use Area and provide for the protection and use of the wetland areas in the management plan. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.200. Incompatible uses. (a) Except as provided in this section, the commissioner may prohibit or restrict uses determined to be incompatible with the purposes of the Knik River Public Use Area under AS 41.23.180 within the state-owned land and water described in AS 41.23.230.

(b) Nothing in AS 41.23.180 — 41.23.230 prohibits the Department of Fish and Game from engaging in rehabilitation, enhancement, and development of fish and wildlife habitat within an area described in AS 41.23.230 that is consistent with the purposes stated in AS 41.23.180.

(c) The commissioner may not restrict

(1) lawful fishing, hunting, or trapping rights allowed under a regulation of the Board of Fisheries or the Board of Game in the Knik River Public Use Area; or

(2) the use of weapons, including firearms, in the Knik River Public Use Area except in locations where the commissioner determines that the use of weapons constitutes a threat to public safety.

(d) The commissioner shall

(1) allow the Knik River Public Use Area to be used for activities that are compatible with the reasons for establishing the public use area in AS 41.23.180 and include all-terrain vehicles, aircraft, watercraft, airboats, snowmobiling, horseback riding, hiking, bicycling, dog sledding, cross-country skiing, skijoring, camping, hunting, fishing, wildlife viewing, photography, and, where permitted, mineral exploration and mining; and

(2) recognize the existing off-road motor vehicle trails and the access those trails provide to areas in the Knik River Public Use Area, make accommodations that will provide the shortest possible route to avoid critical habitat, conduct trail rehabilitation in a way that minimizes damage, maintain and enhance off-road motor vehicle options and opportunities in the Knik River Public Use Area, and provide for increased use of the public use area.

(e) The commissioner of public safety and the commissioner of fish and game shall have necessary access for fish and game management, research, and enforcement purposes. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.210. Enforcement authority. (a) In the Knik River Public Use Area described in AS 41.23.230, the following persons are peace officers of the state for the purpose of enforcing the provisions of AS 41.23.180 — 41.23.230 and regulations adopted under AS 41.23.180 — 41.23.230:

(1) an employee of the department or other person authorized by the commissioner;

(2) a peace officer, as that term is defined in AS 01.10.060.

(b) A person designated in (a) of this section may, when enforcing the provisions of AS 41.23.180 — 41.23.230 or a regulation adopted under AS 41.23.180 — 41.23.230,

(1) execute a warrant or other process issued by an officer or court of competent jurisdiction;

(2) administer or take an oath, affirmation, or affidavit; and

(3) issue a citation or arrest a person who violates a provision of AS 41.23.180 — 41.23.230 or a regulation adopted under AS 41.23.180 — 41.23.230.

(c) A citation issued under (b) of this section must comply with the provisions of AS 12.25.175 — 12.25.230. (§ 1 ch 83 SLA 2006; am §§ 44, 45 ch 29 SLA 2010)

Effect of amendments. — The 2010 amendment, effective July 1, 2010, in (b)(3), added "issue a citation or" preceding "arrest a person"; added (c).

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Editor's notes. — Under § 61, ch. 29, SLA 2010, the 2010 amendment of (b) and enactment of (c) of this section apply "to all citations issued . . . for violations occurring on or after July 1, 2010."

Sec. 41.23.220. Penalty. (a) A person who violates a provision of AS 41.23.180 — 41.23.230 or a regulation adopted under AS 41.23.180 — 41.23.230 is guilty of a violation as defined in AS 11.81.900.

(b) The supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.230. Knik River Public Use Area. Subject to valid existing rights, state-owned land and water and the state land and water acquired in the future that is within the boundaries described in this section are designated as the Knik River Public Use Area, are reserved for all uses compatible with their primary function as public use land, and are assigned to the department for control and management:

(1) Township 15 North, Range 4 East, Seward Meridian;

(2) Township 15 North, Range 5 East, Seward Meridian;

(3) Township 15 North, Range 6 East, Seward Meridian;

(4) Township 15 North, Range 7 East, Seward Meridian
Section 3: NW¼NW¼
Section 4: N½NE¼, N½NW¼
Section 5: N½NE¼, NW¼
Section 6: SW¼SE¼, N½SE¼, SW¼, N½
Section 7: SW¼NW¼, N½NW¼;

(5) Township 16 North, Range 2 East, Seward Meridian
Section 1: Portions located below the ordinary high water of Knik River
Section 2: Portions located below the ordinary high water of Knik River
Section 3: Portions located below the ordinary high water of Knik River;

(6) Township 16 North, Range 3 East, Seward Meridian
Sections 1 — 3
Section 4: Portions located below the ordinary high water of Knik River
Section 5: Portions located below the ordinary high water of Knik River
Section 6: Portions located below the ordinary high water of Knik River
Section 9: Portions located below the ordinary high water of Knik River
Section 10: Portions located below the ordinary high water of Knik River
Sections 11 — 13
Section 14: Portions located below the ordinary high water of Knik River
Section 23: Portions located below the ordinary high water of Knik River
Section 24: Portions located below the ordinary high water of Knik River;

(7) Township 16 North, Range 4 East, Seward Meridian;

(8) Township 16 North, Range 5 East, Seward Meridian;

(9) Township 16 North, Range 6 East, Seward Meridian;

(10) Township 16 North, Range 7 East, Seward Meridian

Section 6: NW¼SE¼, S½SE¼, W½
Section 7
Sections 17 — 20
Section 28: NW¼SW¼, S½SW¼
Sections 29 — 32
Section 33: S½NE¼, SE¼, W½
Section 34: SE¼SW¼, W½SW¼;
(11) Township 17 North, Range 2 East, Seward Meridian
Section 36: Portions located below the ordinary high water of Knik River;
(12) Township 17 North, Range 3 East, Seward Meridian
Sections 1 — 5
Sections 9 — 16
Section 17: S½
Sections 20 — 29
Section 31: NE¼NE¼, S½NE¼, SE¼, SW¼ located below the ordinary high water of Knik River
Sections 32 — 36;
(13) Township 17 North, Range 4 East, Seward Meridian;
(14) Township 17 North, Range 5 East, Seward Meridian;
(15) Township 17 North, Range 6 East, Seward Meridian;
(16) Township 18 North, Range 6 East, Seward Meridian. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.240. Purpose and establishment of the Kodiak Narrow Cape Public Use Area. The purpose of AS 41.23.240 — 41.23.270 is to protect, maintain, enhance, and perpetuate the present use of the area described in AS 41.23.270 as the Kodiak Narrow Cape Public Use Area. The Kodiak Narrow Cape Public Use Area is established to

(1) protect, maintain, perpetuate, and enhance year-round general public recreation;

(2) protect, maintain, perpetuate, and enhance public enjoyment and use of fish and wildlife;

(3) allow for continued use of the area for grazing and other purposes authorized in a land use plan adopted by the commissioner or by law;

(4) allow additional public uses of the area in a manner compatible with the purposes specified in (1), (2), and (3) of this section. (§ 1 ch 53 SLA 2007)

Effective dates. — Chapter 53, SLA 2007, which enacted this section, became effective October 10, 2007.

Sec. 41.23.250. Management. (a) The commissioner is responsible for the management of the surface and subsurface estate of the Kodiak Narrow Cape Public Use Area. After adequate public hearings, the commissioner may adopt and may revise a management plan for the Kodiak Narrow Cape Public Use Area. The commissioner shall provide a copy of the management plan and each revision to the chairs of the resource committees of the legislature within 30 days after its adoption or revision. The commissioner shall consult with the Department of Fish and Game in the adoption and revision of the management plan.

(b) Subject to valid existing rights, including existing rights for grazing leases and operations and the interagency land management agreement between the department and the Alaska Aerospace Corporation for the Kodiak Launch Complex, the commissioner may not dispose of the surface estate in state land within the Kodiak Narrow Cape Public Use Area.

(SCO 1429 effective April 15, 2001; amended by SCO 1583 effective August 11, 2005)

Rule 43.9. Skiing Bail Forfeiture Schedule.

Pursuant to AS 05.45.100(i), the following offenses listed in AS 05.45.100(c) and (g) may be disposed of without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the fine imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered or processed as a criminal case.

State or Regulation	Description of Offense	Bail
AS 45.100(c)(1)	Skiing on closed slope or trail	$ 150
AS 5.45.100(c)(2)	Stopping device required	50
AS 05.45.100(c)(3)	Crossing uphill track of surface lift	50
AS 05.45.100(c)(4)	Skiing or riding lift under influence of alcohol or drugs	150
AS 05.45.100(c)(5)	Failure to ski within ski area boundaries	150
AS 05.45.100(g)	Failure to remain at scene of accident	150

(Adopted by SCO 1557 effective October 15, 2004)

Rule 43.10. Knik River Public Use Area Bail Forfeiture Schedule.

Pursuant to AS 41.23.220(b), the following offenses committed within the Knik River Public Use Area (KRPUA) shall be disposed of without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the fine imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Regulation	Description of Offense	Bail
11 AAC 96.016(b)(1)	Failure to obtain permit for activity listed in 11 AAC 96.010	$150
11 AAC 96.016(b)(2)	Failure to register commercial recreation use	50
11 AAC 96.016(b)(4)	Commercial harvest of non-timber forest products without a permit	100
11 AAC 96.016(c)(1)	Leaving vehicle unattended more than 72 hours	300
11 AAC 96.016(c)(2)	Transporting non-functional vehicle into the area	400
11 AAC 96.016(c)(3)	Operating a vehicle over 10,000 pounds without prior written authorization	150
11 AAC 96.016(c)(4)	Unauthorized operation of a vehicle resulting in disturbance of wetlands or organic mat to a depth greater than 6 inches	300
11 AAC 96.016(c)(5)	Unauthorized fire	50
11 AAC 96.016(c)(6)	Burning a wooden pallet, vehicle, structure, or other unauthorized object or material	50
11 AAC 96.016(c)(7)	Place, dump, or discard waste or refuse	100
11 AAC 96.016(c)(8)	Place, dump, discard, or release hazardous substances	300
11 AAC 96.016(c)(9)	Unauthorized construction, maintenance or abandonment of a structure	200
11 AAC 96.016(c)(10)	Unauthorized cutting, collecting, or harvesting of trees larger than 5-inch diameter	75
11 AAC 96.016(c)(11)	Erecting a camp, structure, or facility for more than 14 consecutive days without authorization	100
11 AAC 96.016(c)(12)	Discharging a firearm at unauthorized target	50
11 AAC 96.016(c)(13)	Discharging a firework	50
11 AAC 96.016(c)(14)	Discharging a firearm in prohibited area	75
11 AAC 96.016(c)(15)	Repeatedly approaching fish or wildlife, altering animal's behavior	300
11 AAC 96.016(c)(16)	Unauthorized construction, development, widening, brushing, or creating road or trail	100
11 AAC 96.016(c)(17)	Damage, deface, destroy, or remove public property	300

(Adopted by SCO 1711 effective May 15, 2009)

Rule 43.11. Weights and Measures Bail Forfeiture Schedule.

Pursuant to AS 45.75.133, the following offenses are appropriate for disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Statute	Description of Offense	Bail
AS 45.75.380(a)(1)	Use of incorrect weight or measure	$ 250
AS 45.75.380(a)(2)	Use of unsealed weight or measure	250
AS 45.75.380(a)(3)	Failure to dispose of rejected weight or measure	100
AS 45.75.380(a)(4)	Removal of weights & measure seal or tag	100
AS 45.75.380(a)(5)	Offers for sale short-weight/short-measure	500
AS 45.75.380(a)(6)	Fraudulent buying with weight or measure	500
AS 45.75.380(a)(7)	Commodity sales contrary to law or regulation	500
AS 45.75.380(a)(8)	Failure to provide customer display	100
AS 45.75.380(a)(9)	Obstruction of inspector	500

(Adopted by SCO 1735 effective July 1, 2010)

Rule 44. Rulemaking.

(a) **Uniform Policy.** The supreme court shall make and promulgate rules governing administration of all courts, and practice and procedure in civil and criminal cases in all courts. The rules shall be uniform throughout the Alaska Court System.

March 9, 2011

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The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
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Re: House Bill 175
ACLU Review of Legal Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony with respect to House Bill 175.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that respect, we wish to advise you of constitutional issues with the Bill.

Last year, HB 324 was passed (26th Legislature, Chapter No. 19, SLA 2010, Effective Date: July 1, 2010), amending Alaska Rule of Criminal Procedure 5 to permit a new arrestee to be held for up to 48 hours before the initial appearance before a judge or magistrate, rather than the 24 hour period which had long been the law. HB 175 would create consistency between the amended rule and the statute relating to pretrial detention.

Requirement for Hearing Without Unreasonable Delay

Under *Gerstein v. Pugh*, a probable cause hearing must be held without unreasonable delay. 420 U.S. 103 (1975). After *Gerstein*, a standard of 24 hours was adopted by most states and most circuits. Years later, a narrowly divided US Supreme Court stated that the initial appearance must be made only within 48 hours. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). However, *Riverside* does not bind the states in their interpretation of their own constitutions.

In one accounting of state responses to *Gerstein*, most states had concluded that 24 hours was the appropriate term of detention before appearing before a magistrate or judge, and only seven states explicitly permitted more than 24 hours prior to an initial hearing. *Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 333-34 (Mass. 1993).

Since Alaska had guaranteed a 24-hour window for initial appearances for 18 years since the *Riverside* decision, the state courts may be hard pressed to see why a 48-hour window would not likely permit "unreasonable delay." The Alaska courts have not yet had a chance to rule on the dimensions of the "speedy trial" provision of Article I, section 11 as it relates to initial appearances, since Rule 5 has long guaranteed a 24-hour window of appearance. The Alaska Supreme Court could very well decide that the state constitutional provisions relating to speedy trial and due process require no more than a 24-hour window prior to initial appearance, just as the Massachusetts Supreme Court did in *Jenkins*.

Given that the currently existing rules of criminal procedure already provide an exception for defendants arrested far from urban centers and allow the prosecution to request a delay to gather more information where necessary for a bail hearing, the state's success over the last 18 years in providing an initial appearance within 24 hours strongly suggests that a delay of more than 24 hours would represent unnecessary delay, making the statute unconstitutional.

Contribution to Prison Over-Crowding, Increased Costs

The Legislature should also take note of the fact that **almost half of all Alaska prisoners are being held pretrial**, typically constituting 46 to 48% of all prisoners in Alaskan institutions. The high rate of pre-trial detention contributes substantially to the state of overcrowding in Alaska prisons and the need to build more of the prisons that cost our state dearly. Consider that the Department of Law reports that almost 27,000 new criminal cases were filed last year – roughly 6,000 felony cases and roughly 21,000 misdemeanor cases. If every one of those 27,000 arrests results in a single extra day in custody, that increase of 27,000 prisoner-days would impose a similar burden in on the correctional system as 74 prisoners spending a year in prison.

Every prisoner-year in custody costs roughly $45,000. **The cost of additional incarceration from such the policy change contemplated in HB 175 could cost up to $3.3 million in increased costs every year**, just by adding a single day of initial incarceration for each arrest.

Extension of the post-arrest time that a prisoner can be kept in custody without any bail will merely serve to increase our prison population unnecessarily, mostly by increased incarceration of prisoners accused only of misdemeanors.

The Legislature should reverse course and return to the 24-hour window Alaska observed for decades. We are not aware of any evidence of a single incident in which a prisoner was released wrongfully because of any limitation imposed by the 24-hour window before the initial appearance. Locking up thousands of people accused of misdemeanors for longer periods of time and spending millions of dollars to keep our prisons crowded is not good public policy.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
Representative Max Gruenberg, Representative_Max_Gruenberg@legis.state.ak.us
Representative Lindsey Holmes, Representative_Lindsey_Holmes@legis.state.ak.us
Representative Mike Chenault, Representative_Mike_Chenault@legis.state.ak.us

27-LS0579\A.1
Gardner
3/14/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 175

Page 3, following line 18:

Insert a new bill section to read:

"* **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected."

Renumber the following bill section accordingly.

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Senate Judiciary Committee Date: March 1, 2010

Thru: Richard Svobodny, Deputy Attorney General
Anne Carpeneti, Assistant Attorney General

From: Susan S. McLean SMc
Director, Criminal Division

Subject: **Other State Rules - First Appearance After Arrest**

General Considerations

The Fourth Amendment requires that a person must be released from custody after 48 hours if a court has not determined that there is probable cause for the arrest. *County of Riverside v. McLaughlin,* 500 U.S. 44, 57-59, 111 S.Ct. 1661, 1670-1671 (1991). Violation of the rule is but one factor to consider in determining whether to suppress a defendant's in-custody statements.

- Since probable cause (and the amount of bail) must be determined before an arrest warrant issues, a probable cause determination only applies to warrantless arrests.
- Since probable cause may be determined on the basis of affidavits and sworn testimony after a warrantless arrest, the defendant's presence is not required at a probable cause hearing.
- Many states require appearance before a magistrate without unnecessary delay, but most courts have not defined "without unnecessary delay" as a specific amount of time, and determine meaning on a case by case basis.

Only 3 of the 24 states which set specific time limits mandate appearance within 24 actual hours of arrest.

Summary - First Appearance Following Warrantless Arrest, By Total Number of States

3 states - 24 hours, calculated including weekends and holidays (AK, FL, MD)
1 state - 24 hours, weekends and holidays *may* be included or excluded (WA)
6 states - 24 hours, calculated *excluding* weekends and holidays (AZ, CT, DE, ID, MA, NH)

1 state - 36 hours, calculated *excluding* day of arrest, Sundays and holidays (MN)

7 states- 48 hours, including weekends and holidays (AL, AR, GA, HI, MS, NE, TX)
1 state - 48 hours, *excluding* Sunday, holiday, and days when court not in session (CA)
1 state - 48 hours, *excluding* Saturday, Sunday and holidays (ME)
1 state - 48 hours if 1st appearance is combined w/prob. cause hearing (court decision) (WI)

2 states - 72 hours, including weekends and holidays (NJ, WY)
1 state - 72 hours, *excluding* Saturday, Sunday and holidays (LA)
1 state - 72 hours is "without delay", if probable cause w/in 48 hours (court decision) (TN)
21 states - "without unnecessary delay" (CO, IL, IA, KS, KY, MI, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, UT, VT, WV)

2 states - "forthwith" (SC, VA)

1 state - "promptly" (repealed a 24- hour rule in 1995) (IN)

1 state - person must be released if not "charged" within 20 hours, but no provision for first appearance (MO)

State Time Limits for Initial Appearance Before Magistrate

State	Time Limit	Authority	Statutory language/construction
Alabama	48 hours - Warrantless arrest 72 hours - Arrest w/ warrant	Ala. R. Crim. P. 4.3(a)(1)(iii) Ala. R. Crim. P. 4.3(b)(2)(i)	
Alaska	24 hours, including weekends and holidays	Alaska R. Crim. P. 5(a)(1)	
Arizona	24 hours, excluding Sat., Sun and holidays	Ariz. R. Crim. P. 4.1(b) and Ariz. R. Crim. P. 1.3	*See, State v. Watkins,* 2008 WL 3171651 * 3 (Ariz. App. Aug.5, 2008) (Sat. Sun. and legal holiday excluded from calculation of 24 hrs; citing Rules 4.1(b) and 1.3))
Arkansas	48 hours Case law suggests that exception may exist for weekends and holidays	Ark. R. Crim. P. 4.1(e)	*See, Larson v. Dorney,*__ F.Supp.__, Slip. Op. 2009WL 903392 *4 (W.D. Ark, April 1, 2009)(delay between arrest on Good Friday and appearance on Monday was "as promptly as calendar would allow")
California	48 hours, excluding Sundays and holidays. If 48 hours expires when court is not in session, then next judicial day.	CA Penal Code § 825(a)(1) CA Penal Code § 825(a)(2)	
Colorado	without unnecessary delay	CRSA. § 16-2-112 Colo. R. Crim. P. 5	
Connecticut	24 hours, excluding Sat., Sun. and holidays	CRS 54-1(g) Conn. Practice Book R. 37-1	Statutory language "promptly before the court sitting next regularly" means the next court day, excluding weekends and holidays. *State v. Pirowski,* 11 Conn. App. 238,240, 526 A.2d 562 (1996)
Delaware	24 hours, excluding Sundays and holidays	11 Del. C. § 1909	
Florida	24 hours, including weekends and holidays	Fla. R. Crim. P 3.130	
Georgia	48 hours –warrantless arrest 72 hours – arrest with warrant	Ga. Uniform St. Ct. R. 26.1 Ga. St § 17-4-62; Ga. St § 117-4-26	
Hawaii	48 hours	H.R.S. 803-9(5)	
Idaho	24 hours, excluding Sat., Sun. and holidays	I.C.R, Rule 5(b)	
Ilinois	without unnecessary delay	I.L.C.S. § 109-1	*See, People v. Willis,* 831 N.E.2d, 531, 538 (Ill., 2005) Ill Court cites *McLaughlin* as requiring 48 hours, but delay is only one factor to be examined in deciding whether confession is voluntary. Court has not otherwise defined "unnecessary delay".

Indiana	" promptly" 24 hr. rule repealed, 1995 Ct. decision implies that more than 48 hours can pass before initial appearance before magistrate	Ind. Code § 35-33-7-1	*See, State v. Larson,* 776 N.W.2d, 254, 258 (Ind. 2009) – probable cause must be determined with 48 hours, but can be based on hearsay and written testimony. "Arrested person has no right to be physically present at probable cause hearing." Ind. law does not provide for a specific period of time in defining how "promptly" a person is brought before magistrate
Iowa	without unnecessary delay	I.C.A. 804.22	
Kansas	without unnecessary delay	KSA 2003 Supp. 22- 2901	*See, State v. Carrow,* 2006 WL 399251 *4 (Kan. App., Feb. 17, 2006) - cites *McLaughlin* as defining "without unreasonable delay" to mean that period of delay "cannot be longer than 48 hours, excluding weekends and holidays"
Kentucky	without unnecessary delay	Ky. R. Crim. P. 3.02(2)	
Louisiana	72 hours excluding Sat., Sun, holidays 48 hours probable cause hearing, which is not adversarial and conducted without presence of defendant	LSA – C.Cr. P. Art. 230-1(A) LSA –C. Cr. P. Art. 230.2(A)	
Maine	48 hours, excluding Sat., Sun and holidays	Me. R. Crim. P. 5(a)	
Maryland	24 hours, including weekends and holidays	Md. Rule 4-212(e) and (f)	Although statute does not specifically state "including weekends", it is clear from case law. *See, e.g., Odum v. State,* 846 A. 2d 145 (Md. App. 2004)
Massachusetts	24 hours, excluding weekends and holidays (see judicial interpretation re probable cause determination)	Mass. R. Crim. P. 7	"accused shall be brought before court then in session, and, if not at its next session". Language at the court's "next session" suggests that if an accused is arrested on Friday, the next session would be a regular court day. *See, Jenkins v. Chief Justice of Dist. Court Dept.,* 619 N.E.2d 324, 337,339 (Mass, 1993) holding that probable cause must be determined within 24 hours but that the determination may be made ex parte upon written documents.
Michigan	without unnecessary delay	M.C.L.A. § 764.13	
Minnesota	36 hours, excluding day of arrest, Sun. and holidays	49 M.S.A. R. Crim. P. 4.02(5)	

Mississippi	without unnecessary delay, within 48 hours	M.C.A. 99-3-17 Uniform Cnty and Cir R 6.03	
Missouri	None – must be charged within 20 hours, but no requirement of personal appearance	V.Ann.Mo.C. Art. 544.170	All persons who are arrested without warrant shall be released if not charged and held by warrant within 20 hours of arrest
Montana	without unnecessary delay	MCA 46-7-101	*See, St. v. Brown,* 933 P.2d 672, 675-676 (Mont. 1999) acknowledging *McLaughlin* 48 hour time limit for probable cause determination, and holding that to be one factor in deciding voluntariness of confession.
Nebraska	48 hours	Neb. Crim. Rule 5.1(b)(1)	
Nevada	without unnecessary delay -warrantless arrest 72 hours- arrest with warrant	N.R.S. 171-1771 N.R.S. 171-178	*See, Powell v. State,* 930 P.2d 1123 (Nev. 1997), acknowledging that *McLaughlin* requires probable cause hearing within 48 hours
New Hampshire	24 hours, excluding Sat., Sun. and holidays	N.R.S. § 594:20(a)	
New Jersey	72 hours, provided that complaint showing probable cause is filed within 12 hours of arrest	N.J. Crim. Rules 3:4-1 and 3:4-2	
New Mexico	without unnecessary delay	NMSA § 31-1-5	
New York	without unnecessary delay	McKinney's CPL § 140.20 sub1	
North Carolina	without unnecessary delay	N.C.G.S.A. § 15A-511	
North Dakota	without unnecessary delay	N.D.C.C. 2906-25 N.D. Crim. Rule 5(a)	
Ohio	without unnecessary delay	O.R.C. § 29.35.05 Ohio Crim. Rule 4(e)	
Oklahoma	without unnecessary delay	22 Okl. Stat. Ann. § 181	*See, Black v. State, 871 P.2d 35, 39 (Okl.Cr.*1994).Citing *McLaughlin*, court recognized that delay longer than 48 hours in taking defendant to probable cause hearing is unreasonable.
Oregon	without unnecessary delay		
Pennsylvania	without unnecessary delay	Pa.R.Crim.P. 519	
Rhode Island	without unnecessary delay (unless charged w/ offense under RI Gen Law. 12.13.1.1*)	Super. R. Crim. P., Rule 5 Dist. R. Crim. P., Rule 9	*Unless charged w/ offense under RI Gen Laws, 12.13.1.1 (charges carrying life sentence or firearm offenses committed by persons previously convicted of offense carrying life sentence), in which case 48 hrs., excluding Sat., Sun. and holidays
South Carolina	Shall be forthwith carried before a magistrate and a warrant of arrest procured	S.C. Code 1976§ 22-5-200	

South Dakota	without unnecessary delay	SDCL § 23A-4-1	*State v. Larson,* 776 N.W. 2d 254, 258 (S.D., 2009) persons arrested without warrant are constitutionally entitled to probable cause determination within 24 hours.
Tennessee	"without unnecessary delay" – Judicially defined – 72 hours for appearance before magistrate 48 hrs for probable cause, but hearing unnecessary	Tenn. R. Crim. P. 5(a)	Due process is violated if probable cause is not determined within 48 hours, but a full adversarial hearing is not necessary. If an individual is not brought before a magistrate within 72 hours there has been an unnecessary delay within the definition of Tenn. R. Crim. P. 5.1. *State v. Carter*, 16 SW 762, 766 (Tenn. 2000)
Texas	48 hours	V.Ann. Tex. C.C.P. Art 14.06	
Utah	without unnecessary delay- 48 hours probable cause, but arrestee need not be present	U.C.A. 1953 § 77-723 Utah Criminal Rule 7	
Vermont	without unnecessary delay	Vt. R. Crim. P. 3(g)	
Virginia	"forthwith"	Va. Code Ann. § 19.2-82	Accused and officer appear together "forwith" for probable cause hearing. Does not apply to arrests with warrant
Washington	(Warrantless arrest only) 24 hours, including weekends and holidays 48 hours prob. cause, but hearing not required	Wash. Cr.RLJ 3.2.1 (c) Wash. Cr.RLJ 3.2.1(a)	"must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day." Sat, Sun and holidays may be considered court days
West Virginia	Without unnecessary delay	W.Va. Code Sex. 62-1-5 W.Va. R. Crim. P. 5	
Wisconsin	Within a reasonable time Judicial definition - 48 hours implicitly the reasonable time	W.S.A. § 970.01	If the initial appearance also serves as the *Riverside* probable-cause hearing it must be held within 48 hours barring extraordinary circumstances. In cases where a defendant's *Riverside (v. McLaughlin)* determination was properly made in a proceeding prior to the initial appearance, court looks at the individual circumstances of the case to determine a "reasonable time" from the defendant's arrest *State v. Evans,* 522 N.W. 2d, 554, 563 (Wis. App., 1994) (Held: 4 days over a weekend not unreasonable)
Wyoming	without unnecessary delay and in no event more than 72 hours	W. R Crim P. 5(a)	

CS FOR HOUSE BILL NO. 175(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date."

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

* **Section 1.** AS 12.25.150(a) is amended to read:

(a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within **48** [24] hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

* **Sec. 2.** AS 12.70.130 is amended to read:

Sec. 12.70.130. Arrest without warrant. The arrest of a person may also be

lawfully made by a peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when arrested the accused must be taken before a judge or magistrate without unnecessary delay and, in any event, within **48** [24] hours after arrest, including Sundays and holidays, and complaint shall be made against the accused under oath setting out the ground for the arrest as in AS 12.70.120. Thereafter the answer of the accused shall be heard as if the accused had been arrested on a warrant.

*** Sec. 3.** AS 28.15.131 is amended by adding a new subsection to read:

(b) Violation of this section is an infraction.

*** Sec. 4.** AS 28.22.019(c) is amended to read:

(c) A person convicted under this section is guilty of **an infraction** [A CLASS B MISDEMEANOR] and **shall be sentenced to pay a mandatory fine of $500** [MAY BE PUNISHED AS PROVIDED IN AS 12.55, EXCEPT THAT A FINE OF AT LEAST $500 MUST BE IMPOSED].

*** Sec. 5.** AS 41.23.220 is amended to read:

Sec. 41.23.220. Penalty. (a) **Except for conduct that is a violation of AS 11.46.420, a** [A] person who violates a provision of AS 41.23.180 - 41.23.230 or a regulation adopted under AS 41.23.180 - 41.23.230 is guilty of a violation as defined in AS 11.81.900.

(b) **Except for conduct that is a violation of AS 11.46.420, the** [THE] supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary

delay **and in any event within forty-eight hours after arrest, including Sundays and holidays**. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. [NECESSARY DELAY WITHIN THE MEANING OF THIS PARAGRAPH (a) IS DEFINED AS A PERIOD NOT TO EXCEED FORTY-EIGHT HOURS AFTER ARREST, INCLUDING SUNDAYS AND HOLIDAYS.]

*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. The amendments to AS 41.23.220, made in sec. 5 of this Act, have the effect of changing Rule 43.10, Alaska Rules of Administration, by prohibiting the disposition of a violation of AS 11.46.420 without court appearance and forfeiture of bail amounts.

*** Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1 - 4 of this Act apply to arrests for offenses committed before, on, or after the effective date of this Act.

(b) Sections 5 - 7 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected.

*** Sec. 10.** This Act takes effect July 1, 2011.

HB 175

<TARGET><BILL>HB 175</BILL><SUBJECT>HB 175</SUBJECT><COMM>HJUD27</COMM></TARGET>

* This bill was absorbed into the Omnibus Crime bill (HB 127) passed last yr.

27-LS0579\A

HOUSE BILL NO. 175

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/28/11
Referred: Judiciary, Finance

Melanie

A BILL

FOR AN ACT ENTITLED

"An Act relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date."

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

*** Section 1.** AS 12.25.150(a) is amended to read:

(a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within **48** [24] hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

*** Sec. 2.** AS 12.70.130 is amended to read:

Sec. 12.70.130. Arrest without warrant. The arrest of a person may also be

received
2-13-12

This bill was reported out of HJUD on 3/18/11

APOA

ALASKA PEACE OFFICERS ASSOCIATION

Business Manager

Joseph Young
Anchorage

Board of Directors
Officers

John Lucking, Jr., President
Soldotna

Kris Sell, Vice President
Juneau

Angella Long, Past President
Wasilla

Marilyn Bailey, Secretary-Treasurer
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Aleutian Islands Chapter
Unalaska

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Mark Pearson, President
Kenai Peninsula Chapter
Kenai

Bob Griffiths, President
Mat-Su Chapter
Wasilla

Thecla LaLonde, President
Wrangell Chapter
Wrangell

February 20, 2012

2/16/12

Representative Carl Gatto
Judiciary Chair
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Gatto:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for considering HB 175 an act relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date

The APOA Executive Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

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

Sincerely,

John Lucking, Jr.
State President

PO Box 240106
Anchorage AK 99524

t 907 277 0515
f 907 272 5355

Making A Difference In The Last Frontier

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **CSHB 175(JUD)**
Fiscal Note Number
Publish Date

Identifier (file name) CSHB175(JUD)-DOC-OC-01-09-12
Title "An Act relating to an appearance before judicial officer after arrest; relating to penalties for perating a vehicle...
Sponsor Judiciary by Request
Requester House Finance Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)								
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to reflect current fiscal year.

Prepared by Leslie Houston, Director — Phone 907-465-3339
Division Department of Corrections - Administrative Services — Date/Time 01/09/12 1:30pm
Approved by Joseph D. Schmidt, Commissioner — Date 1/9/2012
Department of Corrections

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 175(JUD)

Analysis

This bill provides clarifying changes to statute. The potential impacts of this change was previously identified and accounted for when the original legislation passed in 2010. Therefore, this bill has no additional fiscal imacts to the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 175**
Fiscal Note Number
Publish Date

Identifier (file name) HB175CS(JUD)-LAW-CRIM-12-07-11
Title An Act relating to court appearances; arson; and infractions.
Sponsor House Judiciary Committee
Requester (H) Finance

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by John J. Burns, Attorney General
Department of Law

Phone 465-5427
Date/Time 12/07/11 5:10PM
Date 12/7/2011

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 175

Analysis

HB 175 makes two corrections in the law to conform to the changes in the bail statutes adopted last year. It also makes conforming amendments to statutes that are in conflict with the bail schedules in the court rules.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB175**
Fiscal Note Number
() Publish Date

Identifier (file name)	HB175CS(JUD)-DPS-DET-01-11-12	Dept. Affected	Public Safety
Title	"An Act relating to appearance after arrest, penalties for some offenses, and amending criminal rules."	Appropriation	Alaska State Troopers
		Allocation	AST Detachments
Sponsor	House Judiciary by Request		
Requester	(H) FIN	OMB Component Number	2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by Lt. Rodney Dial — Phone (907) 247-4480
Division Alaska State Troopers — Date/Time 1/11/12 11:55 AM
Approved by Joe Masters, Commissioner — Date 12/15/2011
Department of Public Safety

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB175
2012 LEGISLATIVE SESSION

Analysis

This legislation would do the following:

Amends AS 12.25.150(a) by changing the requirement to bring arrested persons before a judge or magistrate from the current 24 hours to 48 hours.

Amends AS 28.15.131 (License to be carried and exhibited on demand) by adding a new subsection stating that violation of this section is an infraction.

Amends AS 28.22.019(c) (Proof of insurance) by reducing violation of this section to an infraction and requiring a mandatory fine of $500.

Amends AS 41.23.220 by defining penalties; except for conduct that is a violation of AS 11.46.420 (Arson in the third degree).

Amends the Alaska Rules of Criminal Procedures, Rule 5(s)(1), regarding appearance before a judge or magistrate.

Amends the Alaska Rules of Criminal Procedures, Sec. 7, regarding the disposition of violations, and Sec. 8 regarding the applicability of this Act.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste. 717
Juneau, AK 99801
Phone: (907) 465-3428
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March 2, 2011

The Honorable Carl Gatto
Chairman
House Judiciary Committee
State Capitol Room 118
Juneau, AK 99801

Re: House Bill 175 – relating to criminal procedures following an arrest

Dear Representative Gatto:

The Department of Law respectfully requests a hearing in the House Judiciary Committee on HB 175, at your earliest convenience. HB 175 is a bill that makes important updates to the existing criminal process that occurs following a person's arrest.

Last year the legislature adopted a major revision to the bail law in our state. One of the important revisions was to change from 24 to 48 hours the deadline for bringing a person who is arrested before a judicial officer. The change last year included the court rule change, but neglected to change the statute. HB 175 corrects this. The bill also corrects inconsistencies in the bail schedules and the statutes for several offenses, including operating a motor vehicle without possessing proof of insurance or possessing a driver's license, and for certain arson offenses.

A sectional analysis is attached that describes each section of the bill. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and Sue Stancliff, Legislative Liaison from the Department of Public Safety to testify regarding this legislation.

Thank you for your consideration of this request.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

Anne D. Carpeneti

By: Anne D. Carpeneti
Assistant Attorney General

HOUSE BILL 175 – BAIL CLEANUP
Sectional Analysis

Section 1 amends AS 12.25.150(a) (relating to arrest) to conform to the provision in the bail reform legislation last year that changed the deadline for bringing a person arrested before a judicial officer from 24 hours to 48 hours of arrest.

Section 2 amends AS 12.70.130 (relating to extraditions) to conform to the provision in the bail reform legislation last year that changed the deadline for bringing a person arrested before a judicial officer from 24 to 48 hours of arrest.

Section 3 changes the penalty for the offense of failure to possess and present upon request to a peace officer a person's driver's license when driving from a misdemeanor, similar to a class B misdemeanor, to an infraction. The offense currently is correctible, and would continue to be correctible. This offense is also currently on the bail schedule (Rule 43.1, Alaska Rules of Administration) at a $50 bail. It is not consistent to have an offense at the same time a misdemeanor, which generally requires a court appearance, and at the same time disposable under the bail schedule for a $50 bail amount. The bill removes this inconsistency.

Section 4 changes the penalty for the crime of failure to carry and present upon request to a peace officer proof of automobile insurance when driving from a class B misdemeanor to an infraction. Current law in statute requires a mandatory fine for this offense of at least $500; at the same time the offense is on the bail schedule for a bail amount of $500. It is correctible under current law and would continue to be correctible under this bill. Again, it is inconsistent to have a class B misdemeanor on the bail schedule for disposition without court appearance. The bill removes the inconsistency, and at the same time retains the bail amount of $500.

Section 5 resolves a similar inconsistency in the penalty for burning a vehicle on the Knik River Public Use Area. In 2006 the legislature created the Knik River Public Use Area. The law authorizes the Department of Natural Resources to adopt regulations governing conduct in the area. AS 41.23.220(a) provides that a person who violates the new law or a regulation under the new law commits a violation. AS 41.23.220(b) requires the Alaska Supreme Court to establish a bail schedule for violations of the statutes and regulations. The law specifically requires that the violations be disposed of without court appearance. One of the regulations adopted prohibits burning a vehicle in the area; the bail was adopted in Supreme Court Order 1711 at $50.

In 2008 the legislature enacted AS 11.46.420, which adopted a new crime, arson in the third degree. This prohibits burning a vehicle on state or municipal land. The penalty for this crime is a class C felony.

These sections correct this inconsistency by excluding burning a vehicle on state land from the prohibitions that are effective in the Knik River Public Use Area.

Section 6 redrafts Rule 5(a)(1), Alaska Rules of Criminal Procedure, to correct a drafting error and to make the rule more readable. The rule was changed last year to extend the deadline from 24 to 48 hours for bringing an arrested person before a judicial officer. This change corrects the drafting error, which currently defines a term that is not used in the rule.

Section 7 notes that the changes included in **Section 5** of the bill have the effect of changing Rule 43.10, Alaska Rules of Administration (the bail schedule) by prohibiting the disposition of cases involving burning a vehicle on state land without a court appearance by mailing to the court a bail amount of $50.

Sections 8 and 9 include applicability and effective date sections.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB175 \A**
() Publish Date

Identifier (file name): HB175-LAW-CRIM-03-04-11
Title: An Act relating to court appearances; arson; and infractions.
Sponsor: House Judicairy Committee
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager
Division: Administrative Services
Approved by: John J. Burns, Attorney General
Department of Law

Phone 465-5427
Date/Time 3/4/11 4:30 PM
Date 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 175

Analysis

HB 175 makes two corrections in the law to conform to the changes in the bail statutes adopted last year. It also makes conforming amendments to statutes that are in conflict with the bail schedules in the court rules.

Passage of this legislation would have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB175**
() Publish Date

Identifier (file name) HB175-DPS-DET-03-04-11
Title: "An Act relating to appearance after arrest, penalties for some some offenses, and amending criminal rules."
Sponsor: Judiciary
Requester: House Judiciary

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Lt. Rodney Dial — Phone (907) 247-4480
Division: Alaska State Troopers — Date/Time 3/4/11 11:30 AM
Approved by: Joseph Masters, Commissioner — Date 3/4/2011
Department of Public Safety

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB175
2011 LEGISLATIVE SESSION

Analysis

This legislation would do the following:

Amend AS 12.25.150(a) by changing the requirement to bring arrested persons before a judge or magistrate from the current 24 hours, to 48 hours.

Amends AS 28.15.131 (License to be carried and exhibited on demand) by adding a new subsection stating that violation of this section is an infraction.

Amends AS 28.22.019(c) (Proof of insurance) by reducing violation of this section to an infraction and requiring a mandatory fine of $500.

Amends AS 41.23.220 by defining penalties; except for conduct that is a violation of AS 11.46.420 (Arson Third Degree).

Amends the Alaska Rules of Criminal Procedures, Rule 5(s)(1) regarding appearance before a judge or magistrate.

Amends the Alaska Rules of Criminal Procedures, Sec 7. regarding the disposition of violations, and Sec. 8 regarding applicability of this act.

It is not estimated that this bill will significantly increase the workload of the division of Alaska State Troopers. There is no fiscal cost to the AST as a result of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB175**
() Publish Date

Identifier (file name) HB175-DOC-OC-03-04-11
Title "An Act relating to an appearance before judicial officer after
Sponsor House Judiciary Committee
Requester House Judiciary Committee

Dept. Affected: DOC
Appropriation: Administration & Support
Allocation: Office of the Commissioner
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by Leslie Houston, Director
Division Dept. of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone 465-3339
Date/Time 3/4/11 12:00 PM
Date 3/4/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB175

Analysis

This bill provides clarifying changes to statute. The potential impacts of this change was previously identified and accounted for when the orignial legislation passed in 2010. Therefore, this bill has no additional fiscal impact to the Department of Corrections.

Backup - HB 175 #1

jurisdiction is not available, a superior court, district court, or magistrate may designate any other peace officer to serve and execute process. A state peace officer shall serve process in any area that is not within the jurisdiction of a peace officer of a municipality or unincorporated community. A peace officer shall use every reasonable means to serve process issued under this chapter. **A judge may not order a peace officer to serve a petition that has been denied by the court.**

*** Sec. 23.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Appearance Before the Judge or Magistrate.**

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. **Necessary** [UNNECESSARY] delay within the meaning of this paragraph (a) is defined as a period not to exceed **forty-eight** [TWENTY-FOUR] hours after arrest, including Sundays and holidays.

*** Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(2), Alaska Rules of Criminal Procedure, is amended to read:

(2) If

(i) The judge or magistrate commits the arrested person to jail for a purpose other than to serve a sentence, and

(ii) The jail is situated in a different community from the place where the judge or magistrate committed the arrested person to jail, and

(iii) The arrested person is not represented by counsel, and

(iv) The arrested person has not previously had a bail

review, and

(v) The arrested person has no date, time and place established for his or her next court appearance, then the arrested person shall be taken before a judge or magistrate in the community where the jail is located within **forty-eight** [TWENTY-FOUR] hours of the person's detention in that jail

(aa) in order for bail to be reviewed, and

(bb) in order to determine if the person is represented by counsel, and

(cc) in order for [THE] counsel to be appointed, if appropriate.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Admission to Bail.** The defendant in a criminal proceeding is entitled to be admitted to bail pursuant to **AS 12.30.006 - 12.30.080** [AS 12.30.010 -12.30.080].

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(b), Alaska Rules of Criminal Procedure, is amended to read:

(b) **Types of Bonds.** The court may require:

(1) the execution of an unsecured appearance bond in an amount specified, under the criteria set forth in **AS 12.30.011** [AS 12.30.010(a)];

(2) the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash [OR OTHER SECURITY], of a sum not to exceed 10 percent of the amount of the bond;

(3) the execution of a bail bond with sufficient solvent sureties or the deposit of cash; or

(4) the execution of a performance bond in a specified amount and the deposit in the registry of the court of cash [OR OTHER SECURITY].

4.16.160. A license may not display the licensee's ocial security number and is not valid until signed y the licensee. If facilities are not available for the aking of the photograph required under this section, the department shall endorse on the license, ne words "valid without photograph."

(b) The department shall provide a method, at the ime that an operator's license is issued, by which he owner of a license may make an anatomical gift nder AS 13.52. The method must provide a means y which the owner may cancel the anatomical gift. 'he department shall inform each applicant in writng that, if the applicant executes a gift under AS 3.52 and if the gift is made with the license, the epartment will transmit the information on the icense to a donor registry created under AS 3.50.110. The department shall also direct the pplicant to notify a procurement organization or he department under AS 13.50.140 if the license is lestroyed or mutilated or the gift is revoked under AS 13.52.183. The department shall carry out the equirements of AS 13.50.100 — 13.50.190. (§ 19 ch 78 SLA 1978; am § 2 ch 50 SLA 1993; am § 21 ch 30 SLA 1997; am § 2 ch 40 SLA 2001; am § 7 ch 68 SLA 2004; am § 7 ch 83 SLA 2004; am § 27 ch 24 SLA 2007; am § 34 ch 100 SLA 2008)

Sec. 28.15.120. Expiration. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.121. Restricted driver's license. a) The department, upon issuing a driver's license, nay for good cause impose restrictions suitable to he licensee's driving ability with respect to special nechanical control devices required on a motor vehicle that the licensee drives. The department nay impose other restrictions applicable to the icensee that it determines to be appropriate to assure the safe operation of a motor vehicle by the icensee.

(b) The department may issue a special restricted icense or may set out restrictions on the usual icense form.

(c) The department may, upon receiving satisfactory evidence of a violation of the restrictions on a icense restricted or issued under this section, suspend the restricted license for a period not to exceed 30 days.

(d) A person may not drive a motor vehicle in violation of the restrictions imposed on a restricted icense. (§ 19 ch 178 SLA 1978)

Sec. 28.15.130. School bus drivers. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.131. License to be carried and exhibited on demand. A licensee shall have the icensee's driver's license in immediate possession at ll times when driving a motor vehicle, and shall present the license for inspection upon the demand of a peace officer or other authorized representative of the Department of Public Safety identified as such to the licensee by the officer or representative. However, a person charged with violating this section may not be convicted if the person produces in court or in the office of the arresting or citing officer, a driver's license previously issued to the person that was valid at the time of the person's arrest or citation. (§ 19 ch 178 SLA 1978; am E.O. No. 99 § 46 (1997))

Sec. 28.15.140. Change of name. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.15.141. Duplicate driver's license. If a valid driver's license issued under this chapter is lost or destroyed, the person to whom the license was issued may, upon payment of the required fee, obtain a duplicate license. A person who recovers an original license for which a duplicate has been issued shall immediately surrender the duplicate to the department. (§ 19 ch 178 SLA 1978)

Sec. 28.15.150. Records. [Repealed, § 19 ch 178 SLA 1978.]

Sec. 28.15.151. Records to be kept by the department. (a) The department shall maintain a file of

(1) every driver's license application, license or permit, and duplicate driver's license issued by it;

(2) every license that has been suspended, revoked, canceled, limited, restricted, or denied, and the reasons for those actions;

(3) all accident reports required to be forwarded to the department under this title; and

(4) every disqualification of an individual from operating a commercial motor vehicle.

(b) The department shall also maintain and update within 10 days after receipt by the department a file of all accident reports, abstracts of court records of convictions of vehicle, driver, and traffic offenses, and other information that the department considers necessary to carry out the purposes of this chapter.

(c) The department shall, upon request, subject to the applicable provisions of AS 12.62 and (f) of this section and without charging a fee, furnish (1) a municipal, state, or federal administrative or judicial agency with a certified abstract of the driving record of a driver within 10 days after receipt of the request by the department; and (2) a parent, foster parent, or guardian of a driver who is under 18 years of age and not an emancipated minor an abstract of the driving record of that driver; the department may refuse to release the driver's address to the parent, foster parent, or guardian if the department determines that the release of the driver's address poses a threat to the health or safety of the driver. The abstract must include a listing of accidents in

(9) "season" means one calendar year beginning October 1 and ending September 30;

(10) "snowmobile" means a self-propelled vehicle primarily designed or altered for travel on snow or ice when supported in part by skis, belts, or cleats; "snowmobile" does not include machinery used strictly for the grooming of snowmobile trails or ski slopes. (§ 1 ch 134 SLA 1998)

Chapter 40.

General Provisions.

Sec. 28.40.050. [Renumbered as AS 28.90.010.]

Sec. 28.40.060. [Renumbered as AS 28.90.020.]

Sec. 28.40.070. [Renumbered as AS 28.90.030.]

Sec. 28.40.072. [Renumbered as AS 28.90.035.]

Sec. 28.40.075. [Renumbered as AS 28.90.040.]

Sec. 28.40.100. [Renumbered as AS 28.90.990.]

Sec. 28.40.110. [Renumbered as AS 28.90.995.]

Chapter 90.

General and Miscellaneous Provisions.

Article

1. Miscellaneous Provisions (§§ 28.90.010 — 28.90.040)
2. General Provisions (§§ 28.90.990, 28.90.995)

Article 1.

Miscellaneous Provisions.

Section

10. Penalties for violations of law, regulations, and municipal ordinances
20. Breath test result validity
30. Fines for offenses committed within highway work zones and traffic safety corridors doubled
35. Prohibition of damage claims regarding highway work zone signs
40. Administration of highway safety program

Sec. 28.90.010. Penalties for violations of law, regulations, and municipal ordinances. (a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(b) A person convicted of a misdemeanor for a violation of a provision of this title for which another penalty is not specifically provided is punishable by a fine of not more than $500, or by imprisonment for not more than 90 days, or by both. In addition, the privilege to drive or the registration of vehicles may be suspended or revoked.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordinance does not correspond to a provision of this title, is guilty of an infraction and is punishable by a fine not to exceed $300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the loss of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221 — 28.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

(e) *[Repealed, § 5 ch 85 SLA 1987.]* (§ 50-1-8 ACLA 1949; am § 12 ch 241 SLA 1976; am §§ 22, 23 ch 144 SLA 1977; am § 5 ch 85 SLA 1987)

Sec. 28.90.020. Breath test result validity. Except for an offense under AS 28.35.280, if an offense described under this title requires that a chemical test of a person's breath produce a particular result, and the chemical test is administered by a properly calibrated instrument approved by the Department of Public Safety, the result described by statute is not affected by the instrument's working tolerance. (§ 17 ch 143 SLA 1996)

Sec. 28.90.030. Fines for offenses committed within highway work zones and traffic safety corridors doubled. (a) Whenever a person violates a provision of this title or a regulation adopted under the authority of this title within a highway work zone or traffic safety corridor, notwithstanding the amount of the fine or the maximum fine set under this title, the fine, or maximum fine, is double the amount provided in this title.

(b) Fines imposed and collected under this section for offenses that are committed in a traffic safety corridor shall be separately accounted for under AS 37.05.142.

(c) Notwithstanding the requirements of (b) of this section and AS 37.05.142, the Alaska Court System shall deposit fines collected under this section for offenses committed in a traffic safety corridor in the general fund if the fine is collected at a court location where separate accounting for traffic safety corridor fines is not achievable.

(d) The administrative director of the Alaska Court System shall notify the Department of Administration

Healy	HE
Hooper Bay (closed)	HB
Kasigluk (closed)	KS
McGrath	MC
Mekoryuk (closed)	ME
Mt. Village (closed)	MV
Nenana	NE
Quinhagak (closed)	QU
Rampart (closed)	RA
Scammon Bay (closed)	SB
St. Mary's	SM
Tanana	TA
Tok	TO
Tununak (closed)	TU

(Adopted by SCO 478 effective August 17, 1981; amended by SCO 541 effective October 1, 1982; by SCO 564 effective April 4, 1983; by SCO 565 effective May 3, 1983; by SCO 617 effective May 15, 1985; by SCO 672 effective June 15, 1986; by SCO 1034 effective June 14, 1990; by SCO 1035 effective nunc pro tunc February 1, 1991; by SCO 1132 effective July 15, 1993; and by SCO 1493 effective September 26, 2002)

Cross References

CROSS REFERENCE: Administrative Bulletins No. 7 and 7.1 (Case Numbering)

Rule 42. Docketing. (Reserved).

Note: Former Rule 42 was deleted and the rule was reserved by SCO 1481, effective October 15, 2002.

Rule 43. Bail Forfeiture Schedules.

(a) **Procedure for Adopting Bail Forfeiture Schedule.** The supreme court will consider adopting a bail forfeiture schedule only when so authorized by statute. The agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director its recommendations for a proposed schedule, listing offenses by number, describing the offenses, and proposing a bail forfeiture amount. The proposed schedule shall be accompanied by commentary explaining the basis for the agency's recommendation, and by a copy of the proposed citation form. The supreme court shall consider the recommendation, and shall determine whether to adopt a bail forfeiture schedule, and if so, shall determine which offenses are amenable to disposition by bail forfeiture and whether the bail forfeiture amounts are appropriate. The administrative director shall notify the agency when an order adopting the schedule is issued.

(b) **Procedures for Amending Bail Forfeiture Schedules.**

(1) By July 1 of each year, each agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director of the Alaska Court System a written recommendation concerning whether the schedule must be amended to reflect any legislative and regulatory changes, or whether policy considerations warrant revisions. Any proposed amendments shall be accompanied by commentary. The supreme court shall consider the agency's recommendations and determine by October 1 whether to adopt them. If it will be impractical for the court to respond by that date, the administrative director will inform the agency of the date by which the response can be expected. The administrative director shall notify the agency when an order amending the schedule is issued.

(2) In addition to the provisions of paragraph (b)(1), an agency may request a bail forfeiture schedule amendment whenever the need arises.

(3) Any person or agency may request a bail forfeiture schedule amendment at any time by proposing an amendment in writing to the chief justice or to the administrative director.

(Adopted by SCO 651 effective July 1, 1985; amended by SCO 1180 effective July 15, 1995)

Rule 43.1. Traffic Bail Forfeiture Schedule.

Pursuant to AS 28.05.151, the following vehicle and traffic offenses are amenable to disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Effective April 30, 1999, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a highway work zone, as that term is defined in AS 28.90.990 and 13 AAC 40.010(b). Effective May 27, 2006, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a traffic safety corridor, as that term is defined in AS 28.90.990.

Pursuant to AS 28.15.131 and 13 AAC 04.008, a citation for an offense listed as "Corr" must be dismissed (or voided) if proof of correction is presented to an inspection official within the time allowed. If the required repair is not made, the offense may be disposed of without court appearance upon payment and forfeiture of the bail amount listed.

Effective August 27, 1998, as a condition of the disposition of an offense without appearance, the defendant shall pay the surcharge prescribed in AS 12.55.039 in addition to the bail forfeiture amount listed below. A court may allow a defendant who is unable to pay the surcharge to perform community work under AS 12.55.055(e) in lieu of the surcharge. The surcharge must be deposited into the general fund in a separate account designated for such surcharges.

Effective September 1, 2003, pursuant to AS 28.05.151(e), an offense listed on this schedule may not be disposed of without court appearance if the offense is an

#3

Statute or Regulation	Description of Offense	Bail
AS 11.46.462	Unlawful possession of an official traffic control device	$ 200
AS 19.10.300(a)	Commercial vehicle (intrastate): failure to maintain minimum insurance	500
AS 28.05.095(a)	Failure to wear safety belt (age 16 and older: passenger or driver)	15
AS 28.05.095(b)	Failure to provide child safety device. (Note: First charge may be dismissed by court upon proof of correction, but second or subsequent charge is not dismissible)	50
AS 28.05.095(b)	Failure to properly secure child in child safety device	50
AS 28.05.095(d)	Illegal removal of vehicle seatbelt	15
AS 28.10.451	Failure to register vehicle	90
AS 28.10.461	Plates/decals/permits must be properly attached and displayed	75
AS 28.10.461	Failure to carry certificate of registration in vehicle	40
AS 28.10.471	Operating vehicle w/expired registration	90
AS 28.10.471	Operating a vehicle w/suspended/revoked registration	300
AS 28.15.011(b)	Driving with license expired less than one year	75
AS 28.15.021(2)	Driving with out-of-state license after 90 days in state	75
AS 28.15.021(6)	Driving a motor-driven cycle with out-of-state driver's license after 90 days in state	75
AS 28.15.057(b)	Operating a vehicle in violation of a provisional license	200
AS 28.15.131	License to be carried and exhibited on demand	Corr/50
AS 28.15.281(a)	Unlawful use of a driver's license	200
AS 28.22.019	Proof of insurance to be carried and exhibited on demand	Corr/500
AS 28.35.029	Open container of alcoholic beverage in motor vehicle	200
AS 28.35.031(c)	Refusal to submit to a preliminary breath test	100
AS 28.35.135(b)	Failure to notify dept. of change of name/address	25
AS 28.35.140(a)	Obstructing or blocking traffic	75
AS 28.35.140(b)	Turn off required when 5 or more vehicles are behind	100
AS 28.35.145(c)	Ownership of a vehicle	75
AS 28.35.155	Operating vehicle w/studded/chained tires when prohibited	Corr/50
AS 28.35.180	Disobedience to signal of officer regulating traffic	75
AS 28.35.185(b)(2)	Overtaking and passing a parked emergency vehicle – if no personal injury	150
AS 28.35.235	Unauthorized use of parking reserved for persons with disabilities	
	-First offense	125
	-Second or more offense	250
AS 28.35.235	Unauthorized use of parking reserved for persons with disabilities while displaying special license plate or permit	
	-First offense	250
	-Second or more offense	500
AS 28.35.251	Contained or confined loads	300
AS 28.35.253	Anti-spray devices required	Corr/60
AS 28.35.261	Low-speed vehicle on highway with limit above 35 mph	100
AS 28.39.010	Operating an unregistered snowmobile	50
AS 28.39.040(e)	Failure to display snowmobile numbered registration decal	50
AS 28.39.040(f)	Failure to carry snowmobile certificate of registration or provide identifying information	50
02 AAC 90.030	School bus driver permit must be carried and displayed upon demand	Corr/50
02 AAC 90.200	Unlawful use of classified license	50
13 AAC 02.005(a)	Disobedience to traffic control devices	100
13 AAC 02.010(a)(1)(A)-(B)	FTY to vehicle in intersection after green signal	150
13 AAC 02.010(a)(1)(A)-(B)	FTY to pedestrian in crosswalk after green signal	150
13 AAC 02.010(a)(3)(A)	Failure to stop for steady red traffic signal	150
13 AAC 02.010(a)(3)(B)	FTY when turning on red signal	150
13 AAC 02.010(a)(3)(B)	Turning on red signal when prohibited	75
13 AAC 02.010(a)(3)(C)	Failure to stop for steady red arrow	150
13 AAC 02.010(b)	Position of vehicle stopping at intersection	75
13 AAC 02.015	Failure to obey pedestrian control signal	10
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Kasigluk (closed)	4KS
McGrath	4MC
Mekoryuk (closed)	4ME
Mt. Village (closed)	4MV
Nenana	4NE
Quinhagak (closed)	4QU
Rampart (closed)	4RA
Scammon Bay (closed)	4SB
St. Mary's	4SM
Tanana	4TA
Tok	4TO
Tununak (closed)	4TU

(Adopted by SCO 478 effective August 17, 1981; amended by SCO 541 effective October 1, 1982; by SCO 564 effective April 4, 1983; by SCO 565 effective May 3, 1983; by SCO 617 effective May 15, 1985; by SCO 672 effective June 15, 1986; by SCO 1034 effective June 14, 1990; by SCO 1035 effective nunc pro tunc February 1, 1991; by SCO 1132 effective July 15, 1993; and by SCO 1493 effective September 26, 2002)

Cross References

CROSS REFERENCE: Administrative Bulletins No. 7 and 7.1 (Case Numbering)

Rule 42. Docketing. (Reserved).

Note: Former Rule 42 was deleted and the rule was reserved by SCO 1481, effective October 15, 2002.

Rule 43. Bail Forfeiture Schedules.

(a) **Procedure for Adopting Bail Forfeiture Schedule.** The supreme court will consider adopting a bail forfeiture schedule only when so authorized by statute. The agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director its recommendations for a proposed schedule, listing offenses by number, describing the offenses, and proposing a bail forfeiture amount. The proposed schedule shall be accompanied by commentary explaining the basis for the agency's recommendation, and by a copy of the proposed citation form. The supreme court shall consider the recommendation, and shall determine whether to adopt a bail forfeiture schedule, and if so, shall determine which offenses are amenable to disposition by bail forfeiture and whether the bail forfeiture amounts are appropriate. The administrative director shall notify the agency when an order adopting the schedule is issued.

(b) **Procedures for Amending Bail Forfeiture Schedules.**

(1) By July 1 of each year, each agency charged with enforcement under a statute for which a bail forfeiture schedule has been authorized shall forward to the administrative director of the Alaska Court System its written recommendation concerning whether the schedule must be amended to reflect any legislative and regulatory changes, or whether policy considerations warrant revisions. Any proposed amendments shall be accompanied by commentary. The supreme court shall consider the agency's recommendations and determine by October 1 whether to adopt them. If it will be impractical for the court to respond by that date, the administrative director will inform the agency of the date by which the response can be expected. The administrative director shall notify the agency when an order amending the schedule is issued.

(2) In addition to the provisions of paragraph (b)(1), an agency may request a bail forfeiture schedule amendment whenever the need arises.

(3) Any person or agency may request a bail forfeiture schedule amendment at any time by proposing an amendment in writing to the chief justice or to the administrative director.

(Adopted by SCO 651 effective July 1, 1985; amended by SCO 1180 effective July 15, 1995)

Rule 43.1. Traffic Bail Forfeiture Schedule.

Pursuant to AS 28.05.151, the following vehicle and traffic offenses are amenable to disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Effective April 30, 1999, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a highway work zone, as that term is defined in AS 28.90.990 and 13 AAC 40.010(b). Effective May 27, 2006, the bail amounts listed below are doubled for violations of AS 28 and regulations adopted under AS 28 committed within a traffic safety corridor, as that term is defined in AS 28.90.990.

Pursuant to AS 28.15.131 and 13 AAC 04.008, a citation for an offense listed as "Corr" must be dismissed (or voided) if proof of correction is presented to an inspection official within the time allowed. If the required repair is not made, the offense may be disposed of without court appearance upon payment and forfeiture of the bail amount listed.

Effective August 27, 1998, as a condition of the disposition of an offense without appearance, the defendant shall pay the surcharge prescribed in AS 12.55.039 in addition to the bail forfeiture amount listed below. A court may allow a defendant who is unable to pay the surcharge to perform community work under AS 12.55.055(c) in lieu of the surcharge. The surcharge must be deposited into the general fund in a separate account designated for such surcharges.

Effective September 1, 2003, pursuant to AS 28.05.151(e), an offense listed on this schedule may not be disposed of without court appearance if the offense is in

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property that is damaged must be a building, while under the first degree provision any property can be damaged. However, while the first degree provision requires that a person be placed in danger of injury, a similar requirement does not exist under the second degree statute.

An affirmative defense to arson in the second degree is provided in subsection (b). The defense recognizes that in some instances the most economical method of removing a building is to burn it. Such conduct is exempted from the coverage of the statute if the defendant establishes that no other person had an interest in the property, or if they did, that they consented to the burning, and that the burning was for a lawful purpose. Burning a building to defraud an insurance company would not be a burning for a lawful purpose. Note that a similar defense does not apply to the first degree statute. If the burning recklessly places another person in danger of serious physical injury, the defendant has committed first degree arson even if he acted for a lawful propose.

From 1983 House Journal at 1250 & 1699 (May 10 & June 13, 1983) and 1983 Senate Journal at 106-107 (February 1, 1983):

The [House Judiciary] Committee does not intend that the mere presence at the scene of a fire of a firefighter or other emergency responder would be sufficient in all cases to constitute danger of serious physical injury necessary to establish the crime of arson in the first degree. The existence of the necessary danger will be an issue of fact which must be determined by the trier of fact in each individual case.

CROSS REFERENCES

Definitions of "property," "serious physical injury," "building," "affirmative defense" - AS 11.81.900(b)
Definition of "intentionally," "recklessly" - AS 11.81.900(a)
Criminal mischief - AS 11.46.480 — 11.46.486
Criminal possession of explosives - AS 11.61.240

Original Code Provision - AS 11.20.010; 11.20.020; AS 11.20.030; AS 11.20.040; AS 11.20.060; AS 11.20.070.

TD: III, 69-73.

Sec. 11.46.420. Arson in the third degree. (a) A person commits the crime of arson in the third degree if the person intentionally damages a motor vehicle by starting a fire or causing an explosion while that vehicle is located on state or municipal land.

(b) Arson in the third degree is a class C felony. (§ 1 ch 68 SLA 2008)

Sec. 11.46.427. Criminally negligent burning in the first degree. (a) A person commits the crime of criminally negligent burning in the first degree if the person

(1) violates AS 11.46.430; and

(2) within the preceding 10 years, has been convicted on two separate occasions of violating AS 11.46.400 — 11.46.430 or AS 41.15.150 or a law or ordinance of this or another jurisdiction with elements similar to those offenses.

(b) Criminally negligent burning in the first degree is a class C felony. (§ 15 ch 75 SLA 2008)

Sec. 11.46.430. Criminally negligent burning in the second degree. (a) A person commits the crime of criminally negligent burning in the second degree if with criminal negligence the person damages property of another by fire or explosion.

(b) Criminally negligent burning in the second degree is a class A misdemeanor. (§ 4 ch 166 SLA 1978; am § 16 ch 75 SLA 2008)

COMMENTARY

From Senate Journal Supp. No. 47, at 47 (June 12, 1978):

The crime of criminally negligent burning, a class A misdemeanor, covers the criminally negligent damaging of the property of another by fire or explosion. The person who falls asleep in a hotel bed with a cigarette in his hand, for example, would violate the statute if the bed caught on fire. If physical injury or death results, prosecution would be brought under the Code's homicide or assault statutes.

CROSS REFERENCES

Definition of "property" - AS 11.81.900(b)
Definition of "property of another" - AS 11.46.990
Definition of "criminal negligence" - AS 11.81.900(a)
Arson in the first and second degree - AS 11.46.400, 11.46.410

Original Code Provision - AS 11.15.340

TD: III, 73-74.

Sec. 11.46.450. Failure to control or report a dangerous fire. (a) A person commits the crime of failure to control or report a dangerous fire if the person knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when the person can do so without substantial personal risk, or to give a prompt fire alarm if

(1) the person knows that the person is under an official, contractual, or other legal duty to prevent or combat the fire; or

(2) the fire was started by the person, with the person's consent, or on property in the person's custody or control.

(b) Failure to control or report a dangerous fire is a class A misdemeanor. (§ 4 ch 166 SLA 1978)

COMMENTARY

From Senate Journal Supp. No. 47, at 47-48 (June 12, 1978):

Existing AS 41.15.110(a) creates an affirmative duty on a person to exercise due care to prevent the uncontrolled spread of a fire when he knows of a fire or sets a fire on forest lands, owned, possessed or controlled by him.

Section 4: Lots 9 — 11
Section 5: SW¼SW¼
Section 7: Lot 4, S½NE¼, NE¼SE¼, S½SE¼
Section 8: E½, NE¼NW¼, S½NW¼, SW¼
Section 9: Lots 1 — 2, E½NE¼, SW¼NE¼, W½NW¼, SE¼NW¼, SW¼
W½NE¼SE¼, NW¼SE¼
Section 10: NW¼NW¼
Section 11: Lots 1 — 5
Section 12: Lots 2 — 3
Section 17: NW¼NW¼
Section 18: N½NE¼, SW¼NE¼, W½SE¼NE¼, NE¼SE¼SE¼NE¼, SE¼NW¼
NE¼SW¼, SE¼;
(2) Township 1 North, Range 2 West, Fairbanks Meridian
Section 13: SE¼, E½E½E½SW¼
Section 23: NE¼SW¼, W½SE¼, W½SE¼SE¼, SE¼SE¼SE¼
W½NE¼SE¼SE¼
Section 24: E½
Section 26: W½W½NW¼NW¼
Section 27: N½NE¼NE¼, SE¼NE¼NE¼, E½SW¼NE¼NE¼.
(§ 1 ch 48 SLA 1990; am § 5 ch 9 SLA 1994)

Sec. 41.23.180. Purpose of AS 41.23.180 — 41.23.230. The purpose of AS 41.23.180 — 41.23.230 is to establish the area described in AS 41.23.230 as the Knik River Public Use Area. The Knik River Public Use Area is established to

(1) perpetuate and enhance

(A) general public recreation;

(B) public enjoyment of fish and wildlife;

(2) protect and maintain migratory waterfowl nesting areas; habitats for moose, Dall sheep, and brown bear; and other fish and wildlife habitat so that traditional public use of fish and wildlife populations may continue;

(3) provide an area for the public to enjoy the full spectrum of public uses, including maintenance and enhancement of off-road motorized vehicle and nonmotorized recreational opportunities;

(4) allow

(A) continued motorized access for miners and owners of private property in the Knik River Public Use Area; and

(B) additional public uses of the area determined by the commissioner to be compatible with this section. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.190. Management. (a) The commissioner is responsible for the management of the land and mineral estate within the Knik River Public Use Area consistent with the purposes of AS 41.23.180. After adequate public hearings, the commissioner may designate incompatible uses and shall adopt and may revise a management plan for the Knik River Public Use Area. The management plan must include provisions for the enforcement of the plan and compliance with the requirements of the plan.

(b) The commissioner of fish and game, the Board of Fisheries, and the Board of Game are responsible for the management of fish and game resources and public use of fish and wildlife in the Knik River Public Use Area consistent with the purposes of AS 41.23.180.

(c) The Knik River Public Use Area may not be managed as a unit of the state park system.

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(d) The commissioner shall identify wetland areas within the Knik River Public Use Area and provide for the protection and use of the wetland areas in the management plan. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.200. Incompatible uses. (a) Except as provided in this section, the commissioner may prohibit or restrict uses determined to be incompatible with the purposes of the Knik River Public Use Area under AS 41.23.180 within the state-owned land and water described in AS 41.23.230.

(b) Nothing in AS 41.23.180 — 41.23.230 prohibits the Department of Fish and Game from engaging in rehabilitation, enhancement, and development of fish and wildlife habitat within an area described in AS 41.23.230 that is consistent with the purposes stated in AS 41.23.180.

(c) The commissioner may not restrict

(1) lawful fishing, hunting, or trapping rights allowed under a regulation of the Board of Fisheries or the Board of Game in the Knik River Public Use Area; or

(2) the use of weapons, including firearms, in the Knik River Public Use Area except in locations where the commissioner determines that the use of weapons constitutes a threat to public safety.

(d) The commissioner shall

(1) allow the Knik River Public Use Area to be used for activities that are compatible with the reasons for establishing the public use area in AS 41.23.180 and include all-terrain vehicles, aircraft, watercraft, airboats, snowmobiling, horseback riding, hiking, bicycling, dog sledding, cross-country skiing, skijoring, camping, hunting, fishing, wildlife viewing, photography, and, where permitted, mineral exploration and mining; and

(2) recognize the existing off-road motor vehicle trails and the access those trails provide to areas in the Knik River Public Use Area, make accommodations that will provide the shortest possible route to avoid critical habitat, conduct trail rehabilitation in a way that minimizes damage, maintain and enhance off-road motor vehicle options and opportunities in the Knik River Public Use Area, and provide for increased use of the public use area.

(e) The commissioner of public safety and the commissioner of fish and game shall have necessary access for fish and game management, research, and enforcement purposes. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.210. Enforcement authority. (a) In the Knik River Public Use Area described in AS 41.23.230, the following persons are peace officers of the state for the purpose of enforcing the provisions of AS 41.23.180 — 41.23.230 and regulations adopted under AS 41.23.180 — 41.23.230:

(1) an employee of the department or other person authorized by the commissioner;

(2) a peace officer, as that term is defined in AS 01.10.060.

(b) A person designated in (a) of this section may, when enforcing the provisions of AS 41.23.180 — 41.23.230 or a regulation adopted under AS 41.23.180 — 41.23.230,

(1) execute a warrant or other process issued by an officer or court of competent jurisdiction;

(2) administer or take an oath, affirmation, or affidavit; and

(3) issue a citation or arrest a person who violates a provision of AS 41.23.180 — 41.23.230 or a regulation adopted under AS 41.23.180 — 41.23.230.

(c) A citation issued under (b) of this section must comply with the provisions of AS 12.25.175 — 12.25.230. (§ 1 ch 83 SLA 2006; am §§ 44, 45 ch 29 SLA 2010)

Effect of amendments. — The 2010 amendment, effective July 1, 2010, in (b)(3), added "issue a citation or" preceding "arrest a person"; added (c).

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Editor's notes. — Under § 61, ch. 29, SLA 2010, the 2010 amendment of (b) and enactment of (c) of this section apply "to all citations issued . . . for violations occurring on or after July 1, 2010."

Sec. 41.23.220. Penalty. (a) A person who violates a provision of AS 41.23.180 — 41.23.230 or a regulation adopted under AS 41.23.180 — 41.23.230 is guilty of a violation as defined in AS 11.81.900.

(b) The supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.230. Knik River Public Use Area. Subject to valid existing rights, state-owned land and water and the state land and water acquired in the future that is within the boundaries described in this section are designated as the Knik River Public Use Area, are reserved for all uses compatible with their primary function as public use land, and are assigned to the department for control and management:

(1) Township 15 North, Range 4 East, Seward Meridian;

(2) Township 15 North, Range 5 East, Seward Meridian;

(3) Township 15 North, Range 6 East, Seward Meridian;

(4) Township 15 North, Range 7 East, Seward Meridian
Section 3: NW¼NW¼
Section 4: N½NE¼, N½NW¼
Section 5: N½NE¼, NW¼
Section 6: SW¼SE¼, N½SE¼, SW¼, N½
Section 7: SW¼NW¼, N½NW¼;

(5) Township 16 North, Range 2 East, Seward Meridian
Section 1: Portions located below the ordinary high water of Knik River
Section 2: Portions located below the ordinary high water of Knik River
Section 3: Portions located below the ordinary high water of Knik River;

(6) Township 16 North, Range 3 East, Seward Meridian
Sections 1 — 3
Section 4: Portions located below the ordinary high water of Knik River
Section 5: Portions located below the ordinary high water of Knik River
Section 6: Portions located below the ordinary high water of Knik River
Section 9: Portions located below the ordinary high water of Knik River
Section 10: Portions located below the ordinary high water of Knik River
Sections 11 — 13
Section 14: Portions located below the ordinary high water of Knik River
Section 23: Portions located below the ordinary high water of Knik River
Section 24: Portions located below the ordinary high water of Knik River;

(7) Township 16 North, Range 4 East, Seward Meridian;

(8) Township 16 North, Range 5 East, Seward Meridian;

(9) Township 16 North, Range 6 East, Seward Meridian;

(10) Township 16 North, Range 7 East, Seward Meridian

Section 6: NW¼SE¼, S½SE¼, W½
Section 7
Sections 17 — 20
Section 28: NW¼SW¼, S½SW¼
Sections 29 — 32
Section 33: S½NE¼, SE¼, W½
Section 34: SE¼SW¼, W½SW¼;
(11) Township 17 North, Range 2 East, Seward Meridian
Section 36: Portions located below the ordinary high water of Knik River;
(12) Township 17 North, Range 3 East, Seward Meridian
Sections 1 — 5
Sections 9 — 16
Section 17: S½
Sections 20 — 29
Section 31: NE¼NE¼, S½NE¼, SE¼, SW¼ located below the ordinary high water of Knik River
Sections 32 — 36;
(13) Township 17 North, Range 4 East, Seward Meridian;
(14) Township 17 North, Range 5 East, Seward Meridian;
(15) Township 17 North, Range 6 East, Seward Meridian;
(16) Township 18 North, Range 6 East, Seward Meridian. (§ 1 ch 83 SLA 2006)

Effective dates. — Section 1, ch. 83, SLA 2006, which enacted this section, took effect on September 28, 2006.

Sec. 41.23.240. Purpose and establishment of the Kodiak Narrow Cape Public Use Area. The purpose of AS 41.23.240 — 41.23.270 is to protect, maintain, enhance, and perpetuate the present use of the area described in AS 41.23.270 as the Kodiak Narrow Cape Public Use Area. The Kodiak Narrow Cape Public Use Area is established to

(1) protect, maintain, perpetuate, and enhance year-round general public recreation;

(2) protect, maintain, perpetuate, and enhance public enjoyment and use of fish and wildlife;

(3) allow for continued use of the area for grazing and other purposes authorized in a land use plan adopted by the commissioner or by law;

(4) allow additional public uses of the area in a manner compatible with the purposes specified in (1), (2), and (3) of this section. (§ 1 ch 53 SLA 2007)

Effective dates. — Chapter 53, SLA 2007, which enacted this section, became effective October 10, 2007.

Sec. 41.23.250. Management. (a) The commissioner is responsible for the management of the surface and subsurface estate of the Kodiak Narrow Cape Public Use Area. After adequate public hearings, the commissioner may adopt and may revise a management plan for the Kodiak Narrow Cape Public Use Area. The commissioner shall provide a copy of the management plan and each revision to the chairs of the resource committees of the legislature within 30 days after its adoption or revision. The commissioner shall consult with the Department of Fish and Game in the adoption and revision of the management plan.

(b) Subject to valid existing rights, including existing rights for grazing leases and operations and the interagency land management agreement between the department and the Alaska Aerospace Corporation for the Kodiak Launch Complex, the commissioner may not dispose of the surface estate in state land within the Kodiak Narrow Cape Public Use Area.

(SCO 1429 effective April 15, 2001; amended by SCO 1583 effective August 11, 2005)

Rule 43.9. Skiing Bail Forfeiture Schedule.

Pursuant to AS 05.45.100(i), the following offenses listed in AS 05.45.100(c) and (g) may be disposed of without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the fine imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered or processed as a criminal case.

State or Regulation	Description of Offense	Bail
AS .45.100(c)(1)	Skiing on closed slope or trail	$ 150
AS 5.45.100(c)(2)	Stopping device required	50
AS 05.45.100(c)(3)	Crossing uphill track of surface lift	50
AS 05.45.100(c)(4)	Skiing or riding lift under influence of alcohol or drugs	150
AS 05.45.100(c)(5)	Failure to ski within ski area boundaries	150
AS 05.45.100(g)	Failure to remain at scene of accident	150

(Adopted by SCO 1557 effective October 15, 2004)

Rule 43.10. Knik River Public Use Area Bail Forfeiture Schedule.

Pursuant to AS 41.23.220(b), the following offenses committed within the Knik River Public Use Area (KRPUA) shall be disposed of without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the fine imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Regulation	Description of Offense	Bail
11 AAC 96.016(b)(1)	Failure to obtain permit for activity listed in 11 AAC 96.010	$150
11 AAC 96.016(b)(2)	Failure to register commercial recreation use	50
11 AAC 96.016(b)(4)	Commercial harvest of non-timber forest products without a permit	100
11 AAC 96.016(c)(1)	Leaving vehicle unattended more than 72 hours	300
11 AAC 96.016(c)(2)	Transporting non-functional vehicle into the area	400
11 AAC 96.016(c)(3)	Operating a vehicle over 10,000 pounds without prior written authorization	150
11 AAC 96.016(c)(4)	Unauthorized operation of a vehicle resulting in disturbance of wetlands or organic mat to a depth greater than 6 inches	300
11 AAC 96.016(c)(5)	Unauthorized fire	50
11 AAC 96.016(c)(6)	Burning a wooden pallet, vehicle, structure, or other unauthorized object or material	50
11 AAC 96.016(c)(7)	Place, dump, or discard waste or refuse	100
11 AAC 96.016(c)(8)	Place, dump, discard, or release hazardous substances	300
11 AAC 96.016(c)(9)	Unauthorized construction, maintenance or abandonment of a structure	200
11 AAC 96.016(c)(10)	Unauthorized cutting, collecting, or harvesting of trees larger than 5-inch diameter	75
11 AAC 96.016(c)(11)	Erecting a camp, structure, or facility for more than 14 consecutive days without authorization	100
11 AAC 96.016(c)(12)	Discharging a firearm at unauthorized target	50
11 AAC 96.016(c)(13)	Discharging a firework	50
11 AAC 96.016(c)(14)	Discharging a firearm in prohibited area	75
11 AAC 96.016(c)(15)	Repeatedly approaching fish or wildlife, altering animal's behavior	300
11 AAC 96.016(c)(16)	Unauthorized construction, development, widening, brushing, or creating road or trail	100
11 AAC 96.016(c)(17)	Damage, deface, destroy, or remove public property	300

(Adopted by SCO 1711 effective May 15, 2009)

Rule 43.11. Weights and Measures Bail Forfeiture Schedule.

Pursuant to AS 45.75.133, the following offenses are appropriate for disposition without court appearance upon payment and forfeiture of the bail amounts listed. If a person charged with one of these offenses appears in court and is found guilty, the penalty imposed for the offense may not exceed the bail amount for that offense listed below. An offense for which a bail forfeiture amount has been established shall be charged on a citation which meets the requirements of District Court Criminal Rule 8(c) and shall not be filed, numbered, or processed as a criminal case.

Statute	Description of Offense	Bail
AS 45.75.380(a)(1)	Use of incorrect weight or measure	$ 250
AS 45.75.380(a)(2)	Use of unsealed weight or measure	250
AS 45.75.380(a)(3)	Failure to dispose of rejected weight or measure	100
AS 45.75.380(a)(4)	Removal of weights & measure seal or tag	100
AS 45.75.380(a)(5)	Offers for sale short-weight/short-measure	500
AS 45.75.380(a)(6)	Fraudulent buying with weight or measure	500
AS 45.75.380(a)(7)	Commodity sales contrary to law or regulation	500
AS 45.75.380(a)(8)	Failure to provide customer display	100
AS 45.75.380(a)(9)	Obstruction of inspector	500

(Adopted by SCO 1735 effective July 1, 2010)

Rule 44. Rulemaking.

(a) **Uniform Policy.** The supreme court shall make and promulgate rules governing administration of all courts, and practice and procedure in civil and criminal cases in all courts. The rules shall be uniform throughout the Alaska Court System.

March 9, 2011

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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STUDENT ADVISOR

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

Re: House Bill 175
ACLU Review of Legal Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony with respect to House Bill 175.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that respect, we wish to advise you of constitutional issues with the Bill.

Last year, HB 324 was passed (26th Legislature, Chapter No. 19, SLA 2010, Effective Date: July 1, 2010), amending Alaska Rule of Criminal Procedure 5 to permit a new arrestee to be held for up to 48 hours before the initial appearance before a judge or magistrate, rather than the 24 hour period which had long been the law. HB 175 would create consistency between the amended rule and the statute relating to pretrial detention.

Requirement for Hearing Without Unreasonable Delay

Under *Gerstein v. Pugh*, a probable cause hearing must be held without unreasonable delay. 420 U.S. 103 (1975). After *Gerstein*, a standard of 24 hours was adopted by most states and most circuits. Years later, a narrowly divided US Supreme Court stated that the initial appearance must be made only within 48 hours. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). However, *Riverside* does not bind the states in their interpretation of their own constitutions.

In one accounting of state responses to *Gerstein*, most states had concluded that 24 hours was the appropriate term of detention before appearing before a magistrate or judge, and only seven states explicitly permitted more than 24 hours prior to an initial hearing. *Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 333-34 (Mass. 1993).

Since Alaska had guaranteed a 24-hour window for initial appearances for 18 years since the *Riverside* decision, the state courts may be hard pressed to see why a 48-hour window would not likely permit "unreasonable delay." The Alaska courts have not yet had a chance to rule on the dimensions of the "speedy trial" provision of Article I, section 11 as it relates to initial appearances, since Rule 5 has long guaranteed a 24-hour window of appearance. The Alaska Supreme Court could very well decide that the state constitutional provisions relating to speedy trial and due process require no more than a 24-hour window prior to initial appearance, just as the Massachusetts Supreme Court did in *Jenkins*.

Given that the currently existing rules of criminal procedure already provide an exception for defendants arrested far from urban centers and allow the prosecution to request a delay to gather more information where necessary for a bail hearing, the state's success over the last 18 years in providing an initial appearance within 24 hours strongly suggests that a delay of more than 24 hours would represent unnecessary delay, making the statute unconstitutional.

Contribution to Prison Over-Crowding, Increased Costs

The Legislature should also take note of the fact that **almost half of all Alaska prisoners are being held pretrial**, typically constituting 46 to 48% of all prisoners in Alaskan institutions. The high rate of pre-trial detention contributes substantially to the state of overcrowding in Alaska prisons and the need to build more of the prisons that cost our state dearly. Consider that the Department of Law reports that almost 27,000 new criminal cases were filed last year – roughly 6,000 felony cases and roughly 21,000 misdemeanor cases. If every one of those 27,000 arrests results in a single extra day in custody, that increase of 27,000 prisoner-days would impose a similar burden in on the correctional system as 74 prisoners spending a year in prison.

Every prisoner-year in custody costs roughly $45,000. **The cost of additional incarceration from such the policy change contemplated in HB 175 could cost up to $3.3 million in increased costs every year**, just by adding a single day of initial incarceration for each arrest.

Extension of the post-arrest time that a prisoner can be kept in custody without any bail will merely serve to increase our prison population unnecessarily, mostly by increased incarceration of prisoners accused only of misdemeanors.

The Legislature should reverse course and return to the 24-hour window Alaska observed for decades. We are not aware of any evidence of a single incident in which a prisoner was released wrongfully because of any limitation imposed by the 24-hour window before the initial appearance. Locking up thousands of people accused of misdemeanors for longer periods of time and spending millions of dollars to keep our prisons crowded is not good public policy.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
Representative Max Gruenberg, Representative_Max_Gruenberg@legis.state.ak.us
Representative Lindsey Holmes, Representative_Lindsey_Holmes@legis.state.ak.us
Representative Mike Chenault, Representative_Mike_Chenault@legis.state.ak.us

27-LS0579\A.1
Gardner
3/14/11

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 175

Page 3, following line 18:

Insert a new bill section to read:

"* **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected."

Renumber the following bill section accordingly.

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Senate Judiciary Committee Date: March 1, 2010

Thru: Richard Svobodny, Deputy Attorney General
Anne Carpeneti, Assistant Attorney General

From: Susan S. McLean SMc
Director, Criminal Division

Subject: **Other State Rules - First Appearance After Arrest**

General Considerations

The Fourth Amendment requires that a person must be released from custody after 48 hours if a court has not determined that there is probable cause for the arrest. *County of Riverside v. McLaughlin,* 500 U.S. 44, 57-59, 111 S.Ct. 1661, 1670-1671 (1991). Violation of the rule is but one factor to consider in determining whether to suppress a defendant's in-custody statements.

- Since probable cause (and the amount of bail) must be determined before an arrest warrant issues, a probable cause determination only applies to warrantless arrests.
- Since probable cause may be determined on the basis of affidavits and sworn testimony after a warrantless arrest, the defendant's presence is not required at a probable cause hearing.
- Many states require appearance before a magistrate without unnecessary delay, but most courts have not defined "without unnecessary delay" as a specific amount of time, and determine meaning on a case by case basis.

Only 3 of the 24 states which set specific time limits mandate appearance within 24 actual hours of arrest.

Summary - First Appearance Following Warrantless Arrest, By Total Number of States

3 states - 24 hours, calculated including weekends and holidays (AK, FL, MD)
1 state - 24 hours, weekends and holidays *may* be included or excluded (WA)
6 states - 24 hours, calculated *excluding* weekends and holidays (AZ, CT, DE, ID, MA, NH)

1 state - 36 hours, calculated *excluding* day of arrest, Sundays and holidays (MN)

7 states- 48 hours, including weekends and holidays (AL, AR, GA, HI, MS, NE, TX)
1 state - 48 hours, *excluding* Sunday, holiday, and days when court not in session (CA)
1 state - 48 hours, *excluding* Saturday, Sunday and holidays (ME)
1 state - 48 hours if 1st appearance is combined w/prob. cause hearing (court decision) (WI)

2 states - 72 hours, including weekends and holidays (NJ, WY)
1 state - 72 hours, *excluding* Saturday, Sunday and holidays (LA)
1 state - 72 hours is "without delay", if probable cause w/in 48 hours (court decision) (TN)
21 states - "without unnecessary delay" (CO, IL, IA, KS, KY, MI, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, UT, VT, WV)

2 states - "forthwith" (SC, VA)

1 state - "promptly" (repealed a 24- hour rule in 1995) (IN)

1 state - person must be released if not "charged" within 20 hours, but no provision for first appearance (MO)

State Time Limits for Initial Appearance Before Magistrate

State	Time Limit	Authority	Statutory language/construction
Alabama	48 hours - Warrantless arrest 72 hours - Arrest w/ warrant	Ala. R. Crim. P. 4.3(a)(1)(iii) Ala. R. Crim. P. 4.3(b)(2)(i)	
Alaska	24 hours, including weekends and holidays	Alaska R. Crim. P. 5(a)(1)	
Arizona	24 hours, excluding Sat., Sun and holidays	Ariz. R. Crim. P. 4.1(b) and Ariz. R. Crim. P. 1.3	*See, State v. Watkins,* 2008 WL 3171651 * 3 (Ariz. App. Aug.5, 2008) (Sat. Sun. and legal holiday excluded from calculation of 24 hrs; citing Rules 4.1(b) and 1.3))
Arkansas	48 hours Case law suggests that exception may exist for weekends and holidays	Ark. R. Crim. P. 4.1(e)	*See, Larson v. Dorney,*__ F.Supp.__, Slip. Op. 2009WL 903392 *4 (W.D. Ark, April 1, 2009)(delay between arrest on Good Friday and appearance on Monday was "as promptly as calendar would allow")
California	48 hours, excluding Sundays and holidays. If 48 hours expires when court is not in session, then next judicial day.	CA Penal Code § 825(a)(1) CA Penal Code § 825(a)(2)	
Colorado	without unnecessary delay	CRSA. § 16-2-112 Colo. R. Crim. P. 5	
Connecticut	24 hours, excluding Sat., Sun. and holidays	CRS 54-1(g) Conn. Practice Book R. 37-1	Statutory language "promptly before the court sitting next regularly" means the next court day, excluding weekends and holidays. *State v. Pirowski,* 11 Conn. App. 238,240, 526 A.2d 562 (1996)
Delaware	24 hours, excluding Sundays and holidays	11 Del. C. § 1909	
Florida	24 hours, including weekends and holidays	Fla. R. Crim. P 3.130	
Georgia	48 hours –warrantless arrest 72 hours – arrest with warrant	Ga. Uniform St. Ct. R. 26.1 Ga. St § 17-4-62; Ga. St § 117-4-26	
Hawaii	48 hours	H.R.S. 803-9(5)	
Idaho	24 hours, excluding Sat., Sun. and holidays	I.C.R, Rule 5(b)	
Ilinois	without unnecessary delay	I.L.C.S. § 109-1	*See, People v. Willis,* 831 N.E.2d, 531, 538 (Ill., 2005) Ill Court cites *McLaughlin* as requiring 48 hours, but delay is only one factor to be examined in deciding whether confession is voluntary. Court has not otherwise defined "unnecessary delay".

Indiana	" promptly" 24 hr. rule repealed, 1995 Ct. decision implies that more than 48 hours can pass before initial appearance before magistrate	Ind. Code § 35-33-7-1	*See, State v. Larson,* 776 N.W.2d, 254, 258 (Ind. 2009) – probable cause must be determined with 48 hours, but can be based on hearsay and written testimony. "Arrested person has no right to be physically present at probable cause hearing." Ind. law does not provide for a specific period of time in defining how "promptly" a person is brought before magistrate
Iowa	without unnecessary delay	I.C.A. 804.22	
Kansas	without unnecessary delay	KSA 2003 Supp. 22- 2901	*See, State v. Carrow,* 2006 WL 399251 *4 (Kan. App., Feb. 17, 2006) - cites *McLaughlin* as defining "without unreasonable delay" to mean that period of delay "cannot be longer than 48 hours, excluding weekends and holidays"
Kentucky	without unnecessary delay	Ky. R. Crim. P. 3.02(2)	
Louisiana	72 hours excluding Sat., Sun, holidays 48 hours probable cause hearing, which is not adversarial and conducted without presence of defendant	LSA – C.Cr. P. Art. 230-1(A) LSA –C. Cr. P. Art. 230.2(A)	
Maine	48 hours, excluding Sat., Sun and holidays	Me. R. Crim. P. 5(a)	
Maryland	24 hours, including weekends and holidays	Md. Rule 4-212(e) and (f)	Although statute does not specifically state "including weekends", it is clear from case law. *See, e.g., Odum v. State,* 846 A. 2d 145 (Md. App. 2004)
Massachusetts	24 hours, excluding weekends and holidays (see judicial interpretation re probable cause determination)	Mass. R. Crim. P. 7	"accused shall be brought before court then in session, and, if not at its next session". Language at the court's "next session" suggests that if an accused is arrested on Friday, the next session would be a regular court day. *See, Jenkins v. Chief Justice of Dist. Court Dept.,* 619 N.E.2d 324, 337,339 (Mass, 1993) holding that probable cause must be determined within 24 hours but that the determination may be made ex parte upon written documents.
Michigan	without unnecessary delay	M.C.L.A. § 764.13	
Minnesota	36 hours, excluding day of arrest, Sun. and holidays	49 M.S.A. R. Crim. P. 4.02(5)	

Mississippi	without unnecessary delay, within 48 hours	M.C.A. 99-3-17 Uniform Cnty and Cir R 6.03	
Missouri	None – must be charged within 20 hours, but no requirement of personal appearance	V.Ann.Mo.C. Art. 544.170	All persons who are arrested without warrant shall be released if not charged and held by warrant within 20 hours of arrest
Montana	without unnecessary delay	MCA 46-7-101	*See, St. v. Brown,* 933 P.2d 672, 675-676 (Mont. 1999) acknowledging *McLaughlin* 48 hour time limit for probable cause determination, and holding that to be one factor in deciding voluntariness of confession.
Nebraska	48 hours	Neb. Crim. Rule 5.1(b)(1)	
Nevada	without unnecessary delay -warrantless arrest 72 hours- arrest with warrant	N.R.S. 171-1771 N.R.S. 171-178	*See, Powell v. State,* 930 P.2d 1123 (Nev. 1997), acknowledging that *McLaughlin* requires probable cause hearing within 48 hours
New Hampshire	24 hours, excluding Sat., Sun. and holidays	N.R.S. § 594:20(a)	
New Jersey	72 hours, provided that complaint showing probable cause is filed within 12 hours of arrest	N.J. Crim. Rules 3:4-1 and 3:4-2	
New Mexico	without unnecessary delay	NMSA § 31-1-5	
New York	without unnecessary delay	McKinney's CPL § 140.20 sub1	
North Carolina	without unnecessary delay	N.C.G.S.A. § 15A-511	
North Dakota	without unnecessary delay	N.D.C.C. 2906-25 N.D. Crim. Rule 5(a)	
Ohio	without unnecessary delay	O.R.C. § 29.35.05 Ohio Crim. Rule 4(e)	
Oklahoma	without unnecessary delay	22 Okl. Stat. Ann. § 181	*See, Black v. State, 871 P.2d 35, 39 (Okl.Cr.*1994).Citing *McLaughlin*, court recognized that delay longer than 48 hours in taking defendant to probable cause hearing is unreasonable.
Oregon	without unnecessary delay		
Pennsylvania	without unnecessary delay	Pa.R.Crim.P. 519	
Rhode Island	without unnecessary delay (unless charged w/ offense under RI Gen Law. 12.13.1.1*)	Super. R. Crim. P., Rule 5 Dist. R. Crim. P., Rule 9	*Unless charged w/ offense under RI Gen Laws, 12.13.1.1 (charges carrying life sentence or firearm offenses committed by persons previously convicted of offense carrying life sentence), in which case 48 hrs., excluding Sat., Sun. and holidays
South Carolina	Shall be forthwith carried before a magistrate and a warrant of arrest procured	S.C. Code 1976§ 22-5-200	

South Dakota	without unnecessary delay	SDCL § 23A-4-1	*State v. Larson,* 776 N.W. 2d 254, 258 (S.D., 2009) persons arrested without warrant are constitutionally entitled to probable cause determination within 24 hours.
Tennessee	"without unnecessary delay" – Judicially defined – 72 hours for appearance before magistrate 48 hrs for probable cause, but hearing unnecessary	Tenn. R. Crim. P. 5(a)	Due process is violated if probable cause is not determined within 48 hours, but a full adversarial hearing is not necessary. If an individual is not brought before a magistrate within 72 hours there has been an unnecessary delay within the definition of Tenn. R. Crim. P. 5.1. *State v. Carter*, 16 SW 762, 766 (Tenn. 2000)
Texas	48 hours	V.Ann. Tex. C.C.P. Art 14.06	
Utah	without unnecessary delay- 48 hours probable cause, but arrestee need not be present	U.C.A. 1953 § 77-723 Utah Criminal Rule 7	
Vermont	without unnecessary delay	Vt. R. Crim. P. 3(g)	
Virginia	"forthwith"	Va. Code Ann. § 19.2-82	Accused and officer appear together "forwith" for probable cause hearing. Does not apply to arrests with warrant
Washington	(Warrantless arrest only) 24 hours, including weekends and holidays 48 hours prob. cause, but hearing not required	Wash. Cr.RLJ 3.2.1 (c) Wash. Cr.RLJ 3.2.1(a)	"must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day." Sat, Sun and holidays may be considered court days
West Virginia	Without unnecessary delay	W.Va. Code Sex. 62-1-5 W.Va. R. Crim. P. 5	
Wisconsin	Within a reasonable time Judicial definition - 48 hours implicitly the reasonable time	W.S.A. § 970.01	If the initial appearance also serves as the *Riverside* probable-cause hearing it must be held within 48 hours barring extraordinary circumstances. In cases where a defendant's *Riverside (v. McLaughlin)* determination was properly made in a proceeding prior to the initial appearance, court looks at the individual circumstances of the case to determine a "reasonable time" from the defendant's arrest *State v. Evans,* 522 N.W. 2d, 554, 563 (Wis. App., 1994) (Held: 4 days over a weekend not unreasonable)
Wyoming	without unnecessary delay and in no event more than 72 hours	W. R Crim P. 5(a)	

CS FOR HOUSE BILL NO. 175(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to an appearance before a judicial officer after arrest; relating to penalties for operating a vehicle without possessing proof of motor vehicle liability insurance or a driver's license; relating to penalties for certain arson offenses; amending Rule 5(a)(1), Alaska Rules of Criminal Procedure, and Rule 43.10, Alaska Rules of Administration; and providing for an effective date."

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

* **Section 1.** AS 12.25.150(a) is amended to read:

(a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within **48** [24] hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers.

* **Sec. 2.** AS 12.70.130 is amended to read:

Sec. 12.70.130. Arrest without warrant. The arrest of a person may also be

lawfully made by a peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when arrested the accused must be taken before a judge or magistrate without unnecessary delay and, in any event, within **48** [24] hours after arrest, including Sundays and holidays, and complaint shall be made against the accused under oath setting out the ground for the arrest as in AS 12.70.120. Thereafter the answer of the accused shall be heard as if the accused had been arrested on a warrant.

*** Sec. 3.** AS 28.15.131 is amended by adding a new subsection to read:

(b) Violation of this section is an infraction.

*** Sec. 4.** AS 28.22.019(c) is amended to read:

(c) A person convicted under this section is guilty of **an infraction** [A CLASS B MISDEMEANOR] and **shall be sentenced to pay a mandatory fine of $500** [MAY BE PUNISHED AS PROVIDED IN AS 12.55, EXCEPT THAT A FINE OF AT LEAST $500 MUST BE IMPOSED].

*** Sec. 5.** AS 41.23.220 is amended to read:

Sec. 41.23.220. Penalty. (a) **Except for conduct that is a violation of AS 11.46.420, a** [A] person who violates a provision of AS 41.23.180 - 41.23.230 or a regulation adopted under AS 41.23.180 - 41.23.230 is guilty of a violation as defined in AS 11.81.900.

(b) **Except for conduct that is a violation of AS 11.46.420, the** [THE] supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary

delay **and in any event within forty-eight hours after arrest, including Sundays and holidays**. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. [NECESSARY DELAY WITHIN THE MEANING OF THIS PARAGRAPH (a) IS DEFINED AS A PERIOD NOT TO EXCEED FORTY-EIGHT HOURS AFTER ARREST, INCLUDING SUNDAYS AND HOLIDAYS.]

*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. The amendments to AS 41.23.220, made in sec. 5 of this Act, have the effect of changing Rule 43.10, Alaska Rules of Administration, by prohibiting the disposition of a violation of AS 11.46.420 without court appearance and forfeiture of bail amounts.

*** Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1 - 4 of this Act apply to arrests for offenses committed before, on, or after the effective date of this Act.

(b) Sections 5 - 7 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected.

*** Sec. 10.** This Act takes effect July 1, 2011.

HB 179

<TARGET><BILL>HB 179</BILL><SUBJECT>HB 179</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" RepBobLynnBlog.com

Session:
Alaska State Capitol #108
Juneau, AK 99801-1182

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Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

March 16, 2011

To: Representative Carl Gatto, Chairman

Fr: Representative Bob Lynn

Re: HB 179, "An Act relating to animal cruelty…"

I am requesting a hearing for HB 179, "*An Act relating to cruelty to animals and making failure to care for five or more animals in a single continuous episode a C felony"* at your earliest convenience.

I have attached supporting documentation.

House Judiciary is the first committee of referral.

Any questions or concerns can be directed to my staffer, Thomas Reiker, at 465-4965 or thomas_reiker@legis.state.ak.us .

Thank you in advance for your consideration.

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans Affairs Committee

Finance Subcommittees

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" RepBobLynnBlog.com

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Sponsor Statement
HB 179
"An Act relating to cruelty to animals..."

Under current law, each neglected animal constitutes a separate offense, but these offenses are only misdemeanors. I would like the gravity of the charge to reflect the gravity of the situation. As such, HB 179 makes it a Class C felony to criminally neglect five or more animals at the same time.

We have seen several cases throughout the state where people take on tens, sometimes hundreds, of animals with no reasonable expectation that they can adequately care for them all. People should be allowed to have as many pets as they like, but they should also be expected to care for these animals. Each time our authorities have to remove multiple animals, it shocks our collective conscience and overwhelms our animal rescue capabilities. We must strengthen our laws to discourage this type of behavior. As such, I respectfully request your support for HB 179.

Contact: Thomas Reiker, (907) 465-4965

Revised: March 30, 2011

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB179\A**
() Publish Date

Identifier (file name)HB179-DOA-OPA-3-25-11
Title An Act relating to cruelty to animals and making failure.....
Sponsor Representatives Lynn, Guttenberg, Gardner
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***		***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***		***	***	***	***	***

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, first version.

Prepared by Rachel Levitt, Acting Director
Division Office of Public Advocacy
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 269-3504
Date/Time 3/25/11 1:30 PM
Date 3/25/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB179\A

Analysis

This bill amends the crime of cruelty to animals to include failing to care for five or more animals and causing death, severe physical pain, or prolonged suffering to the animals. The Office of Public Advocacy cannot reliably predict how many new cases will be charged under this expanded definition ,and therefore, the agency has submitted an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB179\A**
() Publish Date

Identifier (file name)HB179-DOA-PDA-3-24-11
Title An Act relating to cruelty to animals and making failure.....
Sponsor Representatives Lynn, Guttenberg, Gardner
Requester House Judicial

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 3/24/11 3:30 PM
Date 3/25/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB179\A

Analysis

This bill amends the crime of cruelty to animals to include failing to care for five or more animals and causing death, severe physical pain, or prolonged suffering to the animals. The Agency can not reliably predict how many new cases will be charged under this expanded definition and, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB 179**
() Publish Date 3/9/2011

Identifier (file name) HB179-DOC-OC-03-28-11
Title "An Act relating to cruelty to animals and making failure to care
Sponsor Representative Lynn
Requester House Judiciary Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by Leslie Houston, Director
Division Dept. of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone 465-3339
Date/Time 03/28/2011 1:00 p.m.
Date 3/28/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 179

Analysis

HB 179 amends existing animal cruelty law to include failing to care for five or more animals and causing death, severe physical pain, or prolonged suffering to the animals.

Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of actual violations that will occur.

The Department of Corrections will closely monitor potential future fiscal impacts of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB179 \A**
() Publish Date

Identifier (file name): HB179-LAW-CRIM-03-25-11
Dept. Affected: Law
Title: An Act relating to cruelty to animals and making failure to care for five or more animals in a single continuous episode a class C felony.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: REPRESENTATIVE(S) LYNN
Requester: (H) JUD
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 3/25/11 10:00 AM
Approved by: John J. Burns, Attorney General — Date 3/25/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB179 \A

Analysis

HB 179 would adopt a class C felony for animal cruelty if a person, acting with criminal negligence, contemporaneously fails to care for five or more animals, and causes the death or severe pain or prolonged suffering to five or more animals.

This bill would have an indeterminate fiscal impact to the Department of Law.

adn.com
Anchorage Daily News

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Mat-Su dog breeder faces 50 counts of animal cruelty

WILLOW: Officials pick up 110 animals, but also find 22 that died.

Anchorage Daily News/adn.com

(01/11/11 07:46:29)

A Mat-Su man faces 50 counts of cruelty to animals after state troopers and borough officials found 22 dead dogs and 110 other dogs that were ailing, troopers said.

Frank Rich, 53, of Willow was arrested and taken to the Mat-Su Pretrial Facility, troopers said.

Animal-care staff with the Matanuska-Susitna Borough were working late into Monday evening to remove about 110 dogs from Rich's property in the Montana Creek area, the borough said.

Most of the dogs being rescued are malnourished and dehydrated, troopers said.

Another 22 dogs already had died from exposure, starvation and dehydration, troopers said.

Richard Stockdale, the borough's Animal Care & Regulation manager, said most of the dogs are huskies, a few are malamutes.

The borough said Rich is a dog breeder.

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150 dogs seized from breeder's home

January 11, 2011 | by Jackie Bartz and Channel 2 News staff

Jackie Bartz/KTUU.com

MONTANA CREEK, Alaska — Animal care staff in the Mat-Su Valley worked through the night Monday to remove more than 150 dogs from a breeder's home.

0 1

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Alaska State Troopers arrived Monday evening at the Montana Creek home of 53-year-old Frank Rich of Willow, near Mile 92 of the Parks Highway, to investigate a report of animal neglect.

Troopers say when they arrived at the house on Kashwitna Drive, there was no food or water for the dogs. There were about 150 dogs on the property.

Troopers say nearly all the dogs were malnourished and dehydrated. The animals were shivering and eating snow and their own feces. An additional 22 dogs that had already died were found on the properly, apparently dead from exposure, starvation and dehydration. They say there could be more dead dogs on the property.

About 30 of the dogs are puppies. Some are just a few weeks old.

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Troopers arrested Rich for 50 counts of cruelty to animals and remanded him to to the Mat-Su Pretrial Facility. He was arraigned Tuesday morning on the Class A misdemeanors, and a judge entered a plea of not guilty.

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Rich is held on $5,000 bail. If he posts bail, he cannot own dogs.

Rich told troopers he lost his job in October and was having a tough time supporting the dogs for his breeding operation.

Mat-Su Borough Animal Care & Regulation Manager Richard Stockdale said Animal Care removed the dogs from Rich because of the lack of care. There were 157 of his dogs at the shelter Tuesday morning.

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- Alaska State Troopers
- Animals

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VIDEO: 150 dogs seized from breeder's home

How You Can Help

Mat-Su Borough Animal Adoption Page

PHOTO: Dogs seized after alleged neglect

"It is huge, I mean right now we are at full capacity, you see we're closed today just so we can process them through," Stockdale said.

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Index by Keyword | Index by Date | Privacy Policy

He said most of the dogs were huskies. "Most animals are emaciated and dehydrated," Stockdale said.

Animal Care is asking the community for donations of money and the dogs' current brand of food, Hills Science Diet Advanced Fitness. The shelter needs the specific brand of dog food, money, zip ties, tarps, outside kennels, blankets and metal food bowls to help with the influx of dogs.

Supplies to help out can be dropped off at the Willow Fire Statoin and the Anchorage Animal Shelter.

Officials are also asking the public to come in and adopt other dogs -- not the dogs removed from Rich's house -- to alleviate pressure on the facility and let workers treat the incoming dogs. The facility is offering a discount on adopting the dogs that were already there.

Officials say Rich's dogs will not be up for adoption any time soon -- it depends on the outcome of the trial, or if Rich signs over control.

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Seized dogs finding new homes

PALMER — In the wake of a ruling ordering dozens of abused dogs be turned over to the Mat-Su Borough, some of the more than 150 animals seized early this year have started to find homes.

But if you're looking to adopt a husky mix, be patient.

"We have a few that are out for adoption just because of their health," said Animal Care and Regulation Manager Richard Stockdale. But most dogs still have a way to go, he said. "They're doing OK, but they're not quite ready to do the adoption thing."

Some of the dogs are headed to the correctional farm at Point MacKenzie, where inmates will care for them. Stockdale said he likes that arrangement because the farm has more manpower than he does and the dogs will get more attention.

But while having the dogs at the farm will relieve some of the burden on his staff, some of the challenges are going to get worse. One dog has already had a litter of puppies. Another is very close. Stockdale said several of the female dogs arrived at the shelter pregnant.

The dogs, most of which were emaciated and dehydrated — and some of which had already died — were seized Jan. 10 from the Willow-area home of Frank Rich. As in most dog seizure cases, the borough said it could not adopt the dogs out immediately. The borough set to work on seizing the dogs permanently. Rich appealed a forfeiture notice the borough filed, which sent the case to borough administrative hearing officer, Karen Jennings. On Feb. 10, Jennings ruled in the borough's favor.

However, that might not be the final word on who owns the dogs. Rich has 30 days to appeal and send the case to state Superior Court. Borough Attorney Lisa Thomas said Thursday that she has received no notice that Rich has taken this route.

But while that uncertainty remains, Stockdale said he's proceeding with the process of rehabilitating the dogs and getting them adopted. He said that is the right move.

"The forfeiture was upheld," he said. "They're now the borough's dogs."

Thomas backed him up on that point. The case's status, she said, is that right now the dogs are the borough's property.

Running parallel to the borough's process is a criminal case filed at the Palmer Courthouse — set for a hearing today — in which Rich is charged with 50 counts of animal cruelty.

Jennings' ruling contains hints of what a potential jury in Rich's criminal trial might see.

According to borough staff, Rich first showed up on their radar in October 2002 when he applied for and received a kennel license, which subsequently expired in 2005.

In April 2006, the borough received a complaint of 20 puppies running loose on Kashwitna Road. Rich was warned about the loose dogs and told to apply to renew his kennel license. In 2007, the borough got another complaint, this time about aggressive dogs getting loose from his property. An animal control officer sent to investigate "observed unsanitary conditions in the dog lot," a borough report says. Rich was cited for those unsanitary conditions and for having an unlicensed kennel in August

2007.

A week later, Rich applied for a license. The borough agreed to put down 24 of his dogs to reduce the numbers in the kennel. Even with the reduced numbers, Rich failed the inspection necessary for the license. His kennel was inspected again in September 2007.

"While the dogs were no longer standing in mud and water, the conditions were still unsanitary," Jennings wrote.

Finally, in October 2007, Rich passed an inspection and got a license, which expired in October 2010. He didn't stay on the right side of the law for more than a year, though. In late 2009, the number of dogs on his lot had swelled to 155, which was above the 127 allowed by his license. He was issued a warning.

In April of last year he applied to renew his license. The borough hasn't ruled on that application yet.

The ruling also contains a few snippets of how Rich tried to explain himself when animal care officers came to seize his dogs. He told them that the dead dogs had looked healthy and "suddenly died." He said he'd quit his job two months prior to their arrival and that money had been tight. He'd sold a vehicle and other things to pay for dog food. He said he prioritized feeding the puppies because he could sell them and use the money to feed the adults. He said there was no water for the dogs because it would freeze when he put it out, "so the dogs eat snow." He said he didn't call the borough because he worried all his dogs would be put down, and anyway he said he "did not want to burden the borough."

Jennings takes particular notice of testimony that Rich could have gotten water for the dogs at a nearby spring and that some of the dogs were found in a heated cabin on the property.

"Rich had a free source of water available and in addition, since the cabin was heated, could have kept the water from freezing so it could be provided to the dogs in his lot. Rich's failure to provide the most basic of needs, water, when he had the capacity to do so is evidence that he cannot be relied on to care for the dogs if they are returned to him," Jennings wrote.

Contact Andrew Wellner at andrew.wellner@frontiersman.com or 352-2270.

Woman sentenced to probation in animal-cruelty case

September 24, 2010|by Ashton Goodell

ANCHORAGE, Alaska — She's been called a cat hoarder, but an Anchorage woman convicted on several counts of animal cruelty says she tried to give stray animals a better life. District Court Judge Alex Swiderski sentenced 54-year-old Deborah Allen Thursday for mistreating several dozen cats and dogs.

Allen won't be spending any time in jail, but will be on probation for 10 years. Animal-rights activists say Allen's good intentions to adopt strays almost killed her animals.

The city removed 32 animals from Allen's home last October. On Thursday, Swiderski ordered at least another 50 pets to be turned over to Animal Control as part of her sentencing.

The prosecutor, Herbert Viergutz, says Allen took on too many animals and couldn't take care of those she was trying to save. Several of them were skinny and sick, with lung congestion and coughs.

The animals have been kept as evidence for nearly a year at Animal Control -- but Allen claims the animals were in better condition under her care than they are now.

Both sides want the animals to find health, happy homes.

"Ms. Allen's rights to all of her animal victims should be forfeited immediately, thereby allowing all the animals at Animal Control a chance to find a new and loving home," Viergutz said.

"I tell you, Judge, if nothing else, if you don't have any respect for me or if you are going to give me jail time fine -- but please, please, please do not send my animals to Animal Control," Allen said.

Swiderski told Allen she could no longer care for or own animals. He said with a mental evaluation and a recommendation from a psychologist, he might consider allowing Allen a few personal pets.

Contact Ashton Goodell at agoodell@ktuu.com

Homes sought for animals from cruelty case

October 01, 2010|by Ashton Goodell

ANCHORAGE, Alaska — Anchorage Animal Care and Control plans to remove dozens of animals from an Anchorage woman's home and animal shelter this weekend. A judge ordered Deborah Allen to turn over all of her animals after she was found guilty of animal cruelty.

At least 50 cats are waiting to be removed from Allen's home -- more than Animal Control can usually take on at once. Several shelters have stepped forward to help adopt out the animals, but even with the extra help, 50 cats and a handful of dogs is a lot to handle.

When Vickie Young with Polar Pug Rescue and Friends first saw her dog, Nym, she didn't even know she was a poodle. Her hair was matted down and covered in feces. Young adopted all the dogs removed from Allen's home.

"A far cry from when we first got them -- they were scared to death of people," Young said.

Several of the dogs had skin infections and eye problems from poor living conditions and a lack of medical care.

"They were in pretty rough shape: they had several inches of matting, which then causes them to have bacteria on the skin, and then the skin starts rotting away," Young said.

The dogs are doing a lot better now; most are healthy and ready to adopt, and Young has no doubt they'll find homes quickly. The problem is the cats -- Animal Control already has 11, and is expecting at least 50 more.

"We've had multiple calls about the dogs, but we have yet to receive a single phone call about the cats," said Animal Control's Brooke Taylor.

"We are very, very up-front with people when we have special-needs animals, and we have a lot," said Sally Clampitt with the Alaska Society for the Prevention of Cruelty to Animals. "Really healthy, talented, fabulous animals don't always end up in Animal Control."

Animal Control removed more than 23 cats from Allen's house last year, but didn't have the space to take in all the animals. It's still trying to make room and find other organizations to take on the rest of the animals staying at Allen's animal shelter, Chateau Pampered Purr.

Allen didn't want to talk on camera, but it's still possible she might pursue a civil case against Animal Control. She claimed in court that the shelter didn't adequately take care of the animals they took away from her, and she wants a third party to adopt the animals out.

Animal Control is ready to start adopting out the healthier animals, and will keep a waiting list of those interested in any of the animals still recovering.

Contact Ashton Goodell at agoodell@ktuu.com

HB 179

<TARGET><BILL>HB 179</BILL><SUBJECT>HB 179</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans' Affairs Committee

Finance Subcommittees
Administration
Corrections
Military and Veterans' Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" RepBobLynnBlog.com

Session:
Alaska State Capitol #108
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
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Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

March 16, 2011

To: Representative Carl Gatto, Chairman

Fr: Representative Bob Lynn

Re: HB 179, "An Act relating to animal cruelty…"

I am requesting a hearing for HB 179, "*An Act relating to cruelty to animals and making failure to care for five or more animals in a single continuous episode a C felony"* at your earliest convenience.

I have attached supporting documentation.

House Judiciary is the first committee of referral.

Any questions or concerns can be directed to my staffer, Thomas Reiker, at 465-4965 or thomas_reiker@legis.state.ak.us .

Thank you in advance for your consideration.

Alaska State Legislature

Chairman
State Affairs Committee

Member
Judiciary Committee
Energy Special Committee
Joint Armed Services Special Committee
Military and Veterans Affairs Committee

Finance Subcommittees

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" RepBobLynnBlog.com

Session:
Alaska State Capitol #108
Juneau, AK 99801-1182

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Phone: (907) 269-0205
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Sponsor Statement
HB 179
"An Act relating to cruelty to animals..."

Under current law, each neglected animal constitutes a separate offense, but these offenses are only misdemeanors. I would like the gravity of the charge to reflect the gravity of the situation. As such, HB 179 makes it a Class C felony to criminally neglect five or more animals at the same time.

We have seen several cases throughout the state where people take on tens, sometimes hundreds, of animals with no reasonable expectation that they can adequately care for them all. People should be allowed to have as many pets as they like, but they should also be expected to care for these animals. Each time our authorities have to remove multiple animals, it shocks our collective conscience and overwhelms our animal rescue capabilities. We must strengthen our laws to discourage this type of behavior. As such, I respectfully request your support for HB 179.

Contact: Thomas Reiker, (907) 465-4965

Revised: March 30, 2011

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB179\A**
() Publish Date

Identifier (file name) HB179-DOA-OPA-3-25-11
Title An Act relating to cruelty to animals and making failure.....
Sponsor Representatives Lynn, Guttenberg, Gardner
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***		***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***		***	***	***	***	***

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, first version.

Prepared by Rachel Levitt, Acting Director — Phone 907 269-3504
Division Office of Public Advocacy — Date/Time 3/25/11 1:30 PM
Approved by John Cramer, Deputy Commissioner — Date 3/25/2011
Department of Administration

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB179\A

Analysis

This bill amends the crime of cruelty to animals to include failing to care for five or more animals and causing death, severe physical pain, or prolonged suffering to the animals. The Office of Public Advocacy cannot reliably predict how many new cases will be charged under this expanded definition ,and therefore, the agency has submitted an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB179\A**
() Publish Date

Identifier (file name) HB179-DOA-PDA-3-24-11
Title An Act relating to cruelty to animals and making failure.....
Sponsor Representatives Lynn, Guttenberg, Gardner
Requester House Judicial

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 3/24/11 3:30 PM
Date 3/25/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB179\A

Analysis

This bill amends the crime of cruelty to animals to include failing to care for five or more animals and causing death, severe physical pain, or prolonged suffering to the animals. The Agency can not reliably predict how many new cases will be charged under this expanded definition and, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB 179**
() Publish Date: 3/9/2011

Identifier (file name) HB179-DOC-OC-03-28-11
Title: "An Act relating to cruelty to animals and making failure to care
Sponsor: Representative Lynn
Requester: House Judiciary Committee

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**	**	**	**	**	**	**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the first version of the bill.

Prepared by: Leslie Houston, Director — Phone: 465-3339
Division: Dept. of Corrections - Administrative Services — Date/Time: 03/28/2011 1:00 p.m.
Approved by: Joseph D. Schmidt, Commissioner — Date: 3/28/2011
Dept. of Corrections

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 179

Analysis

HB 179 amends existing animal cruelty law to include failing to care for five or more animals and causing death, severe physical pain, or prolonged suffering to the animals.

Department of Corrections is unable to determine the fiscal impacts of the passage of this legislation, as we cannot estimate the total number of actual violations that will occur.

The Department of Corrections will closely monitor potential future fiscal impacts of this legislation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB179 \A**
() Publish Date

Identifier (file name): HB179-LAW-CRIM-03-25-11
Dept. Affected: Law
Title: An Act relating to cruelty to animals and making failure to care for five or more animals in a single continuous episode a class C felony.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: REPRESENTATIVE(S) LYNN
Requester: (H) JUD
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 3/25/11 10:00 AM
Approved by: John J. Burns, Attorney General — Date 3/25/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB179 \A

Analysis

HB 179 would adopt a class C felony for animal cruelty if a person, acting with criminal negligence, contemporaneously fails to care for five or more animals, and causes the death or severe pain or prolonged suffering to five or more animals.

This bill would have an indeterminate fiscal impact to the Department of Law.

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Anchorage Daily News

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Mat-Su dog breeder faces 50 counts of animal cruelty

WILLOW: Officials pick up 110 animals, but also find 22 that died.

Anchorage Daily News/adn.com

(01/11/11 07:46:29)

A Mat-Su man faces 50 counts of cruelty to animals after state troopers and borough officials found 22 dead dogs and 110 other dogs that were ailing, troopers said.

Frank Rich, 53, of Willow was arrested and taken to the Mat-Su Pretrial Facility, troopers said.

Animal-care staff with the Matanuska-Susitna Borough were working late into Monday evening to remove about 110 dogs from Rich's property in the Montana Creek area, the borough said.

Most of the dogs being rescued are malnourished and dehydrated, troopers said.

Another 22 dogs already had died from exposure, starvation and dehydration, troopers said.

Richard Stockdale, the borough's Animal Care & Regulation manager, said most of the dogs are huskies, a few are malamutes.

The borough said Rich is a dog breeder.

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150 dogs seized from breeder's home

January 11, 2011 | by Jackie Bartz and Channel 2 News staff

Jackie Bartz/KTUU.com

MONTANA CREEK, Alaska — Animal care staff in the Mat-Su Valley worked through the night Monday to remove more than 150 dogs from a breeder's home.

0 1

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Alaska State Troopers arrived Monday evening at the Montana Creek home of 53-year-old Frank Rich of Willow, near Mile 92 of the Parks Highway, to investigate a report of animal neglect.

Troopers say when they arrived at the house on Kashwitna Drive, there was no food or water for the dogs. There were about 150 dogs on the property.

Troopers say nearly all the dogs were malnourished and dehydrated. The animals were shivering and eating snow and their own feces. An additional 22 dogs that had already died were found on the properly, apparently dead from exposure, starvation and dehydration. They say there could be more dead dogs on the property.

About 30 of the dogs are puppies. Some are just a few weeks old.

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Troopers arrested Rich for 50 counts of cruelty to animals and remanded him to to the Mat-Su Pretrial Facility. He was arraigned Tuesday morning on the Class A misdemeanors, and a judge entered a plea of not guilty.

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Rich is held on $5,000 bail. If he posts bail, he cannot own dogs.

Rich told troopers he lost his job in October and was having a tough time supporting the dogs for his breeding operation.

Mat-Su Borough Animal Care & Regulation Manager Richard Stockdale said Animal Care removed the dogs from Rich because of the lack of care. There were 157 of his dogs at the shelter Tuesday morning.

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- Animals

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VIDEO: 150 dogs seized from breeder's home

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Mat-Su Borough Animal Adoption Page

PHOTO: Dogs seized after alleged neglect

"It is huge, I mean right now we are at full capacity, you see we're closed today just so we can process them through," Stockdale said.

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He said most of the dogs were huskies. "Most animals are emaciated and dehydrated," Stockdale said.

Animal Care is asking the community for donations of money and the dogs' current brand of food, Hills Science Diet Advanced Fitness. The shelter needs the specific brand of dog food, money, zip ties, tarps, outside kennels, blankets and metal food bowls to help with the influx of dogs.

Supplies to help out can be dropped off at the Willow Fire Statoin and the Anchorage Animal Shelter.

Officials are also asking the public to come in and adopt other dogs -- not the dogs removed from Rich's house -- to alleviate pressure on the facility and let workers treat the incoming dogs. The facility is offering a discount on adopting the dogs that were already there.

Officials say Rich's dogs will not be up for adoption any time soon -- it depends on the outcome of the trial, or if Rich signs over control.

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Seized dogs finding new homes

PALMER — In the wake of a ruling ordering dozens of abused dogs be turned over to the Mat-Su Borough, some of the more than 150 animals seized early this year have started to find homes.

But if you're looking to adopt a husky mix, be patient.

"We have a few that are out for adoption just because of their health," said Animal Care and Regulation Manager Richard Stockdale. But most dogs still have a way to go, he said. "They're doing OK, but they're not quite ready to do the adoption thing."

Some of the dogs are headed to the correctional farm at Point MacKenzie, where inmates will care for them. Stockdale said he likes that arrangement because the farm has more manpower than he does and the dogs will get more attention.

But while having the dogs at the farm will relieve some of the burden on his staff, some of the challenges are going to get worse. One dog has already had a litter of puppies. Another is very close. Stockdale said several of the female dogs arrived at the shelter pregnant.

The dogs, most of which were emaciated and dehydrated — and some of which had already died — were seized Jan. 10 from the Willow-area home of Frank Rich. As in most dog seizure cases, the borough said it could not adopt the dogs out immediately. The borough set to work on seizing the dogs permanently. Rich appealed a forfeiture notice the borough filed, which sent the case to borough administrative hearing officer, Karen Jennings. On Feb. 10, Jennings ruled in the borough's favor.

However, that might not be the final word on who owns the dogs. Rich has 30 days to appeal and send the case to state Superior Court. Borough Attorney Lisa Thomas said Thursday that she has received no notice that Rich has taken this route.

But while that uncertainty remains, Stockdale said he's proceeding with the process of rehabilitating the dogs and getting them adopted. He said that is the right move.

"The forfeiture was upheld," he said. "They're now the borough's dogs."

Thomas backed him up on that point. The case's status, she said, is that right now the dogs are the borough's property.

Running parallel to the borough's process is a criminal case filed at the Palmer Courthouse — set for a hearing today — in which Rich is charged with 50 counts of animal cruelty.

Jennings' ruling contains hints of what a potential jury in Rich's criminal trial might see.

According to borough staff, Rich first showed up on their radar in October 2002 when he applied for and received a kennel license, which subsequently expired in 2005.

In April 2006, the borough received a complaint of 20 puppies running loose on Kashwitna Road. Rich was warned about the loose dogs and told to apply to renew his kennel license. In 2007, the borough got another complaint, this time about aggressive dogs getting loose from his property. An animal control officer sent to investigate "observed unsanitary conditions in the dog lot," a borough report says. Rich was cited for those unsanitary conditions and for having an unlicensed kennel in August

2007.

A week later, Rich applied for a license. The borough agreed to put down 24 of his dogs to reduce the numbers in the kennel. Even with the reduced numbers, Rich failed the inspection necessary for the license. His kennel was inspected again in September 2007.

"While the dogs were no longer standing in mud and water, the conditions were still unsanitary," Jennings wrote.

Finally, in October 2007, Rich passed an inspection and got a license, which expired in October 2010. He didn't stay on the right side of the law for more than a year, though. In late 2009, the number of dogs on his lot had swelled to 155, which was above the 127 allowed by his license. He was issued a warning.

In April of last year he applied to renew his license. The borough hasn't ruled on that application yet.

The ruling also contains a few snippets of how Rich tried to explain himself when animal care officers came to seize his dogs. He told them that the dead dogs had looked healthy and "suddenly died." He said he'd quit his job two months prior to their arrival and that money had been tight. He'd sold a vehicle and other things to pay for dog food. He said he prioritized feeding the puppies because he could sell them and use the money to feed the adults. He said there was no water for the dogs because it would freeze when he put it out, "so the dogs eat snow." He said he didn't call the borough because he worried all his dogs would be put down, and anyway he said he "did not want to burden the borough."

Jennings takes particular notice of testimony that Rich could have gotten water for the dogs at a nearby spring and that some of the dogs were found in a heated cabin on the property.

"Rich had a free source of water available and in addition, since the cabin was heated, could have kept the water from freezing so it could be provided to the dogs in his lot. Rich's failure to provide the most basic of needs, water, when he had the capacity to do so is evidence that he cannot be relied on to care for the dogs if they are returned to him," Jennings wrote.

Contact Andrew Wellner at andrew.wellner@frontiersman.com or 352-2270.

Woman sentenced to probation in animal-cruelty case

September 24, 2010|by Ashton Goodell

ANCHORAGE, Alaska — She's been called a cat hoarder, but an Anchorage woman convicted on several counts of animal cruelty says she tried to give stray animals a better life. District Court Judge Alex Swiderski sentenced 54-year-old Deborah Allen Thursday for mistreating several dozen cats and dogs.

Allen won't be spending any time in jail, but will be on probation for 10 years. Animal-rights activists say Allen's good intentions to adopt strays almost killed her animals.

The city removed 32 animals from Allen's home last October. On Thursday, Swiderski ordered at least another 50 pets to be turned over to Animal Control as part of her sentencing.

The prosecutor, Herbert Viergutz, says Allen took on too many animals and couldn't take care of those she was trying to save. Several of them were skinny and sick, with lung congestion and coughs.

The animals have been kept as evidence for nearly a year at Animal Control -- but Allen claims the animals were in better condition under her care than they are now.

Both sides want the animals to find health, happy homes.

"Ms. Allen's rights to all of her animal victims should be forfeited immediately, thereby allowing all the animals at Animal Control a chance to find a new and loving home," Viergutz said.

"I tell you, Judge, if nothing else, if you don't have any respect for me or if you are going to give me jail time fine -- but please, please, please do not send my animals to Animal Control," Allen said.

Swiderski told Allen she could no longer care for or own animals. He said with a mental evaluation and a recommendation from a psychologist, he might consider allowing Allen a few personal pets.

Contact Ashton Goodell at agoodell@ktuu.com

Homes sought for animals from cruelty case

October 01, 2010|by Ashton Goodell

ANCHORAGE, Alaska — Anchorage Animal Care and Control plans to remove dozens of animals from an Anchorage woman's home and animal shelter this weekend. A judge ordered Deborah Allen to turn over all of her animals after she was found guilty of animal cruelty.

At least 50 cats are waiting to be removed from Allen's home -- more than Animal Control can usually take on at once. Several shelters have stepped forward to help adopt out the animals, but even with the extra help, 50 cats and a handful of dogs is a lot to handle.

When Vickie Young with Polar Pug Rescue and Friends first saw her dog, Nym, she didn't even know she was a poodle. Her hair was matted down and covered in feces. Young adopted all the dogs removed from Allen's home.

"A far cry from when we first got them -- they were scared to death of people," Young said.

Several of the dogs had skin infections and eye problems from poor living conditions and a lack of medical care.

"They were in pretty rough shape: they had several inches of matting, which then causes them to have bacteria on the skin, and then the skin starts rotting away," Young said.

The dogs are doing a lot better now; most are healthy and ready to adopt, and Young has no doubt they'll find homes quickly. The problem is the cats -- Animal Control already has 11, and is expecting at least 50 more.

"We've had multiple calls about the dogs, but we have yet to receive a single phone call about the cats," said Animal Control's Brooke Taylor.

"We are very, very up-front with people when we have special-needs animals, and we have a lot," said Sally Clampitt with the Alaska Society for the Prevention of Cruelty to Animals. "Really healthy, talented, fabulous animals don't always end up in Animal Control."

Animal Control removed more than 23 cats from Allen's house last year, but didn't have the space to take in all the animals. It's still trying to make room and find other organizations to take on the rest of the animals staying at Allen's animal shelter, Chateau Pampered Purr.

Allen didn't want to talk on camera, but it's still possible she might pursue a civil case against Animal Control. She claimed in court that the shelter didn't adequately take care of the animals they took away from her, and she wants a third party to adopt the animals out.

Animal Control is ready to start adopting out the healthier animals, and will keep a waiting list of those interested in any of the animals still recovering.

Contact Ashton Goodell at agoodell@ktuu.com

HB 215

<TARGET><BILL>HB 215</BILL><SUBJECT>HB 215</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

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REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE

MEMORANDUM

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Representative Mike Chenault
Speaker of the House

DATE: March 30, 2011

RE: Request for Hearing-House Bill 215

Please consider this request to schedule House Bill 215: *Judicial Review of Pipeline/ROW,* before your committee at your earliest possible convenience. Back-up for the legislation will be sent to your committee aide shortly.

Thank you for your consideration of my request.

Representative_Mike_Chenault@legis.state.ak.us

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REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE

SPONSOR STATEMENT
HOUSE BILL 215
"An Act relating to judicial review of a right-of-lease or the development or construction of an oil or gas pipeline on state land."

The objective of House Bill 215 is to prohibit the filing of lawsuits that have the potential to delay construction of in-state gaslines. The provisions under House Bill 215 modify current statute and the provisions only apply to state land rights-of-way. Claims may be filed only by an applicant, a competing applicant or a person who has a direct financial interest affected by the lease of a right-of-way. The requests for judicial review must be filed within 60 days of the publication of notice for a right-of-way lease application. Judicial review may only be granted for claims challenging the validity of the statute or challenging a denial of rights under the state constitution. Any claim will be barred unless it is filed within the 60 day time frame.

All claims are to be filed in Alaska Superior Court which will have exclusive jurisdiction to determine the proceeding. The court will not have the jurisdiction to grant any injunctive relief with the exception of an issuance of a final judgment.

This legislation is modeled after the Trans-Alaska Pipeline legislation, 43 USC, Chapter 34, that was adopted by Congress in 1973 (43 USC, Chapter 43, Sec. 1652 (d).) Similar legislation to House Bill 215 was passed by the Alaska State Legislature in 1973, Senate Bill 3, related to the TAPS line.

Representative_Mike_Chenault@legis.state.ak.us

27-LS0741\I
Bullock
4/5/11

CS FOR HOUSE BILL NO. 215( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES CHENAULT, Neuman, Fairclough, Johnson, Hawker, Olson, Feige, Millett, Thompson

A BILL

FOR AN ACT ENTITLED

"An Act relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor."

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

* **Section 1.** AS 38.34.050(c) is amended to read:

(c) Notwithstanding any contrary provision of law, the Department of Natural Resources shall grant the Alaska Housing Finance Corporation a right-of-way lease under AS 38.35 for the gas pipeline transportation corridor if

(1) the corporation submits a complete right-of-way lease application under AS 38.35.050;

(2) the lease application is made the subject of notice and other reasonable and appropriate publication requirements under AS 38.35.070; and

(3) **except for the covenants in AS 38.35.120(a)(1), (2), and (5),** the

corporation agrees to be bound by the right-of-way lease covenants set out in AS 38.35.120**; notwithstanding AS 38.35.120(b), a right-of-way lease subject to this paragraph is valid and of legal effect**.

*** Sec. 2.** AS 38.35.100(d) is amended to read:

(d) The commissioner shall include in a conditional lease each requirement and condition of the covenants established under AS 38.35.120**, except for covenants that do not apply to a lease entered into under AS 38.34.050(c)**. The commissioner may also require that the lessee agree to additional conditions that the commissioner finds to be in the public interest. In place of the covenant established under AS 38.35.120(a)(9), the commissioner shall require the lessee to agree that it will not transfer, assign, pledge, or dispose of in any manner, directly or indirectly, its interest in a conditional right-of-way lease or a pipeline subject to the conditional lease, unless the commissioner, after considering the public interest and issuing written findings to substantiate a decision to allow the transfer, authorizes the transfer. The commissioner shall also require the lessee to agree not to allow the transfer of control of the lessee without the approval of the commissioner; as used in this subsection, "transfer of control of the lessee" means the transfer of 30 percent or more, in the aggregate, of ownership interest in the lessee in one or more transactions to one or more persons by one or more persons.

*** Sec. 3.** AS 38.35.120(a) is amended to read:

(a) **Except as provided in AS 38.34.050(c), a** [A] noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at $1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline subject to the lease throughout its route both on state land obtained under the lease and on the other land; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including

itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Regulatory Commission of Alaska shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier; however, a lessee that owns or operates a natural gas pipeline

(A) subject to regulation either under the Natural Gas Act (15 U.S.C. 717 et seq.) of the United States or by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph;

(B) that is a North Slope natural gas pipeline (i) is required to operate as a common carrier only with respect to the intrastate transportation of North Slope natural gas, as that term is defined in AS 42.06.630, and (ii) is not required to operate as a common carrier as to a liquefied natural gas facility or a marine terminal facility associated with the pipeline, and is not otherwise required to perform its functions under the lease as a common carrier; for purposes of this subparagraph, "North Slope natural gas pipeline" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of North Slope natural gas, as defined by AS 42.06.630, for delivery, for storage, or for further transportation, and including all pipe, pump, or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control centers for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to carry out transportation, including an extension or enlargement of the line;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and

facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Regulatory Commission of Alaska under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Regulatory Commission of Alaska;

(8) it will, at its own expense, during the term of the lease,

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any

person other than another owner of the pipeline (including subsidiaries, parents, and affiliates of the owners), except to the extent that the commissioner, after consideration of the protection of the public interest (including whether the proposed transferee is fit, willing, and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property, and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold consent to the transfer, assignment, or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions, and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner, filing a copy in the office of the lieutenant governor, and mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation, or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction

or operation of the pipeline.

*** Sec. 4.** AS 38.35.120(b) is amended to read:

(b) **Except as provided in AS 38.34.050(c), for** [FOR] a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at $1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of AS 38.35.110 - 38.35.140. **Except as provided in AS 38.34.050(c), an** [AN] oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

*** Sec. 5.** AS 38.35.200(a) is amended to read:

(a) **A person that is a** [AN APPLICANT OR] competing applicant or **that** [A PERSON WHO] has a direct financial interest affected by the lease **of a right-of-way under this chapter that** [WHO] raises **an objection** [OBJECTIONS] within **the later of** 60 days **after the effective date of this Act or** [OF] the publication of notice under AS 38.35.070 **and a person that is an applicant** are the only persons with standing to seek judicial review of

(1) a decision of the commissioner under AS 38.35.100**; or**

(2) an action described in (b) of this section.

*** Sec. 6.** AS 38.35.200(b) is repealed and reenacted to read:

(b) Notwithstanding any contrary provision of law, an action or decision of the commissioner or other state officer or agency concerning the issuance or approval of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the development, construction, or initial operation of a natural gas pipeline that uses a right-of-way subject to this chapter may not be subject to judicial review, except that a claim alleging the invalidity of this section must brought within 60 days after the effective date of this Act, and a claim alleging that an action will deny rights under the Constitution of the State of Alaska must be brought within 60 days following the date of that action. A claim that is not filed within the limitations established in this subsection is barred. A complaint under this subsection must be filed in superior court, and the superior court has exclusive jurisdiction. Notwithstanding AS 22.10.020(c),

except in conjunction with a final judgment on a claim filed under this subsection, the superior court may not grant injunctive relief, including a temporary restraining order, preliminary injunction, permanent injunction, or stay against the issuance of a right-of-way, permit, lease, certificate, license, or other authorization. In this section, "natural gas pipeline" has the meaning given in AS 42.06.630.

*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes shall change the catch line of AS 38.35.200 from "Judicial review of decisions of commissioner on application" to "Judicial review."

Sec. 38.35.070. Notice of application.

Upon receiving an application under AS 38.35.050, the commissioner shall

(1) cause notice of it to appear in a daily newspaper of general circulation published in the vicinity of the location of the proposed pipeline, the notice to include:

(A) a general description of the land involved;

(B) a summary of the substance of the application;

(2) file copies of the application with each coordinate agency;

(3) furnish at cost copies of a notice or application to persons requesting them; and

(4) provide other publication and notice the commissioner considers reasonable and appropriate to inform the public of the application.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 7 ch 3 FSSLA 1973)

Sec. 38.35.100. Decision on application.

(a) The commissioner shall promptly determine, in a written finding, on an application filed under AS 38.35.050, whether the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the present or future public interest. In making a determination the commissioner shall consider whether or not

(1) the proposed use of the right-of-way will unreasonably conflict with existing uses of the land involving a superior public interest;

(2) the applicant has the technical and financial capability to protect state and private property interests;

(3) the applicant has the technical and financial capability to take action to the extent reasonably practical to

(A) prevent any significant adverse environmental impact, including but not limited to erosion of the surface of the land and damage to fish and wildlife and their habitat;

(B) undertake any necessary restoration or revegetation; and

(C) protect the interests of individuals living in the general area of the right-of-way who rely on fish, wildlife, and biotic resources of the area for subsistence purposes;

(4) the applicant has the financial capability to pay reasonably foreseeable damages for which the applicant may become liable on claims arising from the construction, operation, maintenance, or termination of the pipeline;

(5) the applicant has agreed that in the construction and operation of a pipeline within the right-of-way the applicant will comply with, and require contractors and their subcontractors to comply with, applicable and valid laws and regulations regarding the hiring of residents of the state then in effect or that take effect subsequently.

(b) If the commissioner makes the determinations under (a) of this section favorably to the applicant, then the commissioner may grant the whole or part of the application. If the commissioner makes the determinations under (a)(1) - (5) of this section favorably to the applicant but determines that the applicant is not then fit, willing, and able to perform under the application, the commissioner may grant the application under a conditional lease subject to conditions established by the commissioner that will ensure that the applicant will, within a prescribed period of time not exceeding 10 years, establish that the applicant is fit, willing, and able, under (a) of this section, to perform the transportation or other acts that will be required by the present or future public interest. An applicant is not entitled to a notice or authorization to proceed to construction, or its equivalent, under a conditional lease until the commissioner determines in writing that the applicant has satisfactorily established that the applicant is then fit, willing, and able to perform under (a) of this section. Otherwise, the commissioner shall deny the application.

(c) The commissioner may offer the applicant a lease or a conditional lease under this section. If the applicant does not accept a lease offered under this section within 30 days, the lease offered is withdrawn.

(d) The commissioner shall include in a conditional lease each requirement and condition of the covenants established under AS 38.35.120. The commissioner may also require that the lessee agree to additional conditions that the commissioner finds to be in the public interest. In place of the covenant established under AS 38.35.120(a)(9), the commissioner shall require the lessee to agree that it will not transfer, assign, pledge, or dispose of in any manner, directly or indirectly, its interest in a conditional right-of-way lease or a pipeline subject to the conditional lease, unless the commissioner, after considering the public interest and issuing written findings

to substantiate a decision to allow the transfer, authorizes the transfer. The commissioner shall also require the lessee to agree not to allow the transfer of control of the lessee without the approval of the commissioner; as used in this subsection, "transfer of control of the lessee" means the transfer of 30 percent or more, in the aggregate, of ownership interest in the lessee in one or more transactions to one or more persons by one or more persons.

(e) The commissioner shall require a conditional lessee to agree that

(1) in the absence of the approval of the commissioner, a transfer may not relieve the lessee of an obligation assumed under the lease;

(2) a transfer, including the transfer of lessee, that occurs without the approval of the commissioner is ineffective to transfer interests in and obligations under the lease; and

(3) a transfer constitutes a default under the lease.

(f) In an application for the approval under (d) of this section of a transfer of an interest, the commissioner shall consider whether the proposed transferee will be fit, willing, and able to perform the transportation or other acts proposed under the conditions established in the conditional lease and whether the transfer is in the public interest. In approving the transfer of an interest under (d) of this section and this subsection, the commissioner may impose any condition on the transfer that the commissioner considers in the public interest.

(g) If, during the term of a conditional lease, the commissioner determines under (a) of this section that the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the present or future public interest, the commissioner may amend the conditional right-of-way lease to insert the covenant established in AS 38.35.120(a)(9) in place of the covenant against a transfer established under (d) and (e) of this section.

(h) The issuance of a conditional lease does not prevent the commissioner from issuing other conditional or unconditional leases for the same right-of-way. A conditional lease may be revoked at any time that the commissioner determines that the applicant or conditional lessee will not be fit, willing, and able to perform during the term of the lease or when another applicant or conditional lessee is determined to be fit, willing, and able to perform under an application or lease for all or part of the right-of-way. An applicant or conditional lessee accrues no rights, including preference or priority rights, to a particular right-of-way until the commissioner makes a determination that the applicant or conditional lessee is then fit, willing, and able to perform the transportation or other acts proposed under (a) of this section.

(i) The commissioner shall insert a provision implementing the requirements of (a)(5) of this section into each agreement entered into by the commissioner for the construction and operation of a pipeline within the state.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 9 ch 3 FSSLA 1973; am Sec. 1, 2 ch 51 SLA 1987)

Sec. 38.35.200. Judicial review of decisions of commissioner on application.

(a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

(1) failure to follow the procedures set out in this chapter; or

(2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process.

History -

(Sec. 1 ch 72 SLA 1972; am Sec. 19 ch 3 FSSLA 1973)

Sec. 42.06.630. Definitions.

In this chapter,

(1) "affiliated interest" means any person or other entity that

(A) is controlled or owned, in whole or in part, by a pipeline carrier;

(B) is controlled or owned, in whole or in part, by an entity which controls or owns, in whole or in part, a pipeline carrier;

(C) is an agent, employee, contractor, or subcontractor of a pipeline carrier or any entity controlled or owned, in whole or in part, by a pipeline carrier; or

(D) controls or owns, in whole or in part, a pipeline carrier;

(2) "capacity" means, with reference to a North Slope natural gas pipeline, the average daily volume throughput of the North Slope natural gas pipeline, calculated at the normal operating pressure of the North Slope natural gas pipeline as set out in the pipeline design;

(3) "commission" means the Regulatory Commission of Alaska (AS 42.04.010);

(4) "commissioner" means a member of the commission;

(5) "duties" means duties, powers, obligations, and functions;

(6) "firm transportation service" means service by a natural gas pipeline carrier that is not subject to a prior claim by another shipper or another class of service; service constitutes "firm transportation service" if the service receives the same priority as any other class of firm transportation service;

(7) "gas" includes all natural gas and hydrocarbons produced at the wellhead and not defined as oil;

(8) "interruptible transportation service" means service by a natural gas pipeline carrier in which the carrier's pipeline system capacity may be subject to a prior claim by another shipper or another class of service; a service constitutes "interruptible transportation service" if the service is given a lower priority than another class of service, resulting in noncontinuous service to a shipper of natural gas;

(9) "intrastate," as applied to the transportation of North Slope natural gas, means the transportation of North Slope natural gas between any point within the state and another point within the state, for ultimate consumption of the North Slope natural gas within the state;

(10) "natural gas pipeline" or "natural gas pipeline facility" means all the facilities of a total system of pipe, whether owned or operated by a natural gas pipeline carrier under a contract, agreement, or lease in this state used by a natural gas pipeline carrier for transportation of natural gas for delivery, storage, or further transportation, and including all pipe, pump and compressor stations, station equipment, and all other facilities used or necessary for an integral line of pipe to effectuate the transportation from point to point, excluding, however, gas processing plants, treaters, and separators;

(11) "natural gas pipeline carrier" means the owner, including a corporation, company, or other entity organized under the laws of the United States or of any state, of a natural gas pipeline, as the term is defined in this section, or an interest in it, or any person, including a corporation, company, or other entity organized under the laws of the United States or of any state, authorized to construct or extend pipeline facilities under this chapter;

(12) "North Slope natural gas" means gas that is produced from the area of Alaska lying north of 68 degrees North latitude and that, but for a pipeline subject to regulation under this chapter, had not been committed for sale and delivery in a commercial market due to the prevailing costs or price conditions;

(13) "North Slope natural gas pipeline" or "North Slope natural gas pipeline facility" means all the facilities of a total system of pipe, whether owned or operated by a North Slope natural gas pipeline carrier under a contract, agreement, or lease, in this state used by a North Slope natural gas pipeline carrier for transportation of North Slope natural gas for delivery, storage, or further transportation, including all pipe, pump, and compressor stations, station equipment, gas processing plants, treaters,

separators, and all other facilities used or necessary for an integral line of pipe to carry out the transportation from point to point, but excluding marine terminal facilities and the integrated plant, facilities, and equipment, including pollution control equipment, used for conditioning, storage, handling, or processing of North Slope natural gas into liquefied natural gas;

(14) "North Slope natural gas pipeline carrier" means the owner, including a corporation, company, or other entity organized under the laws of the United States or of a state, of a North Slope natural gas pipeline, or an interest in it, or a person, including a corporation, company, or other entity, organized under the laws of the United States or of a state, authorized to construct, operate, or extend North Slope natural gas pipeline facilities under this chapter;

(15) "oil" includes crude oil, and other hydrocarbons regardless of gravity that are produced at the wellhead in liquid form, its products and liquid hydrocarbons, including the liquid hydrocarbons known as distillate or condensate recovered or extracted from gas, other than gas produced in association with oil and commonly known as casinghead gas;

(16) "pipeline" or "pipeline facility" means all the facilities of a total system of pipe, whether owned or operated by a pipeline carrier under a contract, agreement, or lease, in this state used by a pipeline carrier for transportation, for hire and as a common carrier, of oil, gas, coal, or other mineral slurry for delivery, storage, or further transportation, and including all pipe, pump and compressor stations, station equipment, and all other facilities used or necessary for an integral line of pipe to effectuate the transportation from point to point, excluding, however, gas processing plants, treaters, and separators;

(17) "pipeline carrier" means the owner, including corporations organized under the laws of the United States or of any state, of any pipeline, as the term is defined in this section, or any interest in it, or any person, including corporations organized under the laws of the United States or of any state, authorized to construct or extend pipeline facilities under AS 42.06.240(a);

(18) "regulation" includes rules;

(19) "tariff" means a rate, charge, toll, rule, or regulation of an oil or gas pipeline facility relating to services furnished by the facility to the general public or other users for compensation.

History -

(Sec. 1 ch 139 SLA 1972; am Sec. 7, 8 ch 6 FSSLA 1973; am Sec. 12 - 14 ch 35 SLA 1977; am Sec. 14, 15, 20 ch 110 SLA 1981; am Sec. 88 ch 74 SLA 1985; am Sec. 19 ch 25 SLA 1999; am Sec. 8 ch 56 SLA 2000; am Sec. 2 - 4 ch 60 SLA 2003)

Revisors Notes -

Reorganized in 1983, 1998, and 2000 to alphabetize the defined terms.

Paragraphs (10) and (11) were enacted as (18) and (19). Renumbered in 2003, at which time paragraphs (10) - (17) were renumbered as (12) - (19).

Decisions -

"Its products" construed. - The legislature intended the phrase "its products" in paragraph (7) [now (15)] to include refined oil. Tesoro Alaska Petro. Co. v. Kenai Pipe Line Co., 746 P.2d 896 (Alaska 1987).

"Pipeline facility" construed. - A marine terminal facility which was physically connected to the remainder of a carrier's pipeline system logically was within the definition of "pipeline facility" in paragraph (8) [now (16)] for the outward movement of crude oil, and thus was subject to the Alaska Public Utilities Commission's regulatory authority. Tesoro Alaska Petro. Co. v. Kenai Pipe Line Co., 746 P.2d 896 (Alaska 1987).

"Transportation from point to point" construed. - It is not necessary that for "transportation from point to point" to fall within paragraph (8) [now (16)] one of the "points" must be a wellhead. Where incoming crude oil is "transported" from a tanker docked at the carrier's wharf, through marine

terminal lines, to the terminal storage tanks, this qualifies as "transportation from point to point." Tesoro Alaska Petro. Co. v. Kenai Pipe Line Co., 746 P.2d 896 (Alaska 1987).

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB215**
() Publish Date

Identifier (file name) HB215-DNR-SPCO-04-01-11
Title JUDICIAL REVIEW OF PIPELINE PROJECT/ROW
Sponsor Rep. Chenault
Requester House Judiciary

Dept. Affected Natural Resources
Appropriation Resource Development
Allocation Pipeline Cooridnator's Office
OMB Component Number 1191

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Mike Thompson
Division Pipeline Coordinator's Office
Approved by Daniel S. Sullivan
Department of Natural Resources

Phone 257-1330
Date/Time 4/1/11 12:00 AM
Date 4/1/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way.

There would be no fiscal impact on the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB215**
() Publish Date

Identifier (file name) HB215-DOR-AHFC-04-01-11
Title Judicial Review of Pipeline Project/ROW
Sponsor Representative Chenault
Requester House Judiciary Committee

Dept. Affected Revenue
Appropriation Alaska Housing Finance Corp.
Allocation AK Gasline Development Corp
OMB Component Number 2986

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

initial version

Prepared by Cary Bolling, Officer Governmental Relations
Division Alaska Housing Finance Corporation
Phone 907-350-2479
Date/Time 4/1/11 11:00 AM

Approved by Dan Fauske, CEO
Alaska Housing Finance Corporation
Date 4/1/2011 1:30PM

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB215

Analysis

HB 215 relates to judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land. No additional resources or staff expected; therefore there is no anticipated fiscal impact to the corporation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB215 \M**
() Publish Date

Identifier (file name): HB215-LAW-CIV-04-2-11
Dept. Affected: Law
Title: An Act relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land.
Appropriation: Civil
Allocation: Oil, Gas and Mining
Sponsor: REPRESENTATIVE(S) Chenault
Requester: (H) Judiciary
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost **0.0**

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 4/2/11 9:00 PM
Approved by: John J. Burns, Attorney General — Date: 4/2/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB215 \M

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way.

LAWS OF ALASKA

1973

Source

FSS-FCCS HCS CSSB 3

Chapter No.

3

AN ACT

Relating to pipelines; and providing for an effective date.

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

* Section 1. AS 38.35.010 is amended by adding a new subsection to read:

(b) The State of Alaska reserves unto itself all rights, powers, privileges and immunities not preempted by federal interstate commerce laws and regulations in the right-of-way leasing of any state lands for pipeline construction, transmission, or operation within its boundaries.

* Sec. 2. AS 38.35.020 is amended to read:

Sec. 38.35.020. GRANT OF RIGHT-OF-WAY LEASE. (a) Rights-of-way on state land including rights-of-way over, under, along, across, or upon the right-of-way of a public road or highway or the right-of-way of a railroad or other public utility, or across, upon, over, or under a river or other body of water or land belonging to or administered by the state may be granted by noncompetitive lease by the commissioner for pipeline purposes for the transportation of oil, products or natural gas under those conditions prescribed by law or by administrative regulation. Except to the extent authorized by an oil and gas lease or unit agreement approved by the state, no person may engage in any construction or operation of any part of an oil, products, or natural gas pipeline, which in whole or in part is or is proposed to be on state land unless that person has obtained from the commissioner a right-of-way lease of the land under this chapter.

(b) The commissioner may by regulation exempt the construction or operation of field gathering lines or any

reasonable classification of them from the requirement of a right-of-way lease under this chapter.

* Sec. 3. AS 38.35.030 is amended to read:

Sec. 38.35.030. ABANDONMENT, REDUCTION OR IMPAIRMENT OF SERVICE OF PIPELINE. No lessee may abandon any portion of a pipeline that is subject to a lease granted under this chapter, or operation or transportation, service, or sale by it, or reduce or impair service, except in accordance with the terms of the lease or sec. 40 of this chapter.

* Sec. 4. AS 38.35.040 is amended to read:

Sec. 38.35.040. TEMPORARY OR EMERGENCY SERVICE OR TEMPORARY ABANDONMENT, REDUCTION OR IMPAIRMENT OF SERVICE BY LESSEE. The commissioner may, either upon a request made in the form he shall by regulation require, or upon his own motion without request, authorize or require temporary or emergency rendering of service or temporary or emergency abandonment, reduction or impairment of service by a pipeline of a lessee without compliance with secs. 50 - 100 of this chapter. Nothing in this section prevents a carrier from temporarily suspending operations in the event of an emergency which threatens public health or safety; however, notice shall be given the commissioner as soon as possible.

* Sec. 5. AS 38.35.050 is repealed and re-enacted to read:

Sec. 38.35.050. APPLICATIONS FOR RIGHT-OF-WAY LEASES. (a) A person or persons desiring to own a pipeline which is proposed to be located in whole or in part on state land, shall apply for a noncompetitive right-of-way lease of the state land.

(b) Applications under (a) of this section shall be made in a form and manner prescribed by regulation, and shall include any and all data, information, plans and exhibits which the commissioner determines are necessary to prepare the analysis required by sec. 80 of this chapter and to make a decision under sec. 100 of this chapter.

(c) Any amendment to an application filed under this section which constitutes a substantial change in the application is subject to all provisions of this chapter applying to an original application.

(d) All persons owning or planning to own an interest in a pipeline or proposed pipeline subject to a lease must join in the application under (a) of this section. Any person employed by the lessee in operating the pipeline is bound by the covenants of the lease applicable to functions within the scope of his employment as if he were an applicant under the lease and the state may enforce any breach of a covenant directly against an operator who is not in compliance with the covenant.

* Sec. 6. AS 38.35.060 is repealed.

* Sec. 7. AS 38.35.070 is amended to read:

Sec. 38.35.070. NOTICE OF APPLICATION. Upon receiving

an application under sec. 50 of this chapter, the commissioner shall

(1) cause notice of it to appear in a daily newspaper of general circulation published in the vicinity of the location of the proposed pipeline, the notice to include:

(A) a general description of the land involved;

(B) a summary of the substance of the application;

(2) file copies of the application with each coordinate agency;

(3) furnish at cost copies of a notice or application to persons requesting them; and

(4) provide other publication and notice he considers reasonable and appropriate to inform the public of the application.

* Sec. 8. AS 38.35.080 is amended to read:

Sec. 38.35.080. ANALYSIS AND PUBLIC HEARING. (a) The commissioner shall, within a reasonable time after receiving the application, prepare an analysis of the application or of the matter of which he was notified, including a proposal for action if feasible; a proposed lease and a general statement of his basis and purpose, if favorable action is proposed; or, when a proposal for action is not feasible before a hearing, a description of the subjects and issues involved.

(b) Upon completion of the analysis but not less than 30 days before the date set for hearing an application or a substantial amendment to an application, the commissioner shall publish notice, and make copies available as provided in sec. 70 of this chapter.

(c) The commissioner shall set all applications for public hearing as soon as practicable, if a public hearing on an application is requested by any person within 30 days of publication of notice under sec. 70(a) of this chapter or if the proposed action being considered involves a substantial public interest. The commissioner shall set the application for public hearing and publish notice of the time and place of the public hearing at least 30 days before the hearing.

(d) Except to the extent specified in sec. 190(b) of this chapter, the provisions of the Administrative Procedure Act (AS 44.62) do not apply to hearings held under this section.

* Sec. 9. AS 38.35.100 is repealed and re-enacted to read:

Sec. 38.35.100. DECISION ON APPLICATION. (a) The commissioner shall promptly determine, on an application filed with him under sec. 50 of this chapter, whether the

applicant is fit, willing and able to perform the transportation or other acts proposed in a manner that will be required by the present or future public interest. In making a determination the commissioner shall consider whether or not

(1) the proposed use of the right-of-way will unreasonably conflict with existing uses of the land involving a superior public interest;

(2) the applicant has the technical and financial capability to protect state and private property interests;

(3) the applicant has the technical and financial capability to take action to the extent reasonably practical to

(A) prevent any significant adverse environmental impact, including but not limited to, erosion of the surface of the land and damage to fish and wildlife and their habitat;

(B) undertake any necessary restoration or revegetation; and

(C) protect the interests of individuals living in the general area of the right-of-way who rely on fish, wildlife and biotic resources of the area for subsistence purposes;

(4) the applicant has the financial capability to pay reasonably foreseeable damages for which he may become liable on claims arising from the construction, operation, maintenance or termination of the pipeline.

(b) If the commissioner makes these determinations favorably to the applicant, then he may grant the whole or part of the application. Otherwise, he shall deny the application. In order to grant the whole or part of the application the commissioner shall offer a lease to the applicant for its acceptance through signing of the lease and agreeing to comply with its terms, conditions, and obligations. Only upon proper acceptance of offered lease by the applicant within 30 days after its having been presented is the grant of the application consummated.

* Sec. 10. AS 38.35.110 is amended to read:

Sec. 38.35.110. TERM OF LEASE. Each lease of state land for pipeline right-of-way purposes shall contain a provision that the lease shall run for a specified term of not greater than 30 years, and shall be renewable for additional periods of up to 10 years each, so long as the lessee is in commercial operation and is in full compliance with all state law, including but not limited to state law pertaining to regulation and taxation of the pipeline facility, and is in compliance with all terms of the lease. In making this determination he shall take into consideration the cost of the proposed pipeline, its useful life, and the probable financing requirement for the proposed pipeline.

* Sec. 11. AS 38.35.120 is repealed and re-enacted to read:

Sec. 38.35.120. COVENANTS REQUIRED TO BE INCLUDED IN LEASE. (a) A noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at $1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline subject to the lease throughout its route both on state land obtained under the lease and on other land; however, a lessee who owns or operates a natural gas pipeline subject to regulation either (A) under the Natural Gas Act (15 U.S.C. 717 et. seq.) of the United States, or (B) by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Alaska Pipeline Commission shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Alaska Pipeline Commission under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other

provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Alaska Pipeline Commission;

(8) it will, at its own expense, during the term of the lease

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any person other than another owner of the pipeline (including subsidiaries, parents and affiliates of the owners), except to the extent that the commissioner, after consideration of the protection of the public interest (including whether the proposed transferee is fit, willing and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold his consent to the transfer, assignment or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner and filing a copy of it in the office of the lieutenant governor and by mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations

incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction or operation of the pipeline.

(b) For a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at $1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of secs. 110 - 140 of this chapter. An oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

(c) The commissioner may insert in any right-of-way lease other reasonable provisions and conditions that he determines the public interest requires.

(d) The lease will also contain terms and conditions that are reasonably necessary to obligate the lessee, to the extent reasonably practicable, to

(1) prevent conflicts with other existing uses of the land involving a superior public interest;

(2) protect state and private property interests;

(3) prevent any significant adverse environmental impact, including but not limited to the erosion of the surface of the land, and damage to fish and wildlife and their habitat;

(4) restore and revegetate during the term and at termination of the lease; and

(5) protect the interests of individuals living in the general area of the right-of-way who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.

(e) In the event the commissioner proposes to offer a lease or leases to two or more lessees for the same pipeline, the commissioner may include terms in the lease or leases which establish the limit of the obligations and liabilities of each lessee arising under this chapter or under the lease or leases.

(f) The commissioner may, at his discretion, include any or all of the terms set out in this section in leases

of state land for products pipeline right-of-way purposes.

* Sec. 12. AS 38.35.130 is amended to read:

Sec. 38.35.130. RIGHT-OF-WAY EASEMENTS OR LEASES ACQUIRED FROM OTHERS. (a) The lessee may, if the commissioner delegates the function to it, condemn, by declaration of taking, under AS 09.55.420 - 09.55.450, real property and acquire leases of or easements or rights-of-way on lands in the state required for right-of-way purposes for a pipeline subject to the lease on behalf of and as agent for the state in which title to or interest in the land shall vest.

(b) The lease shall contain a covenant that the land, right-of-way, or easement acquired under this section is or will form part of the land leased to the lessee.

* Sec. 13. AS 38.35.140 is repealed and re-enacted to read:

Sec. 38.35.140. PAYMENT OF RENTAL AND COSTS. (a) The lease price for a right-of-way lease shall be the annual fair market rental of the state lands included in the right-of-way based on the appraised fair market value of the land. The lease price is payable annually in advance on or before the anniversary of the lease. The appraised fair market rental value shall be adjusted periodically under the provisions of AS 38.05.105. Rental may not be charged for any land acquired by the lessee under sec. 130(b) of this chapter and conveyed without cost to the state.

(b) The lessee shall reimburse the state for all reasonable costs incurred in monitoring the construction of the pipeline on the right-of-way.

* Sec. 14. AS 38.35.150 is repealed.

* Sec. 15. AS 38.35.160 is repealed.

* Sec. 16. AS 38.35.170 is repealed and re-enacted to read:

Sec. 38.35.170. FORFEITURE OF LEASE. Failure to begin construction of the pipeline facility within a reasonable time of the granting of a right-of-way lease under this chapter for reasons within the control of the lessee or failure of an owner of an interest in the granted right-of-way substantially to comply with the terms of the right-of-way shall be grounds for forfeiture of the right-of-way interest of the lessee or owner in an action brought by the commissioner in the superior court. Before the commencement of any action for forfeiture of an interest in a right-of-way under this section, the commissioner shall give the lessee or owner of the interest notice in writing of the alleged default and shall not commence the proceeding unless the lessee or owner of the interest has failed to initiate good faith efforts to cure the default within 60 days of the notice of the alleged default.

* Sec. 17. AS 38.35.180(c) is amended to read:

(c) Neither this section nor the state's obtaining an injunction or recovering penalties extinguishes any civil

cause of action arising out of a violation of this chapter or the provisions of a right-of-way lease.

* Sec. 18. AS 38.35.190(b), (c) and (d) are repealed.

* Sec. 19. AS 38.35.200 is repealed and re-enacted to read:

Sec. 38.35.200. JUDICIAL REVIEW OF DECISIONS OF COMMISSIONER ON APPLICATION. (a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under sec. 70 of this chapter are the only persons with standing to seek judicial review of a decision of the commissioner under sec. 100 of this chapter.

(b) The only grounds for judicial review of a decision of the commissioner are

(1) failure to follow the procedures set out in this chapter; or

(2) abuse of discretion so capricious, arbitrary or confiscatory as to constitute a denial of due process.

* Sec. 20. AS 38.35.210 is amended to read:

Sec. 38.35.210. DELEGATION OF COMMISSIONER'S AUTHORITY. The commissioner may delegate to an employee of the Department of Natural Resources or the Department of Law the authority granted under this chapter, except for the authority to execute leases.

* Sec. 21. AS 38.35.220(d) is repealed.

* Sec. 22. AS 38.35.230 is repealed and re-enacted to read:

Sec. 38.35.230. DEFINITIONS. In this chapter

(1) "commissioner" means the commissioner of natural resources;

(2) "coordinate agencies" includes Department of Labor, Department of Highways, Department of Environmental Conservation, and the Alaska Pipeline Commission;

(3) "lease" means the instrument or extension of an instrument issued under this chapter granting a leasehold interest in state land for pipeline right-of-way purposes to a person and authorizing the construction or operation of, or transportation, service or sale by a pipeline for crude oil, natural gas, or products;

(4) "lessee" means a person or persons holding a valid lease issued by the commissioner;

(5) "natural gas" includes all hydrocarbons produced at the wellhead not defined as oil;

(6) "oil" includes crude petroleum oil and other hydrocarbons regardless of gravity which are produced at the wellhead in liquid form and the liquid hydrocarbons

known as distillate or condensate recovered or extracted from gas, other than gas produced in association with oil and commonly known as casinghead gas;

(7) "pipeline" or "pipeline facility" means all the facilities of a total system of pipe (whether owned or operated under a contract, agreement, or lease) used by a carrier for transportation of crude oil, natural gas, or products for delivery, for storage, or for further transportation, and including all pipe, pump or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control center for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, and fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to effectuate transportation, including an extension or enlargement of the line;

(8) "product" means refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum and any liquid product or by-product derived from crude petroleum oil or natural gas;

(9) "state land" means

(A) "state lands" as defined in AS 38.05.-365;

(B) public land of the United States selected by the state under sec. 6 of the Alaska Statehood Act of 1958 (PL 85-508; 72 Stat. 399), as amended, and real property of the United States transferred to the state under secs. 21, 35 and 45 of the Alaska Omnibus Act of 1959 (PL 86-70; 73 Stat. 141), as amended;

(C) any interest owned by the state in land;

(10) "transportation" means the shipment or carriage by a pipeline of crude oil, natural gas, or products from an upstream terminus in one or more fields or points of production or supply of the minerals to a downstream terminus in one or more points for delivery of the minerals to a purchaser or consignee, for storage, or for further carriage or shipment, including shipment or carriage within the state that may be classified as interstate or foreign transportation to the extent that the transportation may constitutionally be subjected to the provisions of this chapter, as well as all services necessary to effectuate shipment or carriage, including, among other things, the receipt, storage, processing, handling, transfer in transit, forwarding, and delivery of the minerals.

* Sec. 23. AS 38.35 is amended by adding new sections to

read:

Sec. 38.35.205. LEASE SAVINGS CLAUSE. A judicial finding that any term or condition of a right-of-way lease issued under this chapter is unlawful or invalid may not operate to invalidate the lease or any other term or condition of the lease.

Sec. 38.35.225. BINDING EFFECT OF COVENANTS. By entering into a lease under this chapter, the lessee is bound by all the covenants provided for in the lease to the full extent of the power of the state to impose those covenants under its authority as owner of the land to be leased or under its police or regulatory powers or otherwise; provided that the right of the lessee to challenge the power of the state to require such a covenant as owner of the land to be leased or under its police or regulatory powers or otherwise is preserved until such time as action to enforce the covenant is taken by the state.

* Sec. 24. AS 09.55.240(a)(12) is amended to read:

(12) for the location of pipelines for gathering, transmitting, transporting, storing, or delivering natural or artificial gas or oil or any liquid or gaseous hydrocarbons, including, but not limited to, pumping stations, terminals, storage tanks, or reservoirs, and related installations.

* Sec. 25. AS 38.05.020(c)(1) is amended to read:

(1) granting leases of state land for pipeline right-of-way purposes;

* Sec. 26. AS 38.05.020(c)(2) is amended to read:

(2) leasing, purchasing, or otherwise acquiring (including condemning by declaration of taking), easements or other interests in land in this state for the purpose of utilizing or granting leases of the land, easements or interests for pipeline right-of-way purposes;

* Sec. 27. AS 38.05.020(c)(4) is amended to read:

(4) investigating any matters concerning any lessee with a view to assuring compliance by it with its right-of-way lease, this chapter, and any other applicable state or federal law;

* Sec. 28. AS 38.05.330 is amended to read:

Sec. 38.05.330. PERMITS. The director, without the prior approval of the commissioner, may issue permits, rights-of-way or easements on state land for secondary roads, trails, ditches, field gathering lines or transmission and distribution pipelines not subject to AS 38.35, telephone and transmission lines, log storage, oil well drilling sites and production facilities for the purposes of recovering minerals from adjacent lands under valid lease, and other similar uses or improvements, or for the limited personal use of timber or materials. The commissioner, upon recommendation of the director, shall

establish a reasonable rate or fee schedule to be charged for these uses. In the granting, suspension or revocation of a permit or easement of lands, the director shall give preference to that use of the land which will be of greatest economic benefit to the state and the development of its resources. However, first preference shall be granted to the upland owner for the use of a tract of tideland, or tideland and contiguous submerged land, which is seaward of the upland property of the upland owner and which is needed by the upland owner for any of the purposes for which the use may be granted.

* Sec. 29. AS 42.06.310 is amended by adding a new subsection to read:

(c) Every common carrier shall, when ordered by the Alaska Pipeline Commission, extend or enlarge its pipeline or storage facilities provided the extension or enlargement shall be found to be reasonable and required in the public interest and that the expense involved will not impair the ability of the common carrier or public utility to perform its duty to the public.

* Sec. 30. The commissioner of natural resources shall submit to the members of the Eighth Legislature not later than September 1, 1974 a full report covering all lands conveyed under provisions of AS 38.05.063 and 38.05.076. The report shall contain a description of all parcels conveyed under the Act including acreage (to include a detailed plat of each parcel), land classification, appraised value, lease or sale value, proposed land usage, and any other information the commissioner may feel necessary to an understanding of the particular disposal.

* Sec. 31. AS 38.05.063 and 38.05.076 are repealed effective September 1, 1974.

* Sec. 32. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

Approved by governor: November 19, 1973
Actual effective date: November 20, 1973

-CITE-
43 USC CHAPTER 34 - TRANS-ALASKA PIPELINE 01/19/04

-EXPCITE-
TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-
CHAPTER 34 - TRANS-ALASKA PIPELINE

-MISC1-
Sec.

1651. Congressional findings and declaration.
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-SECREF-
CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 33 sections 2702, 2707, 2735; title 49 section 60130.

-End-

-CITE-
43 USC Sec. 1651 01/19/04

-EXPCITE-
TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-

Sec. 1651. Congressional findings and declaration

-STATUTE-

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country.

-SOURCE-

(Pub. L. 93-153, title II, Sec. 202, Nov. 16, 1973, 87 Stat. 584.)

-MISC1-

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101-380, title VIII, Sec. 8001, Aug. 18, 1990, 104 Stat. 564, provided that: "This title [enacting sections 1642 and 1656 of this title, amending sections 1350 and 1653 of this title and section 3145 of Title 16, Conservation, and enacting provisions set out as notes under this section and section 1653 of this title] may be cited as the 'Trans-Alaska Pipeline System Reform Act of 1990'."

SHORT TITLE

Section 201 of title II of Pub. L. 93-153 provided that: "This title [enacting this chapter] may be cited as the 'Trans-Alaska Pipeline Authorization Act'."

SEPARABILITY

Section 411 of Pub. L. 93-153 provided that: "If any provision of this Act [enacting this chapter, section 1456a of this title, and section 3512 of Title 44, Public Printing and Documents, amending section 1608 of this title, sections 45, 46, 53, and 56 of Title 15, Commerce and Trade, section 185 of Title 30, Mineral Lands and Mining, section 3502 of Title 44, and section 391a of former Title 46, Shipping, and enacting provisions set out as notes under sections 1608 and 1651 of this title, section 1904 of Title 12, Banks and Banking, section 45 of Title 15, section 791a of Title 16, Conservation, and section 1221 of Title 33, Navigation and Navigable Waters] or the applicability thereof is held invalid the remainder of this Act shall not be affected thereby."

PRESIDENTIAL TASK FORCE

Pub. L. 101-380, title VIII, Sec. 8103, Aug. 18, 1990, 104 Stat. 567, established a Presidential Task Force on the Trans-Alaska Pipeline System, to conduct an audit of the Trans-Alaska Pipeline System and make recommendations to the President, Congress, and the Governor of Alaska, authorized appropriations for the Task Force, and required it to transmit its final report to the President, Congress, and the Governor no later than 2 years after the date on which funding was made available.

NORTH SLOPE CRUDE OIL; REPORT ON EQUITABLE ALLOCATION

Pub. L. 94-586, Sec. 18, Oct. 22, 1976, 90 Stat. 2916, directed that the President, within 6 months of Oct. 22, 1976, determine special expediting procedures necessary to insure the equitable allocation of North Slope crude oil to the Northern Tier States of Washington, Oregon, Idaho, Montana, Illinois, Indiana, and Idaho to carry out the provisions of section 410 of Pub. L. 93-153 [set out below], and to report his findings to Congress, such report to include a statement demonstrating the impact that the delivery system would have on reducing the dependency of New England and the Middle Atlantic States on foreign oil imports.

TRANS-CANADA PIPELINE; NEGOTIATIONS WITH CANADA; FEASIBILITY STUDY

Title III (Secs. 301-303) of Pub. L. 93-153 authorized the President to enter into negotiations with the Government of Canada to determine Canadian willingness to permit construction of pipelines or other transportation systems across its territory to bring gas and oil from Alaska's North Slope to the United States; the need for intergovernmental agreements to protect interests of any parties involved with construction, operation, and maintenance of such natural gas or oil transportation systems; terms and conditions for construction across Canadian territory; desirability of joint studies to insure environmental protection, reduce regulatory uncertainty, and insure meeting energy requirements; quantity of oil and gas for which Canada would guarantee transit; and acquisition of other energy sources so as to make unnecessary the shipment of oil from the Alaska pipeline by tanker into the Puget Sound area. The President was to report to Congress on actions taken and recommendations for further action. In addition, the Secretary of the Interior was to investigate, and to report to Congress within 2 years of Nov. 16, 1973, as to the feasibility of oil or gas pipelines from the North Slope of Alaska to connect with a pipeline through Canada that would deliver oil or gas to United States markets. Nothing in title III was to limit the authority of the Secretary or any other Federal official to grant a gas or oil pipeline right-of-way or permit, which that official was otherwise authorized by law to grant.

EXCLUSION OF PERSONS FROM TRANS-ALASKA PIPELINE ACTIVITIES ON BASIS OF RACE, CREED, COLOR, NATIONAL ORIGIN, OR SEX PROHIBITED

Section 403 of Pub. L. 93-153 provided that: "The Secretary of the Interior shall take such affirmative action as he deems necessary to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from receiving, or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization granted or issued under title II [this chapter]. The Secretary of the Interior shall promulgate such rules as he deems necessary to carry out the purposes of this subsection and may enforce this subsection, and any rules promulgated under this subsection, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42, The Public Health and Welfare]."

EQUITABLE ALLOCATION OF NORTH SLOPE CRUDE OIL

Section 410 of Pub. L. 93-153 provided that: "The Congress declares that the crude oil on the North Slope of Alaska is an important part of the Nation's oil resources, and that the benefits of such crude oil should be equitably shared, directly or indirectly, by all regions of the country. The President shall use any authority he may have to insure an equitable allocation of available North Slope and other crude oil resources and petroleum products among all regions and all of the several States."

-End-

-CITE-
43 USC Sec. 1652 01/19/04

-EXPCITE-
TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-
Sec. 1652. Authorizations for construction

-STATUTE-
(a) Congressional declaration of purpose

The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) Issuance, administration, and enforcement of rights-of-way, permits, leases, and other authorizations

The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection.

(c) Applicability of statutes governing rights-of-way for pipelines through Federal lands; other statutory terms and conditions; waiver of procedural requirements; supersedure of administrative authorizations for construction

Rights-of-way, permits, leases, and other authorizations issued pursuant to this chapter by the Secretary shall be subject to the provisions of section 185 of title 30, as amended by Pub. L. 93-153 (except the provisions of subsections (h)(1), (k), (q), (w)(2), and (x)); all authorizations issued by the Secretary and other Federal officers and agencies pursuant to this chapter shall include the terms and conditions required, and may include the terms and conditions permitted, by the provisions of law that would otherwise be applicable if this chapter had not been enacted, and they may waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of this chapter. The direction contained in subsection (b) of this section shall supersede the provisions of any law or regulation relating to an administrative determination as to whether the authorizations for construction of the trans-Alaska oil pipeline shall be issued.

(d) National Environmental Policy Act of 1969 bypassed; issuance of authorizations for construction and operation not to be subject to judicial review; time limits on charges of invalidity or unconstitutionality; jurisdiction; hearings; review

The actions taken pursuant to this chapter which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final

Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified. Any such complaint shall be filed in a United States district court, and such court shall have exclusive jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided, and no other court of the United States, of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any such claim whether in a proceeding instituted prior to or on or after November 16, 1973. Such court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment entered in a case involving a claim filed pursuant to this section. An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

(e) Amendment or modification of rights-of-way, permits, leases, or other authorizations

The Secretary of the Interior and the other Federal officers and agencies are authorized at any time when necessary to protect the public interest, pursuant to the authority of this section and in accordance with its provisions, to amend or modify any right-of-way, permit, lease, or other authorization issued under this chapter.

-SOURCE-

(Pub. L. 93-153, title II, Sec. 203, Nov. 16, 1973, 87 Stat. 584; Pub. L. 98-620, title IV, Sec. 402(46), Nov. 8, 1984, 98 Stat. 3360; Pub. L. 100-352, Sec. 6(c), June 27, 1988, 102 Stat. 663.)

-REFTEXT-

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (d), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (section 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

-MISC1-

AMENDMENTS

1988 - Subsec. (d). Pub. L. 100-352 amended last sentence generally. Prior to amendment, last sentence read as follows: "Any review of an interlocutory or final judgment, decree, or order of such district court may be had only upon direct appeal to the Supreme Court of the United States."

1984 - Subsec. (d). Pub. L. 98-620 struck out provision that any such proceeding had to be assigned for hearing at the earliest possible date, had to take precedence over all other matters pending on the docket of the district court at that time, and had to be expedited in every way by such court.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100-352, set out as a note under section 1254 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98-620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1655 of this title; title 30 section 185; title 50 App. section 2406.

-End-

-CITE-

43 USC Sec. 1653 01/19/04

-EXPCITE-

TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-

Sec. 1653. Liability for damages

-STATUTE-

(a) Activities along or in vicinity of pipeline right-of-way; strict liability; limitation on liability; subrogation; emergency subsistence and other aid; exemption for State of Alaska

(1) Except when the holder of the pipeline right-of-way granted pursuant to this chapter can prove that damages in connection with or resulting from activities along or in the vicinity of the proposed trans-Alaskan pipeline right-of-way were caused solely by an act of war or negligence of the United States, other government entity, or the damaged party, such holder shall be strictly liable to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes. Claims for such injury or damages may be determined by arbitration or judicial proceedings.

(2) Liability under paragraph (1) of this subsection shall be limited to $350,000,000 for any one incident, and the holders of the right-of-way or permit shall be liable for any claim allowed in proportion to their ownership interest in the right-of-way or permit. Liability of such holders for damages in excess of $350,000,000 shall be in accord with ordinary rules of negligence.

(3) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(4) Upon order of the Secretary, the holder of a right-of-way or permit shall provide emergency subsistence and other aid to an affected Alaska Native, Native organization, or other person pending expeditious filing of, and determination of, a claim under

this subsection.

(5) Where the State of Alaska is the holder of a right-of-way or permit under this chapter, the State shall not be subject to the provisions of this subsection, but the holder of the permit or right-of-way for the trans-Alaska pipeline shall be subject to this subsection with respect to facilities constructed or activities conducted under rights-of-way or permits issued to the State to the extent that such holder engages in the construction, operation, maintenance, and termination of facilities, or in other activities under rights-of-way or permits issued to the State.

(b) Control and removal of pollutants at expense of right-of-way holder

If any area in the State of Alaska within or without the right-of-way or permit area granted under this chapter is polluted by any activities related to the Trans-Alaska Pipeline System, including operation of the terminal, conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal or State officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

-SOURCE-

(Pub. L. 93-153, title II, Sec. 204, Nov. 16, 1973, 87 Stat. 586; Pub. L. 101-380, title VIII, Secs. 8101, 8102(a)(1), (4), (b)-(e), Aug. 18, 1990, 104 Stat. 565-567.)

-MISC1-

AMENDMENTS

1990 - Subsec. (a)(1). Pub. L. 101-380, Sec. 8101(a), substituted "caused solely by" for "caused by".

Subsec. (a)(2). Pub. L. 101-380, Sec. 8101(b), substituted "$350,000,000" for "$50,000,000" in two places.

Subsec. (b). Pub. L. 101-380, Sec. 8101(c), inserted "in the State of Alaska" after "any area", "related to the Trans-Alaska Pipeline System, including operation of the terminal," after "any activities", and "or State" after "any other Federal".

Subsec. (c). Pub. L. 101-380, Sec. 8102(a)(1), struck out subsec. (c) which related to liability for discharges of oil loaded at terminal facilities and to establishment of Trans-Alaska Pipeline Liability Fund.

Subsec. (c)(2). Pub. L. 101-380, Sec. 8102(b), substituted "caused solely by" for "caused by".

Subsec. (c)(3). Pub. L. 101-380, Sec. 8102(d), inserted at end "The Fund shall expeditiously pay claims under this subsection, including such $14,000,000, if the owner or operator of a vessel has not paid any such claim within 90 days after such claim has been submitted to such owner or operator. Upon payment of any such claim, the Fund shall be subrogated under applicable State and Federal laws to all rights of any person entitled to recover under this subsection. In any action brought by the Fund against an owner or operator or an affiliate thereof to recover amounts under this paragraph, the Fund shall be entitled to recover prejudgment interest, costs, reasonable attorney's fees, and, in the discretion of the court, penalties."

Subsec. (c)(4). Pub. L. 101-380, Sec. 8102(e), designated existing provisions as par. (A) and added pars. (B) and (C).

Subsec. (c)(5). Pub. L. 101-380, Sec. 8102(a)(4), inserted before

period at end of second sentence ", except that after August 18, 1990, the amount to be accumulated shall be $100,000,000 or the amount determined by the trustees and certified to the Congress by the Comptroller General as necessary to pay claims arising from incidents occurring prior to August 18, 1990, and administrative costs, whichever is less".

Subsec. (c)(13), (14). Pub. L. 101-380, Sec. 8102(c), added pars. (13) and (14).

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-380 applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub. L. 101-380, set out as an Effective Date note under section 2701 of Title 33, Navigation and Navigable Waters.

Section 8102(a)(5)(A) of Pub. L. 101-380 provided that: "The repeal by paragraph (1) [repealing subsec. (c) of this section] shall be effective 60 days after the date on which the Comptroller General of the United States certifies to the Congress [certified July 5, 2000] that -

"(i) all claims arising under section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) have been resolved,

"(ii) all actions for the recovery of amounts subject to section 204(c) of the Trans-Alaska Pipeline Authorization Act have been resolved, and

"(iii) all administrative expenses reasonably necessary for and incidental to the implementation of section 204(c) of the Trans-Alaska Pipeline Authorization Act have been paid."

SAVINGS PROVISION

Section 8102(a)(3) of Pub. L. 101-380 provided that: "The repeal made by paragraph (1) [repealing subsec. (c) of this section] shall have no effect on any right to recover or responsibility that arises from incidents subject to section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) occurring prior to the date of enactment of this Act [Aug. 18, 1990]."

BULK FUEL STORAGE TANKS

Pub. L. 105-277, div. A, Sec. 101(g) [title III, Sec. 329(a), (b)], Oct. 21, 1998, 112 Stat. 2681-439, 2681-470, provided that:

"(a) Transfer of Funds. - Notwithstanding any other provision of law, the remainder of the balance in the Trans-Alaska Pipeline Liability Fund that is transferred and deposited into the Oil Spill Liability Trust Fund under section 8102(a)(2)(B)(ii) of the Oil Pollution Act of 1990 (43 U.S.C. 1653 note) after June 16, 1998 shall be used in accordance with this section.

"(b) Use of Interest Only. - The interest produced from the investment of the Trans-Alaska Pipeline Liability Fund balance that is transferred and deposited into the Oil Spill Liability Trust Fund under section 8102(a)(2)(B)(ii) of the Oil Pollution Act of 1990 [Pub. L. 101-380] (43 U.S.C. 1653 note) after June 16, 1998 shall be transferred annually by the National Pollution Funds Center to the Denali Commission for a program, to be developed in consultation with the Coast Guard, to repair or replace bulk fuel storage tanks in Alaska which are not in compliance with federal law, including the Oil Pollution Act of 1990 [33 U.S.C. 2701 et seq.], or State law."

[For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.]

DISPOSITION OF FUND BALANCE

Section 8102(a)(2) of Pub. L. 101-380, as amended by Pub. L. 105-277, div. A, Sec. 101(g) [title III, Sec. 329(c)], Oct. 21, 1998, 112 Stat. 2681-439, 2681-471, provided that:

"(A) Reservation of amounts. - The trustees of the Trans-Alaska Pipeline Liability Fund (hereafter in this subsection referred to as the 'TAPS Fund') shall reserve the following amounts in the TAPS Fund -

"(i) necessary to pay claims arising under section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)); and

"(ii) administrative expenses reasonably necessary for and incidental to the implementation of section 204(c) of that Act.

"(B) Disposition of the balance. - After the Comptroller General of the United States certifies that the requirements of subparagraph (A) have been met, the trustees of the TAPS Fund shall dispose of the balance in the TAPS Fund after the reservation of amounts are made under subparagraph (A) by -

"(i) rebating the pro rata share of the balance to the State of Alaska for its contributions as an owner of oil, which, except as otherwise provided under article IX, section 15, of the Alaska Constitution, shall be used for the remediation of above-ground storage tanks; and then

"(ii) transferring and depositing the remainder of the balance into the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

"(C) Disposition of the reserved amounts. - After payment of all claims arising from an incident for which funds are reserved under subparagraph (A) and certification by the Comptroller General of the United States that the claims arising from that incident have been paid, the excess amounts, if any, for that incident shall be disposed of as set forth under subparagraphs (A) and (B).

"(D) Authorization. - The amounts transferred and deposited in the Fund shall be available for the purposes of section 1012 of the Oil Pollution Act of 1990 [33 U.S.C. 2712] after funding sections 5001 [33 U.S.C. 2731] and 8103 [43 U.S.C. 1651 note] to the extent that funds have not otherwise been provided for the purposes of such sections."

LIABILITIES OF TRUSTEES OF TAPS FUND

Section 8102(a)(5)(B) of Pub. L. 101-380 provided that: "Upon the effective date of the repeal pursuant to subparagraph (A) [see Effective Date of 1990 Amendment note above], the trustees of the TAPS Fund shall be relieved of all responsibilities under section 204(c) of the Trans-Alaska Pipeline Authorization Act [43 U.S.C. 1653(c)], but not any existing legal liability."

PRESERVATION OF RIGHTS AND REMEDIES OF CONTRIBUTORS TO TAPS FUND

Section 8102(a)(6) provided that: "This subsection [amending this section and enacting provisions set out as notes above] is intended expressly to preserve any and all rights and remedies of contributors to the TAPS Fund under section 1491 of title 28, United States Code (commonly referred to as the 'Tucker Act')."

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 9509.

-End-

-CITE-

43 USC Sec. 1654 01/19/04

-EXPCITE-
TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-
Sec. 1654. Antitrust laws

-STATUTE-
The grant of a right-of-way, permit, lease, or other authorization pursuant to this chapter shall grant no immunity from the operation of the Federal anti-trust laws.

-SOURCE-
(Pub. L. 93-153, title II, Sec. 205, Nov. 16, 1973, 87 Stat. 588.)

-REFTEXT-
REFERENCES IN TEXT
The Federal antitrust laws, referred to in text, are classified generally to chapter 1 (Sec. 1 et seq.) of Title 15, Commerce and Trade.

-End-

-CITE-
43 USC Sec. 1655 01/19/04

-EXPCITE-
TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-
Sec. 1655. Roads and airports

-STATUTE-
A right-of-way, permit, lease, or other authorization granted under section 1652(b) of this title for a road or airstrip as a related facility of the trans-Alaska pipeline may provide for the construction of a public road or airstrip.

-SOURCE-
(Pub. L. 93-153, title II, Sec. 206, Nov. 16, 1973, 87 Stat. 588.)

-End-

-CITE-
43 USC Sec. 1656 01/19/04

-EXPCITE-
TITLE 43 - PUBLIC LANDS
CHAPTER 34 - TRANS-ALASKA PIPELINE

-HEAD-
Sec. 1656. Civil penalties

-STATUTE-
(a) Penalty
Except as provided in subsection (c)(4) of this section, the Secretary of the Interior may assess and collect a civil penalty under this section with respect to any discharge of oil -
(1) in transit from fields or reservoirs supplying oil to the

trans-Alaska pipeline; or

(2) during transportation through the trans-Alaska pipeline or handling at the terminal facilities, that causes damage to, or threatens to damage, natural resources or public or private property.

(b) Persons liable

In addition to the person causing or permitting the discharge, the owner or owners of the oil at the time the discharge occurs shall be jointly, severally, and strictly liable for the full amount of penalties assessed pursuant to this section, except that the United States and the several States, and political subdivisions thereof, shall not be liable under this section.

(c) Amount

(1) The amount of the civil penalty shall not exceed $1,000 per barrel of oil discharged.

(2) In determining the amount of civil penalty under this section, the Secretary shall consider the seriousness of the damages from the discharge, the cause of the discharge, any history of prior violations of applicable rules and laws, and the degree of success of any efforts by the violator to minimize or mitigate the effects of such discharge.

(3) The Secretary may reduce or waive the penalty imposed under this section if the discharge was solely caused by an act of war, act of God, or third party action beyond the control of the persons liable under this section.

(4) No civil penalty assessed by the Secretary pursuant to this section shall be in addition to a penalty assessed pursuant to section 1321(b) of title 33.

(d) Procedures

A civil penalty may be assessed and collected under this section only after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. In any proceeding for the assessment of a civil penalty under this section, the Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures. Any person who requested a hearing with respect to a civil penalty under this subsection and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

(e) State law

(1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.

(2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.

-SOURCE-

(Pub. L. 93-153, title II, Sec. 207, as added Pub. L. 101-380, title VIII, Sec. 8202, Aug. 18, 1990, 104 Stat. 571.)

-MISC1-

EFFECTIVE DATE

Section applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub. L. 101-380, set out as a note under section 2701 of Title 33, Navigation and Navigable Waters.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 9509.

-End-

-HEAD-

AMENDMENT

OFFERED IN THE HOUSE BY

TO: CSHB 215( ), Draft Version "I"

Page 6, line 19:

Delete "**(b)**"

Insert "**(c)**"

Page 6, line 20:

Delete all material and insert:

"* **Sec. 6.** AS 38.35.200 is amended by adding a new subsection to read:"

Page 6, line 21:

Delete "(b)"

Insert "(c)"

AMENDMENT

OFFERED IN THE HOUSE BY

TO: CSHB 215( ), Draft Version "I"

Page 1, line 2:

Delete **"and"**

Page 1, line 4, following **"corridor"**:

Insert **"; and providing for an effective date"**

Page 7, following line 10:

Insert a new bill section to read:

"*** Sec. 8.** This Act takes effect immediately under AS 01.10.070(c)."

27-LS0741\I.3
Bullock
4/8/11

AMENDMENT

OFFERED IN THE HOUSE BY

TO: CSHB 215( ), Draft Version "I"

Page 6, line 21, following "law":

Insert "and except for an action described in (c) of this section"

Page 7, following line 5:

Insert a new bill section to read:

"* **Sec. 7.** AS 38.35.200 is amended by adding a new subsection to read:

(c) An appeal of a permitting decision by the Department of Environmental Conservation under AS 46.03 or AS 46.14 that is made under authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency is not

(1) subject to the limitation in (a)(2) of this section;

(2) included in the actions described in (b) of this section."

Renumber the following bill section accordingly.

Alaska State Legislature

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REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE
SECTIONAL ANALYSIS

HOUSE BILL 215: "*An Act relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing finance Corporation for a gas pipeline transportation corridor.*"

Section 1: Amends AS 38.34.050(c), Cooperation and access to information. Adds language that excludes covenants found in AS 38.35.120(a) (1), (2) and (5) from the covenants required to be included in the lease. These covenants refer to a common carrier pipeline which is not applicable to the AGDC (Alaska Gasline Development Corporation) proposal. The AGDC gas pipeline proposal is to be that of a contract carrier. Without the removal of the specific covenants, AGDC will be impacted in its ability to finance the project.

Also adds language that a right-of-way lease is valid and of legal effect notwithstanding AS 38.35.120(b). This allows AGDC to continue its work through the summer under the assumption that AGDC has the ability to operate under this take or pay approach.

Section 2: Amends AS 38.35.100(d), Decision on application. Conforming language to note the changes found in Section 1.

Section 3: Amends AS 38.35.120(a), Covenants required to be included in lease. Conforming language to note the changes found in Section 1.

Section 4: Amends AS 38.35.120(b), Covenants required to be included in lease. Conforming language to note the changes found in Section 1.

Section 5: Amends AS 38.35.200(a), Judicial review of decisions of commissioner on application. Adds language that is intended to limit the ability of those with objections to natural gas pipeline construction to stop necessary projects. Allows a competing applicant or a person with a direct financial interest affected by the lease of a right-of-way to raise an objection within 60 days of the application or 60 days after the effective date of this legislation. Allows an applicant standing to seek judicial review anytime in the process.

Representative_Mike_Chenault@legis.state.ak.us

Section 6: Adds a new subsection to AS 38.35.200, Judicial review of decisions of commissioner on application. This subsection (c) is modeled after the Trans-Alaska Pipeline Authorization Act provision to foreclose lawsuits against any phase of development and/or construction. This subsection only allows those who have standing to bring about an action alleging that an action will deny rights under the state Constitution or challenging the invalidity of this section. The complaint must be filed in a state Superior Court and the court may not grant injunctive relief with the exception of a final judgment.

Section 7: Amends uncodified law by adding a new section for Revisor's Instructions. Changes the catch line of AS 38.35.200 from "Judicial review of decisions of commissioner on application" to "Judicial review."

April 8, 2011

TO: Representative Gatto

Chairman of Alaska House Judiciary Committee

Dear Chairman Gatto:

This note is in follow-up to my brief testimony on Wednesday (April 6, 2011) before the House Judiciary Committee concerning the original version of HB 215 (available thru BASIS).

Version I of HB 215 that was introduced at the Committee hearing (still not available on the Bill Status portion of BASIS) is different then the Bill package I was asked to review. In addition to the earlier provisions that modify the judicial review restrictions, the bill would exempt the AHFC gas pipeline from the rights-of-way covenants addressing common carriage, pipeline interconnection, and availability of delivery points.

I myself and ANGDA are not involved with, nor do we have any information on, the in-state bullet line project ("ASAP") of AHFC's subsidiary AGDC. Since the Committee Substitute Bill focuses entirely on and affects only the AHFC in-state gas pipeline, I don't believe I have any comments to offer to supplement Mr. Fauske's testimony.

As I indicated to you ANGDA obtained a "conditional" State Rights-Of-Way for a gas spur pipeline between Glennallen and Palmer. Our experience under the ROW Leasing Act was a positive one, and in

particular, the public process involved improved several aspects of the pipeline design and alignment.

In 2006 ANGDA worked with the RCA to draft revisions of the Alaska Pipeline Act's (AS 42.06) open season provisions. The "unworkable" nature of this detailed portion of AS 42.06.240(f) was first highlighted in the remarks of former Alaska Attorney Generals Charlie Cole before the July 28, 2004, LB&A hearing on stranded gas. A summary of the issues and history is contained in the RCA letter to then Governor Murkowski dated February 28, 2006. Ultimately, the framework for conducting a gas pipeline open season is the decisive element in providing open access and consumer benefits. Initially ANGDA proposed that rather than repeal the problematic sections, that public corporations be exempted from the provisions, in reliance on the fact that public corporations of the State act in the public interest by their very nature. To my knowledge no change in statute has been made.

I do not wish to testify at the hearing this afternoon, but I can be available for questions if the Committee wishes.

Harold Heinze

CEO of ANGDA

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MEMORANDUM April 7, 2011

SUBJECT: Judicial review of a right-of-way lease in HB 215 (Work Order No. 27-LS0741\M)

TO: Representative Beth Kerttula
Attn: Hannah McCarty

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked whether the limitations on the judicial review of a right-of-way lease under AS 38.35 by the amendment to AS 38.35.200 in HB 215 are constitutional under art. VIII, sec. 2, Constitution of the State of Alaska, with respect to the disposal of public land.

You also asked whether the bill compromises the Alaska Pollutant Discharge Elimination System (APDES) primacy under the Clean Water Act. You wrote that the Clean Water Act (CWA) requires states to have judicial review of water permits in order to qualify for primacy in handling CWA permits.

As a preliminary note, the statute that is amended in HB 215 was enacted in 1973 and apparently has never been the subject of litigation or addressed in an opinion by the attorney general.

In its current form, AS 38.35.200(a) limits standing to object to a right-of-way lease application decision by the commissioner of natural resources (commissioner) to an applicant, competing applicant, or a person that has a financial interest affected by the lease. The subsection also limits the period for raising the objection to 60 days after the commissioner files the notice stating that an application for a right-of-way lease has been received. In its current form, AS 38.35.200(b) limits the grounds for judicial review to the failure to follow the procedures in AS 38.35 or "abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process."

Applicability of art. VIII, sec. 10 of the Alaska constitution

The amendment to AS 38.35.200(a) in sec. 1 of HB 215 makes editorial changes, but not substantive changes to the designation of the persons that may raise an objection. The 60-day period following publication of the notice under AS 38.05.070 for raising an objection to a right-of-way application decision continues for a notice published after the

effective date of the Act. However, the language "within **the later of** 60 days **after the effective date of this Act or** [OF] the publication of notice" could be interpreted to extend a 60-day period that began before the effective date of the Act until 60 days after the effective date, or to add a 60-day period to a period that expired before the effective date. I do not know from the language of the bill what the intent is. Perhaps the "**the later of**" language may have been intended to be "**the earlier of**." You may wish to clarify the intent of the timing provision with the sponsor.

Article VIII, sec. 10, Constitution of the State of Alaska, prohibits leases of state lands "without prior public notice and other safeguards of the public interest as may be prescribed by law." AS 38.35.020 authorizes the commissioner to grant a noncompetitive right-of-way lease. The requirements that must be met to be eligible for a right-of-way lease are within AS 38.35, as well as the process for applying. A person seeking a right-of-way lease begins the process by filing an application[1] that is followed by the publication of a notice stating that an application has been received.[2] It is the publication of this notice that starts the 60-day period for raising an objection.

Consistent with the requirements in art. VIII, sec. 10 of the constitution, the legislature required prior public notice before the approval of a lease application. However, although the notice is public, only a person that applied for the lease, a competing applicant, or a person with financial interest affected by the lease has standing to object. I do not know whether a court would find that adequate safeguards of the public interest are present in this process. However, considering the narrow scope of AS 38.35, the legislative declaration of policy in AS 38.35.010, the limited number of persons that qualify to apply and be granted a lease, and the policy to encourage the development of the state's resources in art. VIII, sec. 1, Constitution of the State of Alaska, I expect the court would defer to the legislature and the discretion of the commissioner so far as the amendment to AS 38.35.200 in HB 215 applies to the grant of a right-of-way.

The limitations applicable to the challenge of an approval, permit, license, certificate, or other authority

The issues raised by the limitation on the judicial review of an approval, lease, license, or other authority in AS 38.35.200(a)(2), as added by HB 215, are different from the land issues. AS 38.35 addresses rights-of-way on state land for construction of an oil or gas pipeline and the policy expressed in that chapter, as noted above, is to encourage the development of the state's resources. There is a certain logic when considering the impact of a right-of-way application to limit objections to those raised by the persons identified in AS 38.35.200(a), both in current law and as amended in HB 215. The persons identified have a direct interest in the grant of a lease, either because each is attempting to receive a lease or because the person has a financial interest directly affected by the lease. However, the impacts of the authorizations in AS 38.35.200(a)(2)

[1] AS 38.35.050.
[2] AS 38.35.070.

that are added by HB 215 are broader. Whereas the policy decision to limit objections to the right-of-way may be limited because of the policy to develop resources, the environmental impacts are broader and may directly affect many more persons.

You expressed concern that limiting the review of approvals, leases, licenses, or other authorizations to those identified in AS 38.35.200(a) as it currently reads and as amended by HB 215 may compromise the state's primacy under the Clean Water Act to administer the APDES. Under 40 C.F.R. 123.27, a state must have remedies available for violations of state program requirements related to water programs. The requirements in 40 C.F.R. 123.27 relevant to AS 38.35.200 as amended in HB 215 are as follows:

> (a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:
>
> (1) *To restrain immediately and effectively any person by order or by suit in State court* from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;
>
> Note: Paragraph (a)(1) requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.
>
> (2) *To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation* of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit[.]
>
> . . .
>
> (d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:
>
> (1) *Authority which allows intervention as of right in any civil or administrative action* to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or
>
> (2) Assurance that the State agency or enforcement authority will:
>
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);
>
> (ii) *Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation*; and

> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(Emphasis added.)

Based on the federal requirements for a state National Pollutant Discharge Elimination System (NPDES) program, such the APDES, it is likely that the amendment to AS 38.35.200 in HB 215 would be in conflict with the requirements for a state program because of the limitations on who may bring an action under AS 38.35.200 and the limited subject matter of that language. In other words, the standing and other limitations in the amendments to AS 28.35.200 in HB 215 could compromise APDES primacy to the extent they are inconsistent with the federal requirements for a state program.

If I may be of further assistance, please advise.

DMB:ljw
11-231.ljw

HB 216

<TARGET><BILL>HB 216</BILL><SUBJECT>HB 216</SUBJECT><COMM>HJUD27</COMM></TARGET>

27-LS0701\R
Bannister
2/9/12

CS FOR HOUSE BILL NO. 216( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date."

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

*** Section 1.** AS 24.08.035 is amended by adding new subsections to read:

(f) In addition to the other requirements of this section, if a bill directs an agency in the executive branch of state government to adopt, amend, or repeal a regulation or will result in an agency's adopting, amending, or repealing a regulation, the department affected shall include in the fiscal note for the bill a specific time by which the agency shall adopt, amend, or repeal the regulation. If the agency is not able to meet the deadline set in the fiscal note, the agency shall

(1) set a new deadline; and

(2) report to the Administrative Regulation Review Committee the new deadline and the reasons for being unable to meet the deadline set in the fiscal

note.

(g) In (f) of this section, "agency" includes the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Public Offices Commission, and the Alaska Oil and Gas Conservation Commission, but does not include other boards or commissions.

AEA

* **Sec. 2.** AS 44.62.200 is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts a notice of the proposed adoption, amendment, or repeal of a regulation on the Alaska Online Public Notice System or furnishes the notice in an electronic format under AS 44.62.190(a), a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice that is posted on the Alaska Online Public Notice System or furnished in an electronic format under AS 44.62.190(a). The brief description shall be written in clear, easily readable language that a person without a legal background is able to understand. Notwithstanding AS 44.62.300, an action may not be brought for failure of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.035(f) and (g), enacted by sec. 1 of this Act, apply to bills that are filed on or after the effective date of this Act.

(b) AS 44.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

* **Sec. 4.** This Act takes effect July 1, 2012.

will use this or alternatively a new CS... (same content)

27-LS0701\T.2
Bannister
2/8/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE PEGGY WILSON as CS R

TO: CSHB 216( ), Draft Version "T"

Page 1, line 3, following "**regulation**":

Insert "**; and providing for an effective date**"

Page 1, line 5:

Delete "new subsections"

Insert "a new subsection"

Page 1, line 9:

Delete "fiscal note for the bill must set a specific time by which the regulation must be adopted, amended, or repealed"

Insert "department affected shall include in the fiscal note for the bill a specific time by which the agency shall adopt, amend, or repeal the regulation"

Page 2, lines 2 - 6:

Delete all material.

Insert "(g) In (f) of this section, "agency" includes the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Public Offices Commission, and the Alaska Oil and Gas Conservation Commission, but does not include another board or commission."

Page 2, lines 2 - 6:

Delete all material.

Page 2, following line 25:

Insert a new bill section to read:

"*** Sec. 4.** This Act takes effect July 1, 2012."

Q. Rep. Gruenberg check this?

ALASKA STATE LEGISLATURE

Interim:
P.O. Box 109
Wrangell, AK 99929
Phone: (907) 874-3088
Fax: (907) 874-3055

Session:
State Capitol, Room 406
Juneau, AK 99801-1182
Phone: (907) 465-3824
1-800-686-3824
Fax: (907) 465-3175

REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

Carl–
– Heard + held twice
1/31 & 2/3
– New CS w/ amdt.

SPONSOR STATEMENT
House Bill 216

"An Act relating to deadlines in bills directing the adoption of regulations and to the informative summary required for the proposed adoption, amendment, or repeal of a regulation."

HB 216 will accomplish two goals relating to changes to state regulations; increasing the speed with which regulations are written, and describing in plain, easy-to-understand language all regulations that are adopted, amended or repealed.

Legislators and the public have often been frustrated by the fact that months, or even years, sometimes pass between the time that a bill is passed by the legislature and the time the regulation is implemented. The result is, Alaska residents, businesses and legislators are confused about what the change means. As an example: as we were looking at the governor's House Bill 110, on oil taxes, we didn't have proof of what regulations were currently being enforced because the ACES regulations hadn't even been written - three years after we passed the legislation. The same confusion can impact individuals who are unclear about when, or if, new regulations concerning their business or recreational activities take effect. HB 216 states that any bill requiring creation or modification of any regulation must include a regulation completion deadline.

The other problem addressed by this bill is the confusion and lack of understanding of many proposed regulation changes or new additions. This confusion is caused by the legalese used to describe proposed regulations. This language, while accurately and legally describing proposed regulations, is difficult to understand by the average individual. HB 216 will require that all proposed regulation changes include descriptions, in plain English, of what the original regulation does and what the proposed change will do.

Passage of this legislation will encourage public participation in the regulation review process, as people find it easier to understand what the regulations mean to them. It will also help speed passed legislation to implementation when regulations are completed in a set, scheduled timeframe.

The State Affairs committee passed the bill with two amendments that clarified the informative summary language.

ALASKA STATE LEGISLATURE

Interim:
P.O. Box 109
Wrangell, AK 99929
Phone: (907) 874-3088
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Session:
State Capitol, Room 406
Juneau, AK 99801-1182
Phone: (907) 465-3824
1-800-686-3824
Fax: (907) 465-3175

REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

MEMORANDUM

Date: February 3, 2012

To: Representative Carl Gatto, Chair, Judiciary Committee

From: Representative Peggy Wilson

RE: **HB 216 "Regulations: Informative Summary/Bills"**
February 3, 2012 meeting

Changes for HB216 from Version E to Version T for

House Judiciary Committee Meeting on February 3, 2012

Sponsor, Representative Peggy Wilson ~ Staff, Sheila Finkenbinder, 465-6887

Version T incorporates new language that responds to the issues that were brought up in this committee last Monday and subsequently by the Department of Law. Here is a summary of the changes.

The first thing you'll notice is that the long title of the bill has been changed to reflect that it is now about "Fiscal Notes for bills directing or resulting in the adoption, amendment or repeal of regulations".

Next, you will notice that Section 1 now amends **AS 24.08.035 - Fiscal notes on bills** rather than adding a section to **AS 24.08 - Enactments**

- Rep. Gruenberg – You had several questions and comments, which we have addressed in this new CS.
    - I agree with you that this bill should state that the timeline should be noted in the fiscal note. As stated earlier, this has been fixed with the changes noted above. In addition to that:

- In Section 1, (f), on line 6, you will notice it now states "**if a bill directs** an agency in the executive branch of state government to adopt, amend, or repeal a regulation **or will result in** an agency adopting, amending, or repealing a regulation, the fiscal note must"

- You asked about the advisability of requiring agencies to set a new deadline if they don't meet the first one. Section 1 now takes care of that in: (f) (1) on line 12.

- Rep. Holmes – You also had several questions.

  - You asked if we wanted to keep the word "must" in Section 1 or if it could be changed to "may". I believe the answer is **Yes**, we want to use the word 'must'. If we don't say that agencies 'must' set deadlines and provide descriptive summaries of their regulations, some of them will do nothing, and we will see no improvements in this frustrating process. You will now find that 'must' on line 9.

  - Your suggestion to use the term "cross-referencing" in Section 2, on page 2, rather than "following Internet links", has ~~been implemented~~. You'll find that change on page 2, line16.

- After much consideration, I have decided to include some boards and commissions in the requirements of Section 1. On page 2, lines 4-6, you will see that "state boards and commissions" **does not include** the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Public Offices Commission or the Alaska Oil and Gas Conservation Commission.

  - I am still open to adding the names of other boards and commissions that should also be expected to meet deadlines when adopting regulations or making changes.

- The Department of Law Attorney General's office has made some suggestions for changes that respond to committee members' concerns. I believe that all of them have been integrated into this CS.

  - Section 2, on page 2 now includes the words "brief description" several times, clarifying that this new subsection about 'posted notices' will not be confused as the formal 'notice' requirement.

  - Their other concern was the way in which the bill referred to the deadline for adopting regulations, amendments or repeals. The language now indicates that the agency is required to report if a deadline is not met, but this will not be stated in the fiscal note.

NEW CS

27-LS0701\T
Bannister
2/2/12

CS FOR HOUSE BILL NO. 216( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn

affects > 1 agcy
yet addresses only
1 agcy.

A BILL

FOR AN ACT ENTITLED

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation."

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

p7, l 7 and 2 clearer re: Adm. Inst. of Depts.

*** Section 1.** AS 24.08.035 is amended by adding new subsections to read:

(f) In addition to the other requirements of this section, if a bill directs an agency in the executive branch of state government to adopt, amend, or repeal a regulation or will result in an agency's adopting, amending, or repealing a regulation, the fiscal note for the bill must set a specific time by which the regulation must be adopted, amended, or repealed. If the agency is not able to meet the deadline set in the fiscal note, the agency shall

(1) set a new deadline; and

(2) report to the Administrative Regulation Review Committee the new deadline and the reasons for being unable to meet the deadline set in the fiscal

note.

(g) The requirements in (f) of this section do not apply to the adoption, amendment, or repeal of regulations by a state board or commission. In this subsection, "state board or commission" does not include the Alaska Housing Finance Corporation, ~~the Alaska~~ Industrial Development and Export Authority, the Alaska Public Offices Commission, or the Alaska Oil and Gas Conservation Commission.

Pt. 2 Hh!

*** Sec. 2.** AS ~~44.62.200~~ is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts a notice of the proposed adoption, amendment, or repeal of a regulation on the Alaska Online Public Notice System or furnishes the notice in an electronic format under AS 44.62.190(a), a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice that is posted on the Alaska Online Public Notice System or furnished in an electronic format under AS 44.62.190(a). The brief description shall be written in clear, easily readable language that a person without a legal background is able to understand ~~o~~ without cross-referencing the Alaska Administrative Code. Notwithstanding AS 44.62.300, an action may not be brought for failure of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

Carl – Amdt. 1 passed 2/3/12

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.035(f) and (g), enacted by sec. 1 of this Act, apply to bills that are filed on or after the effective date of this Act.

(b) AS 44.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

Pt. 3

2/10/12 There will be a new amdt. (#2) to take care of the (g) language problem;

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 216**
Fiscal Note Number
() Publish Date

Identifier (file name) HB216-GOV-OMB-1-13-2012
Title Deadlines in bills for the Adoption of Regulations
Sponsor P. Wilson
Requester House State Affairs

Dept. Affected All
Appropriation
Allocation
OMB Component Number

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
	TOTAL	***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for the 2012 legislative session.

Prepared by Arnold Liebelt, Policy Analyst — Phone 907-465-4676
Division Office of Management and Budget — Date/Time 1/13/12 12:30 PM
Approved by Karen Rehfeld, Director — Date 1/13/2012
Office of Management and Budget

evised 1/10/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 216

Analysis

HB 216 sets out to accomplish two objectives.

1. Requires bills to include language that establishes a date when regulations must be implemented;

2. Requires that all proposed regulation changes include descriptions in plain English that is easily understood by the public, of what the existing regulation does and what the proposed change will do.

Based on the language of the bill, the extent of the fiscal impact cannot be quantified for every agency, but we do believe the impact would be extensive, and that it would be statewide. With regards to objective 1, fiscal notes for bills introduced will need to consider the cost associated with the time required to implement regulations. Depending on the nature and the complexity of the bill, the fiscal impact could include the need for additional staff or a consultant to assist with implementing the regulations within the time allowed. Departments such as Health & Social Services, Environmental Conservation, Fish & Game, Commerce Community and Economic Development, and Natural Resources have historically had more complex legislation than other departments and as such, could be impacted to a higher degree. Quantifying this impact is not possible.

The second objective of this bill will raise the amount departments need to pay for public notices as they would be required to print a summary of the existing regulation as well as a summary of the proposed change. This will need to be written in clear, easily readable language that can be understood by those without a legal background. The additional amount of information that will need to be written will have a fiscal impact, and the cost of framing the regulation without legal language could also have an immediate fiscal impact and a long term fiscal impact if the language needs legal interpretation in the future.

CS FOR HOUSE BILL NO. 216(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date."

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

*** Section 1.** AS 24.08.035 is amended by adding new subsections to read:

(f) In addition to the other requirements of this section, if a bill directs an agency in the executive branch of state government to adopt, amend, or repeal a regulation or will result in an agency's adopting, amending, or repealing a regulation, the department affected shall include in the fiscal note for the bill a specific time by which the agency shall adopt, amend, or repeal the regulation. If the agency is not able to meet the deadline set in the fiscal note, the agency shall

(1) set a new deadline; and

(2) report to the Administrative Regulation Review Committee the new deadline and the reasons for being unable to meet the deadline set in the fiscal

note.

(g) In (f) of this section, "agency" includes the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, the Alaska Public Offices Commission, and the Alaska Oil and Gas Conservation Commission, but does not include other boards or commissions.

* **Sec. 2.** AS 44.62.200 is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts a notice of the proposed adoption, amendment, or repeal of a regulation on the Alaska Online Public Notice System or furnishes the notice in an electronic format under AS 44.62.190(a), a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice that is posted on the Alaska Online Public Notice System or furnished in an electronic format under AS 44.62.190(a). The brief description shall be written in clear, easily readable language that a person without a legal background is able to understand. Notwithstanding AS 44.62.300, an action may not be brought for failure of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.035(f) and (g), enacted by sec. 1 of this Act, apply to bills that are filed on or after the effective date of this Act.

(b) AS 44.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

* **Sec. 4.** This Act takes effect July 1, 2012.

2/13/12
Leg. Legal final reg. (Lori)

27-LS0701\R
Bannister
2/9/12

CS FOR HOUSE BILL NO. 216( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

Conceptually Amd Amt. 1

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation; and providing for an effective date."

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

*** Section 1.** AS 24.08.035 is amended by adding new subsections to read:

(f) In addition to the other requirements of this section, if a bill directs an agency in the executive branch of state government to adopt, amend, or repeal a regulation or will result in an agency's adopting, amending, or repealing a regulation, the department affected shall include in the fiscal note for the bill a specific time by which the agency shall adopt, amend, or repeal the regulation. If the agency is not able to meet the deadline set in the fiscal note, the agency shall

(1) set a new deadline; and

(2) report to the Administrative Regulation Review Committee the new deadline and the reasons for being unable to meet the deadline set in the fiscal

note.

(g) In (f) of this section, "agency" includes the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Public Offices Commission, and the Alaska Oil and Gas Conservation Commission, but does not include other boards or commissions.

+ aea

*** Sec. 2.** AS 44.62.200 is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts a notice of the proposed adoption, amendment, or repeal of a regulation on the Alaska Online Public Notice System or furnishes the notice in an electronic format under AS 44.62.190(a), a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice that is posted on the Alaska Online Public Notice System or furnished in an electronic format under AS 44.62.190(a). The brief description shall be written in clear, easily readable language that a person without a legal background is able to understand. Notwithstanding AS 44.62.300, an action may not be brought for failure of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.035(f) and (g), enacted by sec. 1 of this Act, apply to bills that are filed on or after the effective date of this Act.

(b) AS 44.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

*** Sec. 4.** This Act takes effect July 1, 2012.

Melanie Lesh

From: Apache <apache@wwwjnu02.legis.state.ak.us>
Sent: Thursday, February 09, 2012 1:49 PM
To: LIO Juneau; Melanie Lesh
Subject: Teleconference Order: February 13, 2012

Meeting: new

Sponsor and/or Committee Name: Judiciary Committee

Date of Teleconference: February 13, 2012

Start Time: 1:00 p.m.

End Time: 3:00 p.m.

Chairing Site: Juneau

Juneau Room: 120

Testimony: invite only

Testimony Time Limit: three min

Executive Session: no

Stream to AlaskaLegislature.tv: yes

Contact Person: Melanie Lesh

Telephone Number: 465-4990

Email Address: melanie.lesh@legis.state.ak.us

LIO Sites:

All LIOs

May other LIO's add: yes

Offnet Name(s):

Amended 2/13/12

none

Subject of meeting and/or Bills on Agenda:

SB 30

27-LS0701\T
Bannister
2/2/12

CS FOR HOUSE BILL NO. 216( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relating to fiscal notes for bills directing or resulting in the adoption, amendment, or repeal of regulations, and to the notice required for the proposed adoption, amendment, or repeal of a regulation."

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

* **Section 1.** AS 24.08.035 is amended by adding new subsections to read:

(f) In addition to the other requirements of this section, if a bill directs an agency in the executive branch of state government to adopt, amend, or repeal a regulation or will result in an agency's adopting, amending, or repealing a regulation, ~~the fiscal note for the bill must~~ set a specific time by which the regulation must be adopted, amended, or repealed. If the agency is not able to meet the deadline set in the fiscal note, the agency shall

(1) set a new deadline; and

(2) report to the Administrative Regulation Review Committee the new deadline and the reasons for being unable to meet the deadline set in the fiscal

note.

(g) The requirements in (f) of this section do not apply to the adoption, amendment, or repeal of regulations by a state board or commission. In this subsection, "state board or commission" does not include the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Public Offices Commission, or the Alaska Oil and Gas Conservation Commission.

*** Sec. 2.** AS 44.62.200 is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts a notice of the proposed adoption, amendment, or repeal of a regulation on the Alaska Online Public Notice System or furnishes the notice in an electronic format under AS 44.62.190(a), a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice that is posted on the Alaska Online Public Notice System or furnished in an electronic format under AS 44.62.190(a). The brief description shall be written in clear, easily readable language that a person without a legal background is able to understand, ~~without cross-referencing the Alaska Administrative Code.~~ Notwithstanding AS 44.62.300, an action may not be brought for failure of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.035(f) and (g), enacted by sec. 1 of this Act, apply to bills that are filed on or after the effective date of this Act.

(b) AS 44.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

ALASKA MUNICIPAL LEAGUE
Alaska Conference of Mayors

217 Second Street, Suite 200 • Juneau, Alaska 99801
Tel (907) 586-1325 • Fax (907) 463-5480 • www.akml.org

January 30, 2012

Representative Peggy Wilson
State Capitol
Room 408
Juneau, Alaska 99801

Dear Representative Wilson,

I am writing to express the Alaska Municipal League's support for HB216, particularly the amendments to Section 2, Chapter 3 of AS 44.62.045.

It makes perfect sense to require the agencies to provide an informative summary of proposed regulations which describe how the amendments will change existing regulation "in clear, easily readable language that a person without a legal background is able to understand."

AML was forced to hire legal counsel (at a cost of over $8,000) to analyze sections of the new regulations proposed by APOC dealing with comprehensive revisions to Public Official and Legislative Finance Disclosure and Campaign Disclosure. It is AML's job to keep local elected officials and their municipal employees current on legislation, regulations and statutes that affect their local governments. When the agencies are unwilling to help us understand these regulations, we must do what we can to obtain the information.

In late 2010, the Alaska Public Offices Commission (APOC) published proposed revisions for public review and comment. AML requested from APOC, some explanation of what changes were encompassed in the new proposed regulations, as the document was approximately 125 pages long. APOC refused to provide any detailed explanation of the changes; in fact, the staff told us they had been instructed not to answer any questions about the proposed regulations. Without clarification of the new regulations, it makes it much more difficult to comment. We then hired legal counsel to perform a side-by-side examination of the old regulations and the new regulations. Only after enlisting the support from the Governor's office and many legislators were we able to secure additional information from APOC.

Most municipalities have numerous boards and commissions made up of community volunteers who are subject to APOC financial disclosure regulations. These private citizens are not equipped by training, nor do they have the time to understand and translate new regulations without the help from APOC. A plain, clear, easily readable explanation of the changes would have helped local officials understand and comment

on the new regulations. It appears to me that APOC, while drafting changes, could have done computerized "track" changes as the drafting process was taking place.

The opportunity for public comment on new regulations will not result in any substantive input if the adopting agency does not assist the public in understanding new regulatory changes. It also is quite ironic that the agency tasked with keeping government more transparent refuses to help the public understand proposed regulations.

It should not be difficult for an agency to comply with HB216, as they presumably understand what changes they are proposing and how they will affect the public. It is unreasonable to expect members of the public to read, translate, cross-reference and understand new regulation without some explanation from the authors.

Again, AML supports the adoption of HB216, as it will assist elected and volunteer municipal officials better understand how they are regulated by state agencies.

Thank you for the opportunity to comment.

Sincerely,

Kathie Wasserman

Kathie Wasserman
Executive Director

ALASKA STATE LEGISLATURE

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REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

MEMORANDUM

Date: February 3, 2012

To: Representative Carl Gatto, Chair, Judiciary Committee

From: Representative Peggy Wilson

RE: **HB 216 "Regulations: Informative Summary/Bills"**
February 3, 2012 meeting

Changes for HB216 from Version E to Version T for

House Judiciary Committee Meeting on February 3, 2012

Sponsor, Representative Peggy Wilson ~ Staff, Sheila Finkenbinder, 465-6887

Version T incorporates new language that responds to the issues that were brought up in this committee last Monday and subsequently by the Department of Law. Here is a summary of the changes.

The first thing you'll notice is that the long title of the bill has been changed to reflect that it is now about "Fiscal Notes for bills directing or resulting in the adoption, amendment or repeal of regulations".

Next, you will notice that Section 1 now amends **AS 24.08.035 - Fiscal notes on bills** rather than adding a section to **AS 24.08 - Enactments**

- Rep. Gruenberg – You had several questions and comments, which we have addressed in this new CS.
    - I agree with you that this bill should state that the timeline should be noted in the fiscal note. As stated earlier, this has been fixed with the changes noted above. In addition to that:

- In Section 1, (f), on line 6, you will notice it now states "**if a bill directs** an agency in the executive branch of state government to adopt, amend, or repeal a regulation **or will result in** an agency adopting, amending, or repealing a regulation, the fiscal note must"

- You asked about the advisability of requiring agencies to set a new deadline if they don't meet the first one. Section 1 now takes care of that in: (f) (1) on line 12.

- Rep. Holmes – You also had several questions.

  - You asked if we wanted to keep the word "must" in Section 1 or if it could be changed to "may". I believe the answer is **Yes**, we want to use the word 'must'. If we don't say that agencies 'must' set deadlines and provide descriptive summaries of their regulations, some of them will do nothing, and we will see no improvements in this frustrating process. You will now find that 'must' on line 9.

  - Your suggestion to use the term "cross-referencing" in Section 2, on page 2, rather than "following Internet links", has been implemented. You'll find that change on page 2, line16.

- After much consideration, I have decided to include some boards and commissions in the requirements of Section 1. On page 2, lines 4-6, you will see that "state boards and commissions" **does not include** the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Public Offices Commission or the Alaska Oil and Gas Conservation Commission.

  - I am still open to adding the names of other boards and commissions that should also be expected to meet deadlines when adopting regulations or making changes.

- The Department of Law Attorney General's office has made some suggestions for changes that respond to committee members' concerns. I believe that all of them have been integrated into this CS.

  - Section 2, on page 2 now includes the words "brief description" several times, clarifying that this new subsection about 'posted notices' will not be confused as the formal 'notice' requirement.

  - Their other concern was the way in which the bill referred to the deadline for adopting regulations, amendments or repeals. The language now indicates that the agency is required to report if a deadline is not met, but this will not be stated in the fiscal note.

Melanie Lesh

From: Apache <apache@wwwjnu02.legis.state.ak.us>
Sent: Thursday, February 02, 2012 2:56 PM
To: LIO Juneau; Melanie Lesh
Subject: Teleconference Order: 02/03/12

Meeting: new

Sponsor and/or Committee Name: House Judiciary Committee

Date of Teleconference: 02/03/12 FRIDAY

Start Time: ~~1:00~~ p.m.

End Time: 3:00

Chairing Site: Juneau

Juneau Room: Room 120

Testimony: invite only

Testimony Time Limit: three min

Executive Session: no

Stream to AlaskaLegislature.tv: yes

Contact Person: Melanie Lesh

Telephone Number: 465-4990

Email Address: melanie.lesh@legis.state.ak.us

☆ HB56 - Rep Gatto talk to Bill in Juneau

LIO Sites:

All LIOs

HB292 Thompson's (Jane) Trust - Panel

May other LIO's add: yes

Offnet Name(s):

None

23, 10, 441

Subject of meeting and/or Bills on Agenda:

BILL: HB 216

Kathie Wasserman

From: Ray Gillespie [raygillespie@ak.net]
Sent: Wednesday, December 22, 2010 8:29 AM
To: 'Ware, Patricia A (DOA)'; 'Anderson, Jerry D (DOA)'
Cc: Kathie Wasserman; Nizich, Michael A (GOV); randall.ruaro@alaska.gov; John.Cramer@alaska.gov; Heather.Brakes@alaska.gov; senator_Hollis_French@legis.state.ak.us; Rep_Kurt_Olson@legis.state.ak.us; Rep_Bill_Stoltze@legis.state.ak.us; Rep. Anna Fairclough; Paul_Richards@gci.net; Chris Hladick; mayor
Subject: RE: Commission decision not to provide info

Patty and Jerry:

I received a report yesterday's commission meeting wherein it decide not to respond to the request for more information about the proposed regulations.

It is difficult to fathom why the APOC doesn't feel some obligation to fully disclose what new material is being added in the proposed regulations.
The discussion about disadvantaging some folks misses the point. Simply providing a marked up or highlighted version showing the changes and giving it the same distribution as the original draft would solve the perceived problem.

The more information provide the public the better. APOC seems to be saying the "less information provided the public the better". This position is entirely inconsistent with the mission of the APOC to seek full disclosure on public policy matters.

The net result of the decision is that the citizen has to hire an attorney to find the changes or they have to possess the time and skills to conduct their own line by line review of the 126 pages of new regulations. The APOC attorney admitted in the Commission hearing that it would take 6 hours to do a comparison of the old and new regulations. How likely is it that a layperson such as a local elected or volunteer board member is going to find the time to do this independently? APOC has an obligation to HELP the public understand rather than frustrating that objective.

It certainly can't be too much to ask that the drafter of the new regulations bracket the deletions and underline the additions similar to what the legislature does with new legislation. Helping the public understand what the agency is doing rather than hiding it ought to be the goal.

Will you be responding to the question about whether or not you will enforce the new "ethics" code using the Commission regulatory authority?

This is not intended as a criticism of any staff or individual employed at the Commission. This is directed at the unfortunate process employed by the Commission in adopting new regulations.

Regards,
Ray Gillespie

From: Ware, Patricia A (DOA) [mailto:patricia.ware@alaska.gov]
Sent: Thursday, December 16, 2010 3:30 PM
To: Ray Gillespie
Cc: Anderson, Jerry D (DOA)
Subject:

27-LS0701\E
Bannister
1/28/12

CS FOR HOUSE BILL NO. 216( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PEGGY WILSON, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relating to deadlines in bills directing the adoption of regulations and to the notice required for the proposed adoption, amendment, or repeal of a regulation."

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

*** Section 1.** AS 24.08 is amended by adding a new section to read:

Sec. 24.08.045. Bills authorizing regulations. (a) A bill that directs an agency in the executive branch of state government to adopt regulations must

(1) set a specific time by which the regulations must be adopted; and

(2) provide that, if the agency is not able to meet the deadline set in the bill, the agency shall report to the Administrative Regulation Review Committee the reasons for being unable to meet the specific time set in the bill.

(b) This section does not apply to the adoption of regulations by a state board or commission.

*** Sec. 2.** AS 44.62.200 is amended by adding a new subsection to read:

(d) When a state agency, other than the Regulatory Commission of Alaska, the

Board of Fisheries, or the Board of Game, posts a notice of the proposed adoption, amendment, or repeal of a regulation on the Alaska Online Public Notice System or furnishes the notice in an electronic format under AS 44.62.190(a), the notice must include a brief description of the changes made by the proposed adoption, amendment, or repeal and shall be written in clear, easily readable language that a person without a legal background is able to understand without following Internet links to the Alaska Administrative Code. Notwithstanding AS 44.62.300, an action may not be brought for failure of the notice to comply with the requirements of this subsection relating to the description of the changes or the clarity and readability of the notice.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 24.08.045, enacted by sec. 1 of this Act, applies to bills that are filed on or after the effective date of this Act.

(b) AS 42.62.200(d), enacted by sec. 2 of this Act, applies to the proposed adoption, amendment, or repeal of a regulation on or after the effective date of this Act.

ALASKA STATE LEGISLATURE

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REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

SPONSOR STATEMENT
House Bill 216

"An Act relating to deadlines in bills directing the adoption of regulations and to the informative summary required for the proposed adoption, amendment, or repeal of a regulation."

HB 216 will accomplish two goals relating to changes to state regulations; increasing the speed with which regulations are written, and describing in plain, easy-to-understand language all regulations that are adopted, amended or repealed.

Legislators and the public have often been frustrated by the fact that months, or even years, sometimes pass between the time that a bill is passed by the legislature and the time the regulation is implemented. The result is, Alaska residents, businesses and legislators are confused about what the change means. As an example: as we were looking at the governor's House Bill 110, on oil taxes, we didn't have proof of what regulations were currently being enforced because the ACES regulations hadn't even been written - three years after we passed the legislation. The same confusion can impact individuals who are unclear about when, or if, new regulations concerning their business or recreational activities take effect. HB 216 states that any bill requiring creation or modification of any regulation must include a regulation completion deadline.

time frame

The other problem addressed by this bill is the confusion and lack of understanding of many proposed regulation changes or new additions. This confusion is caused by the legalese used to describe proposed regulations. This language, while accurately and legally describing proposed regulations, is difficult to understand by the average individual. HB 216 will require that all proposed regulation changes include descriptions, in plain English, of what the original regulation does and what the proposed change will do.

Passage of this legislation will encourage public participation in the regulation review process, as people find it easier to understand what the regulations mean to them. It will also help speed passed legislation to implementation when regulations are completed in a set, scheduled timeframe.

The State Affairs committee passed the bill with two amendments that clarified the informative summary language.

HB

221

<TARGET><BILL>HB 221</BILL><SUBJECT>HB 221</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]OUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: April 1, 2011 **FURTHER REFERRALS: Finance**

Date of Committee Action: 2/27/12

The JUDICIARY Committee considered: **HB 221**

HOUSE BILL NO. 221
"An Act relating to the appointment of counsel for persons accused of crimes; and amending Rule 39.1, Alaska Rules of Criminal Procedure."

HB 221-PUBLIC DEFENDER APPOINTMENT PROCEDURES

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	COR	X		
	ADM			X
	LAW			X

PREVIOUS FISCAL NOTES

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Bob L	LYNN	X			
Wes Gruenberg	Gruenberg			-	
Lafferty	Pruitt	X			
Chair: Steve M Thompson	THOMPSON	X			
Chair:					

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: HB221-ACS-TRC-02-24-12
Fiscal Note Number:
Publish Date:

Identifier (file name): HB221-ACS-TRC-02-24-2012
Title: Appointment of Counsel for Persons Accused of Crimes
Sponsor: Representative Chenault
Requester:

Dept. Affected: Alaska Court System
Appropriation: Trial Courts
Allocation:
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	362.5		362.5	362.5	362.5	362.5	362.5
Travel							
Services	32.4		27.0	27.0	27.0	27.0	27.0
Commodities	72.0		9.0	9.0	9.0	9.0	9.0
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**466.9**	**0.0**	**398.5**	**398.5**	**398.5**	**398.5**	**398.5**
FUND SOURCE			(Thousands of Dollars)				
1002 Federal Receipts							
1003 GF Match							
1004 GF	466.9		398.5	398.5	398.5	398.5	398.5
1005 GF/Prgm (DGF)							
1037 GF/MH (UGF)							
1178 temp code (UGF)							
TOTAL	**466.9**	**0.0**	**398.5**	**398.5**	**398.5**	**398.5**	**398.5**
POSITIONS							
Full-time	**2.0**		**2.0**	**2.0**	**2.0**	**2.0**	**2.0**
Part-time	**4.0**		**4.0**	**4.0**	**4.0**	**4.0**	**4.0**
Temporary							
CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Nancy Meade, General Counsel — Phone: 907-463-4736
Division: Alaska Court System — Date/Time: 2/24/2012 1:00 P.M.
Approved by: Nancy Meade for Christine Johnson, Administrative Director — Date: 2/24/2012
Alaska Court System

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB221-ACS-TRC-02-24-12

Analysis

HB 221 includes a direct rule amendment that will impact the way the Court System determines whether a criminal defendant who requests it is eligible for a court-appointed counsel at public expense. Currently, appointments of public counsel may be made after an oral inquiry on the record with the defendant under oath. The judge asks questions about the defendant's financial resources, and determines from the responses whether public counsel is justified, or whether additional information is needed. If additional information is needed, the defendant is often asked to complete a financial statement., usually with the assistance of a court employee. The revision will require the court or its designee to require each defendant who requests public counsel to complete a signed sworn financial statement. A majority of current public counsel appointments are completed after the oral inquiry only; the bill's change to also require a signed sworn financial statement from each defendant will require changes in processing procedures at all criminal initial appearance hearings.

In FY 2011, the court opened 38,798 felony and misdemeanor cases statewide; the defendant in each of those cases is entitled to court-appointed counsel if he or she cannot afford a private attorney. Of that total number of criminal defendants, the court estimates, based on statistics about how many defendants actually receive appointed counsel in existing cases, that 80% request court-appointed counsel. Each of these defendants will need to fill out the sworn financial statement, for a total of 31,038 statements.

The court will incur costs in implementing this change because it will need to provide assistance to all defendants who request public counsel in filling out the financial statement. The court's actual experience with the many defendants who currently do fill out a financial statement (rather than receiving an appointment after an oral inquiry by a judge) is that each statement takes an average of 15 minutes of time for a member of the court staff, who assists the defendant with answering and explaining questions. This time varies depending on the defendant's level of literacy, proficiency with English, and other individual factors. To provide this assistance in a way that is minimally disruptive to the court's arraignment hearings, the court would need six additional staff positions (two full-time and four part-time), at a Range 10, to assist the defendants who request court-appointed counsel.

The number of additional staff needed varies by court location; in some courts, the numbers of defendants seeking counsel would not justify adding a new position, but would cause an existing employee to add a number of overtime hours. As shown on page three, the cost of the six new positions is $362,500. As also shown on page 3, the new staff members would require office equipment and supplies. The court would also need interview stations and physical space in the five busiest courts for the staff members to work with the defendant, at an estimated cost of $24,000.

Finally, it is anticipated that the financial statement would need to be translated into other languages at a cost of $5,400 (a four-page form with 847 words, plus an informational booklet, with 2,023 words , at .30 per word), and that the court would need to provide language interpreter services to non-English-speaking defendants at a cost $15,000 ($75/hour for on-site interpreting or use of the language line as appropriate).

HB 221's total fiscal impact on the court system in FY 2013 will be $466,900.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB221-ACS-TRC-02-24-12

Analysis Continued

Alaska Court System
HB221 - Calculation of Costs (Based on FY11 Criminal Case Filings)

Location	Cases Filed in FY2011	Cases Requiring Interview (80%)	Duration of Interview	Number of Minutes	FTE Requested
Anchorage	15,242	12,194	15	182,910	2.00
Bethel-Area	2,510	2,008	15	30,120	0.30
Dillingham/Naknek/Unalaska	1,083	866	15	12,990	0.15
Fairbanks Area	5,359	4,287	15	64,305	0.80
Kenai/Homer/Seward	3,298	2,638	15	39,570	0.50
Juneau (Southeast Alaska)	4,082	3,266	15	48,990	0.50
Second District	2,371	1,897	15	28,455	0.30
Palmer	3,474	2,779	15	41,685	0.50
Kodiak, Sand Point, Valdez, Cordova, Glenallen, St. Paul	1,379	1,103	15	16,545	0.20
Totals	38,798	31,038		465,570	5.25

Calculation of FTE (Productive Hours to Conduct Interviews):

Total Hours/Year	1,950
Less: 12 Holidays @ 7.5 hours	(90)
Less: 4 Weeks Leave	(150)
Net Work hours/FTE	1,710

Deputy Clerk Range 10A	FTE Full Time Salary	Benefits @ 34.6%	Health Insurance	FTE's	Total by Location / Area
Anchorage	34,064	11,786	15,960	2.00	123,620
Bethel-Area	51,096	17,679		0.30	30,949
Dillingham/Naknek/Unalaska	46,668	16,147		0.15	14,133
Fairbanks Area	35,086	12,140	15,960	0.80	53,740
Kenai/Homer/Seward	34,064	11,786	7,980	0.50	30,905
Juneau (Southeast Alaska)	35,767	12,375	7,980	0.50	32,051
Second District	51,096	17,679		0.30	30,949
Palmer	34,064	11,786	7,980	0.50	30,905
Kodiak, Sand Point, Valdez, Cordova, Glenallen, St. Paul	37,811	13,083		0.20	15,268
				5.25	362,521

Furniture/Equipment Six New Postions (two full-time, four part-time)

Computer/Printer/Desk/Chair	39,000	$6,500 per Position
Software @ $2,000/Position	12,000	
Office Supplies @ $1,500/Positior	9,000	
Interview Stations/Equipment	24,000	Anchorage (2), Fairbanks (1), Kenai (1), Juneau (1), Palmer (1)
Interpreter Services	15,000	Language Line and On-Site Interpreters as Needed
Forms Translation Services	5,400	Translation of Financial Statement Form and Information Booklet
Total Non-Personal Services	104,400	
Total Personal Services	362,500	
Total Fiscal Note	466,900	

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REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE ALASKA STATE HOUSE

SECTIONAL ANALYSIS
HOUSE BILL 221

"An act relating to the appointment of counsel for persons accused of crimes; and amending Rule 39.1, Alaska Rules of Criminal Procedure"

Section 1: Amends AS 18.85.120(b), Determination of indigency; repayment. Allows for material factors relative to the defendants financial resources and the ability to pay to be considered for Court appointed counsel.

Section 2: Amends Court Rule 39.1(e), Alaska Rules of Criminal Procedure, Determining Eligibility. Adds the word AND removes the word or. This change will allow the Court or its designee to ask about the defendant's financial status AND requiring the defendant to complete a signed sworn financial statement. Adds the phrase SUBJECT TO PENALTIES OF PERJURY.

The main purpose of House Bill 221 is to allow for the prosecution of a defendant who lies or misrepresents their financial status to gain Court appointed legal representation by committing perjury.

Representative_Mike_Chenault@legis.state.ak.us

Sec. 18.85.120. Determination of indigency; repayment.

(a) The determination of a person's indigency shall be made by the court in which an action against the person is pending. The determination shall be made by the court and shall set out the basis for the finding that the person is indigent.

(b) In determining whether a person is indigent and in determining the extent of the person's inability to pay, the court shall consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents. Release on bail does not preclude a finding that a person is indigent. In each case, the person, subject to the penalties for perjury, shall certify under oath, and in writing or by other record, material factors relative to the person's ability to pay that the court prescribes.

(c) Upon the person's conviction, the court may enter a judgment that a person for whom counsel is appointed pay for services of representation and court costs. Enforcement of a judgment under this subsection may be stayed by the trial court or the appellate court during the pendency of an appeal of the person's conviction. Upon a showing of financial hardship, the court (1) shall allow a person subject to a judgment entered under this subsection to make payments under a payment schedule; (2) shall allow a person subject to a judgment entered under this subsection to petition the court at any time for remission, reduction, or deferral of the unpaid portion of the judgment; and (3) may remit or reduce the balance owing on the judgment or change the method of payment if the payment would impose manifest hardship on the person or the person's immediate family. Payments made under this subsection shall be paid into the state general fund.

(d) Except as provided in AS 18.85.100(e), as a condition of receiving services under this chapter, a person shall affirm indigency under oath to the court and execute a general waiver authorizing the release to the court of income information regarding any income source the person has had for a period of three years immediately preceding the person's first court appearance in connection with each cause. At the conclusion of all services by the public defender to the person, the court shall upon request release to the attorney general all information received under this subsection except information that might incriminate or tend to incriminate the person.

all other facts essential to a broad understanding of the whole matter. **Gregory v. State,** Op. No. 1269, 550 P2d 374 (Alaska 1976).

Magistrate must ascertain whether defendant understands benefits of counsel by recorded colloquy with defendant before right to counsel may be waived. **Gregory v. State,** Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant is unable to make an intelligent choice as to waiver of right to counsel it is the duty of the court to assign counsel. **Gregory v. State,** Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant pleads guilty without the assistance of counsel, the plea is invalid unless defendant waived his right to counsel. **Gregory v. State,** Op. No. 1269, 550 P2d 374 (Alaska 1976).

Failure of arraignment or trial record to demonstrate that defendant understood what he was giving up by declining the assistance of counsel was cause for reversal even though record showed that defendant had been advised of his right to counsel. **O'Dell v. Municipality of Anchorage,** Op. No. 1588, 576 P2d 104 (Alaska 1978).

Failure of court to ask questions of defendant to assure that he understood precisely what rights he was giving up by declining legal representation at sentencing hearing required vacation of sentence. **Smith v. State,** Op. No. 134, 651 P2d 1191 (Alaska App. 1982).

Trial judge committed reversible error in not allowing defendant, charged with drunk driving in 1984, to have a 1975 drunk driving conviction set aside on the ground that, although informed by the magistrate taking his guilty plea in 1975 of his right to an attorney, he was not informed of what an attorney could do for him. **Petranovich v. State,** Op. No. 547, 709 P2d 867 (Alaska App. 1985).

Failure of the trial court to assure by an on-the-record inquiry that the accused understood the benefits of counsel and the dangers of self-representation prior to waiving his right to counsel was reversible error notwithstanding the accused's previous contacts with the criminal justice system. **James v. State,** Op. No. 669, 730 P2d 811 (Alaska App. 1987).

Defendant's waiver of his right to counsel prior to pleading guilty to a DWI charge was valid where the magistrate advised him of the maximum and minimum penalties for the offense and after he responded affirmatively to the question: "Do you know what a lawyer is?." **Tobuk v. State,** Op. No. 683, 732 P2d 1099 (Alaska App. 1987).

III. Effective Assistance of Counsel.

A defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. **Risher v. State,** Op. No. 1053, 523 P2d 421 (Alaska 1974).

All that is required of counsel in rendering effective assistance of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions. **Risher v. State,** Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant does not suffer an unconstitutional deprivation of effective assistance of counsel because of an error committed by his attorney which in no manner contributes to the conviction. **Risher v. State,** Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant who has not demonstrated that he understands the benefits of counsel cannot be said to have waived counsel. **Gregory v. State,** Op. No. 1269, 550 P2d 374 (Alaska 1976).

LAW REVIEW COMMENTARIES

"Sentenced By Tradition: The Third Party Custodian Condition of Pretrial Release in Alaska," 26 Alaska L. Rev. 317 (2009).

Rule 39.1. Determining Eligibility for Court-Appointed Counsel.

(a) **Scope of Application.** This rule specifies the procedure courts shall follow to assess whether a defendant is eligible for court-appointed counsel in a criminal case.

(b) **Eligibility for Appointment.**[1]

(1) *Standard.* A defendant is eligible for court-appointed counsel if the court finds that the total financial resources available to the defendant are not sufficient to pay allowable household expenses and the likely cost of private representation through trial.

(2) *Exception.* The court may determine that a defendant is ineligible for court-appointed counsel under AS 18.85.170(4) if the defendant has disposed of assets in order to qualify for appointed counsel.

(c) **Financial Resources Defined.**

(1) *Resources to be Considered.* In assessing the defendant's ability to pay the likely cost of private representation through trial, the court shall consider all resources available to the defendant, including all sources of expected income, cash, the value of assets readily convertible to cash, and credit or borrowing ability.

(2) *Parents' Resources.* If the defendant is a minor or an adult who cannot live independently, the court shall consider the resources of both the defendant and the defendant's parents, unless the parents were victims of the alleged offense or the court finds other good cause to treat their resources as being unavailable to the defendant.

(3) *Income.* Income includes all categories of income listed in Section II, Parts A and B of the Commentary to Civil Rule 90.3, including permanent fund dividends.

(4) *Cash.* Cash includes cash on hand and accounts in financial institutions. All savings should be considered, except where the use of the savings would deprive the defendant or the defendant's family of food, clothing, shelter, or necessary medical care.

(5) *Assets.* The court shall consider the value of all assets that are readily convertible to cash, other than health aids, clothing, and ordinary household furnishings. With the following exceptions, in valuing an asset, the court shall consider either the amount the defendant would realize if the asset were sold or the amount the defendant could borrow using the asset as collateral, whichever is greater.

(A) The court shall consider the loan value of tools and equipment essential to employment or to subsistence activity. Tools and equipment are essential only if the defendant could not earn a living or provide basic necessities without them. If the defendant cannot borrow against these assets while continuing to have use of them, the court shall disregard their value in calculating the defendant's available resources.

(B) In valuing the defendant's principal residence, the

court shall consider the entire loan value or the amount of the sale value that exceeds the homestead exemption allowed under the Alaska Exemptions Act.[2] If the defendant cannot borrow against the residence and would realize less than the homestead exemption amount if the residence were sold, the court shall disregard the value of the residence in calculating the defendant's available resources.

(C) In assessing the loan value of essential tools and equipment and the principal residence, the court shall consider only the amount the defendant can realistically afford to repay.

(6) *Credit.* Available credit includes amounts available on credit cards and amounts that can be borrowed against life insurance policies or from pension or savings plans. In assessing available credit, the court shall consider only the amount the defendant can realistically afford to repay.

(d) **Likely Cost of Private Representation.**

(1) For purposes of this rule, the following amounts represent the likely cost of private representation through trial:

	Estimated Total Cost of Representation
Misdemeanor	$ 2,000
C Felony	5,000
B Felony	7,500
A or Unclassified Felony	20,000

(2) The court may adjust these amounts under the following circumstances:

(A) If the court finds that the scheduled amount differs from the amount charged by local attorneys, the court may use the amount charged locally.

(B) If the court finds that no local attorneys are available to handle the case, the court may adjust the scheduled amount to include the additional fees and travel costs that an out-of-town attorney would charge.

(C) If the court finds that the case has special characteristics that are likely to increase the cost of private representation, such as the need for expert witnesses, special investigations, or expensive tests, the court may adjust the scheduled amount to include this additional expense.

(3) In assessing a defendant's ability to pay the likely cost of private representation, the court should assume that at least 50 percent of the likely fee must be

paid immediately and that the total fee must be paid within four months.

(e) **Determining Eligibility.** The court or its designee shall determine whether a defendant is eligible for court-appointed counsel by placing the defendant under oath and asking about the defendant's financial status, or by requiring the defendant to complete a signed sworn financial statement. A defendant who requests appointed counsel must execute a general waiver authorizing the release of financial information to the court as required by AS 18.85.120.

(f) **Presumptive Eligibility.** The court may appoint counsel without further inquiry if:

(1) the defendant currently receives public assistance benefits through a state or federal program for indigent persons, such as Aid to Families with Dependent Children, the Alaska Temporary Assistance Program, Adult Public Assistance, General Relief, Food Stamps, Medicaid, or Supplemental Security Income (SSI);

(2) counsel was appointed for the defendant within the past twelve months based on an examination of the defendant's financial circumstances, and the defendant's financial condition has not significantly improved; or

(3) the gross annual income available to the defendant is less than the adjusted federal poverty guidelines amount for the defendant's household size, and other financial resources (cash, assets, and credit) available to the defendant are worth less than 50 percent of the amount shown in (d)(1) (the likely cost of private representation through trial).

(g) **Other Eligibility.** If the court does not find that the defendant is presumptively eligible under paragraph (f), the court shall conduct an inquiry sufficient to determine whether the defendant is eligible for court-appointed counsel under the standard stated in paragraph (b). The court may make this determination based on the information then available to the court or, when appropriate, may

(1) require the defendant to submit a completed financial resources affidavit with supporting documentation of income;

(2) require the defendant to submit information or documentation concerning particular assets or expenses;

(3) require the defendant to appear at a representation hearing or a pretrial services interview; or

(4) require the defendant to make reasonable efforts to retain private counsel and to report these efforts to the court orally or in writing.

(h) **Allowable Household Expenses.**

(1) *Allowable Expenses.* The following household expenses are allowable to the extent they are reasonable:

(A) housing;

(B) utilities;

(C) food;

(D) health care;

(E) child care;

(F) insurance;

(G) transportation (for one vehicle for each person whose income is considered);

(H) minimum loan and credit card payments; and

(I) mandatory child support and other court-imposed obligations; and

(J) other expenses that the court deems essential.

(2) *Alternative to Calculating Actual Expenses.* As an alternative to calculating actual household expenses, the court may assume that these expenses are approximately equal to the adjusted federal poverty guidelines amount for the defendant's household size.

(3) *Expenses Paid by Other Persons.* The expenses described in (h)(1) and (h)(2) are allowable only to the extent they are paid (or were supposed to be paid) by the defendant. If another person, such as a spouse, relative, or roommate, pays some or all of the household expenses, the court shall disregard the portion of the expenses paid by that person. If the defendant is married, the court should assume, absent a showing of good cause, that each spouse pays an amount proportionate to that spouse's relative income.

(i) **Adjusted Federal Poverty Guidelines.** The "adjusted federal poverty guidelines amount" is the federal poverty guidelines amount for Alaska increased by the geographic cost-of-living adjustment established in AS 39.27.020 for the court location nearest the defendant's residence.

(j) **Responsibilities of Administrative Director.** The administrative director shall

(1) publish annually an administrative bulletin specifying the adjusted federal poverty guidelines amount for each court location;[3] and

(2) periodically review the efficacy of the appointment procedure established by this rule.

(Adopted by SCO 1351 effective May 15, 1999.)

Editor's notes.

Notes

[1] AS 18.85.170(4) defines "indigent person" for purposes of public defender appointments as "a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter."

[2] For the current homestead exemption amount, See 8 AAC 95.030. This Department of Labor regulation, rather than AS 09.38.010, establishes the amount of the homestead exemption. See AS 09.38.115.

[3] See Admin. Bulletin 65.1

LAW REVIEW COMMENTARIES

"Sentenced By Tradition: The Third Party Custodian Condition of Pretrial Release in Alaska," 26 Alaska L. Rev. 317 (2009).

Rule 40. Time.

(a) **Computation.** Except as otherwise specifically provided in these rules, in computing any period of time, the day of the act or event from which the designated period of time begins to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When a period of time prescribed or allowed is less than seven days, not counting any period for mailing added under subsection (d) of this rule, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

(1) With or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) Upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35 except as otherwise provided in those rules, or the period for taking an appeal.

(c) **Unaffected by Expiration of Term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

(d) **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed period after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by SCO 273 effective June 15, 1977; by SCO 661 effective March 15, 1986; by SCO 1007 effective January 15, 1990; by SCO 1126 effective July 15, 1993; by SCO 1639 effective October 15, 2007; and by SCO 1694 effective October 15, 2009)

Note: Ch. 77 SLA 2002 (HB157), Section 2, adds new Chapter 26 to Title 6 of the Alaska Statutes, concerning providers of fiduciary services. According to Section 9 of the Act, AS 06.26.760(b)(2) has the effect of amending Criminal Rule 40 by postponing the deadlines set in the Alaska Rules of Criminal Procedure for the filing of documents by a trust company in a criminal action when the Department of Community and Economic Development has taken possession of the trust company.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB221**
Fiscal Note Number
Publish Date

Identifier (file name) HB221-DOA-PDA-1-27-12
Title Public Defender Appointment Procedures
Sponsor Representative Chenault
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 1/27/12 10:19 AM
Date 1/27/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB221

Analysis

This bill amends AS 18.85.120(b) by requiring that persons requesting the services of the Public Defender submit the factors relative to both their ability to pay and their financial resources in writing and under oath. Rule 39.1(e) of the Rules of Criminal Procedure is also amended to require the defendant to submit to inquiry regarding their eligibility for services by the court or the court's designee and to complete a signed sworn financial statement, subject to penalties of perjury.

It is not possible to reliably predict whether or not this bill will have a fiscal impact. It will, however, allow for the appointment process to be more easily audited. The Agency, therefore, submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 221**
Fiscal Note Number
() Publish Date

Identifier (file name) HB221-LAW-CRIM-02-17-12
Title An Act relating to the appointment of counsel for persons accused of crimes.
Sponsor Representative CHENAULT
Requester (H) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
FUND SOURCE			(Thousands of Dollars)				
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Prgm (DGF)							
1037 GF/MH (UGF)							
1178 temp code (UGF)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
POSITIONS							
Full-time							
Part-time							
Temporary							
CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Phone 465-5427
Date/Time 2/17/2012 4:00PM

Approved by Michael C. Geraghty, Attorney General
Department of Law
Date 2/17/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 221
2012 LEGISLATIVE SESSION

Analysis

House Bill 221 requires an applicant for the services of court-appointed counsel to provide information about the financial resources of the person.

The bill also requires an applicant for court-appointed counsel to swear both orally and in writing that the information the person is giving the court is accurate, and provides that the person who gives the information does so under penalty of perjury.

The fiscal impact to the Department of Law is zero.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 21, 2012

SUBJECT: Defining a public agency for purposes of requiring representation of indigents in custody disputes; drafting issues for amendment to HB 221 (Work Order No. 27-LS0650\A.1)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Dennis C. Bailey DCB
Legislative Counsel

This memo accompanies the requested amendment. Please be aware of the following issues that have become apparent during drafting.

The proposed definition of "parent" refers to an "unwed father," which raises a question -- to whom is the father "unwed"? The draft now uses the phrase "putative father" whose paternity has not been established. "Putative" means reputed or supposed. Is this OK?

Also, please be aware that the definitions have been moved to the paragraph, sec. 44.21.410(a)(4)(A), that describes of the duty of the Office of Public Advocacy (OPA) to represent indigent parties in cases involving custody when the opposing party is represented by a public agency. The new location is appropriate because that paragraph is the one involved in the *Alaska Network* case. Because of the new location, the new definitions only apply to the OPA activities listed in the paragraph rather than the entire section. However, in either location, the new definition of "parent" would also apply to the duty of OPA to represent "indigent parents of a minor respondent in a commitment proceeding concerning the minor under AS 47.30.775." Is that what you intend?

If I may be of further assistance, please advise.

DCB:plm:ljw
12-105.pm

Enclosure

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TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Dennis C. Bailey DCB
Legislative Counsel

not to be offered

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If I may be of further assistance, please advise.

DCB:plm:ljw
12-105.pm

Enclosure

27-LS0650\A.1
Bailey
2/18/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE CHENAULT

TO: HB 221

Page 1, line 1:

Delete "**and**"

Insert "**relating to the scope of representation required by the office of public advocacy in civil cases;**"

Page 1, line 2, following "**Procedure**":

Insert "**; and providing for an effective date**"

Page 1, following line 3:

Insert a new bill section to read:

"*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS AND INTENT. (a) The legislature finds that

(1) the ruling in In the Matter of Alaska Network on Domestic Violence and Sexual Assault, 264 P.3d 835 (Alaska 2011), substantially expanded the doctrine established in Flores v. Flores, 598 P.2d 893 (Alaska 1979), which held that public representation must be provided to an indigent party in a child custody case where the opposing party is represented by a public agency, and substantially expanded the duty of the office of public advocacy to represent indigent persons in civil cases;

(2) there is no authoritative precedent, state or federal, to support an extension of due process rights to an indigent parent who is proceeding without counsel in a child custody case only because the other parent is represented by counsel provided by a private, nonprofit organization;

(3) it is the legislature's exclusive role to appropriate money from the state treasury under art. IX, sec. 13, Constitution of the State of Alaska; and

(4) under art. II, Constitution of the State of Alaska, the legislature may pass laws establishing the scope of representation by the office of public advocacy.

(b) It is the intent of the legislature under sec. 3. of this Act to

(1) overrule the decision in In the Matter of Alaska Network on Domestic Violence and Sexual Assault, 264 P.3d 835 (Alaska 2011);

(2) establish criteria to determine when an entity is considered a public agency for purposes of appointing the office of public advocacy as counsel in civil cases; and

(3) clarify the scope of representation required by the office of public advocacy in civil cases."

Page 1, line 4:

Delete "**Section 1**"

Insert "**Sec. 2**"

Renumber the following bill section accordingly.

Page 1, following line 11:

Insert a new bill section to read:

"*** Sec. 3.** AS 44.21.410(a) is amended to read:

(a) The office of public advocacy shall

(1) perform the duties of the public guardian under AS 13.26.360 - 13.26.410;

(2) provide visitors and experts in guardianship proceedings under AS 13.26.131;

(3) provide guardian ad litem services to children in child protection actions under AS 47.17.030(e) and to wards and respondents in guardianship proceedings who will suffer financial hardship or become dependent upon a government agency or a private person or agency if the services are not provided at state expense under AS 13.26.025;

(4) provide legal representation in cases involving judicial bypass procedures for minors seeking abortions under AS 18.16.030, in guardianship proceedings to respondents who are financially unable to employ attorneys under AS 13.26.106(b), to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency, and to indigent parents or guardians of a minor respondent in a commitment proceeding concerning the minor under AS 47.30.775; **in this paragraph,**

(A) "parent"

(i) means a natural parent of a child or a person who has lawfully adopted a child; and

(ii) does not include a putative father whose paternity has not been established;

(B) "party" means an indigent parent of a child who is the subject of a child custody proceeding;

(C) "public agency" means a department, office, agency, division, board, commission, public corporation, or other organizational unit of or created under the executive branch of the state government;

(5) provide legal representation and guardian ad litem services under AS 25.24.310; in cases arising under AS 47.15 (Interstate Compact for Juveniles); in cases involving petitions to adopt a minor under AS 25.23.125(b) or petitions for the termination of parental rights on grounds set out in AS 25.23.180(c)(3); in cases involving petitions to remove the disabilities of a minor under AS 09.55.590; in children's proceedings under AS 47.10.050(a) or under AS 47.12.090; in cases involving appointments under AS 18.66.100(a) in petitions for protective orders on behalf of a minor; and in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests;

(6) develop and coordinate a program to recruit, select, train, assign, and supervise volunteer guardians ad litem from local communities to aid in delivering services in cases in which the office of public advocacy is appointed as guardian ad litem;

(7) provide guardian ad litem services in proceedings under AS 12.45.046 or AS 18.15.355 - 18.15.395;

(8) establish a fee schedule and collect fees for services provided by the office, except as provided in AS 18.85.120 or when imposition or collection of a fee is not in the public interest as defined under regulations adopted by the commissioner of administration;

(9) provide visitors and guardians ad litem in proceedings under AS 47.30.839;

(10) provide legal representation to an indigent parent of a child with a disability; in this paragraph, "child with a disability" has the meaning given in AS 14.30.350;

(11) investigate complaints and bring civil actions under AS 44.21.415(a) involving fraud committed against residents of the state who are 60 years of age or older; in this paragraph, "fraud" has the meaning given in AS 44.21.415."

Renumber the following bill section accordingly.

Page 2, following line 7:

Insert new bill sections to read:

"* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 44.21.410(a), as amended by sec. 3 of this Act applies to civil actions filed on or after the effective date of this Act.

* **Sec. 6.** Section 3 of this Act takes effect immediately under AS 01.10.070(c)."

Melanie Lesh

From: Sue Wright
Sent: Thursday, February 09, 2012 1:02 PM
To: Melanie Lesh
Subject: HB221

Melanie, Please schedule HB 221 next week I will have the changes to you first thing in the morning. I will be in Juneau especially to testify on this bill.

Sue Wright

HB

224

<TARGET><BILL>HB 224</BILL><SUBJECT>HB 224</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

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Toll Free (800) 665-2689
Representative_Paul_Seaton@legis.state.ak.us

345 W. Sterling Highway
Suite 102B
Homer, AK 99603
Phone: 235-2921
Fax: 235-4008

REPRESENTATIVE Paul Seaton

District 35

MEMORANDUM

TO: Representative Carl Gatto
Chair, House Judiciary Committee

FROM: Representative Paul Seaton

DATE: April 8, 2011

RE: Request for hearing, HB 224

I respectfully request a hearing before the House Judiciary Committee on HB 224, banning the sale of products containing nicotine to a minor.

Attached please find: HB 224; Sponsor Statement; AS 11.76.100 Selling or giving tobacco to a minor; research and articles on products containing nicotine.

Invited testimony/available for questions: Doug Gardner, Legislative Legal Attorney

At this time I do not expect any off-net participation.

Staff contact: Katie Koester: 465-2028 or Mary Jane Shows 465-2689

received
04/08/11 12:16pm

Alaska State Legislature

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REPRESENTATIVE Paul Seaton

District 35

Sponsor Statement HB 224
Banning the Sale of Products Containing Nicotine to a Minor

Faced with lagging sales given the unpopularity and banning of smoking in many public places, tobacco companies are investing in new and innovative ways to deliver their product. Some of the newest items on the market, called "dissolvable products" are mints, lozenges, strips and toothpicks containing nicotine. These products slowly dissolve in the mouth and deliver a nicotine hit between 0.6 and 3.0 mg per item while a cigarette contains 1 mg of nicotine (Brandweek, 2008). Some have legitimate uses for promoting smoking cessation and providing smokers relief when they are in situations where they cannot smoke. However, the opportunity for abuse is wide with the over the counter availably of dissolvable products containing nicotine.

HB 224 makes it illegal to sell or give a product containing nicotine to a minor. Under this bill an individual is fined $300 if convicted of selling or giving a product contacting nicotine to a individual under 19. HB 224 addresses the need for minors to access products that are regulated and marked for smoking cessation, such as nicotine gum, by allowing a minor to purchase products containing nicotine with the prescription of a health care provider or to be given the product by an adult parent or guardian.

There is a very real risk that increased nicotine use in youth and adolescents promotes addiction to nicotine at a young age and could encourage future tobacco use and addiction (Science Daily, 2003). A recent Harvard School of Public Health study found dissolvable nicotine products to be toxic if ingested by children (Harvard School of Public Health, 2010). A 14-year old boy in England was hospitalized after overdosing on nicotine gum (Vapure News, 2009).

Many of the products containing nicotine that are entering the market now look and taste like candy. A study conducted by student volunteers in Virginia surveyed 1400 teens and 42% identified Camel Orbs as a candy based on their packaging (Virginia Foundation for Healthy Youth, 2010). According to Brandweek, a professional publication on brand identity marketing, "camel dissolvable will not be positioned as a smoking cessation or reduced risk product, per the company" (Brandweek, 2008). Products containing nicotine are not subject to FDCA Chapter IX , the regulations that govern tobacco (Chicago Breaking News, 2011).

Without the regulation of products containing nicotine by the state there is an increased chance of children becoming addicted to nicotine, and tobacco later in life. Many of these products are new to the market and have not yet been introduced in Alaska. HB 224 takes a proactive approach to encouraging the responsible use of dissolvable nicotine products.

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REPRESENTATIVE Paul Seaton

District 35

Sponsor Statement HB 224
Banning the Sale of Products Containing Nicotine to a Minor

Faced with lagging sales given the unpopularity and banning of smoking in many public places, tobacco companies are investing in new and innovative ways to deliver their product. Some of the newest items on the market, called "dissolvable products" are mints, lozenges, strips and toothpicks containing nicotine. These products slowly dissolve in the mouth and deliver a nicotine hit between 0.6 and 3.0 mg per item while a cigarette contains 1 mg of nicotine (Brandweek, 2008). Some have legitimate uses for promoting smoking cessation and providing smokers relief when they are in situations where they cannot smoke. However, the opportunity for abuse is wide with the over the counter availably of dissolvable products containing nicotine.

HB 224 makes it illegal to sell or give a product containing nicotine to individuals under the age of 19 by adding "product containing nicotine" to AS.11.76.100, the Alaska statute governing the sale of tobacco products to minors. Under this bill an individual is fined $300 if convicted of selling or giving a product contacting nicotine to a minor.

HB 224 addresses the need for minors to access products such as nicotine gum if they are trying to quit smoking by allowing a minor to purchase products containing nicotine with a physician's prescription or to be given the product by an adult parent or guardian.

There is a very real risk that increased nicotine use in youth and adolescents promotes addiction to nicotine at a young age and could encourage future tobacco use and addiction (Science Daily, 2003). A recent Harvard School of Public Health study found dissolvable nicotine products to be toxic if ingested by children (Harvard School of Public Health, 2010). A 14-year old boy in England was hospitalized after overdosing on nicotine gum (Vapure News, 2009).

Many of the products containing nicotine that are entering the market now look and taste like candy. A study conducted by student volunteers in Virginia surveyed 1400 teens and 42% identified Camel Orbs as a candy based on their packaging (Virginia Foundation for Healthy Youth, 2010). According to Brandweek, a professional publication on brand identity marketing, "camel dissolvable will not be positioned as a smoking cessation or reduced risk product, per the company" (Brandweek, 2008). Products containing nicotine are not subject to FDCA Chapter IX , the regulations that govern tobacco (Chicago Breaking News, 2011).

Without the regulation of products containing nicotine by the state there is an increased chance of children becoming addicted to nicotine, and tobacco later in life. Many of these products are new to the market and have not yet been introduced in Alaska. HB 224 takes a proactive approach to encouraging the responsible use of dissolvable nicotine products.

27-LS0466\I
Gardner
4/11/11

CS FOR HOUSE BILL NO. 224( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE SEATON

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting the sale or gift of a product containing nicotine to a minor under certain conditions."

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

*** Section 1.** AS 11.76 is amended by adding a new section to read:

Sec. 11.76.109. Selling or giving product containing nicotine to a minor. (a) A person commits the offense of selling or giving a product containing nicotine to a minor if the person

(1) negligently sells a product containing nicotine to a person under 19 years of age; or

(2) is 19 years of age or older and negligently exchanges or gives a product containing nicotine to a person under 19 years of age.

(b) The provisions of (a) of this section do not apply to the sale, exchange, or gift to a person under 19 years of age of a product containing nicotine that is intended or expected to be consumed without being combusted if the product

(1) has been approved by the United States Food and Drug Administration for sale as a tobacco use cessation or harm reduction product or for other medical purposes;

(2) is being marketed and sold solely for the approved purposes; and

(3) is prescribed by a health care professional or given to a person under 19 years of age by the person's parent or legal guardian.

(c) In this section, "product containing nicotine" does not include a cigarette, a cigar, tobacco, or a product containing tobacco.

(d) Selling or giving a product containing nicotine to a minor is a violation and, upon conviction, is punishable by a fine of not less than $300.

Sec. 11.76.100. Selling or giving tobacco to a minor.

(a) A person commits the offense of selling or giving tobacco to a minor if the person

(1) negligently sells a cigarette, a cigar, tobacco, or a product containing tobacco to a person under 19 years of age;

(2) is 19 years of age or older and negligently exchanges or gives a cigarette, a cigar, tobacco, or a product containing tobacco to a person under 19 years of age;

(3) maintains a vending machine that dispenses cigarettes, cigars, tobacco, or products containing tobacco; or

(4) holds a business license endorsement under AS 43.70.075 and allows a person under 19 years of age to sell a cigarette, a cigar, tobacco, or a product containing tobacco.

(b) Notwithstanding the provisions of (a) of this section, a person who maintains a vending machine is not in violation of (a)(3) of this section if the vending machine is located

(1) on premises licensed as a beverage dispensary under AS 04.11.090 , licensed as a club under AS 04.11.110 , or licensed as a package store under AS 04.11.150 ; and

(A) as far as practicable from the primary entrance; and

(B) in a place that is directly and continually supervised by a person employed on the licensed premises during the hours the vending machine is accessible to the public; or

(2) in an employee break room or other controlled area of a private work place that is not generally considered a public place and the room or area contains a posted warning sign at least 11 inches by 14 inches indicating that possession of tobacco by a person under 19 years of age is prohibited under AS 11.76.105 .

(c) In this section, a person maintains a vending machine if the person owns the machine or owns or controls a facility in which the machine is located.

(d) The court shall forward a record of each person convicted under this section who holds a business license endorsement under AS 43.70.075, or who is an employee or agent of a person who holds a license endorsement under AS 43.70.075 to the Department of Commerce, Community, and Economic Development.

(e) The provisions of (a) of this section do not apply to a person who sells or gives tobacco to a minor, if the minor is a prisoner at an adult correctional facility.

(f) A person who violates (a) of this section is guilty of a violation and upon conviction is punishable by a fine of not less than $300.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB224
() Publish Date:

Identifier (file name): HB224-DHSS-BHA-04-08-11
Title: Sales of Nicotine Products to Minor
Sponsor: Rep. Seaton
Requester: House JUD Committee

Dept. Affected: Health and Social Services
Appropriation: Behavioral Health
Allocation: Behavioral Health Administration
OMB Component Number: 2665

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Melissa Stone, Director — Phone 269-3601
Division: Behavioral Health — Date/Time 4/8/11 5:00 PM
Approved by: Alison Elgee, Assistant Commissioner — Date 4/8/2011
DHSS Finance & Management Services

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB224
2011 LEGISLATIVE SESSION

Analysis:

This bill will have no significant fiscal impact on Behavioral Health. HB224 will broaden AS 11.76.100, which currently prohibits selling or giving tobacco products to persons under 19, to encompass all nicotine products, with an exception for tobacco cessation products provided by the minor's parent or prescribed by a licensed physician.

If enacted, this bill would not impact our Synar Tobacco Enforcement requirements, but will have some limited impact on our general compliance and enforcement activities that occur outside of Synar. We do not believe it will impact us to the extent that additional funds or a change in our practices will occur.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB224 \ A**
() Publish Date

Identifier (file name): HB224-LAW-CIV-04-08-11
Dept. Affected: Law
Title: An Act relating to the prohibition of sales of nicotine products to a minor.
Appropriation: Civil
Allocation: Commercial and Fair Business
Sponsor: REPRESENTATIVE(s) SEATON
Requester: (H) JUD
OMB Component Number: 2717

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 4/8/11 8:00 PM
Approved by: John J. Burns, Attorney General — Date 4/8/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB224 \ A

Analysis

HB 224 amends the minor offense criminal statute AS 11.76.100 ("Selling or giving tobacco to a minor," defined in the statute as anyone under 19). The bill broadens the statute and its title to include the negligent sale to a minor of any product containing nicotine, not just tobacco, adding an exception for nicotine products approved by the FDA for, and marketed solely as, tobacco cessation uses (e.g., nicotine gum, patches, lozenges) if prescribed by a physician or given to the minor by a parent or guardian.

There is no anticipated fiscal impact to Department of Law.

dailyamerican.com/da-ot-tobacco-products-may-fool-some-20110324,0,6985965.story

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Tobacco products may fool some

VICKI ROCK

Daily American Staff Writer

Somerset -

They look like mints, chewing gum, a green marking pen and bottled water. They have healthy sounding flavors including peach and apple, and they smell like fruits. They are tobacco products.

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FISHER INVESTME

"The Washington County Health Partners Inc. created the backpack of non-tobacco items and their tobacco product look-alikes to show schools and legislators what the very ingenious tobacco people are doing to market to our youth," said Clara Hinton, Somerset County tobacco educator. She is also on the executive coalition of the Washington County Health Partners Inc.

There is Camel Snus, a spitless tobacco product, that comes in flavors. The package looks like a cell phone or a container of mints. Skoal cut tobacco's package also looks like mints or beef jerky. Ariva and Stonewall dissolvable tobacco products look like breath mints. White Owl Blunts in flavors including grape and strawberry look like the marking pen. Revved Up, a caffeinated energy dip, looks like mints. NicLite, a nicotine water sold as a homeopathic product, looks like a small bottle of regular water.

"This is one you won't guess," Hinton said. "It looks like a single packaged alcohol wipe. It blew me away. It is Nicogel. A kid could sit in class and the teacher would think he's using a sanitizing gel and he is getting a fix in class."

The dissolvable tobacco products contain two milligrams of nicotine, which is slightly higher than a cigarette.

"Little kids can overdose on just 10 milligrams," she said. "This is serious stuff."

The "What's in Your Child's Backpack" educational tool kit was developed as a regional effort across 10 counties.

"Most of these products are under $3, easy to hide, and look, taste and smell like candy," Lee Rutledge-Falcione, director of Washington County Health Partners Inc., said in a written statement. "Aggressive marketing and development of these new products is promoting the use of smokeless products and putting our youth at risk. It is very important that tobacco use prevention education continues, even in

this tight budget year."

Tobacco companies spend $534 million to market their products in Pennsylvania, according to the Washington County Health Partners. Each year 18,500 Pennsylvania young people become new daily smokers.

Adults are also using the products, which cost much less than cigarettes, Hinton said. She teaches a smoking cessation class at Somerset Hospital and many of the adults in the class had already seen all the tobacco products.

"Pennsylvania is sadly the only state that does not have a tax or user-fee on other tobacco products," she said. "Thirty percent of all teens who try nicotine products get addicted. It is a drug. It works on the brain. It has a permanent effect on the structure of the brain. We know kids are buying it — it's affordable and it's available and more products are coming out. Parents and teachers need to be aware because they may think something's harmless and it's not. Young people already know about it."

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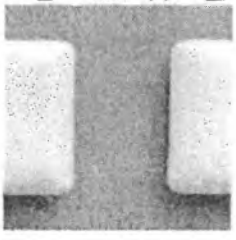


Anti-Smokers Give Nicotine Gum to 14 year old, Child Overdoses

Posted by vapor in Buzz, News, Other Topics on 07 21st, 2009 | no responses

A 14-year-old boy was hospitalised after overdosing on nicotine gum handed out at school, it emerged today. Share

Aiden Williams is thought to have chewed up to 45 sticks of the gum before collapsing in the playground at Menzies High School Science College in West Bromwich, West Midlands.

Anti-smoking advisers from Sandwell Council's Drug Education, Counselling and Confidential Advice (Decca) gave the gum to another boy after the school raised concerns about that pupil's smoking habit.

But the boy, a friend of Aiden, passed it on and Aiden was taken to Sandwell General Hospital with stomach pains on July 8 after bingeing on the gum.

He was kept in overnight for observation and discharged the following day.

About the Virginia Foundation for Healthy Youth:

Established by the Virginia General Assembly, the **Virginia Foundation for Healthy Youth** was formerly known as the Virginia Tobacco Settlement Foundation. The Foundation is responsible for statewide efforts to prevent and reduce youth tobacco use and childhood obesity. Since the Foundation began its work in 2001, teen smoking in Virginia has been almost cut in half.

The Virginia Foundation for Healthy Youth directly reaches more than 141,000 children through classroom-based prevention programs in hundreds of public schools, after-school programs, community centers, daycares and prevention programs statewide. The Foundation's award-winning "Y do u think" marketing campaign delivers prevention messages to 600,000 children annually through TV and radio ads and Internet content.

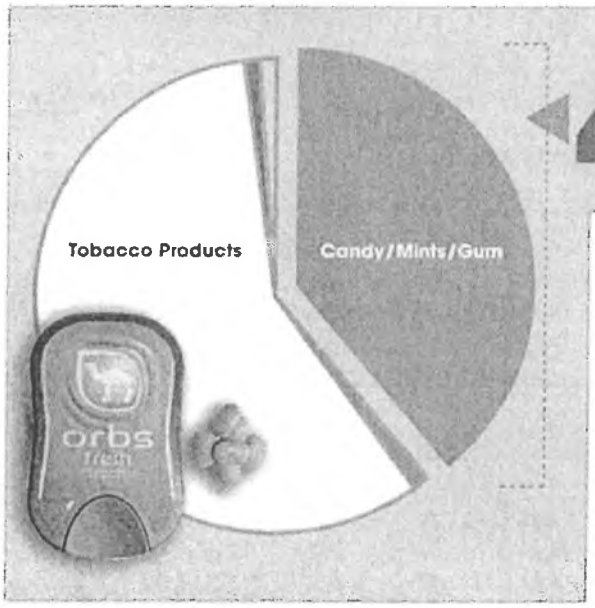
The Foundation is funded through a portion of Virginia's share of the 1998 Master Settlement Agreement (MSA).

For more information about the Virginia Foundation for Healthy Youth, please see our brochure at HealthyYouthVA.org/pdf/HealthyYouthBrochure_lores.pdf.

###

Virginia Survey on New Tobacco Products

Virginia youth collected 2,433 surveys from the general public from May 2009 to June 2010. These opinion surveys assessed whether the new smokeless and spitless tobacco products are mistakenly perceived as candy or mints because of their packaging and flavoring. The facts featured below are major findings from the survey. Please visit meltdownva.com for more survey findings.



42% OF TEENS THOUGHT CAMEL ORBS WERE CANDY, MINTS OR GUM BASED ON ITS PACKAGING.

81% OF RESPONDENTS BELIEVED THAT WINTERGREEN, A SMOKELESS TOBACCO PRODUCT FLAVOR, WAS ASSOCIATED WITH CANDY, GUM OR MINTS.

53% OF RESPONDENTS BELIEVED THAT FROST, A SMOKELESS TOBACCO PRODUCT FLAVOR, WAS ASSOCIATED WITH CANDY, GUM OR MINTS.

28% OF TEENS WHO DO NOT CURRENTLY USE TOBACCO SAID THEY WOULD TRY CAMEL ORBS FRESH BASED ON ITS PACKAGING.

Some Recent Media Reports about Camel Orbs:

Richmond Times-Dispatch, May 7, article about Va. Foundation for Healthy Youth survey:
http://www2.timesdispatch.com/rtd/business/local/article/B-TOBA07_20100506-210802/342684/

New York Times, April 19, article about Camel Orbs controversy:
http://www.nytimes.com/2010/04/19/business/19smoke.html

The Columbus Dispatch, May 2, article about Sen. Brown wanting Camel Orbs taken off market:
http://www.dispatch.com/live/content/local_news/stories/2010/05/02/brown-wants-candylike-tobacco-taken-off-market.html?type=rss&cat=&sid=101

Convenience Store News, May 3, article about RJ Reynolds Tobacco's focus on new smokeless tobacco products
http://www.csnews.com/csn/cat_management/tobacco/article_display.jsp?vnu_content_id=1004088365&imw=Y

The Colbert Report, April 28, humorous satire about Camel Orbs:
http://www.colbertnation.com/the-colbert-report-videos/308747/april-28-2010/cheating-death---tobacco-mints--breast-milk---hallucinogens

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Many teens mistook smokeless tobacco products for candy

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One out of three teenagers younger than 18 mistakenly identified a new type of smokeless tobacco product as candy or gum in a survey conducted by a Virginia tobacco-prevention group.

Conducted last year by student volunteers with the Virginia Foundation for Healthy Youth, the survey asked about 1,400 people, including 728 younger than 18, to identify package images for several types of novel, smokeless tobacco products, along with package images of conventional mints and gums.

About 39 percent of survey participants younger than 18 identified Camel Orbs as mints or gum.

About 39 percent of the people younger than 18 identified Camel Orbs as mints or gum.

Camel Orbs are a pelletlike type of oral tobacco that dissolves in the mouth, delivering a dose of nicotine to the user.

Developed by R.J. Reynolds Tobacco Co., the nation's second-largest cigarette maker, Camel Orbs are part a wider trend in the tobacco industry to introduce new smokeless products to the market as cigarette sales have declined and as indoor smoking bans become more common.

The smokeless products have been criticized by health officials and tobacco-control advocates, who say they appear too much like candy and pose a poison risk to young children.

The U.S. Food and Drug Administration is planning to review dissolvable tobacco products, and U.S. Sen. Frank R. Lautenberg, D-N.J., last month urged the agency to pull the products from stores pending more study.

The results of the survey indicate that packaging of the products alone may appeal to youth, said Danny Saggese, director of marketing for the Virginia Foundation for Healthy Youth.

"It poses a significant risk to youth and raises the possibility of them not only using these products, but using them in places where smoking is now prohibited, and potentially becoming nicotine addicts," he said.

Of the teenagers younger than 18 surveyed, 28 percent said they would try Camel Orbs based on packaging alone.

Camel Orbs are not available in Virginia, said David Howard, a spokesman for Winston-Salem, N.C.-based Reynolds. The company is test-marketing the product in Columbus, Ohio; Indianapolis; and Portland, Ore.

Howard said Camel Orbs are sold behind the shelf along with other tobacco products.

"They are clearly tobacco products," he said. "Their sale is age-restricted. It is illegal to sell them to minors. The packages carry the same warnings as other smokeless tobacco products." Starting late next month, the FDA will require smokeless tobacco products to have warning labels that cover one-third of the front and back of the packages, Howard said.

Christine Hou, a senior at the Maggie L. Walker Governor's School, said she thinks the novel smokeless products are not widely known among teens, "but it is something [tobacco companies] are putting out there, which is scary."

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Filed under Government, Regulations

FDA ruling clears tobacco lozenges for sale

By Associated Press
Posted March 23 at 1:31 p.m.

Tobacco maker Star Scientific Inc. said Wednesday that the Food and Drug Administration has informed it that two of its dissolvable tobacco lozenges aren't covered by the law regulating tobacco, clearing the way for them to be marketed.

The small Virginia company, which has sold tobacco products that dissolve in the user's mouth since 2001, said the FDA's Center for Tobacco Products say that its Ariva-BDL and Stonewall-BDL products aren't subject to regulation.

The news drove Star's stock up 33 cents, or 9 percent, to $3.95.

Star Scientific had asked the FDA to certify the lozenges as "modified risk" tobacco products under a 2009 law, making itself the test case for a big issue of whether the agency would allow certain products to be marketed as less harmful than cigarettes.

The company says the lozenges contain "below detectable levels" of certain cancer-causing chemicals found in tobacco and its smoke. The tablets contain tobacco's addictive component, nicotine. Star Scientific has said its method of tobacco cultivation and preparation creates tobacco leaves with low levels of some carcinogens.

How the FDA handles "modified-risk" products is being closely watched by the public health community and bigger tobacco companies, which are looking for new products to sell as they face declining cigarette demand.

But Star Scientific said the agency's notices from Dr. Lawrence Deyton, the center's director said, "At this time, only cigarettes, cigarette tobacco, smokeless tobacco and roll-your-own tobacco are subject" to the law and that based on the company's submissions, the products are not subject to regulation.

In a statement Wednesday, the FDA said it recognizes there are uncertainties whether nicotine-containing products derived from tobacco should be regulated as drugs or tobacco products. The agency added that it is considering its legal and regulatory options regarding these products.

Star Scientific had believed the products fell under the jurisdiction of the Center for Tobacco Products, and the company was somewhat surprised by the agency's determination, spokeswoman Sara Troy Machir said in an interview with The Associated Press.

However, the distinction may come in how the product is made.

"Yes they are absolutely tobacco products under the definition, but when we get into the manufacturing process that's where we are hamstrung because it's absolutely proprietary information," Machir said.

The FDA still must address the issue of dissolvable tobacco. By next March, its scientific advisory panel must complete a report and recommendations on the products being sold by Star and other tobacco companies. The agency also has expressed concerns that dissolvable products contain a lot of nicotine and could be particularly appealing to kids and young adults.

R.J. Reynolds, which is owned by Reynolds American Inc. in Winston-Salem, N.C., is test-marketing dissolvable, finely milled tobacco tablets, strips and a toothpick shape under the names Camel Orbs, Camel Strips and Camel Sticks. Richmond-based Altria Group Inc., owner of the nation's largest tobacco company, Philip Morris USA, is test marketing wooden sticks coated with finely milled tobacco under the top-selling Marlboro brand in Kansas.

Read more about the topics in this post: FDA, Tabacco lozenges, Tobacco products

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Tobacco Company's New, Dissolvable Nicotine Products Could Lead to Accidental Poisoning in Infants and Youth

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For immediate release: Monday, April 19, 2010

Boston, MA—A tobacco company's new, dissolvable nicotine pellet--which is being sold as a tobacco product, but which in some cases resembles popular candies--could lead to accidental nicotine poisoning in children, according to a new study from the Harvard School of Public Health (HSPH), the Northern Ohio Poison Control Center, the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA). The researchers also say the candy-like products could appeal to young people and lead to nicotine addiction as well.

The study appears in an advance online edition of the journal *Pediatrics* on April 19, 2010 and will appear in a later print issue.

In 2009, the R.J. Reynolds Tobacco Company launched a dissolvable nicotine product called Camel Orbs, which according to the company's promotional literature contains 1 mg nicotine per pellet and is flavored with cinnamon or mint. The company also introduced Camel Strips (to contain 0.6 mg nicotine per strip) and Sticks (to contain 3.1 mg nicotine per strip).

It appears that the product is intended as a temporary form of nicotine for smokers in settings where smoking is banned. However, the potential public health effect could be disastrous, particularly for infants and adolescents, said Professor Gregory N. Connolly, lead author of the study and director of the Tobacco Control Research Program at HSPH.

Ingestion of tobacco products by infants and children is a major reason for calls to poison control centers nationwide. In 2007, 6,724 tobacco-related poisoning cases were reported among children five years of age and under. Small children can experience nausea and vomiting from as little as 1 mg of nicotine.

"This product is called a 'tobacco' product, but in the eyes of a 4-year-old, the pellets look more like candy than a regular cigarette. Nicotine is a highly addictive drug and to make it look like a piece of candy is recklessly playing with the health of children," said Connolly.

The researchers computed, based on median body weight, how much nicotine ingestion would lead to symptoms of poisoning in children: A one-year-old infant could suffer mild to moderate symptoms of nicotine poisoning by ingesting 8 to 14 Orbs, 14 Strips or 3 Sticks; ingesting 10 to 17 Orbs, 17 Strips or 3 to 4 Sticks could result in severe toxicity or death. A four-year-old child could have moderate symptoms by ingesting 13 to 21 Orbs, 14 Strips or 4 Sticks and could suffer severe toxicity or death by consuming 16 to 27 Orbs, 27 Strips or 5 Sticks. The researchers report that a poison control center in Portland, Oregon, a test market for Orbs, reported a case in which a three-year old ingested an Orbs pellet.

R.J. Reynolds claims that Orbs packaging is "child resistant," but the researchers say adults could unknowingly leave the pellets out in the open where children could easily access them. The researchers also say that the candy-like appearance and flavoring and ease-of-use of the product could appeal to children.

"Unintentional Childhood Poisonings Through Ingestion of Conventional and Novel Tobacco Products," Gregory N. Connolly, Patricia Richter, Alfred Aleguas Jr., Terry F. Pechacek, Stephen B. Stanfill, Hillel R. Alpert, *Pediatrics,* online April 19, 2010.

photo: Andrew Seidenberg

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R.J. Reynolds Preps Dissolvable Tobacco

Oct 8, 2008

- Mike Beirne

R.J. Reynolds Tobacco will dive deeper into the smokeless category next year by nationally distributing Camel Snus and introducing in test markets dissolvable alternatives to cigarettes called Camel Sticks, Camel Orbs and Camel Strips.

The new products, grouped under the Camel Dissolvables banner, are smokeless and spit-free; they are made from finely milled tobacco and held together with food grade binders. The products will launch in the first quarter in Columbus, Ohio, Portland, Ore., and Indianapolis. The Camel Dissolvables Sticks can be placed in the mouth like a toothpick or broken into a piece that is placed between the upper lip and gum, where it dissolves after 10 minutes. RJR recommends the same usage for Orbs, which is a pellet that lasts about 15 minutes, and Strips, which dissolve after about 3 minutes.

The three forms of smokeless tobacco will be packed in plastic, child-resistant packaging. Strips will come in Fresh mint flavor and Sticks in Mellow; Orbs will be available in both flavors. Camel Dissolvables deliver between 0.6 to 3.1 milligrams of nicotine, while cigarette smokers typically inhale about 1 mg per cigarette.

Advertising is still being developed, but a company rep said print ads, direct marketing, sampling (at bars and nightclubs) and POP will support. The Reynolds American unit currently has a company policy that restricts advertising cigarettes in consumer publications. That self-imposed ban does not apply to other tobacco products and trade publications. Gyro, Philadelphia, and Agent 16, New York, are the lead agencies.

By introducing the products in select test markets, RJR hopes to find out which forms of Camel Dissolvables are the most popular, and how demographics or usage determines preferences. The product concept partly evolved from consumer feedback, following a test of Camel Snus in 2006. Camel Snus is also spitless, but some smokers said they didn't care for loose tobacco or pouched smokeless products, particularly ones they had to remove from their mouth after use.

The smokeless category has been a magnet for cigarette makers with sales averaging 5% to 7% annually, per various estimates. Although there is a growing body of literature contending that smokeless tobacco is less harmful than smoking cigarettes, a 2007 study by the American Cancer Society found that male smokers who switched to smokeless had higher death rates than men who quit or never smoked. Camel Dissolvables will not be positioned as a smoking cessation or reduced risk product, per the company.

"The consumer should be aware of the information available about the potential risks of each tobacco product. There are none that are safe and there are none that are without risks," said RJR rep David Howard.

In addition to introducing the new dissolvable alternatives, RJR will expand distribution for Camel Snus (pronounced *snooze*) by offering retailers countertop and under the counter refrigerator units to keep the product cold.

In 2006, Reynolds American acquired Conwood, the second largest maker of smokeless products in the U.S. Philip Morris USA's smokeless products include Marlboro Snus and Marlboro Snuff. Altria, Philip Morris' parent company, expects to close by January on its purchase of UST, the holding company for U.S. Smokeless Tobacco, the largest smokeless product company and maker of Skoal and Copenhagen.

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Early Nicotine Use May Lead To Lasting Addiction, Study Finds

ScienceDaily (Sep. 10, 2003) — Durham, N.C. -- People who begin smoking in their teens may be particularly vulnerable to long-term nicotine addiction, according to an animal study conducted by Duke University Medical Center pharmacologists. The study emphasizes that the age at which individuals begin using nicotine can have a major physiological impact to encourage later use of the drug.

See Also:

Health & Medicine
- Smoking
- Teen Health
- Children's Health

Mind & Brain
- Smoking Addiction
- Addiction
- Illegal Drugs

Reference
- Nicotine
- Drug addiction
- Addiction
- Alkaloid

In their study, the researchers compared the amount of nicotine self-administered by adolescent rats to the amount used by animals first exposed during adulthood. Young rats showed nearly double the rate of nicotine use compared with those initially exposed as adults, the study found.

The adolescents' heavier nicotine use persisted into adulthood, the team reports in the September 2003 issue of the journal Psychopharmacology.

"The results indicate that early nicotine exposure can leave a lasting imprint on the brain," said Edward Levin, Ph.D., professor in the psychiatry and behavioral sciences department at Duke University Medical Center and a researcher at Duke's Nicotine Research Center. The study was supported by grants from the National Institute on Drug Abuse and the National Institute of Mental Health.

Most tobacco use begins during adolescence, Levin pointed out. Among smokers in the United States, 88 percent smoked their first cigarette before the age of 18 and 60 percent before age 14. Adolescence is also a crucial period for the brain, he said, in which the final phase of neuron development occurs.

"The great majority of tobacco addiction begins during adolescence, yet little is known about differential effects of nicotine in adolescents versus adults," Levin said.

Other studies have suggested that smokers who take up the habit at a young age are more likely to continue to smoke, Levin said. However, researchers find it difficult to assess the underlying cause of an association between age and addiction in humans, he added, because the same factors that make people prone to nicotine addiction may also encourage them to begin using the drug at a young age.

To clarify the basis of early nicotine addiction, Levin and colleagues tested for a link between the age of initial nicotine use and addiction in female rats in the laboratory. The researchers provided some rats with nicotine at 40 to 46 days of age, while others were provided nicotine only after 70 to 76 days, once they had reached adulthood. Rats could self-administer a dose of nicotine by pressing a lever.

The adolescent rats self-administered significantly more nicotine than did adults, the researchers found. In a test for chronic nicotine use in the rats during a period of four weeks, animals that began using nicotine during adolescence continued to use more of the drug even after they became adults.

The results suggest that people who begin using nicotine during adolescence may be at greater risk for long-lasting addiction, the team reports.

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"The brain continues to develop throughout the teenage years," Levin said. "Early nicotine use may cause the wiring of the brain to proceed inappropriately. In essence, the brains of adolescents who use tobacco may be sculpted around an addiction to nicotine."

Other Duke participants in the study included Amir Rezvani, Ph.D., Daniel Montoya, Jed Rose, Ph.D., and H. Scott Swartzwelder, Ph.D., also of the Durham Veterans Administration Hospital.

Drug Rehab Treatment — Intervention Program For Immediate Drug Addiction Treatment. www.DrugRehabCenter.com

New Jersey Drug Treatment — Our Mission is to provide housing and treatment to women in need. www.MrsWilsons.org

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The above story is reprinted (with editorial adaptations by Science*Daily* staff) from materials provided by Duke University Medical Center.

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Early Nicotine Use May Lead To Lasting Addiction, Study Finds

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In their study, the researchers compared the amount of nicotine self-administered by adolescent rats to the amount used by animals first exposed during adulthood. Young rats showed nearly double the rate of nicotine use compared with those initially exposed as adults, the study found.

The adolescents' heavier nicotine use persisted into adulthood, the team reports in the September 2003 issue of the journal Psychopharmacology.

"The results indicate that early nicotine exposure can leave a lasting imprint on the brain," said Edward Levin, Ph.D., professor in the psychiatry and behavioral sciences department at Duke University Medical Center and a researcher at Duke's Nicotine Research Center. The study was supported by grants from the National Institute on Drug Abuse and the National Institute of Mental Health.

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"The great majority of tobacco addiction begins during adolescence, yet little is known about differential effects of nicotine in adolescents versus adults," Levin said.

Other studies have suggested that smokers who take up the habit at a young age are more likely to continue to smoke, Levin said. However, researchers find it difficult to assess the underlying cause of an association between age and addiction in humans, he added, because the same factors that make people prone to nicotine addiction may also encourage them to begin using the drug at a young age.

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The results suggest that people who begin using nicotine during adolescence may be at greater risk for long-lasting addiction, the team reports.

"The brain continues to develop throughout the teenage years," Levin said. "Early nicotine use may cause the wiring of the brain to proceed inappropriately. In essence, the brains of adolescents who use tobacco may be sculpted around an addiction to nicotine."

Other Duke participants in the study included Amir Rezvani, Ph.D., Daniel Montoya, Jed Rose, Ph.D., and H. Scott Swartzwelder, Ph.D., also of the Durham Veterans Administration Hospital.

Editor's Note: The original news release can be found here.

This story has been adapted from a news release issued by Duke University Medical Center.

The Earlier You Light Up, the Harder to Quit

Early nicotine use linked to long-term addiction

FRIDAY, Sept. 12 (HealthDayNews) -- If you started smoking as a teenager, you may be particularly vulnerable to long-term nicotine addiction.

An animal study by Duke University Medical Center researchers found the age at which rats begin using nicotine can have a major physiological impact to encourage later use of nicotine.

The researchers compared the amount of nicotine self-administered by adolescent rats to the amount used by rats first exposed to nicotine during adulthood. The study found the young rats used nearly double the rate of nicotine compared to the adult rats. The young rats' heavy nicotine use persisted into adulthood.

The study appears in the September issue of *Psychopharmacology*.

"The results indicate that early nicotine exposure can leave a lasting imprint on the brain," researcher Edward Levin, a professor of psychiatry and behavioral sciences, says in a news release.

He notes that among smokers in the United States, 88 percent smoked their first cigarette before the age of 18 and 60 percent took their first puff before age 14.

"The great majority of tobacco addiction begins during adolescence, yet little is known about differential effects of nicotine in adolescents versus adults," Levin says.

"The brain continues to develop through the teenage years. Early nicotine use may cause the wiring of the brain to proceed inappropriately. In essence, the brains of adolescents who use tobacco may be sculpted around an addiction to nicotine," Levin adds.

More information

Here's where you can learn more about nicotine addiction.

--Robert Preidt

SOURCE: Duke University, news release, Sept. 8, 2003

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MEMORANDUM April 13, 2011

SUBJECT: Changing the Age in AS 11.76.109 from 19 to 18 Years of Age
CSHB 224(JUD) (Work Order No. 27-LS0466\D)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Sarah Munson

FROM: Doug Gardner
Director

Enclosed is CSHB 224(JUD), bill draft 27-LS0466\D, which makes two changes to section 1 of the bill, replacing 19 with 18 on page 1, line 13, and making the same change on page 2, line 6 of the bill. I saw some of the testimony on television, and the brief part that I saw, was a representative of DHSS discussing the fact that they provide tobacco cessation products to persons 18 years of age or older on a call-in help line. The change that was made, presumably, was to assure DHSS that dispensation of tobacco cessation products legal in DHSS' program is legal.

The changes that were made leave a gap in proposed AS 11.76.109, for persons who are 18 - 19 years of age. Before the changes, tobacco cessation products that met the criteria in AS 11.76.109(b) could be provided to persons under 19 years of age. By lowering the age in AS 11.76.109(b), the criminal liability created in AS 11.76.109(a), for providing a product containing nicotine to anyone under 19 years of age, will make it an offense for anyone that provides a product containing nicotine to a person who is 18 years of age. The way the bill was drafted, proposed AS 11.76.109 made it legal to provide a product containing nicotine to a person under 19 years of age if it was non-combustible, approved by the FDA, and prescribed by a health care professional, or given by a parent or legal guardian. With the amendments, as I read them, tobacco cessation products can be provided to persons under 18 years of age, but not persons who are 18. The way to have achieved the result that DHSS was advocating would have been to add language to proposed AS 11.76.109(b) similar to:

> (3) is either
>
> (A) prescribed by a health care professional or given to a person under 19 years of age by the person's parent or legal guardian; or
>
> (B) provided to a person through a smoking cessation program sponsored by the Department of Health and Social Services.

Or if the committee intended the exception for smoking cessation programs to apply only to those 18 years of age or older the committee could have added the following to (b)(3) following the word "professional":

> ", given to a person at least 18 years of age through a smoking cessation program administered by the Department of Health and Social Services,"[1]

Changing the age to 18 in AS 11.76.109(b), creates criminal liability for anyone who provides a product containing nicotine, including smoking cessation products, to a person 18 years of age. Please call if you have questions. I made the changes the committee asked for, but wanted to warn you of what appears to be an unintended consequence. If this consequence was considered by the committee, and was intended, you should disregard this memo.

If I can be of further assistance, please advise.

DDG:med
11-042.med

Enclosure

[1] A similar restriction can be added to the first alternative above if the exception is to apply only to products given to persons at least 18 years of age.

HB 229

<TARGET><BILL>HB 229</BILL><SUBJECT>HB 229</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]OUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: February 20, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 3-2-12

The JUDICIARY Committee considered: **HB 229**

HOUSE BILL NO. 229
"An Act relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board."

HB 229-BIG GAME COMMERCIAL SERVICES BOARD

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 229 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
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NEW FISCAL NOTES
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	CED			X

PREVIOUS FISCAL NOTES

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	-			
	Kelley	X			
	Hawker	*			
	Holmes	X			
	Pruitt	X			
Chair:	THOMPSON	X			
Chair:					

House Judiciary ~ Friday, March 2nd, 2012

(GAVEL IN) Let's call this meeting of the House Judiciary Committee to order.

It is 1:05 p.m. Friday, March 2nd , 2012.

Present are:

___ Rep. Gatto (Previously Excused)

✓ Representative Lynn + Rep. Hawker

✓ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

✓ Representative Holmes

✓ and Myself, Representative Thompson

Let's start with Housekeeping: Please disable your electronic devices, if they're left on, even on vibrate, they may interfere with the recording system. Thank you.

We have one new bill -

HB 229 BIG GAME COMMERCIAL SERVICES

HB 229 "An Act relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board."

Sponsored by Rep. Eric Fiege.

Q. Rep. Gruenberg
☆ Copies of opinions or statute if no."

Here to introduce HB 229 is Rep. Fiege and/or Legislative Aide Mike Paschall.

Rep. Fiege, please come to the table, put your name on the record and give us some background on your bill.

Bill
Presentation _____

Does the committee have any questions for the sponsor?

Seeing there are no further questions for the sponsor.

Open Public testimony.

Witness List:

- Wayne Kubat, Wasilla (Guide) difficult understanding
- Paul Johnson, Chair, Big Game Commercial Services Board

Available for Questions:

- Thor Stacy, Alaska Professional Hunters (@ Board of Game mtg.
- Lt. Bernard Chastain, Alaska State Troopers, Wildlife Enforcement 269-5509 (off net)

Admin/Law: (on offnet)

- Kevin Saxby, AAG - who advises the Big Game Cml. Svs. Board
- Alpheus Bullard, Leg. Legal — terms are not currently defined. Similar to Pharmacists, not defined in 55. Case law.

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Close public testimony.

((Rep. Holmes has three amendments))

Rep. Holmes would you like to Move your amendment, which will be Amendment #1? … (all in packet)

Object for discussion.

Remove objection.

That brings HB 229 back before the committee for discussion. Are there any further questions for the sponsor?

Can I have a motion to move CS HB 229 (27-LS0764/D), as amended, from committee?

Rep. Keller: I move to report CS HB 229 (27-LS0764/D), as amended, from committee with individual recommendations and the attached fiscal note.

Susan, call the roll.

...

Having concluded our scheduled business for today... At _____ p.m., I adjourn today's meeting of the House Judiciary Committee (GAVEL OUT).

ordered final 3/2/12 (2:20 p.m.)

27-LS0764\D.3
Bullard
3/1/12

AMENDMENT #1 ✓ 3/2/12

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: CSHB 229(RES)

+ #5 sec. 9 effective date amd w/d

Page 1, lines 3 - 4:

Delete "**master guide-outfitter license**"

Insert "**license for certain retired guides and outfitters**"

Page 2, lines 3 - 12:

Delete all material and insert:

"**Sec. 08.54.608. Retired status license.** (a) On retiring from guiding or outfitting, or both, and on payment of an appropriate one-time fee, an individual who has held a license issued under AS 08.54.610, 08.54.620, or 08.54.630 that has not been suspended or revoked under AS 08.54.710 may apply for a retired status license. The retired status license shall indicate whether the individual was licensed as a master guide-outfitter, registered guide-outfitter, class-A assistant guide, or assistant guide. An individual holding a retired status license may not guide, outfit, or take charge of a camp in the state under the retired status license. A retired status license is valid for the life of the license holder and does not require renewal.

(b) An individual with a retired status license issued under (a) of this section may apply for a new registered guide-outfitter license under AS 08.54.610, a new class-A assistant guide license under AS 08.54.620, or a new assistant guide license under AS 08.54.630."

Page 3, line 28:

Delete "**master guide-outfitter**"

Page 4, line 1:

Delete "master guide-outfitter license"

Insert "license issued under AS 08.54.608"

Page 4, line 3:

Delete "master guide-outfitter"

Rep. Holmes M

27-LS0764\D.2
Bullard
3/1/12

AMENDMENT #3 O.K.

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: CSHB 229(RES)

Page 2, line 16:

Delete "**a class-A**"

Insert "

(1) a class-A assistant guide in a game management unit if the registered guide-outfitter providing the services of a class-A assistant guide is able to demonstrate, to the satisfaction of the board, adequate knowledge of and experience in the game management unit; and

(2) an"

27-LS0764\D.4
Bullard
3/1/12

AMENDMENT #13 #4 as amd. ✓

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: CSHB 229(RES)

OK

Page 2, lines 20 - 28:

Delete all material and insert:

"* **Sec. 4.** AS 08.54.610(e) is amended to read:

(e) A registered guide-outfitter who contracts for a guided hunt shall be

[(1) PHYSICALLY PRESENT IN THE FIELD WITH THE CLIENT AT LEAST ONCE DURING THE CONTRACTED HUNT; AND

(1) (2)] primarily in the field **supervising** and participating in the contracted hunt. **The contracting registered guide-outfitter shall also conduct the hunt**, unless the hunt, **under regulations adopted by the board,** is being conducted by a class-A assistant guide or a registered guide-outfitter employed by the contracting registered guide-outfitter."

(1 amdt. 1 to #4 OK

27-LS0764\D.1
Bullard
2/29/12

AMENDMENT #4

OFFERED IN THE HOUSE
TO: CSHB 229(RES)

(Conceptual)
#6 y
title Δ's

Page 1, line 3:
Delete "**and**"

Page 1, line 4, following "**license**":
Insert "**; and providing for an effective date**"

Page 4, following line 3:
Insert new bill sections to read:
"~~*** Sec. 9.** Section 4 of this Act takes effect July 1, 2013.~~ Sec. April 1, 2013.
* ~~**Sec. 10.** Except~~ as provided in sec. 9 of this Act, this Act takes effect immediately under AS 01.10.070(c)."

Amdt. 10
#6 2nd Sec! 1, 2, 6, 7 effect. immedeat. under AS 01.01

O.K. 1st) Sec. 9 / 3, 4, 5 April 1, 2013.

concept

27-LS0764\D.5
Bullard
3/2/12

AMENDMENT

#2 w/d

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 229(RES)

(covered)

Page 1, line 3:

Delete "**master**"

Page 2, lines 3 - 12:

Delete all material and insert:

"**Sec. 08.54.608. Retired status license.** (a) On retiring from guiding or outfitting, or both, and on payment of an appropriate one-time fee, an individual who has held a license issued under AS 08.54.610 that has not been suspended or revoked under AS 08.54.710 may apply for a retired status license. The retired status license shall indicate whether the individual was licensed as a master guide-outfitter or as a registered guide-outfitter. An individual holding a retired status license may not guide or outfit in the state under the retired status license. A retired status license is valid for the life of the license holder and does not require renewal.

(b) An individual with a retired status license issued under (a) of this section may apply for a new registered guide-outfitter license under AS 08.54.610."

Page 3, line 28:

Delete "**master guide-outfitter**"

Page 4, line 1:

Delete "master guide-outfitter license"

Insert "license issued under AS 08.54.608"

Page 4, line 3:

Delete "master guide-outfitter"

REPRESENTATIVE
ERIC FEIGE
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

SPONSOR STATEMENT – HB 229

An Act relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board.

HB 229 makes changes in statute recommended by members of the Big Game Commercial Services Board addressing changes to rules regarding the administration and licensing of guides.

Big game guides are regulated under statute and regulation and oversight is provided by the Big Game Commercial Service Board. The proposed changes provide more flexibility in where guides can work when contracting with another guide, allows a registered guide-outfitter more flexibility in the use of class-A guides, and changes penalties for minor procedural violations by guides.

E-Mail: Representative.Eric.Feige@legis.state.ak.us

REPRESENTATIVE
ERIC FEIGE
House District 12

House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
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Sectional Analysis – HB 229 Version I

Sec. 1: Provides additional authority to the Big Game Commercial Services Board to create regulations to administer the regulation of big game guides. Under current statute, the board is limited to regulations that are "required" under statute.

Sec. 2: Creates a provision in statute for a retired master guide-outfitter license that recognizes those that have earned a master guide-outfitter license. No privileges are granted under the license to provide guiding services.

Sec. 3: Clarifies language to specify that a guide-outfitter may provide the services of a class-A assistant guide under the control of a contracting guide-outfitter anywhere the contracting guide-outfitter is licensed to contract hunts.

Sec. 4: Changes the requirements for a registered guide-outfitter to require them to be in the field supervising, participating in, and conducting a hunt as defined under regulation by the board, unless a class-A assistant guide is conducting the hunt.

Sec. 5: Provides the board with the power to suspend or revoke a license of someone engaged in conduct involving unprofessionalism, moral turpitude, or gross immorality.

Sec. 6: Changes penalties for certain violations to allow a court to order the board to suspend a license instead of requiring a court to order the board to suspend a license.

Sec. 7: Authorizes the department to set a fee for the new retired master guide-outfitter license.

Sec. 8: Conforming language to specify the holder of a retired master guide-outfitter license may not guide.

Prepared by Michael Paschall, Office of Rep. Eric Feige, February 14, 2012

Email: Representative.Eric.Feige@legis.state.ak.us

Boards & Commissions Factsheets

BIG GAME COMMERCIAL SERVICES

Board: Big Game Commercial Services Board
Board identification number: 042

Department: DEPARTMENT OF COMMERCE COMMUNITY AND ECONOMIC DEV

Authority: AS 08.54.591; Const. Art III Section 26

Status: Active

Sunset date: 6/30/2012

Requirements: Legislative Confirmation and Financial Disclosure

Prohibitions: None

Term: 4 years

Description: 9 members - 8 appointed by Governor: 2 members who are licensed registered guide-outfitters; 2 members who are licensed transporters, 1 member of the Board of Game chosen by the Board of Game and who does not hold a guide or transport license, 2 members who represent private landholders affected by guided hunting or transportation activities/services and who do not hold a license under this board, and 2 public members.

Function: Licenses and regulates the activities of providers of commercial services to big game hunters in the interest of the state's wildlife resources.

Chair: Governor selects

Special facts: Big Game Commercial Services Board replaced the Guide Board which was repealed on 6/30/89. Serve at the pleasure of the governor. The governor may select the chair. A majority constitutes a quorum. A member who has served all or part of two successive terms may not be reappointed unless four years have elapsed since the person last served on the Board.

Compensation: Standard Travel and Per Diem. No additional compensation.

Meetings: At least twice annually, plus panel meetings; 14 days maximum.

For further information contact:
Karl Marx
Occupational Licensing Examiner
Corporations, Business, and Professional Licensing
DCCED, P.O. Box 110806 M/S 0806
Juneau, AK 99811-0806
Phone: (907) 465-2543, FAX: (907) 465-2974

Big Game Commercial Services Roster

Go to the Big Game Commercial Services Home page

Big Game Commercial Services Board

Roster of Board Members

Member/Address	Position	Date Appointed	Date Reappointed	Term Expires
Brenda Rebne 1928 Kulik Circle Anchorage, AK 99504	Private Landholder	1/28/2008	3/1/2012	3/01/2016
Dirk Nickisch 2199 Nottingham Dr. Fairbanks, AK 99709	Licensed Transporter	11/19/2008	3/1/2009	3/01/2013
Paul E. Johnson Gull Cove Lodge P.O. Box 22 Elfin Cove, AK 99825	Board Chair License Registered Guide-Outfitter	7/24/2005	3/1/2009	3/01/2013
Don Quarberg HC 60 Box 3070 Delta Junction, AK 99737	Public Member	6/20/2011		3/01/14
Kelly Vrem P.O. Box 56 Palmer, AK 99645	Licensed Master Guide-Outfitter	3/1/2011		3/01/2015
Karen Polley 17315 Lena Loop Juneau, AK 99801	Public Member	3/1/2011		3/01/2013
Ted H. Spraker - Link to Bio 49230 Victoria Avenue Soldotna, AK 99669	Board of Game	3/1/2005	3/1/2012	3/1/2016
Michele Metz One Sealaska Plaza, Suite 400 Juneau, AK 99801	Private Landholder	3/1/2012		3/01/2014
Michael Meekin P.O. Box 491 Palmer, AK 99645	Licensed Transporter	3/1/2012		3/01/2015

STATE OF ALASKA
DEPARTMENT OF
COMMERCE
COMMUNITY AND
ECONOMIC DEVELOPMENT
Division of Corporations, Business and Professional Licensing

Sean Parnell, Governor
Susan Bell, Commissioner
Don Habeger, Director

Big Game Commercial Services Board

February 9, 2012

Dear Senator Menard and Representative Feige,

The Big Game Commercial Serves Board supports House Bill 229 and Senate Bill 190 for improving the guide industry in Alaska. The Board was reinstated 7 years ago and has worked on these concerns during the meetings. These changes are housekeeping measures the board feels are needed for a healthy industry. The Board was unanimous in the vote in support of submitting this Bill and its contents. We respectfully ask for the passage of this legislation.

Sincerely,

Paul Johnson

Paul Johnson
Chair, BGCSB

P.O. Box 110806, Juneau, AK 99811-0806
Telephone: (907) 465-2543 Fax: (907) 465-2974 Website: http://www.commerce.state.ak.us/occ/pgui.htm

ALASKA

PROFESSIONAL HUNTERS ASSOCIATION, INC.

HC 60 Box 229C, Copper Center, AK 99573
Phone: 907-822-3755 Fax: 907-822-3752
Email:office@alaskaprohunter.orgwww.alaskaprohunter.org

Dear Representative Feige,

I'm writing thank you for sponsoring HB 229 and affirm the support of the Alaska Professional Hunters Association for this important bill. As the sitting president of the APHA and a lifelong Alaskan and second generation Registered Guide I know firsthand how burdensome unclear and, or, contradictory statutes and regulations can be. HB 229 will alleviate some of this burden by clarifying the relationship between Registered Guides when they work for each other and, at the same time, protecting the value of the Class A Assistant Guide license. The APHA also appreciates the creation of a retired, non-active, license so that respected, retired guides can stay licensed and not cut into fixed, retirement incomes. This is essential to maintaining the social continuity, of an industry that respects its elders and provides a career path that includes substantial time as an apprentice.

The APHA has always pushed for greater professional competency and accountability. For this reason we vigorously support giving the Big Game and Commercial services board the ability to suspend or revoke guide or transporter licensed for unprofessional behavior, moral turpitude and gross immorality. Having operators, representing themselves as guides, who are amoral or chronically immoral or unprofessional hurts our membership in a business that relies on reputation and word of mouth business. Alaska deserves to have the best and most ethical guides harvesting its big game resource.

In closing I want to once again thank the honored members or the legislature that have taken the time to consider HB 229 and carry it through the process on the behalf of me and my organizations livelihoods! I also want to state that many APHA members have spent their personal time advising and working on drafting HB 229 as recognition of the collaborated effort between your office and our membership. For the sake of brevity I have only used a few examples of the positive aspects of HB 229 but we do support the bill in its entirety.

Thank You,

Gary LaRose

Gary LaRose, President Alaska Professional Hunters Association

Dear Representative Feige,

Thank you for your sponsorship and support of HB229 which will provide for a retired status master guide-outfitter license. I initially proposed this provision some 2-3 years ago and had about given up hope for the possibility of passage. While it has not yet passed, hope springs eternal?
I will support passage of the combined HB 229 / SB 190 in any manner possible. Please call on me if I can help.

Sincerely,
dickgun

Dick Gunlogson
Master Guide / Outfitter (Ret)
Willow, Alaska

Received via e-mail 08 Feb. 2012

Linda Hay

From: Wayne <args@mtaonline.net>
Sent: Friday, February 10, 2012 12:16 PM
To: Sen. Linda Menard; Sen. Charlie Huggins
Cc: Rep. Eric Feige
Subject: SB 190 and HB 229

Senator Menard and Senator Huggins,

Thank you for Sponsoring SB190. I've lived in Wasilla since 1984, got my registered guide license in 1986, started our family run business – Alaska Remote Guide Service in 1987, and upgraded my registered guide-outfitter license to master guide-outfitter status a few years back. To my knowledge, there have been no changes to the Big Game Commercial Service Board Statutes since 1994 or before. I think your bill and Representative Feige's HB229 help address some key issues in bringing the statutes current with several changes that have taken place since then in the guide industry. Most of us in the industry want to do what is right, but it is very hard to understand what that is, even after reading the statutes and regulations several times. In fact I was in a working group at the BGCSB meeting in Fairbanks two years ago, when we were discussing supervision and participation issues. Several guides were present along with some top level enforcement personnel. I think it's fair to say that all of us were at least some what confused about what was expected by us in the statutes.

I've been in attendance at every commercial service board meeting for the past several years, and worked in and led several committees that dealt with several issues in this bill. The key concerns that most interested me personally were 08.54.610 (d) and (e). The current requirement in 08.54.610 (e) (1) that the bill asks to delete, works fine for large operations that are lucky enough to have a lodge or main camp in the same Guide Use Area where they hunt. Everybody gets flown to the lodge to start with and then head out hunting from there. By so doing, this requirement has been met. In operations where the main camp or lodge is in a different guide use area or in many smaller operations, meeting this requirement can be a lot more complicated, and requiring the guide to do so can actually impact the quality of the client's hunt and the service that the guide is able to provide.

While the above mentioned points in the bill are my main focus, I fully agree with and support every provision that your bill deals with. I have spent a lot of personal time and effort to help get these issues put forward. As this bill moves forward, feel free to contact me concerning any questions or concerns that may arise, and let me know how I can help. Thank you again for you help!

Sincerely,

Wayne Kubat
Alaska Remote Guide Service
PO Box 874867
Wasilla, Alaska 99687
Phone/Fax:907-376-9568

Linda Hay

From: Kelly Vrem <kelly@vrem.com>
Sent: Tuesday, February 07, 2012 3:48 PM
To: Rep. Eric Feige
Subject: HB 229

Hello,

I would like to express my support for HB 229. As you know I am Master Guide and a resident of your House district. I addition I am on the Big Game Commercial Services Board. HB 229 will benefit the guide industry. It clarifies some regulations and allows the board to deal with misbehaving guides. We appreciate your efforts.

Kelly Vrem

Sutton AK

Sent from my iPad

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 229 (RES)**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB229-DCCED-CBPL-02-24-12
Title: Big Game Commercial Services Board
Sponsor: Representative Feige
Requester: House Judiciary Committee

Dept. Affected: DCCED
Appropriation: Corps, Bus & Professional Licensing
Allocation: Corps, Bus & Professional Licensing
OMB Component Number: 2360

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1156	Rcpt Svcs (DGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note is revised to reflect CS for HB 229 adding a new section that creates a new licensing type.

Prepared by: Don Habeger, Director — Phone: 465-2538
Division: Corporations, Business and Professional Licensing — Date/Time: 2/24/12 10:30am
Approved by: JoEllen Hanrahan, Director Administrative Services — Date: 2/25/2012
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 229 (RES)

Analysis

HB 229 makes changes in statute recommended by members of the Big Game Commercial Services Board addressing changes to rules regarding the administration and licensing of guides. The proposed changes provide more flexibility in where guides can work when contracting another guide, allows a registered guide-outfitter more flexibility in the use of class-A guides, and changes penalties for minor procedural violations by guides.

The CS for HB 229 adds a new section to include a new type of license category: Retired Master Guide-Outfitter.

There is no anticipated fiscal impact to the Division as a result of this legislation.

Chapter 08.54. BIG GAME GUIDES AND RELATED OCCUPATIONS

Cross References -

For provisions relating to forfeiture of equipment for fish and game violations, see AS 16.05.195. For provisions relating to the requirement that certain hunters be accompanied by a licensed guide, see AS 16.05.407 and 16.05.408.

Administrative Code -

For big game commercial services board, see 12 AAC 75.

Article 01. BIG GAME GUIDES AND TRANSPORTERS

Sec. 08.54.010. Guide Board. [Repealed, Sec. 18 ch 37 SLA 1989].

Repealed or Renumbered

Article Notes -

Cross References. For transitional provisions, see Sec. 13 and 14, ch. 33, SLA 1996 in the Temporary and Special Acts. For requirement that certain big game hunters engage a big game guide, see AS 16.05.407 and 16.05.408.

Sec. 08.54.020. Appointment and term of office. [Repealed, Sec. 49 ch 94 SLA 1987].

Repealed or Renumbered

Sec. 08.54.030. - 08.54.141. Board powers and duties, etc.; licensing. [Repealed, Sec. 18 ch 37 SLA 1989].

Repealed or Renumbered

Sec. 08.54.142. - 08.54.146. Transporter licensing. [Repealed, Sec. 27 ch 71 SLA 1986].

Repealed or Renumbered

Sec. 08.54.150. - 08.54.180. Miscellaneous licensing provisions. [Repealed, Sec. 18 ch 37 SLA 1989].

Repealed or Renumbered

Sec. 08.54.185. Additional fees. [Repealed, Sec. 27 ch 71 SLA 1986].

Repealed or Renumbered

Sec. 08.54.186. - 08.54.240. Exams; restricted areas; prohibitions; general provisions. [Repealed, Sec. 18 ch 37 SLA 1989].

Repealed or Renumbered

Sec. 08.54.300. - 08.54.590. Guides and related occupations. [Repealed, Sec. 16 ch 33, SLA 1996].

Repealed or Renumbered

Sec. 08.54.591. Creation and membership of board.

(a) For the purposes of licensing and regulating the activities of providers of commercial services to big game hunters in the interest of the state's wildlife resources, there is created the Big Game Commercial Services Board. For administrative purposes, the board is in the Department of Commerce, Community, and Economic Development.

(b) The board consists of nine members as follows:

(1) two members who are current, licensed registered guide-outfitters;

(2) two members who are licensed transporters;

(3) one member of the Board of Game who is chosen by the Board of Game and who does not hold a guide or transport license;

(4) two members who represent private landholders affected by guided hunting activities or transportation services and who do not hold a license issued under this chapter; and

(5) two public members.

History -
(Sec. 3 ch 84 SLA 2005)

Sec. 08.54.595. Board assistance.
State agencies shall provide the board with information, data, or technical assistance requested by the board for the purposes of licensing and regulating the activities of providers of commercial services to big game hunters.
History -
(Sec. 3 ch 84 SLA 2005)

Sec. 08.54.600. Duties of board.

(a) The board shall

(1) prepare and grade

(A) a qualification examination for a registered guide-outfitter license that requires demonstration that the applicant is qualified generally to provide guided and outfitted hunts and, in particular, possesses knowledge of fishing, hunting, and guiding laws and regulations; and

(B) a certification examination for each game management unit in which the registered guide-outfitter intends to provide big game hunting services; the examination must require demonstration that the registered guide-outfitter is qualified to provide guided and outfitted hunts in the game management unit for which the registered guide-outfitter seeks to be certified and, in particular, must require demonstration that the registered guide-outfitter possesses knowledge of the terrain, transportation problems, game, and other characteristics of the game management unit;

(2) authorize the issuance of registered guide-outfitter, master guide-outfitter, class-A assistant guide, assistant guide, and transporter licenses after the applicant for the license satisfies the requirements for the license;

(3) impose appropriate disciplinary sanctions on a licensee under AS 08.54.600 - 08.54.790;

(4) require an applicant for issuance or renewal of any class of guide license or of a transporter license to state in a written and signed document whether the applicant's right to obtain, or exercise the privileges granted by, a hunting, guiding, outfitting, or transportation services license is revoked or suspended in this state or another state or in Canada;

(5) regularly disseminate information regarding examinations and other qualifications for all classes of guide licenses to residents of the rural areas of the state;

(6) adopt procedural and substantive regulations required by this chapter;

(7) provide for administration of examinations for registered guide-outfitters at least twice a year;

(8) meet at least twice annually.

(b) The board shall provide for administration of an oral examination for a registered guide-outfitter license or for a game management unit certification if requested at the time of application for the license.

(c) The board may adopt regulations as the board considers appropriate to

(1) establish a code of ethics for professions regulated by the board;

(2) establish requirements for the contents of written contracts to provide big game hunting services and transportation services to clients;

(3) authorize the department to request a copy of a big game hunting services or transportation services contract entered into by a person licensed under this chapter.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 1 ch 61 SLA 1997; am Sec. 4, 5 ch 84 SLA 2005)

Revisors Notes -

In 1999, "Department of Commerce and Economic Development" was changed to "Department of Community and Economic Development" in this section in accordance with Sec. 88, ch. 58, SLA 1999.

In 2004, "Department of Community and Economic Development" was changed to "Department of Commerce, Community, and Economic Development" in (a) of this section, in accordance with Sec. 3, ch. 47, SLA 2004.

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" throughout subsections (a) and (b) and otherwise rewrote those subsections; and added subsection (c).

Sec. 08.54.605. Eligibility for licenses.

(a) Notwithstanding AS 08.54.610, 08.54.620, 08.54.630, 08.54.650, and 08.54.660, a person may not receive or renew a registered guide-outfitter license, master guide-outfitter license, class-A assistant guide license, assistant guide license, or transporter license if

(1) the person has been convicted of

(A) a violation of a state or federal hunting, guiding, or transportation services statute or regulation for which

(i) the person was imprisoned for more than five days within the previous five years;

(ii) an unsuspended fine of more than $2,000 was imposed in the previous 12 months;

(iii) an unsuspended fine of more than $3,000 was imposed in the previous 36 months; or

(iv) an unsuspended fine of more than $5,000 was imposed in the previous 60 months;

(B) a felony within the last five years; or

(C) a felony offense against the person under AS 11.41 within the last 10 years; or

(2) the person's right to obtain, or exercise the privileges granted by, a hunting, guiding, outfitting, or transportation services license is suspended or revoked in this state or another state or in Canada.

(b) Notwithstanding (a) of this section, (a)(1)(B) and (C) of this section are not applicable to offenses committed by a person who receives or received any class of guide license or a transporter license under sec. 13, ch. 33, SLA 1996, if the offense was committed before May 23, 1996. This subsection does not apply when a person applies for a license that is different from the class of guide license or the transporter license received under sec. 13, ch. 33, SLA 1996.

(c) A person may not receive a certification for a game management unit if the person is prohibited by (a) of this section from receiving or renewing a registered guide-outfitter license or master guide-outfitter license.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 2, 3 ch 61 SLA 1997; am Sec. 1 ch 33 SLA 1999; am Sec. 6, 7 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in two places each in the introductory language of subsection (a) and in subsection (c) and rewrote subparagraph (a)(1)(A).

Decisions -

Constitutionality. - It is not a violation of equal protection to deny license renewals to those convicted of violating state, but not federal, hunting and guiding statutes, since those who are convicted of violating state laws have committed a different crime from those convicted of parallel federal offenses. Boyd v. State, Dep't of Commerce & Economic Dev., 977 P.2d 113 (Alaska 1999).

Construction with other statutes. - Where an assistant district attorney erroneously informed the defendant that a payment was not a fine under this section, referring to AS 12.55.035 rather than AS 12.55.100, his statement was not technically inconsistent with the licensing commission's rejection of the defendant's license renewal application. Boyd v. State, Dep't of Commerce & Economic Dev., 977 P.2d 113 (Alaska 1999).

Effect of violating fish and game statutes. - For case discussing connection between competence to continue as a guide and violation of fish and game regulations and statutes designed to conserve these state resources, see Herscher v. State, Dep't of Commerce, 568 P.2d 996 (Alaska 1977) (decided under former AS 08.54.350).

Notice and hearing required for license suspension. - In the suspension of a hunting guide license, adequate notice and opportunity for a hearing were required. Herscher v. State, Dep't of Commerce, 568 P.2d 996 (Alaska 1977) (decided under former AS 08.54.350).

Payment of fines. - Since AS 12.55.100 specifically authorizes fines as conditions of probation, and since the defendant's own counsel and the assistant district attorney acknowledged at a sentencing hearing their understanding that a payment constituted a fine, these facts, coupled with the fact that the supreme court has treated such payments as "fines," regardless of the particular language used by the sentencing court, led to the conclusion that the defendant's payment constituted a fine. Boyd v. State, Dep't of Commerce & Economic Dev., 977 P.2d 113 (Alaska 1999).

Since an assistant district attorney did not have the authority to change the laws of the state as written, his written assurances to the defendant that a payment was not a "fine" within the meaning of this statute did not alter the fact that the defendant's payment was a fine. Boyd v. State, Dep't of Commerce & Economic Dev., 977 P.2d 113 (Alaska 1999).

Sec. 08.54.610. Registered guide-outfitter license.

(a) A natural person is entitled to a registered guide-outfitter license if the person

(1) is 21 years of age or older;

(2) has practical field experience in the handling of firearms, hunting, judging trophies, field preparation of meat and trophies, first aid, photography, and related guiding and outfitting activities;

(3) either

(A) has passed the qualification examination prepared by the board under AS 08.54.600; or

(B) provides evidence of 25 years of experience as a class-A assistant guide or class-A assistant guide-outfitter;

(4) has passed a certification examination prepared by the board under AS 08.54.600 for at least one game management unit;

(5) has legally hunted big game in the state for part of each of any five years in a manner directly contributing to the person's experience and competency as a guide;

(6) has been licensed as and performed the services of a class-A assistant guide or assistant guide, or of a class-A assistant guide-outfitter or assistant guide-outfitter under former AS 08.54.300 - 08.54.590, in the state for a part of each of three years;

(7) is capable of performing the essential duties associated with guiding and outfitting;

(8) has been favorably recommended in writing by eight big game hunters whose recommendations have been solicited by the department from a list provided by the applicant, including at least two favorable recommendations for each year of any three years during which the person was a class-A assistant guide or assistant guide, or a class-A assistant guide-outfitter or assistant guide-outfitter under former AS 08.54.300 - 08.54.590;

(9) has provided proof of financial responsibility if required by the department under AS 08.54.680; and

(10) has applied for a registered guide-outfitter license on a form provided by the department and paid the license application fee and the registered guide-outfitter license fee.

(b) A master guide-outfitter license authorizes a registered guide-outfitter to use the title master guide-outfitter, but is for all other purposes under this chapter a registered guide-outfitter license. A natural person is entitled to receive a renewable master guide-outfitter license if the person

(1) is, at the time of application for a master guide-outfitter license, licensed as a registered guide-outfitter under this section;

(2) has been licensed in this state as a registered guide or a guide-outfitter, under former AS 08.54.010 - 08.54.240, former AS 08.54.300 - 08.54.590, or this chapter, for at least 12 of the last 15 years, including the year immediately preceding the year in which the person applies for a master guide-outfitter license;

(3) submits a list to the department of at least 25 clients for whom the person has personally provided guiding or outfitting services and the person receives a favorable evaluation from 10 of the clients selected from the list by the department; and

(4) applies for a master guide-outfitter license on a form provided by the department and pays the application fee, if any.

(c) A registered guide-outfitter may contract to guide or outfit hunts for big game and may provide transportation services, personally or through an assistant, to big game hunters who are clients of the registered guide-outfitter.

(d) A person who is licensed as a registered guide-outfitter may be employed by another registered guide-outfitter to perform the functions of a registered guide-outfitter or class-A assistant guide in the game management unit for which the person is certified under AS 08.54.600 or of an assistant guide in any game management unit.

(e) A registered guide-outfitter who contracts for a guided hunt shall be

(1) physically present in the field with the client at least once during the contracted hunt; and

(2) in the field and participating in the contracted hunt, unless the hunt is being conducted by a class-A assistant guide or a registered guide-outfitter employed by the contracting registered guide-outfitter.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 4 ch 61 SLA 1997; am Sec. 8 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" throughout the section; and in subsection (a) in subparagraph (3)(A) and paragraph (4) substituted "prepared by the board" for "prepared and administered by the department" and inserted "big game" in paragraph (5).

Sec. 08.54.620. Class-A assistant guide license.

(a) A natural person is entitled to a class-A assistant guide license if the person

(1) is 21 years of age or older;

(2) applies for a class-A assistant guide license on a form provided by the department and pays the license application fee and the license fee;

(3) possesses a current first aid card issued by the Red Cross or a similar organization; and

(4) either

(A) has

(i) been employed during at least three calendar years as any class of licensed guide in the game management unit for which the license is sought; and

(ii) at least 10 years' hunting experience in the state; military service outside of the state for not more than three years shall be accepted as part of the required 10 years' hunting experience;

(B) provides

(i) evidence that the person physically resides in the game management unit in which the person is to be employed;

(ii) evidence that the person has had at least 15 years' hunting experience in the game management unit in which the person is to be employed; military service outside of the state for not more than three years shall be accepted as part of the required 15 years' hunting experience; and

(iii) a written recommendation from a registered guide-outfitter who intends to employ the person as a class-A assistant guide; or

(C) provides evidence that the person

(i) physically resides in the game management unit in which the person is to be employed;

(ii) has at least 10 years' hunting experience in the state; military service outside of the state for not more than three years shall be accepted as part of the required 10 years' hunting experience; and

(iii) has passed a class-A assistant guide training course approved by the board.

(b) A class-A assistant guide

(1) may not contract to guide or outfit a big game hunt;

(2) shall be employed by and under the supervision of a registered guide-outfitter who has contracted with the client for whom the class-A assistant guide is conducting the hunt;

(3) may take charge of a camp and provide guide services from the camp without the contracting registered guide-outfitter being in the field and participating in the contracted hunt if the contracting registered guide-outfitter is supervising the guiding activities;

(4) may not perform functions of a class-A assistant guide outside of the game management unit for which the license is issued; and

(5) may be employed by a registered guide-outfitter to perform the functions of an assistant guide in any game management unit.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 9 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, in subsection (a) added paragraph (3), redesignated former paragraph (3) as paragraph (4), rewrote item (4)(B)(iii), and added subparagraph (4)(C); and in subsection (b) substituted "guide-outfitter" for "guide" throughout and "provide guide services" for "conduct guide activities" in paragraph (3).

Sec. 08.54.630. Assistant guide license.

(a) A natural person is entitled to an assistant guide license if the person

(1) is 18 years of age or older;

(2) has legally hunted big game in the state during two calendar years;

(3) possesses a first aid card issued by the Red Cross or a similar organization;

(4) either

(A) obtains a written recommendation from a registered guide-outfitter who intends to employ the person as an assistant guide; or

(B) provides evidence that the person passed an assistant guide training course approved by the board; and

(5) applies for an assistant guide license on a form provided by the department and pays the license application fee and the license fee.

(b) An assistant guide

(1) may not contract to guide or outfit a big game hunt;

(2) shall be employed by a registered guide-outfitter and under the supervision of a registered guide-outfitter or class-A assistant guide while the assistant guide is in the field on guided hunts; and

(3) may not take charge of a camp or provide guide services unless the contracting registered guide-outfitter is in the field and participating in the contracted hunt or a registered guide-outfitter or class-A assistant guide employed by the contracting guide is physically present and supervising the hunt.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 10 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, in subsection (a) inserted "big game" in paragraph (2) and rewrote paragraph (4); and in subsection (b) substituted "guide-outfitter" for "guide" throughout and "provide guide services" for "conduct guide activities" in paragraph (3).

Sec. 08.54.640. Law enforcement officers and game biologists.

(a) Notwithstanding AS 08.54.610 - 08.54.630 and except as provided in (b) of this section, a person may not hold, or earn experience credits to apply for, a registered guide-outfitter license under this chapter, while the person is a law enforcement officer and for three months after terminating the person's status as a law enforcement officer.

(b) A registered guide-outfitter license, class-A assistant guide license, or assistant guide license issued under this chapter, or under former provisions of AS 08.54.300 - 08.54.590, after May 16, 1992, is suspended if the person to whom the license is issued subsequently becomes a law enforcement officer. A person whose license is subject to suspension under this subsection shall notify the department that the person has become a law enforcement officer within 30 days after becoming a law enforcement officer. The suspension of a license under this subsection remains in effect until three months have elapsed from the date on which the licensee provides written notification to the department of the fact that the person is no longer a law enforcement officer. A person whose license is suspended under this subsection is not required to renew the license or pay license renewal fees for the period of suspension. Once a suspension of a license is terminated, the licensee may provide, without further payment of a guide license fee, the guide services authorized by the license for the remainder of the licensing period in which the suspension is terminated. Notwithstanding other provisions of this subsection, if a person whose license is suspended under this subsection fails to notify the department within one year after the person is no longer a law enforcement officer, the person's license lapses and the person is eligible for reissuance of the license only as provided in AS 08.54.670. The board may adopt regulations to implement this subsection.

(c) A person who holds any class of guide license and who is employed by the Department of Fish and Game or a federal wildlife management agency may not, while employed by the department or agency as a game or wildlife biologist and for 12 months after leaving employment with the department or agency as a game or wildlife biologist, engage in providing big game hunting services in a game management unit in which the person conducted game or wildlife management or research activities for the department or agency at any time during the preceding 12 months.

(d) In this section, "law enforcement officer" means a person who is

(1) employed by the Department of Public Safety as a state trooper or as a law enforcement officer engaged in fish and wildlife protection; or

(2) employed as a fish and wildlife law enforcement officer by the United States Department of the Interior or the United States Department of Agriculture.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 11, 12 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in subsection (a) and the first sentence in subsection (b); and substituted "board" for "department" in the last sentence in subsection (b).

Sec. 08.54.650. Transporter license.

(a) A person is entitled to a transporter license if the person

(1) applies for a transporter license on a form provided by the department; and

(2) pays the license application fee and the license fee.

(b) A transporter may provide transportation services and accommodations to big game hunters in the field at a permanent lodge, house, or cabin owned by the transporter or on a boat with permanent living quarters located on salt water. A transporter may not provide big game hunting services without holding the appropriate license.

(c) A transporter shall provide an annual activity report on a form provided by the department. An activity report must contain all information required by the board by regulation.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 13 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, in the second sentence in subsection (c) inserted "all" and substituted "board" for "department".

Sec. 08.54.660. Renewal of guide and transporter licenses.

(a) An applicant for renewal of a registered guide-outfitter, class-A assistant guide, assistant guide, or transporter license shall submit

(1) a request for renewal of the license on a form provided by the department; and

(2) the appropriate license fee for the next licensing period.

(b) The department may not renew a registered guide-outfitter license under this section unless all fees have been paid in full and the registered guide-outfitter has signed an affidavit that all hunt records due during the term of the current license have been filed with the department.

(c) The department may not renew a transporter license unless all fees have been paid in full and the transporter has signed an affidavit that all activity reports due during the term of the current license have been filed with the department.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 14 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in subsections (a) and (b); inserted "the registered guide-outfitter has signed an affidavit that" in subsection (b); and inserted "the transporter has signed an affidavit that" in subsection (c).

Sec. 08.54.670. Failure to renew.

The department may not issue a license to a person who held a registered guide-outfitter, class-A assistant guide, or assistant guide license and who has failed to renew the license under this chapter for four consecutive years unless the person again meets the qualifications for initial issuance of the license.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 15 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide".

Sec. 08.54.680. Financial responsibility and other requirements for guides and transporters.

(a) The department may require a registered guide, who contracts to guide or outfit a big game hunt, or a transporter to provide proof of financial responsibility up to the amount of $100,000. A registered guide or transporter may demonstrate financial responsibility by assets, insurance, or a bond in the requisite amount.

(b) If a registered guide-outfitter, class-A assistant guide, or assistant guide personally pilots an aircraft to transport clients during the provision of big game hunting services, the registered guide-outfitter, class-A assistant guide, or assistant guide shall have a commercial pilot's rating or a minimum of 500 hours of flying time in the state.

(c) On or after January 1, 2006, a registered guide-outfitter may not provide big game hunting services and a transporter may not provide transportation services unless the registered guide-outfitter or transporter has entered into a written contract with the client for the provision of those services. A contract to provide big game hunting services must include at least the following information: the name and guide license number of the registered guide-outfitter, the name of the client, a listing of the big game to be hunted, the approximate time and dates that the client will be in the field, a statement as to what transportation is provided by the registered guide-outfitter, a statement as to whether accommodations and meals in the field are provided by the registered guide-outfitter, and a statement of the amount to be paid for the big game hunting services provided. A contract to provide transportation services must include at least the following information: the name and transporter license number of the transporter, the name of the client, a listing of the big game to be hunted, the approximate time and dates that the client will be in the field, and a statement of the amount to be paid for the transportation services provided. A registered guide-outfitter or transporter shall provide a copy of contracts to provide big game hunting services or transportation services, as appropriate, to the department upon the request of the department. Except as necessary for disciplinary proceedings conducted by the board and as necessary for law enforcement purposes by the Department of Public Safety and the Department of Law, a copy of a contract provided to the department is confidential. The department may provide a copy of contracts in the possession of the department to the Department of Fish and Game or the Department of Natural Resources upon the request of that department if the department receiving the copy agrees to maintain the confidentiality of the contracts.

History -
(Sec. 3 ch 33 SLA 1996; am Sec. 16, 17 ch 84 SLA 2005)
Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in two places in subsection (b); and, effective July 26, 2005, added subsection (c).

Article 02. ENFORCEMENT

Sec. 08.54.710. Discipline of guides and transporters.

(a) The board may impose a disciplinary sanction in a timely manner under (c) of this section if the board finds that a licensee

(1) is convicted of a violation of any state or federal statute or regulation relating to hunting or to provision of big game hunting services or transportation services;

(2) has failed to file records or reports required under this chapter;

(3) has negligently misrepresented or omitted a material fact on an application for any class of guide license or a transporter license; or

(4) has breached a contract to provide big game hunting services or transportation services to a client.

(b) [Repealed, Sec. 4 ch 49 SLA 2008].

(c) The board may impose the following disciplinary sanctions, singly or in combination:

(1) permanently revoke a license;

(2) suspend a license for a specified period;

(3) censure or reprimand a licensee;

(4) impose limitations or conditions on the professional practice of a licensee;

(5) impose requirements for remedial professional education to correct deficiencies in the education, training, and skill of the licensee;

(6) impose probation requiring a licensee to report regularly to the board on matters related to the grounds for probation;

(7) impose a civil fine not to exceed $5,000.

(d) The board shall permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the license was obtained through fraud, deceit, or misrepresentation.

(e) The board shall suspend or permanently revoke a transporter license or any class of guide license without a hearing if the court orders the board to suspend or permanently revoke the license as a penalty for conviction of an unlawful act. If the board suspends or permanently revokes a license under this subsection, the board may not also impose an administrative disciplinary sanction of suspension or permanent revocation of the same license for the same offense for which the court ordered the suspension or permanent revocation under AS 08.54.720.

(f) A certified copy of a judgment of conviction of a licensee for an offense is conclusive evidence of the commission of that offense in a disciplinary proceeding instituted against the licensee under this section based on that conviction, regardless of whether the conviction resulted from a plea of nolo contendere or the conviction is under appeal, unless the conviction is overturned on appeal.

(g) A person whose license is suspended or revoked under this section may not engage in the provision of big game hunting services or transportation services during the period of license suspension or revocation.

(h) If the board revokes a license under this section, the person whose license has been revoked shall immediately surrender the license to the department.

(i) [Repealed, Sec. 4 ch 49 SLA 2008].

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 15 ch 163 SLA 2004; am Sec. 18 - 24 ch 84 SLA 2005; am Sec. 1, 4 ch 49 SLA 2008)

Revisors Notes -

In 2005, in the second sentence of former subsection (i), the revisor substituted "conducted by the office of administrative hearings (AS 44.64.010)" for "before the board" in order to reconcile sec. 15, ch. 163, SLA 2004 and sec. 24, ch. 84, SLA 2005 and to correct a manifest error in sec. 24, ch. 84, SLA 2005.

Cross References -

For disciplinary powers of boards generally, see AS 08.01.075.

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "board" for "department" in subsections (a)-(e), (h), and (i); in subsection (a) substituted "any state or federal statute" for "a state statute" in paragraph (1) and added paragraphs (3) and (4); in subsection (b) substituted "has acted unethically as a registered guide-outfitter" for "is incompetent as a registered guide"; increased the fine from $1,000 to $5,000 in paragraph (c)(7); deleted "innocent" preceding "misrepresentation" in subsection (d); and deleted "under AS 08.54.720" from the end of the first sentence in subsection (e).

The 2008 amendment, effective August 26, 2008, deleted "after a hearing" following "if the board finds" in the introductory language of subsection (a), and repealed paragraphs (b) and (i), relating to unethical behavior by licensees and summary suspension of licenses.

Decisions -

Effect of violating fish and game statutes. - For case discussing connection between competence to continue as a guide and violation of fish and game regulations and statutes designed to conserve these state resources, see Herscher v. State, Dep't of Commerce, 568 P.2d 996 (Alaska 1977) (decided under former AS 08.54.500).

Notice and hearing required for license suspension. - In the suspension of a hunting guide license, adequate notice and opportunity for a hearing were required. Herscher v. State, Dep't of Commerce, 568 P.2d 996 (Alaska 1977) (decided under former AS 08.54.500).

Sec. 08.54.720. Unlawful acts.

(a) It is unlawful for a

(1) person who is licensed under this chapter to knowingly fail to promptly report, unless a reasonable means of communication is not reasonably available, to the Department of Public Safety, and in no event later than 20 days, a violation of a state or federal wildlife or game, guiding, or transportation services statute or regulation that the person reasonably believes was committed by a client or an employee of the person;

(2) person who is licensed under this chapter to intentionally obstruct or hinder or attempt to obstruct or hinder lawful hunting engaged in by a person who is not a client of the person;

(3) class-A assistant guide or an assistant guide to knowingly guide a big game hunt except while employed and supervised by a registered guide-outfitter;

(4) person who holds any class of guide license or transporter license to knowingly enter or remain on private, state, or federal land without prior authorization during the course of providing big game hunting services or transportation services;

(5) registered guide-outfitter to knowingly engage in providing big game hunting services outside of

(A) a game management unit for which the registered guide-outfitter is certified; or

(B) a use area for which the registered guide-outfitter is registered under AS 08.54.750 unless the registration requirement for the area has been suspended by the Department of Fish and Game;

(6) person to knowingly guide without having a current registered guide-outfitter, class-A assistant guide, or assistant guide license and a valid Alaska hunting license in actual possession;

(7) registered guide-outfitter to knowingly fail to comply with AS 08.54.610(e);

(8) person who is licensed under this chapter to knowingly

(A) commit or aid in the commission of a violation of this chapter, a regulation adopted under this chapter, or a state or federal wildlife or game statute or regulation; or

(B) permit the commission of a violation of this chapter, a regulation adopted under this chapter, or a state or federal wildlife or game statute or regulation that the person knows or reasonably believes is being or will be committed without

(i) attempting to prevent it, short of using force; and

(ii) reporting the violation;

(9) person without a current registered guide-outfitter license to knowingly guide, advertise as a registered guide-outfitter, or represent to be a registered guide-outfitter;

(10) person without a current master guide-outfitter license to knowingly advertise as, or represent to be, a master guide-outfitter;

(11) person without a current registered guide-outfitter license to knowingly outfit a big game hunt, provide outfitting services, advertise as an outfitter of big game hunts, or represent to be an outfitter of big game hunts;

(12) person to knowingly provide transportation services to big game hunters without holding a current registered guide-outfitter license or transporter license;

(13) person without a current transporter license to knowingly advertise as, or represent to be, a transporter;

(14) class-A assistant guide or an assistant guide to knowingly contract to guide or outfit a hunt;

(15) person licensed under this chapter to knowingly violate a state statute or regulation prohibiting waste of a wild food animal or hunting on the same day airborne;

(16) person to knowingly provide big game hunting services or transportation services during the period for which the person's license to provide that service is suspended or revoked;

(17) registered guide-outfitter, except in the defense of life or property, to knowingly personally take

(A) big game while accompanying a client in the field; or

(B) a species of big game if the registered guide-outfitter is under contract with a client to provide a guided hunt for that species of big game and the client is in the field;

(18) person who is licensed as a registered guide-outfitter, a class-A assistant guide, or an assistant guide, except in the defense of life or property, to knowingly personally take big game while a client of the registered guide-outfitter by whom the person is employed is in the field unless the person is not participating in, supporting, or otherwise assisting in providing big game hunting services to a client of the registered guide-outfitter by whom the person is employed; or

(19) person who is licensed as a transporter, or who provides transportation services under a transporter license, to knowingly accompany or remain in the field with a big game hunter who is a client of the person except as necessary to perform the specific duties of embarking or disembarking big game hunters, their equipment, or big game animals harvested by hunters; this paragraph does not apply to a person who holds both a transporter license and a registered guide-outfitter license issued under this chapter when the person has a contract to provide guiding services for the client.

(b) In addition to a disciplinary sanction imposed under AS 08.54.710, a person who commits an offense set out in (a)(1) - (7), (17), (18), or (19) of this section is guilty of a misdemeanor and is punishable by a fine of not more than $10,000 or by imprisonment up to one year, or both.

(c) In addition to a disciplinary sanction imposed under AS 08.54.710, a person who commits an offense set out in (a)(8) - (14) of this section is guilty of a misdemeanor and is punishable by a fine of not more than $30,000 or by imprisonment up to one year, or both.

(d) In addition to a disciplinary sanction imposed under AS 08.54.710, a person who commits an offense set out in (a)(15) of this section is guilty,

(1) for a first offense, of a misdemeanor and is punishable by a fine of not more than $30,000 or by imprisonment up to one year, or both;

(2) for a second or subsequent offense, of a class C felony.

(e) In addition to a disciplinary sanction imposed under AS 08.54.710, a person who violates (a)(16) of this section is guilty of a class C felony.

(f) In addition to the penalties set out in (b) - (e) of this section and a disciplinary sanction imposed under AS 08.54.710,

(1) the court may order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(1), (3) - (5), (7), (17), (18), or (19) of this section for a specified period of not more than three years;

(2) the court shall order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(2) or (8) - (14) of this section for a specified period of not less than one year and not more than five years;

(3) the court shall order the board to suspend the guide license or transporter license for a specified period of not less than three years, or to permanently revoke the guide license or transporter license, of a person who commits an offense set out in (a)(15) or (16) of this section; and

(4) all guns, fishing tackle, boats, aircraft, automobiles, or other vehicles, camping gear, and other equipment and paraphernalia used in, or in aid of, a violation of (a) of this section may be seized by persons authorized to enforce this chapter and may be forfeited to the state as provided under AS 16.05.195.

(g) Upon conviction of a person for committing an offense set out in (a) of this section, the execution of sentence may not be suspended and probation may not be granted except on the condition that the minimum term of imprisonment is served. Imposition of sentence may not be suspended.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 5 - 7 ch 61 SLA 1997; am Sec. 25, 26 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, in subsection (a), substituted "guide-outfitter" for "guide" and inserted "or federal wildlife or" throughout, in paragraph (1) inserted ", unless a reasonable means of communication is not reasonably available," and deleted "Division of Fish and Wildlife Protection" following "Department of Public Safety", in paragraph (4) inserted "or transporter license", "state, or federal", and "or transportation services", in paragraph (6) inserted "a valid Alaska", in paragraph (11) inserted "provide outfitting services", and in paragraph (19) substituted "a registered guide-outfitter license" for "any class of guide license" and added "when the person has a contract to provide guiding services for the client" at the end of the paragraph; and substituted "board" for "department" in three places in subsection (f).

Decisions -

Constitutionality of former provisions punishing guiding without valid license as felony. - See Maeckle v. State, 792 P.2d 686 (Alaska Ct. App. 1990) (decided under former AS 08.54.520).

Application of former statute to person guiding with expired license. - See Romero v. State, 792 P.2d 679 (Alaska Ct. App. 1990) (decided under former AS 08.54.520).

Forfeiture of airplane. - Forfeiture of an airplane worth $40,000 was not grossly disproportionate to defendant's offense of possessing and transporting illegally taken game, because under this section when a licensed guide violates a hunting statute or regulation, or aids another person in doing so, the penalty for a first offense includes a fine of not more than $30,000, while the penalty for a second or subsequent offense includes a fine of up to $50,000. Baum v. State, 24 P.3d 577 (Alaska Ct. App. 2001).

Sentence not excessive. - It was not excessive where the judge placed defendant on probation for 10 years and, as a condition of his probation, ordered defendant not to apply for a hunting or guiding license, because a sentencing court has the power to impose a condition of probation that prohibits a defendant from pursuing a licensed activity for longer than the maximum period of license suspension or revocation that might be imposed as a direct term of the defendant's sentence. Baum v. State, 24 P.3d 577 (Alaska Ct. App. 2001).

Sec. 08.54.730. Injunction against unlawful action.

When, in the judgment of the board, a person has engaged in an act in violation of AS 08.54.620(b), 08.54.630(b), 08.54.650(b), 08.54.710(g), or 08.54.720(a) or the regulations adopted under these statutes, the board may apply to the appropriate court for an order enjoining the action. Upon a showing by the board that the person is engaging in the act, the court shall grant injunctive relief or other appropriate order without bond.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 27 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "board" for "department" in three places.

Sec. 08.54.740. Responsibility of guide or transporter for violations.

(a) A registered guide-outfitter who contracts to guide or outfit a big game hunt is equally responsible under AS 08.54.710 for a violation of a state or federal wildlife or game or guiding statute or regulation committed by a person while in the course of the person's employment for the registered guide-outfitter.

(b) A transporter who provides transportation services is equally responsible under AS 08.54.710 for a violation of a state or federal wildlife or game, guiding, or transportation services statute or regulation committed by a person while in the course of the person's employment for the transporter.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 28 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in two places in subsection (a); inserted "or federal wildlife or" in subsections (a) and (b); and deleted ", or transportation services" following "guiding" in subsection (a).

Sec. 08.54.750. Use area registration.

(a) At least 30 days before conducting big game hunting services within a guide use area, a registered guide-outfitter shall inform the department, in person or by registered mail on a registration form provided by the department, that the guide-outfitter will be conducting big game hunting services in the use area. A registered guide-outfitter may not withdraw or amend a guide use area registration during the calendar year in which the registration was submitted to the department.

(b) A registered guide-outfitter may not register for, or conduct big game hunting services in,

(1) more than three guide use areas during a calendar year; or

(2) a guide use area that is outside of a game management unit for which the registered guide-outfitter is certified under AS 08.54.600.

(c) Notwithstanding (a) and (b) of this section, a registered guide-outfitter may register to conduct big game hunting services within a guide use area at any time before beginning operations in the guide use area and may conduct big game hunting services in a guide use area, or for a big game species in a guide use area, that is not one of the three guide use areas for which the registered guide-outfitter has registered under (b) of this section if the Department of Fish and Game has determined by regulation that it is in the public interest to suspend the registration requirements for that guide use area or for all guide use areas in a game management unit or game management subunit for a big game species within those guide use areas.

(d) Notwithstanding (b) of this section, a registered guide-outfitter who is registered in three guide use areas may also register for and conduct big game hunting services in a portion of one additional guide use area on federal land adjacent to a guide use area in which the registered guide-outfitter is already registered if the board finds that the portion of the adjacent guide use area for which the registered guide-outfitter is seeking to be registered would otherwise remain unused by a registered

guide-outfitter because the boundaries of guide use areas do not coincide with boundaries of federal big game guide concession or permit areas.

(e) Notwithstanding (b) of this section, a registered guide-outfitter who is registered in three guide use areas may also register for and conduct big game hunting services for wolf, black bear, brown bear, or grizzly bear in guide use areas within a game management unit or portion of a game management unit where the Board of Game has identified predation by wolf, black bear, brown bear, or grizzly bear as a cause of the depletion of a big game prey population or a reduction of the productivity of a big game prey population that is the basis for the establishment of an intensive management program in the game management unit or portion of the game management unit or for the declaration of the biological emergency in the game management unit or portion of the game management unit. A registered guide-outfitter may only conduct hunts in a guide use area under this subsection for the big game species identified by the Board of Game as the cause of the depletion or reduction of productivity of a big game prey population.

(f) At least 60 days before providing transportation services to, from, or in an area as may be determined by the board, a transporter shall inform the department, in person or by registered mail on a registration form provided by the department, that the transporter will be providing transportation services to, from, or in the use area. The board may establish transporter use areas and adopt regulations to implement this subsection as the board considers necessary.

(g) In this section, "guide use area" means a geographic area of the state identified as a guide-outfitter use area by the former Big Game Commercial Services Board established under former AS 08.54.300 and described on a set of maps titled Guide-Outfitter Use Area Maps, dated June 22, 1994, as amended by the board as the board considers necessary.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 8 ch 61 SLA 1997; am Sec. 29, 30 ch 84 SLA 2005)

Revisors Notes -

Subsection (d) was enacted as (e). Relettered in 1997. Subsection (g) was enacted as (d) and relettered as (e) in 1997 and as (g) in 2010. Subsections (e) and (f) were enacted as (f) and (g) and relettered in 2010.

Cross References -

For limitation on certification for game management units, see AS 08.54.605(c).

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" throughout; added the second sentence in subsection (a); substituted "board" for "department" in subsection (d); in subsection (e) (now (g)) inserted "established under former AS 08.54.300" and ", as amended by the board as the board considers necessary"; and added subsections (f) and (g) (now (e) and (f)).

Sec. 08.54.760. Hunt records; confidentiality of hunt records and activity reports.

(a) The department shall collect and maintain hunt records provided by a registered guide-outfitter. A registered guide-outfitter shall submit to the department a hunt record for each contracted hunt within 60 days after the completion of the hunt. A hunt record must include a list of all big game hunters who used the guiding or outfitting services of the registered guide-outfitter, the number of each

big game species taken, and other information required by the board. The department shall provide forms for reporting hunt records.

(b) The department shall make hunt records received under this section, and activity reports received under AS 08.54.650, available to state agencies, federal law enforcement agencies, and other law enforcement agencies if requested. Aggregated data compiled from hunt records and activity reports may be included in reports by the department. For all other purposes, the hunt records and activity reports are confidential and are not subject to inspection or copying under AS 40.25.110 - 40.25.125.

(c) Forms, records, and reports required under this chapter may be distributed, received, and stored electronically.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 31, 32 ch 84 SLA 2005)

Revisors Notes -

In 2000, "AS 40.25.110 - 40.25.125" was substituted for "AS 09.25.110 - 09.25.125" to reflect the 2000 renumbering of AS 09.25.110 - 09.25.125.

Amendment Notes -

The 2005 amendment, effective December 5, 2005, in subsection (a) substituted "guide-outfitter" for "guide" in three places, "60 days" for "30 days", and "board" for "department"; in subsection (b) rewrote the first sentence; and added subsection (c).

Sec. 08.54.770. License and examination fees.

(a) The department shall set fees under AS 08.01.065 for each of the following:

(1) registered guide-outfitter license;

(2) class-A assistant guide license;

(3) assistant guide license;

(4) transporter license;

(5) license application fee.

(b) The license fee for the registered guide-outfitter, class-A assistant guide, or assistant guide license is in addition to the fee required for a hunting license issued by the Department of Fish and Game under AS 16.05.340.

(c) An applicant for a qualifying examination for a registered guide-outfitter license shall pay a fee established by regulations adopted under AS 08.01.065.

(d) The fee for the transporter license must be equal to the fee for the registered guide-outfitter license.

(e) The amount of the license fee for a nonresident shall be two times the amount of the license fee for a resident.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 33 ch 84 SLA 2005)

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in subsections (a)-(d); added "issued by the Department of Fish and Game under AS 16.05.340" at the end

of subsection (b); and deleted "For licenses issued under this chapter for 1997 and subsequent years" from the beginning of subsection (e).

Decisions -

Higher rates for nonresidents. - Interstate fee differentials which were not predicated on movement of articles of interstate commerce across state lines, but rather upon the residency status of those applying for permits, were to be analyzed under the privileges and immunities or the equal protection clauses, not under the commerce clause. Carlson v. State, Com. Fisheries Entry Comm'n, 919 P.2d 1337 (Alaska 1996).

Case challenging validity of higher nonresident rates for nonresident commercial fishermen was remanded for application of the "per capita formula" in determining whether the higher fees charged to nonresidents are equivalent to the burden borne by residents as measured by the residents' pro rata shares of state revenues to which nonresidents make no contribution. Carlson v. State, Com. Fisheries Entry Comm'n, 919 P.2d 1337 (Alaska 1996).

Sec. 08.54.785. Chapter not applicable.

The provisions of this chapter do not apply to a person providing, for compensation or with the intent to receive compensation, only accommodations to a big game hunter in the field at

(1) a permanent lodge, house, or cabin on private land owned by the person; or

(2) a state or federal cabin on state or federal land.

History -

(Sec. 2 ch 49 SLA 2008)

Sec. 08.54.790. Definitions.

In this chapter,

(1) "big game" means brown bear, grizzly bear, caribou, moose, black bear, bison, Sitka blacktail deer, elk, mountain goat, musk ox, and mountain or Dall sheep; "big game" includes wolf and wolverine when taken under hunting regulations;

(2) "big game hunting service" means a service for which the provider of the service must obtain a registered guide-outfitter, class-A assistant guide, or assistant guide license; "big game hunting service" includes guiding services and outfitting services;

(3) "board" means the Big Game Commercial Services Board;

(4) "compensation" means payment for services including wages or other remuneration but not including reimbursement for actual expenses incurred;

(5) "department" means the Department of Commerce, Community, and Economic Development;

(6) "field" means an area outside of established year-round dwellings, businesses, or other developments associated with a city, town, or village; "field" does not include permanent hotels or roadhouses on the state road system or state or federally maintained airports;

(7) "game management unit" means one of the 26 geographic areas defined by the Board of Game for game management purposes;

(8) "guide" means to provide, for compensation or with the intent or with an agreement to receive compensation, services, equipment, or facilities to a big game hunter in the field by a person

who accompanies or is present with the big game hunter in the field either personally or through an assistant; in this paragraph, "services" includes

(A) contracting to guide or outfit big game hunts;

(B) stalking, pursuing, tracking, killing, or attempting to kill big game;

(C) packing, preparing, salvaging, or caring for meat, except that which is required to properly and safely load the meat on the mode of transportation being used by a transporter;

(D) field preparation of trophies, including skinning and caping;

(E) selling, leasing, or renting goods when the transaction occurs in the field;

(F) using guiding or outfitting equipment, including spotting scopes and firearms, for the benefit of a hunter; and

(G) providing camping or hunting equipment or supplies that are already located in the field;

(9) "outfit" means to provide, for compensation or with the intent to receive compensation, services, supplies, or facilities, excluding the provision of accommodations by a person described in AS 08.54.785, to a big game hunter in the field, by a person who neither accompanies nor is present with the big game hunter in the field either personally or by an assistant;

(10) "transportation services" means the carriage for compensation of big game hunters, their equipment, or big game animals harvested by hunters to, from, or in the field; "transportation services" does not include the carriage by aircraft of big game hunters, their equipment, or big game animals harvested by hunters

(A) on nonstop flights between airports listed in the Alaska supplement to the Airmen's Guide published by the Federal Aviation Administration; or

(B) by an air taxi operator or air carrier for which the carriage of big game hunters, their equipment, or big game animals harvested by hunters is only an incidental portion of its business; in this subparagraph, "incidental" means transportation provided to a big game hunter by an air taxi operator or air carrier who does not

(i) charge more than the usual tariff or charter rate for the carriage of big game hunters, their equipment, or big game animals harvested by hunters; or

(ii) advertise transportation services or big game hunting services to the public; in this sub-subparagraph, "advertise" means soliciting big game hunters to be customers of an air taxi operator or air carrier for the purpose of providing air transportation to, from, or in the field through the use of print or electronic media, including advertising at trade shows, or the use of hunt broker services or other promotional services.

History -

(Sec. 3 ch 33 SLA 1996; am Sec. 34 ch 84 SLA 2005; am Sec. 3 ch 49 SLA 2008)

Revisors Notes -

In 1999, "Department of Commerce and Economic Development" was changed to "Department of Community and Economic Development" in this section in accordance with Sec. 88, ch. 58, SLA 1999.

In 2004, "Department of Community and Economic Development" was changed to "Department of Commerce, Community, and Economic Development" in this section, in accordance with Sec. 3, ch. 47, SLA 2004.

Amendment Notes -

The 2005 amendment, effective December 5, 2005, substituted "guide-outfitter" for "guide" in paragraph (2), added paragraph (3), redesignated subsequent paragraphs accordingly, deleted "usually" preceding "associated" in paragraph (6); and made a stylistic change.

The 2008 amendment, effective August 26, 2008, inserted "excluding the provision of accommodations by a person described in AS 08.54.785" in paragraph (9).

Authority: AS 08.54.600 AS 08.54.720 AS 08.54.790
AS 08.54.680

12 AAC 75.265. GUIDE USE AREA BOUNDARY CHANGES. (a) The board may propose to amend guide use area boundaries

(1) on its own motion;

(2) upon the recommendation of the Department of Fish and Game; or

(3) in response to a petition from another person.

(b) At least 90 days before the date of a board meeting at which guide use area boundaries changes are proposed, the department will publish, in a newspaper of general circulation, a notice soliciting petitions to propose amendments to guide use area boundaries. To be considered for proposal by the board at the board's next meeting, a petition must be received by the department no later than 60 days after the notice is published.

(c) If the board proposes to amend guide use area boundaries, the board will mail notice of the proposed amendment to

(1) each registered guide-outfitter with a valid license who is registered for a guide use area the boundaries of which are proposed for amendment;

(2) the Department of Natural Resources;

(3) the Department of Fish and Game; and

(4) the Department of Public Safety.

(d) The board may amend guide use area boundaries after considering whether

(1) the Department of Fish and Game objects to the proposed amendment; and

(2) amendment of existing guide use area boundaries is necessary in order to respond to

(A) big game conservation and management concerns, including

(i) abundance and diversity of big game;

(ii) the historical harvest of big game in an area; and

(iii) existing administrative boundaries established for wildlife management purposes;

(B) law enforcement concerns;

(C) land ownership in an area;

(D) administrative restrictions;

(E) the existence of boundaries that can be readily identified in the field;

(F) the accessibility of an area and other transportation considerations;

(G) the existence of complementary and noncomplementary land uses within an area;

(H) recommendations of the Department of Natural Resources;

(I) the existing facilities within the area;

(J) any public comment received; and

(K) other considerations relevant to the drawing of guide use area boundaries.

Authority: AS 08.54.600 AS 08.54.750

ARTICLE 3.
PROFESSIONAL ETHICS STANDARDS FOR GUIDES.

Section

300. (Repealed)
310. (Repealed)
320. (Repealed)
330. (Repealed)
340. Professional ethics standards for guides

12 AAC 75.300. PROFESSIONAL COMPETENCE STANDARDS FOR GUIDES. *Repealed 7/30/2006.*

12 AAC 75.310. RESPONSIBILITIES OF GUIDES. *Repealed 7/30/2006.*

12 AAC 75.320. TRANSPORTING MEAT. *Repealed 4/6/2001.*

12 AAC 75.330. DUTIES OF A REGISTERED GUIDE. *Repealed 4/6/2001.*

12 AAC 75.340. PROFESSIONAL ETHICS STANDARDS FOR GUIDES. (a) **Unethical activities.** As used in AS 08.54.710(b) and this chapter in reference to a registered guide-outfitter, assistant guide, or class-A assistant guide, "unethical"

(1) means failing to or being unfit to meet a professional standard of conduct that satisfactorily and safely implements, under field conditions, the knowledge, skills, qualifications, and judgment required for the license held; and

(2) includes

(A) failing to comply with the standards set out in (b) – (f) of this section;

(B) failing to fulfill a condition or requirement established as a disciplinary sanction under AS 08.54.710;

(C) failing to fulfill the supervision, hunt participation, and other requirements of this chapter; and

(D) failing to report to the board, within 30 days after the date of conviction, a conviction in this state, another state, or the United States for a

(i) violation of a state or federal statute or regulation related to hunting;

(ii) violation of a state or federal statute or regulation relating to guiding, outfitting, transportation, or other hunting services; or

(iii) felony.

(b) **Compliance with law.** All classes of guides shall

(1) comply with applicable state and federal statutes and regulations; and

(2) obtain prior authorization as appropriate before entering or remaining on private, state, or federal land during the course of providing big game hunting services.

(c) **Client and employee care standards.** All classes of guides shall

(1) take every reasonable measure to assure the safety and comfort of the client, including ensuring that during the hunt

(A) adequate supplies are present to provide first aid for injuries that are reasonably expected in the field;

(B) sufficient supplies are present to provide for emergencies, including food, clothing, and a source of heat; and

(C) food and shelter are present that are normally considered satisfactory under field conditions;

(2) avoid intentionally, recklessly, or carelessly exposing an employee or client to undue hazards;

(3) advise clients and employees involved in a hunt of the applicable state and federal statutes and regulations relating to hunting, land use, wildlife, big game hunting services, and conservation;

(4) ensure that the proper hunting licenses, hunt record, game tags, and harvest reports for the big game species being hunted are in the client's possession before the hunt begins;

(5) ensure that the appropriate tags are attached to any game taken by a client and all game is sealed or marked as required by 5 AAC 92;

(6) advise a client before a hunt of the game population in the hunting area; and

(7) provide remuneration in a complete and timely manner of debts or refunds owed to clients or contracting guides, or wages owed to an employee.

(d) **Field craft standards.** All classes of guides shall

(1) use every lawful means at the licensee's disposal to bag a wounded animal while it is in danger of escaping, or, in a serious emergency, while human life or well-being is endangered;

(2) barring unforeseen conditions, properly prepare according to generally accepted procedures, all antlers, horns, hides, and capes to be delivered to the taxidermist or to the client at the conclusion of a hunt in a satisfactory and unspoiled condition, unless the guide is providing only outfitting and transportation services for the client;

(3) endeavor to salvage all meat of animals taken by clients, in accordance with state statutes and regulations;

(4) except for brown bear, grizzly bear, wolves, and wolverine, transport the meat of a big game animal taken by the client in accordance with 5 AAC 92;

(5) respect gear, equipment, food, shelter, and camps established by other users;

(6) avoid staging unused or unattended camps and gear to discourage other users from utilizing a location;

(7) allow appropriate buffer areas between hunters and camps in order to avoid disrupting hunts and hunting experiences; in Game Management Unit 9, a person holding any class of guide license may not place a camp within two miles of a permanent structure or permanent camp being used for big game guiding purposes, unless agreed upon in a written agreement between the involved parties;

(8) avoid using an aircraft in any manner to spot big game for the purpose of taking a specific animal, unless specifically authorized under statute or regulation;

(9) avoid utilizing, in any manner, global positioning system (GPS) or other electronic devices to assist in the taking of a big game animal; and

(10) respond personally or through an assistant to requests for assistance communicated during the hunt; a contracting or employing guide must respond within a reasonable time based on the urgency of the request, weather conditions, and other safety factors.

(e) **Standards for cooperation with law enforcement officers and for conservation awareness.** All classes of guides shall

(1) cooperate with state or federal law enforcement officers;

(2) provide any information to assist law enforcement or state and federal wildlife officials; and

(3) practice sound wildlife conservation and create an awareness of conservation needs and practices when dealing with the public.

(f) **Standards of professionalism.** A guide of any class may not

(1) make guarantees as to the success of a hunt or the number of animals to be taken on a hunt;

(2) shall provide supervision as required from a guide of that class, and make a good faith effort to make the verbal or, if applicable, the written client communication as required in 12 AAC 75.240;

(3) if permitted to advertise or sell big game hunts under AS 08.54, may not advertise or sell big game hunts to be conducted solely on tidelands; in this paragraph, "tidelands" has the meaning given in AS 38.05.965; and

(4) if permitted to advertise under AS 08.54, may not misrepresent services by false or misleading advertising.

Authority: AS 08.54.600 AS 08.54.680 AS 08.54.710

ARTICLE 4.
TRANSPORTATION SERVICES.

Section

395. Distribution and use of transporter activity report booklets
400. Transporter activity report
410. Term of transporter license
420. Proof of transporter's financial responsibility
430. (Repealed)
440. Professional ethics standards for providers of transportation services
450. Transporter contract requirements
460. Species-specific licensing

12 AAC 75.395. DISTRIBUTION AND USE OF TRANSPORTER ACTIVITY REPORT BOOKLETS. (a) Upon request, the department will issue a booklet of pre-numbered transporter activity reports to a transporter with a valid license. Once the department issues the booklet, the board

(1) will consider it to be in the possession of the transporter until it is returned; and

(2) may discipline the transporter under AS 08.54.710(a)(2) if the

(A) transporter loses or misplaces the booklet, or fails to return it as required under this section or upon the department's request;

(B) booklet is damaged or destroyed while in the transporter's possession; or

(C) booklet, while in the transporter's possession, is used in a manner that violates AS 08.54.650, this section, or 12 AAC 75.400.

(b) The pre-numbered transporter activity reports must be used sequentially in numerical order and only by the assigned transporter. Transporter activity reports may not be shared.

(c) All four copies of a transporter activity report must be completed in accordance with 12 AAC 75.400. The first three copies must be distributed in accordance with 12 AAC 75.400. The fourth copy must remain in the booklet.

(d) A voided transporter activity report must remain in the booklet.

(e) Once all pre-numbered transporter activity reports contained in a booklet have been used, the booklet with the remaining copies must be returned to the department.

(f) A maximum of 150 pre-numbered transporter activity reports will be issued to a transporter and may be in the transporter's possession at any given time. Upon return of a completed booklet, an additional booklet of pre-numbered transporter activity reports may be issued. However, upon a written request and showing of good cause, as determined by the department, a transporter may have more than 150 pre-numbered transporter activity reports assigned and in the transporter's possession.

(g) A transporter who misplaces or loses a transporter activity report booklet shall submit to the department

(1) a notarized statement documenting the loss of the booklet; and

(2) client information not already submitted to the department under 12 AAC 75.400.

Authority: AS 08.54.600 AS 08.54.650 AS 08.54.660

12 AAC 75.400. TRANSPORTER ACTIVITY REPORT. (a) Each activity report required by AS 08.54.650 must be on a form provided by the department. On or after January 1, 2008, a transporter shall use a pre-numbered transporter activity report booklet issued under 12 AAC 75.395. On or before February 1 of each year, a transporter shall submit to the department completed activity reports for each client transported during the previous calendar year.

(b) On the day a client is transported, a transporter shall complete the portions of the transporter activity report that provide the

(1) name, address, and license number of the transporter;

(2) client's name, address, and hunting license number;

(3) date the client was transported into the field;

(4) specific location to which the client was transported and the game management unit, and subunit if applicable, of each location; and

Rogers

27-LS0764\D.2
Bullard
3/1/12

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: CSHB 229(RES)

are unit specific licensed

Page 2, line 16:

Delete "**a class-A**"

Insert "

(1) a class-A assistant guide in ~~a~~ any game management unit if the registered guide-outfitter providing the services of a class-A assistant guide is able to demonstrate, to the satisfaction of the board, adequate knowledge of and experience in the game management unit; and

(2) an"

MP: + (the Board may establish)

(not regulated at this time)

James = make it
Q. more permissive

Thor = w/ check y Paul ☆

27-LS0764\D.4
Bullard
3/1/12

#3

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: CSHB 229(RES)

Page 2, lines 20 - 28:

Delete all material and insert:

"* **Sec. 4.** AS 08.54.610(e) is amended to read:

(e) A registered guide-outfitter who contracts for a guided hunt shall be

[(1) PHYSICALLY PRESENT IN THE FIELD WITH THE CLIENT AT LEAST ONCE DURING THE CONTRACTED HUNT; AND

(2)] in the field **supervising** and participating in the contracted hunt**. The contracting registered guide-outfitter shall also conduct the hunt**, unless the hunt**, under regulations adopted by the board,** is being conducted by a class-A assistant guide or a registered guide-outfitter employed by the contracting registered guide-outfitter."

definitions

Melanie Lesh

From: Apache <apache@wwwjnu02.legis.state.ak.us>
Sent: Thursday, March 01, 2012 1:32 PM
To: LIO Juneau; Melanie Lesh
Subject: Teleconference Order Form

Meeting: existing

Sponsor and/or Committee Name: Judiciary Committee

Date of Teleconference: March 2, 2012

Start Time: 1:00 p.m.

End Time: 3:00 p.m.

Chairing Site: Capitol Bldg., Juneau

Juneau Room: 120

Bill Information:
HB 229, Public, 3 min

Streamed to akl.tv: yes

Executive Session: no

Contact Person: Melanie Lesh

Telephone Number: 465-4990

Email Address: melanie.lesh@legis.state.ak.us

LIO Sites:

all lios

May other LIO's add: yes

Offnet Name(s):

Thor Stacy, Alaska Professional Hunters
Lt. Bernard Chastain, Alaska State Troopers, Wildlife Enforcement 269-5509 (off net)

Kevin Saxby, Department of Law, 269-5250 (off net)

Alaska
Big Game Commercial Services Board

Board Members

Member Address	Position	Term Expires
Ralph Andersen Bristol Bay Native Corporation P.O. Box 1177 Dillingham, AK 99576	Private Landholder	6/20/08
Roy Ashenfelter Kawerak Inc. P.O. Box 1969 Nome, AK 99762	Private Landholder	6/30/06
Colin B. Brown Yukon Eagle Air P.O. Box 203 Galena, AK 99741	Licensed Transporter	6/30/09
Paul E. Johnson Gull Cove Lodge P.O. Box 22 Elfin Cove, AK 99825	Board Chair License Registered Guide-Outfitter	6/30/09
Bob Mumford 13391 Baywind Drive Anchorage, AK 99615	Public Member	3/01/10
Richard A. Rohrer P.O. Box 2219 Kodiak, AK 99615	Licensed Registered Guide-Outfitter	6/30/07
Betty Jo Schmitz P.O. Box 57268 North Pole, AK 99705	Public Member	6/30/09
Ted H. Spraker 49230 Victoria Avenue Soldotna, AK 99669	Board of Game	6/30/08
Vacant	Licensed Transporter	

CS FOR HOUSE BILL NO. 229(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 2/20/12
Referred: Judiciary

Sponsor(s): REPRESENTATIVE FEIGE

A BILL

FOR AN ACT ENTITLED

"An Act relating to the duties of the Big Game Commercial Services Board; relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board; and creating a retired status master guide-outfitter license." "and providing for an effective date."

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

*** Section 1.** AS 08.54.600(c) is amended to read:

(c) **In addition to the regulations required under (a) of this section, the** [THE] board may adopt regulations [AS] the board considers appropriate**, including regulations** to

(1) establish a code of ethics for professions regulated by the board;

(2) establish requirements for the contents of written contracts to provide big game hunting services and transportation services to clients;

(3) authorize the department to request a copy of a big game hunting services or transportation services contract entered into by a person licensed under this

chapter.

*** Sec. 2.** AS 08.54 is amended by adding a new section to read:

Sec. 08.54.608. Retired status master guide-outfitter license. (a) On retiring from guiding or outfitting, or both, and on payment of an appropriate one-time fee, an individual who has held a master guide-outfitter license issued under AS 08.54.610 that has not been suspended or revoked under AS 08.54.710 may apply for a retired status master guide-outfitter license. An individual holding a retired status master guide-outfitter license may not guide or outfit in the state under the retired status license. A retired status license is valid for the life of the license holder and does not require renewal.

(b) An individual with a retired status master guide-outfitter license may apply for a new registered guide-outfitter license under AS 08.54.610.

*** Sec. 3.** AS 08.54.610(d) is amended to read:

(d) **Notwithstanding AS 08.54.750, a** [A] person who is licensed as a registered guide-outfitter may be employed by another registered guide-outfitter to **provide the services of a class-A** [PERFORM THE FUNCTIONS OF A REGISTERED GUIDE-OUTFITTER OR CLASS-A ASSISTANT GUIDE IN THE GAME MANAGEMENT UNIT FOR WHICH THE PERSON IS CERTIFIED UNDER AS 08.54.600 OR OF AN] assistant guide in any game management unit.

*** Sec. 4.** AS 08.54.610(e) is amended to read:

(e) A registered guide-outfitter who contracts for a guided hunt shall be

[(1) PHYSICALLY PRESENT IN THE FIELD WITH THE CLIENT AT LEAST ONCE DURING THE CONTRACTED HUNT; AND

(2)] in the field **supervising** and participating in the contracted hunt **and conducting the hunt**, unless the **board adopts regulations permitting** [HUNT IS BEING CONDUCTED BY] a class-A assistant guide or a registered guide-outfitter employed by **a** [THE] contracting registered guide-outfitter **to conduct a hunt for a contracting registered guide-outfitter**.

*** Sec. 5.** AS 08.54.710 is amended by adding a new subsection to read:

(j) The board may suspend or permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the licensee engaged in

conduct involving unprofessionalism, moral turpitude, or gross immorality.

*** Sec. 6.** AS 08.54.720(f) is amended to read:

(f) In addition to the penalties set out in (b) - (e) of this section and a disciplinary sanction imposed under AS 08.54.710,

(1) the court may order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(1), (3) - (5), (7), **(8),** (17), (18), or (19) of this section for a specified period of not more than three years;

(2) the court shall order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(2) or **(9) - (14)** [(8) - (14)] of this section for a specified period of not less than one year and not more than five years;

(3) the court shall order the board to suspend the guide license or transporter license for a specified period of not less than three years, or to permanently revoke the guide license or transporter license, of a person who commits an offense set out in (a)(15) or (16) of this section; and

(4) all guns, fishing tackle, boats, aircraft, automobiles, or other vehicles, camping gear, and other equipment and paraphernalia used in, or in aid of, a violation of (a) of this section may be seized by persons authorized to enforce this chapter and may be forfeited to the state as provided under AS 16.05.195.

*** Sec. 7.** AS 08.54.770(a) is amended to read:

(a) The department shall set fees under AS 08.01.065 for each of the following:

(1) registered guide-outfitter license;

(2) class-A assistant guide license;

(3) assistant guide license;

(4) transporter license;

(5) **retired status master guide-outfitter license;**

(6) license application fee.

*** Sec. 8.** AS 08.54.790 is amended by adding new paragraphs to read:

(11) "any class of guide license" does not include a retired status

master guide-outfitter license;

(12) "licensee" means a person to whom a license, other than a retired status master guide-outfitter license, has been issued under this chapter.

27-LS1328\M
Bullard
2/21/12

CS FOR SENATE BILL NO. 190( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MENARD, Huggins

A BILL

FOR AN ACT ENTITLED

"An Act relating to the duties of the Big Game Commercial Services Board; relating to activities, including violations and penalties, under the supervision of the Big Game Commercial Services Board; creating a retired status master guide-outfitter license; and providing for an effective date."

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

*** Section 1.** AS 08.54.600(c) is amended to read:

(c) **In addition to the regulations required under (a) of this section, the** [THE] board may adopt regulations [AS] the board considers appropriate**, including regulations** to

(1) establish a code of ethics for professions regulated by the board;

(2) establish requirements for the contents of written contracts to provide big game hunting services and transportation services to clients;

(3) authorize the department to request a copy of a big game hunting services or transportation services contract entered into by a person licensed under this

chapter.

*** Sec. 2.** AS 08.54 is amended by adding a new section to read:

Sec. 08.54.608. Retired status master guide-outfitter license. (a) On retiring from guiding or outfitting, or both, and on payment of an appropriate one-time fee, an individual who has held a master guide-outfitter license issued under AS 08.54.610 that has not been suspended or revoked under AS 08.54.710 may apply for a retired status master guide-outfitter license. An individual holding a retired status master guide-outfitter license may not guide or outfit in the state under the retired status license. A retired status license is valid for the life of the license holder and does not require renewal.

(b) An individual with a retired status master guide-outfitter license may apply for a new registered guide-outfitter license under AS 08.54.610.

*** Sec. 3.** AS 08.54.610(d) is amended to read:

(d) **Notwithstanding AS 08.54.750, a** [A] person who is licensed as a registered guide-outfitter may be employed by another registered guide-outfitter to **provide the services of a class-A** [PERFORM THE FUNCTIONS OF A REGISTERED GUIDE-OUTFITTER OR CLASS-A ASSISTANT GUIDE IN THE GAME MANAGEMENT UNIT FOR WHICH THE PERSON IS CERTIFIED UNDER AS 08.54.600 OR OF AN] assistant guide in any game management unit.

*** Sec. 4.** AS 08.54.610(e) is amended to read:

(e) A registered guide-outfitter who contracts for a guided hunt shall be

[(1) PHYSICALLY PRESENT IN THE FIELD WITH THE CLIENT AT LEAST ONCE DURING THE CONTRACTED HUNT; AND

(2)] in the field **supervising** and participating in the contracted hunt **and conducting the hunt**, unless the **board adopts regulations permitting** [HUNT IS BEING CONDUCTED BY] a class-A assistant guide or a registered guide-outfitter employed by **a** [THE] contracting registered guide-outfitter **to conduct a hunt for a contracting registered guide-outfitter**.

*** Sec. 5.** AS 08.54.710 is amended by adding a new subsection to read:

(j) The board may suspend or permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the licensee engaged in

conduct involving unprofessionalism, moral turpitude, or gross immorality.

*** Sec. 6.** AS 08.54.720(f) is amended to read:

(f) In addition to the penalties set out in (b) - (e) of this section and a disciplinary sanction imposed under AS 08.54.710,

(1) the court may order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(1), (3) - (5), (7), **(8),** (17), (18), or (19) of this section for a specified period of not more than three years;

(2) the court shall order the board to suspend the guide license or transporter license of a person who commits a misdemeanor offense set out in (a)(2) or **(9) - (14)** [(8) - (14)] of this section for a specified period of not less than one year and not more than five years;

(3) the court shall order the board to suspend the guide license or transporter license for a specified period of not less than three years, or to permanently revoke the guide license or transporter license, of a person who commits an offense set out in (a)(15) or (16) of this section; and

(4) all guns, fishing tackle, boats, aircraft, automobiles, or other vehicles, camping gear, and other equipment and paraphernalia used in, or in aid of, a violation of (a) of this section may be seized by persons authorized to enforce this chapter and may be forfeited to the state as provided under AS 16.05.195.

*** Sec. 7.** AS 08.54.770(a) is amended to read:

(a) The department shall set fees under AS 08.01.065 for each of the following:

(1) registered guide-outfitter license;

(2) class-A assistant guide license;

(3) assistant guide license;

(4) transporter license;

(5) **retired status master guide-outfitter license;**

(6) license application fee.

*** Sec. 8.** AS 08.54.790 is amended by adding new paragraphs to read:

(11) "any class of guide license" does not include a retired status

master guide-outfitter license;

(12) "licensee" means a person to whom a license, other than a retired status master guide-outfitter license, has been issued under this chapter.

* **Sec. 9.** Section 4 of this Act takes effect July 1, 2013.

* **Sec. 10.** Except as provided by sec. 9 of this Act, this Act takes effect immediately under AS 01.10.070(c).

Eddie Grasser
Regional Representative
Region 33

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SCI
FIRST FOR HUNTERS

HB

234

<TARGET><BILL>HB 234</BILL><SUBJECT>HB
234</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]OUSE COMMITTEE REPOR[redacted]

(7)
Date Referred to Committee: February 10, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 2/20/12

The JUDICIARY Committee considered: **HB 234**

HOUSE BILL NO. 234
"An Act relating to picketing or protests at a funeral."

HB 234-PICKETING AND PROTESTS AT FUNERALS

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES** *FN# is assigned by Chief Clerk's Office				
*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**				
FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	LAW			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Bob Lynn	LYNN	X			
Mike Gruenberg	Gruenberg			–	
Wes Keller	Keller	X			
Alan M Thompson	Thompson	X			
Lynn Holmes	Holmes			X	
Dave Talerico	Truitt	X			
Chair:	GATTO	X			
Chair:					

REPRESENTATIVE BILL THOMAS
ALASKA STATE LEGISLATURE DISTRICT 5
e-mail: Representative.Bill.Thomas@legis.state.ak.us
webpage: www.akrepublicans.org/thomas/

State Capitol
Juneau AK, 99801-1182
907-465-3732
888-461-3732
FAX 907-465-2652

Sponsor Statement HB 234
"An Act relating to picketing or protests at a funeral."

The death of a loved one is one of life's most tragic events. More than 46 states across the country have enacted laws protecting families at funerals during their time of grief. These laws establish standards of conduct which respect the family's need for respect and privacy during this difficult time while also allowing others to express their viewpoints.

HB 234 brings Alaska in line with the majority of states and adopts the guidelines which govern conduct during a funeral. HB 234 is modeled after the guidelines used by our national cemeteries and requires that:

- Picketing not take place within 150 feet of the boundary of the cemetery, church, or other facility where the funeral services are occurring, and
- Picketing not take place one hour before or one hour after the service.

This bill asks anyone within the area of a funeral service to conduct themselves in a respectful manner for the duration of the service. HB 234 looks out for the interests of the grieving families while preserving the rights of others to voice their opinions.

I strongly urge your support of HB 234.

HOUSE BILL NO. 234

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES THOMAS, Herron, Olson, Thompson, Miller, Feige, Chenault, Johnson, Peggy Wilson, Dick, Lynn, Saddler

Introduced: 4/9/11
Referred: House Special Committee on Military and Veterans' Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to picketing or protests at a funeral."

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

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS AND LEGISLATIVE INTENT. (a) The legislature finds that families have a legitimate and legally cognizable interest in organizing and attending funerals for deceased relatives, and that the rights of families to mourn the deaths of relatives peacefully and privately are violated when funerals are targeted for picketing or other protest activities. The legislature also finds that family members attending a funeral service are a captive audience, and that it is very difficult for grieving family members to avoid picketing and protest activities within 150 feet of the boundary of a cemetery, mortuary, church, or other facility where a funeral is being held up to an hour before the beginning of a funeral and until an hour after the conclusion of a funeral.

(b) The legislature also recognizes that individuals have a constitutional right to free speech, and that, in the context of funeral ceremonies, the competing interests of picketers or

protesters and grieving family members must be balanced. Therefore, the legislature finds and intends that the purpose of AS 11.61.110(a)(8), as enacted by sec. 2 of this Act, is to protect the privacy of grieving families and to preserve the peaceful character of a cemetery, mortuary, church, or other facility designated as the scheduled location for the funeral of a deceased family member, while still providing picketers and protesters the opportunity to communicate their message at a time and place that minimizes interference with the rights of grieving family members of the deceased.

* **Sec. 2.** AS 11.61.110(a) is amended to read:

(a) A person commits the crime of disorderly conduct if,

(1) with intent to disturb the peace and privacy of another not physically on the same premises or with reckless disregard that the conduct is having that effect after being informed that it is having that effect, the person makes unreasonably loud noise;

(2) in a public place or in a private place of another without consent, and with intent to disturb the peace and privacy of another or with reckless disregard that the conduct is having that effect after being informed that it is having that effect, the person makes unreasonably loud noise;

(3) in a public place, when a crime has occurred, the person refuses to comply with a lawful order of a peace officer to disperse;

(4) in a private place, the person refuses to comply with an order of a peace officer to leave premises in which the person has neither a right of possession nor the express invitation to remain of a person having a right of possession;

(5) in a public or private place, the person challenges another to fight or engages in fighting other than in self-defense;

(6) the person recklessly creates a hazardous condition for others by an act which has no legal justification or excuse; [OR]

(7) the offender intentionally exposes the offender's buttock or anus to another with reckless disregard for the offensive or insulting effect the act may have on that person**; or**

(8) the person knowingly engages in picketing with reckless disregard that the picketing occurs

(A) within 150 feet of the boundary of a cemetery, mortuary, church, or other facility; and

(B) while a funeral is occurring at the cemetery, mortuary, church, or other facility or during the 60-minute period

(i) before the start of the funeral; or

(ii) after the conclusion of the funeral.

* **Sec. 3.** AS 11.61.110(b) is amended to read:

(b) **In** [AS USED IN] this section,

(1) "funeral" means a ceremony or memorial service held in connection with the burial or cremation of a deceased person, but does not include a funeral procession on a public street or highway;

(2) "noise" is "unreasonably loud" if, considering the nature and purpose of the defendant's conduct and the circumstances known to the defendant, including the nature of the location and the time of day or night, the conduct involves a gross deviation from the standard of conduct that a reasonable person would follow in the same situation**; "noise"** [. "NOISE"] does not include speech that is constitutionally protected**;**

(3) "picketing" means protest activities, engaged in by a person, that disrupt or are undertaken to disturb a funeral.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 10, 2011

SUBJECT: Amendment to AS 11.61.110 (disorderly conduct) adding picketing or protesting at a funeral as an offense (Work Order No. 27-LS0627\A)

TO: Representative Bob Herron
Attn: Rob Earl
Representative Bill Thomas
Attn: Kaci Schroeder

FROM: Doug Gardner
Director

You asked for a bill that would limit picketing and protests at a funeral, and requested a criminal law solution as a way to achieve this limitation. I chose to amend AS 11.61.110, to add picketing or protesting at a funeral to the offense of Disorderly Conduct. Enclosed is a draft that I believe accomplishes your request. Given the extensive constitutional issues presented by this bill, I have briefly outlined the issues that may come up if this bill is introduced. If you would like more detail, please advise, and I can provide it.

Overview

At present, in excess of 45 states have passed laws that in one way or another, are very similar to the attached draft bill. Much of the litigation involving various state funeral protest laws has been concentrated in the states that comprise the Sixth Circuit (KY., MI., OH., and TN.), and the Eighth Circuit (AR., IA., MN., MO., NE., S.D.) federal courts. An observation about this trend is that the Westboro Baptist Church, which is a party to or involved in virtually all of these cases is based in Topeka, Kansas, and engages in protest activities with more frequency in areas near the church's home town. Given the volume of litigation in the Sixth and Eighth Circuit courts, and eventually at the appellate level, I chose to draft this bill based on lessons learned in litigation in these circuits, and to base this bill on state statutes that have passed constitutional muster. However, it is important to observe, that the U. S. Supreme Court has yet to address a criminal law involving funeral picketing or protests. The recent high profile decision in *Snyder v. Phelps*, 2011 WL 709517 (U.S.), was a decision that involved civil litigation for money damages, and not a criminal law, so the decision, while instructive, does not resolve some of the issues that are unique to criminal law in the context of free speech.

Snyder v. Phelps

With that backdrop, I want to briefly address and summarize the recent decision in *Snyder v. Phelps* issued by the Supreme Court last week. Mr. Snyder sued Westboro Church leader Albert Phelps in a civil action based on the theory that picketing, and the content of that picketing by Westboro Church at his son's funeral (Snyder's son was a Lance Corporal in the United States Marine Corps, and died as a result of injuries sustained in Iraq in the line of duty), was done in a way that intentionally caused him emotional distress. Some of the slogans on the pickets that Mr. Snyder acknowledged in court proceedings that he could briefly see the tops of from his position in the motorcade to the funeral, included "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell."

The first question for the *Snyder* Court was whether the highest protection afforded speech by the First Amendment of the U. S. Constitution applied to Westboro's speech. The Court concluded, that while offensive to many, the issues raised by Westboro's picket signs were public speech entitled to the "highest rung" of protection in the hierarchy of First Amendment protections. As a consequence, the Court decided that the jury verdict for over $10 million returned at trial in the lower district court had to be set aside because the public speech of Westboro was protected by the First Amendment, and as a consequence was not actionable in a claim for money damages by Mr. Snyder.

In *Snyder*, Chief Justice Roberts, writing for the majority of the Court, observed that after the protest in 2006 by Westboro church at Mr. Snyder's son's funeral, the Maryland Legislature passed a law that prohibits picketing within 100 feet of a funeral service or procession, and noted that Westboro's picketing would have complied with that law. The Court clearly wanted to point out that its decision in *Snyder* did not address Maryland's picketing law, and that "to the extent [law's like Maryland's] are content neutral, they raise very different questions from the tort verdict at issue in [*Snyder*]." However, Chief Justice Roberts noted that the Supreme Court has, in past cases where a law was content neutral, allowed time, place, and manner restrictions and regulation of public speech. These situations were noted by the Chief Justice as picketing around a home and a buffer zone between protesters and an abortion clinic entrance. *Snyder v. Phelps*, 2011 WL 709517 p.17-18 (U.S.), *citing Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (holding that a state has a significant interest in banning targeted picketing in front of private residences where individuals are captive audiences); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) (court rejected a 300 foot buffer zone around an abortion clinic as overly broad restriction, but court approved a 36 foot buffer zone around clinic entrance).

Eighth Circuit Cases

The Eighth Circuit Court of Appeals, in *Olmer v. Lincoln*, 192 F.3d 1176 (8th Cir. 1999), decided in the context of an ordinance that restricted picketing of churches and other religious premises 30 minutes before during and after a funeral service, that while the state has a significant interest in banning targeted speech in front of a person's home

where individuals are captive audiences, that churches are distinguishable, and that the state's interest regarding a church is not as great. As a consequence, the Eighth Circuit cases where funeral protest ordinances or statutes have been litigated have been found unconstitutional, because the state interest in regulating public speech has not been significant enough to justify the state-imposed time, place, and manner restrictions. So, when addressing a content neutral restriction on speech, the Eighth Circuit Court of Appeals has not found funeral protest statutes constitutional, based on the state's failure to meet the first of the three-part test that the court applied in *Olmer*: (1) does the statute regulating speech serve a significant state interest; (2) is the statute narrowly tailored; and (3) does it leave open ample alternative channels of communication.

Despite the *Olmer* decision, a recent decision by a trial court in the Eighth Circuit regarding a Nebraska state criminal statute banning funeral protests within 300 feet of a cemetery, etc., and one hour before until one hour after a funeral, was upheld as constitutional. *Phelps-Roper v. Heineman*, 720 F.Supp.2d 1090 (D. Nebraska 2010). In *Heineman*, the trial court distinguished the *Olmer* decision, finding that the Nebraska statute, which included findings articulating the state's interest in protecting families of the deceased, demonstrated a significant state interest. The trial court also held, that despite the *Olmer*, decision, that it considered grieving family members a captive audience at a funeral, who may be under stress and may suffer emotional harm under circumstances at a funeral where they are unable to avoid pickets and protests. The *Heineman* case is on appeal to the Eighth Circuit Court of Appeals. In summary, the *Heineman* court found that in the case of the content neutral Nebraska statute: (1) the state demonstrated a significant state interest in protecting family members; (2) the statute was narrowly tailored both in time restrictions (hour before until an hour after the funeral with a 300 foot buffer); and that (3) alternate means of speech to communicate Westboro's messages exist (buffer zone is limited to an hour before until an hour after funeral and protesting outside the buffer zone is not restricted in any way at any time).

Sixth Circuit Cases

For purposes of this brief summary, it is not necessary to go into too much detail regarding funeral protests case law in the Sixth Circuit. In *Phelps-Roper v. Bob Taft*, 523 F.Supp.2d 612 (N.D. Ohio 2007), the trial court judge considered an Ohio statute essentially the same as the Nebraska statute in *Heineman*, which created a "fixed" buffer zone of 300 feet[1] around a church or other place where a funeral was being held. The

[1] Most of the state funeral protest statutes I reviewed provided for a 300 foot buffer zone between protesters and funeral attendees. I would note, that while the *Heineman* court and the *Taft* court found 300 foot buffer zones narrowly tailored and allowing alternative channels for speech, other courts have found 300 foot buffer zones overly broad, burdening substantially more speech than necessary to further the government's interest. See *Phelps-Roper v. County of St. Charles*, 2011 WL 227561 (E.D. MO.). I drafted this bill consistent with a 200 foot buffer, which is more conservative than the buffer found in

Ohio statute also imposed a "floating" buffer zone of 300 feet around a funeral procession. The court found the floating buffer unconstitutional, as has every court that I am aware of that has considered the "floating" buffer zone. I would note that on appeal, the Ohio attorney general's office made the decision not to cross-appeal or litigate the part of the trial court's decision involving the floating buffer zone, so I will not address that issue further. With regard to the "fixed" buffer zone, both the trial court and the Sixth Circuit Court of Appeals found the Ohio funeral protest statute content neutral, and constitutional for essentially the same reasons that the *Heineman* trial court did in Nebraska. *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

Alaska Law and Summary of Drafting Issues

In drafting the enclosed bill amending AS 11.61.110, to add a funeral picketing and protest provision to the offenses comprising disorderly conduct in Alaska, I tried to track both the legislative finding language in Revised Statute of Nebraska § 28-1320.01 to 28-1320.03 (2008), and the language of the statute itself. By tracking the Nebraska language and legislative findings and intent, the draft bill focuses on: (1) a statute that has already been found to be content-neutral; (2) a judicial finding of a strong state interest in protecting family members of the deceased, as opposed to a broader group of funeral attendees; (3) statutory language that only restricts picketing focused on a funeral, similar to the language of the ordinance in *Frisby*, 487 U.S. at 482; and (4) a statute that has been held to allow alternative channels for communication.

In Alaska, if the proposed amendments to AS 11.61.110 are scrutinized by the courts as time, place, and manner, content neutral restrictions on speech, the state will have to demonstrate that these restrictions are narrowly tailored, supported by a significant state interest, and leave open ample alternative channels for expression. *Prentzel v. State*, 1988 WL 1511365 (Alaska App.), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). As with any constitutional challenge, the outcome of litigation is always difficult to predict, based on the facts and circumstances of each case, and based on the different outcomes observed in the analysis by the Sixth and Eighth Circuit Courts of Appeal. Please review the enclosed draft, and let me know how you would like to proceed. As you requested, I am also sending a copy of this draft to Representative Thomas's office.

DDG:plm:ljw
11-129.plm

Enclosure

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most state statutes, but you may wish to narrow this buffer zone, perhaps to 150 feet as was done by Congress in 18 U.S.C.S 1388 (prohibition on disruption of funerals at Arlington National Cemetery) or to 100 feet as adopted by the State of Maryland in MD. Code Ann., Criminal Law, § 10-205 (West. 2010).

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 234**
Fiscal Note Number: **1**
(H) Publish Date: **2/10/12**

Identifier (file name): HB234-LAW-CRIM-02-03-12
Title: An Act relating to picketing or protests at a funeral.
Sponsor: Representative Thomas
Requester: (H) Military & Veterans' Affairs

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/3/12 5:10PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/3/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 234

Analysis

HB 234 amends the crime of disorderly conduct by adding the prohibition of engaging in picketing within 150 feet of a cemetery, church, and so on and within 60 minutes of the beginning or end of the funeral.

Disorderly conduct is a class B misdemeanor with a maximum term of imprisonment of 10 days.

The estimated fiscal impact of the bill is zero. The estimate does not include costs related to any legal challenges to the legislation, if it is enacted into law.

High Court Rules For Anti-Gay Protesters At Funerals

by NINA TOTENBERG

Nicholas Kamm/AFP/Getty Images

Members of the Westboro Baptist Church of Topeka, Kan., staged a protest across the street from a high school in Hyattsville, Md., a day before the Supreme Court ruling.

March 2, 2011

text size A A A

The U.S. Supreme Court has ruled that protesters at military funerals cannot be sued for inflicting emotional distress on the family of a dead soldier. The vote was 8 to 1.

When Marine Lance Cpl. Matthew Snyder was killed in Iraq, his funeral in Westminster, Md., drew thousands to pay their respects. But it also drew a protest from the Rev. Fred Phelps and six other members of the Westboro Baptist Church, based in Topeka, Kan.

Phelps and other church members have traveled the country for years, picketing hundreds of military funerals to communicate their belief that "God hates the USA" for its tolerance of homosexuality, particularly in the military.

The picketers did not contend that Snyder was gay. Rather, their message, as Phelps puts it, was that "the whole country is given over to sodomy and to sodomite enablers."

The picketers followed their usual practice at the Snyder funeral. They alerted police in advance and followed instructions to set up their protest on public property, at a site 1,000 feet away from the church, near the vehicle entrance.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and ... inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker.

Though the protest was peaceful and ended before the funeral began, the picketers carried signs with messages offensive to many, including "Thank God for Dead Soldiers," "Fags Doom Nations" and "America Is Doomed."

- Chief Justice John Roberts, in the majority opinion

Albert Snyder, the father of the dead Marine, did not see the signs until later when he viewed TV coverage. He says the picketers turned his son's funeral into a circus, taking away his "last moment" with his son.

"This was a funeral. This wasn't a parade going down the street. I shouldn't have to look away from anything at my own child's funeral," Snyder says. "That's absurd."

Snyder sued Phelps and his church for intentional infliction of emotional distress.

"These people targeted me and my family, and they have done this to over 200 other military men and women's families," Snyder says, his voice rising. "I want to know how you would feel if somebody stood 30 feet away from the main vehicle entrance of a church where you're trying to bury your mother, with a sign that says, 'Thank God for dead sluts.' You tell me that shouldn't be illegal. Is 'fag' any worse than 'slut'?"

A jury agreed with Snyder and awarded him $5 million in damages. But the Supreme Court set aside that verdict Wednesday.

Writing for the court majority, Chief Justice John Roberts said that as repugnant as many of the signs were, they were still plainly related to public, rather than private, matters. They focused on "the political and moral conduct of the United States and its citizens," he said, and speech of such public concern is protected by the First Amendment.

Although Westboro may have chosen to protest the funeral to gain publicity for its views, said the chief justice, and although those views may be particularly hurtful to the dead soldier's father, that does not mean the church members' right of free speech can be curtailed or punished. And a jury award amounts to punishment, Roberts contended, by imposing a penalty for expressing an unpopular viewpoint.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

- Justice Samuel Alito, who cast the lone dissenting vote

"Speech is powerful," Roberts said in conclusion. "It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

Reaction to the decision was markedly muted, given the outrage voiced by veterans groups and politicians at the time the case was argued in the Supreme Court.

The Democratic and Republican leaders of the Senate, along with 40 other members of Congress, filed a brief on Snyder's side. But on Wednesday, reaction on Capitol Hill was nowhere to be found, except in a couple of written statements.

Lawyer Gene Schaerr, who filed a brief in the case for the American Legion, said he was heartened by the fact that the court specifically mentioned that 43 states have enacted laws that put a buffer zone of 100 feet or more around funeral sites. Such laws would not have affected the protest in this case, since protesters were 1,000 feet away.

Nonetheless, says Schaerr, the decision "sends a clear signal to the lower courts that they should not interpret anything in this opinion as casting any doubt about those statutes." The court, however, specifically left open that question, noting that restrictions on the time, place and manner of protests are appropriate in some circumstances.

Wednesday's 8-to-1 ruling came as no surprise to First Amendment scholars, both right and left. They note that the decision is in line with many court decisions protecting the rights of fringe groups — from Nazis marching in Skokie, Ill., to flag burners at a Republican convention in Texas.

University of Chicago law professor Geoffrey Stone notes that Wednesday's ruling fits neatly into that tradition, calling it a "classic case." The only surprise, maintained Stone, was that anyone dissented.

Justice Samuel Alito was the lone dissenter. He viewed the protesters' speech as targeting a private person — the father of the dead soldier — and said that the First Amendment does not give license to such outrageous conduct.

"In order to have a society in which public issues can be openly and vigorously debated," wrote Alito, "it is not necessary to allow the brutalization of innocent victims."

Related NPR Stories

·A Peek Inside The Westboro Baptist ChurchMarch 2, 2011

LEGISLATIVE RESEARCH REPORT

DECEMBER 9, 2011

REPORT NUMBER 12.113

FUNERAL PROTEST LAWS IN OTHER STATES

PREPARED FOR REPRESENTATIVE BILL THOMAS, JR.

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

SUMMARY 1

STATE LAWS PERTAINING TO FUNERAL PROTESTS 2

Table 1: Summary of State Funeral Protest Laws, May 2011 3

CHALLENGED AND UNCONSTITUTIONAL STATE FUNERAL PROTEST LAWS 3

LIST OF ATTACHMENTS 5

You asked for information on funeral protest laws. Specifically, you wished to know how many states currently have a law regulating funeral protests and what each state law stipulates. You also wanted to know for each state that currently has a funeral protest law if violating the restriction is considered a felony or misdemeanor offense. In addition, you asked if any of the state laws have been challenged and if any have been found unconstitutional.

SUMMARY

As you may know, for a number of years the Westboro Baptist Church of Topeka, Kansas has been protesting, among other events, military funerals. These protests have garnered the Church a great deal of national attention.[1] The Church's primary message at these protests is that God hates the United

[1] Summary information was extracted from Kathleen Ann Ruane, *Funeral Protests: Selected Federal Laws and Constitutional Issues*, Congressional Research Service, March 22, 2011, and the Westboro Baptist Church's website.

States for its tolerance of homosexuality. As punishment for its tolerance, God is killing soldiers "in righteous judgment against an evil nation."

As a result of these protests, state and local governments have adopted measures that create "buffer zones" that ban protests of funerals within a certain distance of the services and that establish time restrictions as to when protests can occur in relation to a funeral service. Additionally, the federal government has passed similar bans on protests at military funerals in federally controlled cemeteries.

STATE LAWS PERTAINING TO FUNERAL PROTESTS

According to the National Conference of State Legislatures (NCSL), 46 states currently have some form of a funeral protest law. In Table 1, we provide a summary of these state laws; we include a more detailed summary of each state's law in Attachment A.

Of the 31 states identified in Table 1 that impose a restriction on the time in which a protest may take place in relation to the funeral service, 22 specify that a protest may not occur any time one hour prior to, during, or one hour after the conclusion of the funeral or memorial service. The remaining nine states specify a time restriction range from 30 minutes to 120 minutes before and after the service.

As you can see from Table 1, 39 states create a "buffer zone" that restricts protests of funerals within a certain distance of the service. These buffer zones range from 150 feet to 1,500 feet. The most typical distance, used by 15 states, is 500 feet.

Seven states—California, Florida, Idaho, Louisiana, Maine, Rhode Island, and Virginia—chose not to create time or distance buffer zones but instead appear to have amended their disorderly conduct or disturbing the peace statues to include protests at funeral or memorial services.

Thirty-six states classify the first violation of these funeral protest laws as misdemeanors. Although several states classify the second offense as a felony, two states—Indiana and Michigan—classify the first offense as a felony.

TABLE 1: SUMMARY OF STATE FUNERAL PROTEST LAWS, MAY 2011	
Regulation	**States**
Time Requirement	Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Michigan(1), Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming
Distance Requirement	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming
First Offense Classified as a Misdemeanor	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Source: *Funeral Protest Regulation Statutory Provisions*, National Conference of State Legislatures, May 18, 2011, Jon Griffin, Policy Associate, Fiscal Affairs Program, National Conference of State Legislatures, 303-364-7700 ext. 1529.	
Notes: (1) Michigan law authorizes local governments to create laws that restrict funeral protests from one hour immediately before, or during, or two hours immediately following a service.	

In Attachment B, we provide a sample of funeral protest laws from ten states—Alabama, Colorado, Connecticut, Idaho, Minnesota, Montana, New Mexico, Oklahoma, Rhode Island, and Washington.

According to the NCSL, all four of the states that do not currently have a funeral protest law—Alaska, Hawaii, Nevada, and Oregon—considered such a measure during the last legislative session. Measures in Alaska and Hawaii are still active, while the measures in Nevada and Oregon have failed. Additionally, many states sought to amend their existing laws. We include, as Attachment C, a NCSL summary of all state legislation considered during the last legislative session that pertains to funeral protests.

February 8, 2012

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The Honorable Dan Saddler, Co-Chair
The Honorable Steve Thompson, Co-Chair
House Military and Veterans' Affairs Special Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
Via email: Representative_Dan_Saddler@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

Re: HB 234: Funeral Picketing and Protests
ACLU Review of Constitutional Issues

Dear Co-Chairs Saddler & Thompson:

Thank you for the opportunity to provide written testimony with respect to House Bill 234.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. From that perspective, we wish to advise the Committee of our concern that the proposed bill, if enacted, would violate the rights of free speech and free assembly under the Alaska Constitution and the United States Constitution.

Bill Overview

The current draft of HB 234 proposes to amend the existing disorderly conduct statute, to criminalize the act of "knowingly engag[ing] in picketing with reckless disregard" that the picketing occurs within 150 feet of the boundaries of a "cemetery, mortuary, church, or other facility" and either during a funeral at that location or within an hour of the start or end of the funeral.

The bill goes on to define the term "funeral," excluding a funeral procession from that definition. The bill also defines "picketing" as "protest activities . . . that disrupt or are undertaken to disturb a funeral."

Freedom of Speech

Under the First Amendment to the United States Constitution, people have the freedom to speak without government interference. The freedom of speech is not absolute, ***but government regulation of speech imposes a heavy burden on the government to justify the nature of its regulation and to show that alternative means of vindicating the government interests were inadequate.***

A. The Bill Would Regulate Speech on Sidewalks, a Traditional Public Forum

The present bill directly regulates speech on its face. "[P]rotest activities" are expressive activity, by the very basic meaning of the word "protest." "Picketing" has long been recognized as expressive activity. *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980).

Based on the broad scope of the bill and the real world context of the activities regulated, the bill would criminalize certain expressive activity both on one's own private property – assuming the private property lay within 150 feet of a cemetery or church – as well as on a sidewalk or public park, which are recognized as "traditional public forums" for public speech. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

Given that the bill directly regulates speech **on one's own property and in traditional public forums**, the bill will be subject to the most careful scrutiny by a court, demanding that the restriction be "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (citation omitted).

B. The Bill is Not Content-Neutral, But Only Regulates Protest Activities

"The right to free speech . . . may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill*, 530 U.S. at 716. For that reason, most restrictions on speech must be content-neutral, meaning that the regulation of speech may not refer to the content of the speech. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994). By contrast, content-neutral restrictions on speech in a public forum describe the time, place, and manner in which speech may be made, and must be narrowly tailored to serve a substantial government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Examples of a content-neutral regulation would include an ordinance against using a loudspeaker over a particular volume or after a certain hour.

In the recent funeral picketing case, the United States Supreme Court did admit that some state laws establishing a buffer zone would be analyzed differently (which does not necessarily mean that they would be *constitutional*), but only to "the extent [such state] laws are content neutral." *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

HB 234 appears to refer to the content of speech, and is thus not content-neutral. The term "protest activities" suggests that only the speech of those presenting a negative viewpoint would be affected by the regulation. Under the bill, a person loudly stating that the US military is contributing to the decline of moral values would presumably be engaged in "protest activities," while a person loudly stating that we must honor our veterans would not be engaged in "protest activities."[1] *Frisby*, 487 U.S. at 482. Therefore, the conduct prohibited is not merely traditional picketing, but protesting, oppositional speech. *Snyder*, 131 S. Ct. at 1219 (noting that the claims of the offended plaintiffs "turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself").

Heightening the inference that the bill is intended to discriminate between those presenting supporting views and those presenting opposing views at a funeral, the bill also prohibits activities that "disrupt or are undertaken to disturb a funeral." But in the context of the bill's language, activities that "disrupt" or "disturb" would likely be viewed in light of their content, rather than a neutral standard. "Disrupting" or "disturbing" entails that the activities run contrary to the purpose or plan of the funeral. Loud noises, such as amplified speech or, as has become more common at funerals, the loud revving of motorcycle engines may be viewed as non-disruptive when the expressive conduct accords with the purpose of the funeral, but disruptive when it is not. **Favoring certain expressive activity over another in regulating picketing violates the First Amendment.** *Carey*, 447 U.S. at 470. Notably, in one of the only cases upholding such a law, the parties *stipulated* that the law was content-neutral, rather than contesting the law's neutrality. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008).

C. The Legislative History Suggests Lack of Content-Neutrality

Finally, the legislative history suggests that the bill was not intended to be content-neutral. The Sponsor Statement indicates that the bill "asks anyone within the area of a funeral service to conduct themselves in a respectful manner." Sponsor Statement, HB 234. While most – if not indeed nearly all – of us, can agree that permitting funerals to proceed in a peaceful, quiet environment is a laudable goal, nonetheless the state may not legislate "respectful" behavior on the streets and sidewalks of Alaska, nor in the front yards of its citizens. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180-81 (8th Cir. 1999) (holding that an ordinance prohibiting sign-holding outside churches was unconstitutional because it went "beyond the church building and

---

1. A protest is defined by the Merriam-Webster dictionary as an "act of objecting or a gesture of disapproval." By contrast, the general definition of "picketing" is merely "posting at a particular place."

church property, and seeks to forbid peaceful communication on property belonging to the public, even though the communication may be completely truthful, and even though there is absolutely no physical interference with access to the church"). If "protest activities" that "disrupt" or "disturb" are any activities that are "disrespectful," the law clearly discriminates based on the content of the speech and cannot stand.

D. No Compelling Governmental Interest in Restricting Speech at Funerals

Given that the bill is not content-neutral, the question is then whether "protecting families at funerals during their time of grief" is a compelling state interest justifying a restriction on free speech. **The Constitution requires that "to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an *essentially intolerable manner*."** *Snyder*, 131 S. Ct. at 1220 (emphasis added). The only cases in which the U.S. Supreme Court has upheld such laws have been content-neutral laws relating to the privacy of one's home. *Frisby*, 487 U.S. at 487-88 (upholding content-neutral ordinance banning picketing of a single home which made the resident a "prisoner" in his own home); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (upholding statute permitting mail recipient to halt offensive mailings to his residence).

We emphasize that a funeral is a solemn occasion and that families in grief should be accorded the respect that such an occasion deserves. However, funerals are also traditionally public events, frequently held in places of worship or funeral homes that are open to the public. In Anchorage, for instance, numerous cathedrals and churches occupy the downtown area, as does a large cemetery. In Juneau, a Catholic cathedral and a Russian Orthodox church sit three blocks from the State Capitol. Expecting that one will neither see nor hear anything offensive in a heavily-trafficked public space is not reasonably comparable to an expectation that one can retire to one's private home without running a gantlet of protestors.

While the members of the Westboro Baptist Church espouse an abhorrent ideology and express it in the most repulsive terms, this bill would affect all funerals and all protestors. Protesting a funeral, especially that of a public figure, may express an important view opposing an ideology or history of bad acts committed by the person being buried. Funerals are frequently centered around a eulogy, an opportunity to say complimentary things about the deceased. A protest outside a funeral may be an opportunity to present an alternative viewpoint about the deceased and to communicate it to passers-by.

Alternatively, when the death of an individual occurs under circumstances giving rise to matters of public concern, the funeral may be the locus of public debate. Famously, the lynching death of Emmett Till resulted in a dramatic funeral in Chicago which thousands of people attended; a dramatic moment that galvanized the civil rights movement. **A municipality could use the bill, for instance, to characterize angry or upset attendees at a funeral for a victim of a police shooting as "protestors" and arrest the attendees for disorderly conduct. A bill that restricts the freedom of speech on the basis of content is available for all kinds of mischief.**

E. The Bill Is Not Narrowly Tailored and Does Not Leave Adequate Avenues for Expression

Because the bill extends to 150 feet in every direction from a church, mortuary, funeral home, or cemetery where a funeral may take place, and extends from an hour before to an hour after a funeral, HB 234 unconstitutionally restricts speech in that it is neither narrowly tailored nor does it leave adequate avenues for expression. The only recognized constitutional interest at stake is the right of a listener in a private place to avoid being a captive audience to a message the listener has no desire to hear. *Phelps-Roper v. Strickland*, 539 F.3d at 364.

Funeral attendees are not a captive audience to a quiet protest, provided the protest does not enter the church or block the entrance to the church. *Olmer*, 192 F.3d at 1180-81. Funeral attendees may have to walk or drive past protestors holding signs that offend them, and might wish to avert their eyes for the period they would otherwise be exposed to the offensive messages. Clearly, protestors can be excluded from the funeral home, mortuary, cemetery, or church where the service takes place. **Thus, the statute is not narrowly tailored to the government interest in avoiding making funeral attendees a captive audience to the protest.**

Further, a primary function of a mortuary or funeral home is to serve as a space for funeral services. *Some funeral homes may hold more than one funeral in a day.* Given the length of services and the one hour window before and after the service when a protest may not take place, **HB 234 – as currently drafted – could prohibit even unrelated protests near a funeral home, for potentially many hours out of any given day.**

Since some important public buildings – likely sites for protests – are close to funeral homes, this would impose a serious burden. For instance, there is a funeral home across the street from the Atwood Building in Anchorage. An Episcopal church lies across the street from the Dena'ina Convention Center. A labor demonstration against a particular employer lacks the same efficacy if performed offsite. Employees at a business located next door to church, mortuary, funeral home, or cemetery would be unable to mount an effective protest about labor conditions if their protests had to start and stop every time a funeral was taking place. As an example, the Sheraton Hotel in Anchorage lies across the street from the municipal cemetery in the middle of downtown. Employees at similarly situated businesses could be seriously chilled from engaging in meaningful protests and could conduct regular, continuing protests only at the risk that someone would define their protests as "disrupt[ing]" the funeral service.

Last, the bill leaves open little alternative for those who actually wish to protest the church, funeral home, or cemetery in question, by mandating that the protestors stay at least 150 feet away from the property within an hour before or after funerals. Someone may seek to picket a church, such as to bring attention to victims of sexual assault. Someone may seek to picket a funeral home or a cemetery, such as in a labor dispute or a dispute about the policies of the business. While such protests may incidentally impact funeral attendees, the alternative would thwart the free expression of employees or those with legitimate concerns about the church, funeral home, or cemetery. Taken as a whole, the law would leave few alternatives open to those

who seek to protest outside public or private buildings that happen to be located near a church, funeral home, or cemetery, as well as those who seek to picket the church, funeral home, or cemetery itself.

The bill is not narrowly tailored to the legitimate state interests because the protestor must engage in picketing with "reckless disregard," rather than knowledge, that the picketing takes place within 150 feet of the site of a funeral and within one hour before or one hour after the funeral. "Recklessness" refers to a criminal law standard that a person consciously disregards a substantial risk of a certain condition being present. AS 11.81.900(a)(3). Presumably, there is a substantial "risk" that a funeral will take place at a church, funeral home, mortuary, or cemetery at any time. This standard unreasonably imposes on a protestor the duty of discovering whether or not a funeral is ongoing, recently took place, or will take place within an hour of a protest. Employees protesting labor conditions at the Sheraton will thus be required to find out if any funerals are taking place in the municipal cemetery on a day when they decide to protest. **Protesters should not be burdened with such a duty to discover whether a funeral is taking place at any given time.** Imposing the burden on protesters to discover when and whether a nearby church, cemetery, or funeral home is conducting a funeral leaves the law unreasonably ill-tailored to legitimate state interests and imposes an unconstitutional "protest at your own risk" policy.

Drafting Considerations

We suggest the Committee may wish to consider:

The protests staged by the Westboro Baptist Church express abhorrent views, for which the ACLU has no sympathy. Further, the manner in which they protest is deeply offensive. **The great maxim of free speech is that for all evil speech, "the remedy to be applied is *more speech*, not enforced silence."** *Whitney v. California*, 274 U.S. 357, 378 (1927).

Rather than seeking to prohibit fools from saying foolish and hurtful words, we as a community should come together to show our appreciation for our service members and others in our community whose funerals may be subject to these protests. If the protests of a handful of people inspire a thousand people to come out to show their support and respect at a funeral, does that tribute not outweigh the ill words of a few? The true voice of Alaska should come out when a misguided minority threatens their protests, so we may show why their words are folly.

Second, the members of the Westboro Baptist Church thrive on the controversy and attention generated by their activity. They also thrive on the attorneys' fees generated when legislatures and municipal assemblies act hastily to prevent them from protesting. As truly painful as it is to watch such a protest unfold, it will surely be more galling to pay from the state treasury to facilitate more protests and more litigation by a tiny group of hateful individuals whose message has already received too much attention.

Conclusion

We hope that the Military and Veterans' Affairs Special Committee will recognize that these are just some of the constitutional infirmities in House Bill 234.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned if you have any questions or wish additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: The Honorable Carl Gatto, Vice Chair, Representative_Carl_Gatto@legis.state.ak.us
Representative Alan Austerman, Representative_Alan_Austerman@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
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MEMORANDUM

Date: February 9, 2012

To: Representative Carl Gatto, Chair House Judiciary Committee

From: Representative Thomas

Re: HB 234 "An Act relating to picketing or protests at a funeral."

I respectfully request that the House Judiciary Committee hear HB 234, at its earliest convenience.

HB 234 brings Alaska in line with the majority of states and adopts the guidelines which govern conduct during a funeral. HB 234 is modeled after the guidelines used by our national cemeteries.

If you have any questions about this bill please contact Aaron Schroeder, in my office, at 465-3732.

Thank you.

REPRESENTATIVE BILL THOMAS

ALASKA STATE LEGISLATURE DISTRICT 5

e-mail: Representative.Bill.Thomas@legis.state.ak.us

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List of Witnesses for HB 234

Doug Gardner- Bill Drafter
Director of Legal Services
On-line

HB

253

<TARGET><BILL>HB 253</BILL><SUBJECT>HB 253</SUBJECT><COMM>HJUD27</COMM></TARGET>

Melanie Lesh

From:	House Judiciary
Sent:	Tuesday, February 07, 2012 4:53 PM
To:	Allen, Richard K (DOA); 'Anne Carpeneti '; 'Brandy Cote'; Cori M. Badgley; Crystaline Jones; 'Deb Behr'; 'Douglas Wooliver '; Jackie Schulz; James Waldo; 'Jane Pierson'; 'Jeffrey Mittman'; Jenna Crouse; Jim Pound; 'Kelly A. Howell (DPS)'; LIO Juneau Group; Londi Ensor; Mike Coumbe; Mike Sica; Nancy Meade; 'Quinlan Steiner '; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Steve Thompson; Rep. Wes Keller; 'Shalon Szymanski-Harrington'; 'Sonia Christensen'; Susan Rael
Cc:	House Judiciary
Subject:	HJUD Meeting 2/8/12 Additional Documents
Attachments:	HB253-DOA-PDA-1-23-12.pdf; HB253-DOC-OC-01-13-12.pdf; HB 253 CS ( ) Draft CS.pdf; HB303-DOA-PDA-1-30-12.pdf; HB303-DOA-OPA-1-30-12.pdf

House Judiciary Committee Members and Contacts:

Attached are two new fiscal notes for HB 303 – Suspended Imposition of Sentence; and two new fiscal notes for HB 253 – Cathinone Bath Salts; AND a draft CS from the bill sponsor, Rep Stoltze. The two changes from the original version of HB 253 are:

FYI - This is what Ryan in Stoltze's office will explain. Mel

1. Page 2, line 11 – Replaces the name of the drug listed in AS 11.71.150(e)

(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system

...

Delete "methcathinone"

Insert "2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat"

2. Page 2, following line 27 – Deletes (5), see below:

Sec. 11.71.140. Schedule IA.

(a) A substance shall be placed in schedule IA if it is found under AS 11.71.120(c) to have the highest degree of danger or probable danger to a person or the public.

(b) Schedule IA includes, unless specifically excepted or listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(4) concentrate of poppy straw which is the crude extract of poppy straw in either liquid, solid, or powder form which contains the phennanthrine alkaloids of the opium poppy;

(5) ~~2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat.~~

Melanie

Melanie Lesh
House Judiciary Committee Aide
Rep. Carl Gatto, Chair
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ALASKA STATE LEGISLATURE

Co-Chair:
House Finance Committee

Chair:
House Finance Subcommittees for;
Department of Public Safety
Department of Law

Member:
Legislative Council
Legislative Budget & Audit (alt)

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Sponsor Statement for HB 253

"An Act classifying certain synthetic cathinones as schedule IIA controlled substances; and providing for an effective date."

HB 253 would classify certain synthetic cathinones, commonly known as synthetic cocaine and marketed as 'bath salts,' as a schedule IIA controlled substance.

Marketed as bath salts or plant food with names like 'Meow-Meow,' Vanilla Sky,' 'Ivory Snow,' and 'Bliss,' synthetic cathinones are inexpensive, accessible, and undetectable in most drug tests. Many users of this drug use them in combination with or as a legal alternative to cocaine, ecstasy or methamphetamines.

Drug effects include impaired perception, reduced motor control, disorientation, extreme paranoia and violent episodes. Synthetic cathinones are abused mainly by snorting and oral ingestion. The U.S. Drug Enforcement Administration, the U.S. Military, and the Municipality of Anchorage have all taken action to control or prohibit use of this drug.

According to the National Council of State Legislatures, as of October 24, 2011 there are 33 states that have adopted laws or have departmental rules banning chemical compounds associated with 'bath salts.' Seven states have legislation pending.

Should HB 253 pass, it would be unlawful throughout the State of Alaska to sell, use, purchase, possess, manufacture, transport or deliver synthetic cathinones, the chemical compounds which are being marketed as 'bath salts' and synthetic cocaine.

27-LS1131\M
Luckhaupt
2/3/12

CS FOR HOUSE BILL NO. 253( )

requested 2/9/12

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES STOLTZE, THOMPSON, MILLETT, PRUITT, AND TUCK, Lynn, Costello

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.150(e) is amended to read:

(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts;

(5) fenethylline;

(6) N-ethylamphetamine;

(7) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(9) 4-methylaminorex, also known as 2-amino-4-methyl-5-phenyl-2-oxazoline;

(10) N,N-dimethylamphetamine, also known as N,N,alpha-trimethylybenzencethaneamine or N,N,alpha-trimethylphenethyline, its salts, optical isomers, and salts of optical isomers;

(11) cathinone;

(12) 2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat, its salts, optical isomers, and salts of optical isomers;

(13) 4-methylmethcathinone, also known as mephedrone, its salts, isomers, and salts of isomers;

(14) 3,4-methylenedioxypyrovalerone, also known as MDPV, its salts, isomers, and salts of isomers;

(15) substituted cathinones, including any compound, except bupropion or a compound listed in another schedule, structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways:

(A) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(B) by substitution at the 3-position with an alkyl substituent;

(C) by substitution at the nitrogen atom with alkyl or dialkyl groups or by inclusion of the nitrogen atom in a cyclic structure.

*** Sec. 2.** AS 11.71.140(b)(5) is repealed.

*** Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

HOUSE BILL NO. 253

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES STOLTZE, THOMPSON, MILLETT, PRUITT, AND TUCK, Lynn, Costello

Introduced: 1/17/12
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.150(e) is amended to read:

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(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts;

(5) fenethylline;

(6) N-ethylamphetamine;

(7) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(9) 4-methylaminorex, also known as 2-amino-4-methyl-5-phenyl-2-oxazoline;

(10) N,N-dimethylamphetamine, also known as N,N,alpha-trimethylybenzencethaneamine or N,N,alpha-trimethylphenethyline, its salts, optical isomers, and salts of optical isomers**;**

(11) cathinone;

(12) methcathinone, its salts, optical isomers, and salts of optical isomers;

(13) 4-methylmethcathinone, also known as mephedrone, its salts, isomers, and salts of isomers;

(14) 3,4-methylenedioxypyrovalerone, also known as MDPV, its salts, isomers, and salts of isomers;

(15) substituted cathinones, including any compound, except bupropion or a compound listed in another schedule, structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways:

(A) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(B) by substitution at the 3-position with an alkyl substituent;

(C) by substitution at the nitrogen atom with alkyl or dialkyl groups or by inclusion of the nitrogen atom in a cyclic structure.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB253**
Fiscal Note Number
Publish Date

Identifier (file name) HB253-DOA-PDA-1-23-12
Title Cathinone Bath Salts
Sponsor Representatives Stoltze, Thompson, Millett, Pruitt
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner, Public Defender — Phone 907 334-4414
Division Public Defender Agency — Date/Time 1/20/12 12:55 PM
Approved by John Cramer, Deputy Commissioner — Date 1/23/2012
Department of Administration

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB253
2012 LEGISLATIVE SESSION

Analysis

This bill classifies certain compounds commonly called "bath salts" as Schedule IIA controlled substances. This classification creates new crimes that can be charged as multiple degrees of misconduct involving a controlled substance.

These crimes range from class C felonies to unclassified felonies, with broad sentencing ranges; fourth-degree misconduct involving a controlled substance is a class C felony and carries a potential sentence of up to 5 years imprisonment; third-degree misconduct involving a controlled substance is a class B felony and carries a sentence of up to 10 years imprisonment, first-degree misconduct involving a controlled substance is an unclassified felony and carries a sentencing range of up to 99 years of imprisonment .

The Agency has no reliable method for determining how many cases will be charged under the new classification or how many individuals charged will require public counsel. Additional felony cases will, however, have a fiscal impact on the Agency. The Agency, therefore, submits and indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version
Fiscal Note Number
Publish Date

Identifier (file name) HB 253-DOC-OC-01-13-12
Title "An Act classifying certain substances as Schedule IIA
Sponsor Representative Stoltze
Requester House Judiciary Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director
Division Admin. Services, Department of Corrections
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 02/07/12 9:31AM
Date 2/7/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 253
2012 LEGISLATIVE SESSION

Analysis

This legislation classifies certain substances as Schedule IIA controlled substances.

Currently, possession of a schedule IIA is a Class C felony with a possible sentence of 0-2 years. Manufacturing or delivering a schedule IIA controlled substance is a Class B felony with a possible sentence of 0-4 years. The current average daily cost to house an inmate is $134.90. Therefore, housing an offender could cost the department anywhere from $0.0 (no time served) to $196,954.00 (for a 4-year sentence).

DOC analyzed the impacts of similar laws passed in recent years (Example, HB 7 - Synthetic Marijuana), we have found zero convictions and therefore zero offenders being housed in DOC facilities.

The department is currently unable to quantify the fiscal impacts of this bill, as we cannot predict the number of offenses that will occur. Should this legislation pass, the department will closely monitor the potential future fiscal impacts.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB253**
Fiscal Note Number
() Publish Date

Identifier (file name)	HB253-DPS-LAB-02-03-12	Dept. Affected	Public Safety
Title	CATHINONE BATH SALTS	Appropriation	Statewide Support
		Allocation	Laboratory Services
Sponsor	Representative(s) Stoltze, Thompson, Millett, Pruitt,...		
Requester	(H) JUD	OMB Component Number	527

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Orin Dym, Laboratory Manager	Phone	(907) 269-5743
Division	Scientific Crime Detection Laboratory	Date/Time	2/3/12 4:24 PM
Approved by	Joe Masters, Commissioner	Date	2/3/2012
	Department of Public Safety		

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB253

Analysis

This proposed legislation would add certain synthetic substances to the Schedule IIA list of statutorily controlled substances and provide for an effective date.

The Scientific Crime Detection Laboratory (crime lab) provides analysis of suspected controlled substances, issues reports, and provides expert testimony for the State of Alaska. The crime lab currently receives an average of ten submittals each month from law enforcement referencing "suspected bath salts." If these substances become controlled, the Chemistry Section of the lab can expect some change in requests for laboratory service, but is unable to determine how significant that change will be; whether it will remain roughly ten submittals per month or if it will increase.

These substances are unlike most that have been previously criminalized in that they are not "street drugs" but legally contrived and sold online via the internet and locally over-the-counter through tobacco shops. Because actual fiscal impact is unknown and difficult to determine, the crime lab is not requesting any additional funds or positions at this time but also does not wish to leave a matter the crime laboratory cannot fully assess without the reality of possible, though not probable, future fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 253**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB253-LAW-CRIM-02-03-12
Title: An Act classifying certain substances as Schedule IIA controlled substances.
Sponsor: Representative(s)Stoltze, Thompson, Millett, Pruitt, Tuck
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/3/12 5:10PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/3/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 253
2012 LEGISLATIVE SESSION

Analysis

HB 253 adds new substances to Schedule IIA of Alaska's schedules of controlled substances. These substances are currently not controlled. They are sometimes referred to as synthetic cocaine or bath salts. It is difficult to predict the number of cases that would be filed after these substances are are included in Alaska's schedules of controlled substances but the number should not be great.

AlaskaDispatch
News and voices from the Last Frontier

News

Designer drugs like 'plant food' and 'bath salts' exploding across Alaska

Victoria Barber and Noah Hull Diamond | The Seward Journal | Nov 07, 2011

Enlarge This Image

RELATED

Alaska legislation would ban smoke-shop 'incense' OTC drugs K2, Spice

Alaska law banning K2, Spice scheduled to take effect in July

In towns both large and small throughout Alaska a new class of potent designer drugs has established a foothold, sending more and more users to hospital emergency rooms while police wonder how to fight back.

Mephedrone, methylone and MDPV -- drugs commonly known as "plant food," "bath salts" and "air freshener" -- are legal under state law.

While the street names sound benign, the drugs' effects are anything but. The powerful drugs are easy to get and relatively cheap. The three drugs are marketed interchangeably and sometimes referred to as "synthetic cocaine." They are all powerful central nervous system stimulants, designed to mimic the effects of illegal drugs like meth, cocaine and ecstasy -- with some hallucinogenic properties as well.

"We're seeing a psychoactive substance that seems to be more intense than any of the stimulants -- more intense and more robust in some cases than meth, and definitely cocaine and ecstasy," said Patrick Hayes, supervisor of the outpatient substance abuse program at SeaView Community Services in Seward.

The drugs are relatively inexpensive, in part because they have been easy to get. Bath salts and plant food can be found easily on the Internet, where they are marketed under names like "Vanilla Sky," "Ivory Wave," and "Red Dove." They can come in almost banal-looking packages (bath salts are often emblazoned with images of flower petals, angels, birds and women's feet) and marked with a disclaimer that they're not for human consumption.

The drugs have also gained a following as something that won't show up on urinalysis tests. Until recently the compounds were legal -- the U.S. Drug Enforcement Administration temporarily banned the substances just last month, but the state of Alaska has yet to address the issue legally.

Hayes said that he first heard about plant food in Seward several years ago. During the last two years, he said, it seems to have caught on.

"It seemed like the people who were moving from cocaine to meth eventually starting moving on to it," Hayes said. "I think that meth is being replaced by plant food."

Effects mimic a schizophrenic breakdown

"I used, what you're calling plant food, for the first time about a year or so ago," said "Sam," a Seward resident in his early 30s who spoke on the condition of anonymity.

Sam sat down to talk at a local restaurant on a chilly evening this fall. He grew up with nice parents in a middle-class family, he said, but fell into substance abuse. It started in his teens with cigarettes and marijuana and progressed to hallucinogens, prescription drugs and cocaine.

Today, Sam is usually homeless. He said he turns to plant food as an alternative to spendier, harder-to-find drugs like heroin. "It's pretty cheap, and you get high for a while," Sam said.

Plant food, bath salts and air freshener can be ingested in a variety of ways. They come in powder or pill form and can be snorted, freebased, mixed with water and injected or atomized.

But while the drugs' effects mimic substances like cocaine or ecstasy, there isn't a lot of information about how mephedrone, methylone and MDPV affect the human body, even as users are landing in hospital emergency rooms.

"It's so new, we don't even know the half life (how long it takes the liver to detoxify half of the drug)," Hayes said. "We don't know long-term effects of chronic use. We're seeing people using it, showing up at the ER with symptoms of psychosis, rapid heart-beat, elevated heart pressure, along with delusional thinking and hallucinations, both auditory and visual."

The hallucinations described by users, Hayes said, are "more along the lines of someone who is experiencing a schizophrenic breakdown."

"I've talked to people who've used plant food -- they say it's the worst acid trip they've been on -- but as soon as they come down they want more."

'Absolutely' dangerous

"There may be users that say they've never had a bad trip. That may be," said Jennifer Messick, a traffic safety resource prosecutor with the Municipality of Anchorage who works with the Anchorage Police Department. Those aren't the users that law enforcement ends up dealing with, she said. "We find many users who say they thought it was safe -- a safe alternative to cocaine, meth or whatever, and land in the hospital."

Messick began researching designer drugs a couple years ago. As her expertise has grown, she's been inundated with requests to visit communities around the state and nation to talk with police officers about designer drugs and how to safely handle people who are on them.

Messick said users on mephedrone tend to be paranoid and delusional. They commonly report a sense of impending death or doom, seeing hallucinations of dead people.

Some drug users enter a state of "excited delirium" -- a condition often associated with cocaine or meth -- where they become extremely aggressive, temporarily insensitive to pain and display incredible strength and endurance. This poses "a huge safety risk for officers," Messick said.

It's becoming a bigger problem because use of plant food, bath salts and their kind is increasing "exponentially" across the state, Messick said. It's hit the Mat-Su Valley and Anchorage hard, but small towns have not been spared either. "I can assure you it's about everywhere in Alaska, even some of the villages," Messick said.

Messick said mephedrone, methylone and MDPV started out as party drugs in Russia and Western Europe. They have since been banned in many European nations, including the United Kingdom, but their popularity spread overseas to the U.S. on the heels of synthetic cannabinoids like "spice" and "K2."

Plant food and bath salt use appears to have exploded in the last couple years. Nationwide, there were a total of 298 calls to the American Association of Poison Control Centers about plant food in 2010. In just the first half of 2011 that number jumped to 4,137 - a 1,400 percent increase. That doesn't even include 911 calls, Messick noted.

"Unfortunately, the general public doesn't understand how absolutely dangerous these things are," Messick said.

Families on alert

"I can say I was shocked when I heard (plant food) was in Seward," said Karen Sturdy, director of the Seward Parks and Recreation Department.

Sturdy said she first heard the drug was being used in Seward last year. In a presentation before City Council, she said plant food was one of the dangers facing Seward's youth. "I think it's way more prevalent than anyone is willing to admit," said Sturdy.

The drugs are scary on their own, Sturdy said, but she's also worried that youth, upon hearing the street names, will try to snort or otherwise ingest real plant food or bath salts, thinking it will get them high. "There are kids in Seward who think they are 10 feet tall and bullet proof," Sturdy said. "So, it's frightening."

Lt. Louis Tiner said Seward police are coming into contact with more and more people who are on plant food and bath salts or admit to using them. "But more than anything we hear from concerned people about their friends and family members," Tiner said. "There are people using it and addicted to it and there are people here distributing it. It is something parents should be aware of and on the lookout for."

Illegal, and not illegal

Last month, mephedrone, methylone and MDPV became illegal under federal law. The DEA took emergency action Oct. 21 to control the substances, making the possession and sale of the

chemicals, or products containing them, illegal in the United States. It's a temporary action that will be in effect for a year while the DEA and U.S. Department of Health and Human Services study whether the drugs should be permanently controlled.

Until then, police have few tools with which to battle the use of mephedrone, methylone and MDPV. That's because while the drugs are banned under federal law, the State of Alaska has yet to take action on them. If a police officer in Seward came across someone in possession or selling plant food they could only pass the case along to the DEA for review. While the DEA could prosecute, there's also a chance they wouldn't take action on small-scale, individual cases. "There's a great need for state and local legislation," said Messick.

Anchorage Mayor Dan Sullivan introduced an ordinance last month to criminalize plant food, bath salts and the others. And state Sen. Kevin Meyer announced his intent to introduce legislation in the upcoming session to ban mephedrone and MDPV at the state level.
"What makes these substances even more dangerous is how they are being marketed . . . With names like 'Meow-Meow,' Vanilla Sky,' 'Ivory Snow' and 'Bliss', (they're) obviously aimed at kids and young adults," Meyer said in a press release.

Messick acknowledged the laws may be insufficient. Designer drugs are carefully designed to get around the law. "I tell people to think not just about these drugs, but what drug will come out next year," Messick said. The most important thing to do, he said, is to make sure people know the risks. That can help -- although some people don't care.

"Some chemist will just change the formula a little then it'll be cheap and easy again," said Sam. "I want to get high and if they make it illegal, I still will."

*This article was originally published in **The Seward Journal** and is reprinted here with permission.*

ALASKA STATE LEGISLATURE

Co-Chair:
House Finance Committee

Chair:
House Finance Subcommittees for;
Department of Public Safety
Department of Law

Member:
Legislative Council
Legislative Budget & Audit (alt)

Session:
Alaska State Capitol, Rm 515
Juneau, AK 99801-1182
Phone: (907) 465-4958
Fax: (907) 465-4928

District:
600 E. Railroad Ave.
Wasilla, AK 99654

BILL STOLTZE
STATE REPRESENTATIVE
Representative_Bill_Stoltze@legis.state.ak.us

MEMORANDUM

received
1/27/2012
12:09 PM

To: Representative Carl Gatto, Chair
House Judiciary

From: Representative Bill Stoltze, Co- Chair
House Finance Committee

Date: 01/27/2012

Re: **Hearing Request for HB 253- Cathinone Bath Salts**

I respectfully request that House Bill 253- Cathinone Bath Salts be scheduled for a hearing in the House Judiciary Committee.

Marketed as bath salts or plant food, synthetic cathinones pose a great threat to the community largely due to the fact they are inexpensive, accessible, and undetectable in most drug tests. Many use this drug as a legal alternative to cocaine, ecstasy, or methamphetamines. Without laws to halt such actions Alaskans could see an escalation in drug abuse.

HB 253 if passed, would make it unlawful throughout Alaska to sell, use, purchase, possess, manufacture, transport or deliver synthetic cathinones, the chemical compounds which are being marketed as "bath salts" and synthetic cocaine.

I appreciate your consideration.

27-LS1131\A.1
Luckhaupt
2/3/12

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 253

Page 2, line 11:

Delete "**methcathinone**"

Insert "**2-methylamino-1-phenylpropan-1-one, also known as methcathinone and cat**"

Page 2, following line 27:

Insert a new bill section to read:

"*** Sec. 2.** AS 11.71.140(b)(5) is repealed."

Renumber the following bill section accordingly.

Melanie Lesh

From: Ryan McKee
Sent: Friday, February 03, 2012 10:39 AM
To: Melanie Lesh
Subject: Public Testimony

Melanie,

We will have 1 person testifying , and will also be available for questions for HB 253 on Feb 8th.

- Orin Dym, the Forensic Laboratory Manager from the Crime Lab.
  907-269-5743
  Orin.dym@alaska.gov

Ryan

Melanie Lesh

From: Laughlin, Wilda J (HSS) <wilda.laughlin@alaska.gov>
Sent: Monday, February 06, 2012 2:20 PM
To: Ryan McKee; Melanie Lesh
Cc: Cooper, Michael P (HSS); Lewis, Jill (HSS)
Subject: HB 253 // cathinone bath salts

Please be advised that Dr. Michael Cooper, deputy state epidemiologist, will be calling in by teleconference to testify on HB 253, cathinone bath salts, on Wednesday, Feb. 8.

w.

Wilda J. Laughlin
Legislative Liaison, Dept. of Health and Social Services
Phone (907) 465-1613
Fax (907) 465-3068
Cell (907) 723-3802

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HOUSE BILL NO. 253

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE STOLTZE

Introduced: 1/6/12
Referred: Prefiled

A BILL

FOR AN ACT ENTITLED

"An Act classifying certain substances as schedule IIA controlled substances; and providing for an effective date."

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

*** Section 1.** AS 11.71.150(e) is amended to read:

(e) Schedule IIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) methamphetamine, its salts, isomers, and salts of its isomers;

(3) methylphenidate;

(4) phenmetrazine and its salts;

(5) fenethylline;

(6) N-ethylamphetamine;

(7) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(8) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(9) 4-methylaminorex, also known as 2-amino-4-methyl-5-phenyl-2-oxazoline;

(10) N,N-dimethylamphetamine, also known as N,N,alpha-trimethylybenzencethaneamine or N,N,alpha-trimethylphenethyline, its salts, optical isomers, and salts of optical isomers;

(11) cathinone;

(12) methcathinone, its salts, optical isomers, and salts of optical isomers;

(13) 4-methylmethcathinone, also known as mephedrone, its salts, isomers, and salts of isomers;

(14) 3,4-methylenedioxypyrovalerone, also known as MDPV, its salts, isomers, and salts of isomers;

(15) substituted cathinones, including any compound, except bupropion or a compound listed in another schedule, structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways:

(A) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(B) by substitution at the 3-position with an alkyl substituent;

(C) by substitution at the nitrogen atom with alkyl or dialkyl groups or by inclusion of the nitrogen atom in a cyclic structure.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

'Bath Salts' Drug Trend: Expert Q&A

Why 'bath salts' are dangerous, though not illegal in all states.

ByMatt McMillen
WebMD Feature

Reviewed byLaura J. Martin, MD

Editor's note: On Sept. 7, 2011, the U.S. Drug Enforcement Administration (DEA) invoked its "emergency scheduling authority" to control three synthetic stimulants -- mephedrone, MDPV, and methylone -- commonly called "bath salts" or "plant food" and marketed under such names as "Ivory Wave," "Purple Wave," Vanilla Sky," and "Bliss." The DEA plans to make possessing and selling these chemicals, or products that contain them, illegal in the United States.The emergency action will remain in effect for at least a year, during which time the government is expected to call for permanent control of the drugs.

A new designer drug known as "bath salts" has become increasingly popular and increasingly scary. Poison centers across the U.S. have reported growing numbers of calls about the synthetic stimulant, and more and more states are banning the drug. But as of now, there is no federal law prohibiting their sale.

Make no mistake: These are not bath salts like those you would use in your bath.

WebMD talked to Zane Horowitz, MD, an emergency room physician and medical director of the Oregon Poison Center, about what they are and why you should avoid them.

First of all, what are bath salts?

"The presumption is that most bath salts are MDPV, or methylenedioxypyrovalerone, although newer pyrovalerone derivatives are being made by illegal street chemists. Nobody really knows, because there is no way to test for these substances," Horowitz says.

Why are they called bath salts?

"It's confusing. Is this what we put in our bathtubs, like Epsom salts? No. But by marketing them as bath salts and labeling them 'not for human consumption,' they have been able to avoid them being specifically enumerated as illegal," Horowitz says.

Are bath salts illegal?

"You can find them in mini-marts and smoke shops sold as Ivory Wave, Bolivian Bath, and other names," Horowitz says. "The people who make these things have skirted the laws that make these types of things illegal. While several states have banned the sale of bath salts, ultimately it will have to be a federal law that labels these as a schedule 1 drug, which means it has no medicinal value but a high potential for abuse, and declare them illegal."

What do you experience when you take bath salts?

"Agitation, paranoia, hallucinations, chest pain, suicidality. It's a very scary stimulant that is out there. We get high blood pressure and increased pulse, but there's something more, something different that's causing these other extreme effects. But right now, there's no test to pick up this drug. The only way we know if someone has taken them is if they tell you they have.

The clinical presentation is similar to mephedrone [a chemical found in other designer drugs], with agitation, psychosis, and stimulatory effects. Both of these agents should be of concern, as severe agitated behavior, like an amphetamine overdose, has occurred.

A second concern is the ongoing suicidality in these patients, even after the stimulatory effects of the drugs have worn off. At least for MDPV, there have been a few highly publicized suicides a few days after their use," Horowitz says.

Are bath salts addictive? How are they taken?

"We don't know if they are addictive. We have not had enough long-term experience with it. Acute toxicity is the main problem. But many stimulants do cause a craving. The people who take them are very creative. They snort it, shoot it, mix it with food and drink," Horowitz says.

Bath salts are the latest example of designer drugs. Where do you see this trend going?

"That's right. They are part of a long line of other pills and substances that we call designer drugs. And drug makers will keep creating new combinations at home and in illicit labs," Horowitz says. "It's almost impossible to keep up. And the motivation for buying them is always the same: Drugs like these are new and below the radar, unlike named illegal drugs."

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer
Senate District O

SPONSOR STATEMENT FOR SB 140

"An Act classifying certain synthetic cathinones as schedule IIA controlled substances; and providing for an effective date."

SB 140 would classify certain synthetic cathinones, commonly known as synthetic cocaine and marketed as 'bath salts,' as a schedule IIA controlled substance.

Marketed as bath salts or plant food with names like 'Meow-Meow,' Vanilla Sky,' 'Ivory Snow,' and 'Bliss,' synthetic cathinones are inexpensive, accessible, and undetectable in most drug tests. Many users of this drug use them in combination with or as a legal alternative to cocaine, ecstasy or methamphetamines.

Drug effects include impaired perception, reduced motor control, disorientation, extreme paranoia and violent episodes. Synthetic cathinones are abused mainly by snorting and oral ingestion. The U.S. Drug Enforcement Administration, the U.S. Military, and the Municipality of Anchorage have all taken action to control or prohibit use of this drug.

According to the National Council of State Legislatures, as of October 24, 2011 there are 33 states that have adopted laws or have departmental rules banning chemical compounds associated with 'bath salts.' Seven states have legislation pending.

Should SB 140 pass, it would be unlawful throughout the State of Alaska to sell, use, purchase, possess, manufacture, transport or deliver synthetic cathinones, the chemical compounds which are being marketed as 'bath salts' and synthetic cocaine.

MUNICIPALITY OF ANCHORAGE

Office of the Mayor

Phone: 907-343-7100
FAX: 907-343-7180

Mayor Dan Sullivan

January 25, 2012

The Honorable Kevin Meyer
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: Senate Bill 140

Dear Senator Meyer,

Thank you for introducing Senate Bill 140, *"An Act classifying certain substances as schedule IIA controlled substances; and providing for an effective date."*

The Municipality of Anchorage fully supports the passage of SB 140. The use of cathinone and its derivatives (commonly referred to as "bath salts") has quickly become a significant health and public safety issue.

Due to the huge range in potency between the various compounds and products, municipal first responders have encountered users of these drugs having severe reactions, including from bizarre and dangerous behavior to unconsciousness. Users who operate machinery, especially motor vehicles, have had significant accidents and present a danger to others that is on par with operating under the influence of alcohol.

In response, the Municipality has enacted its own local code, but does not have the jurisdiction to deal with the influx of the drug on a state-wide basis or impose the kinds of meaningful criminal sentences that are needed to stem the manufacture, distribution, and sale of these drugs.

Thank you again for introducing this important legislation.

Sincerely,

Dan Sullivan
Mayor

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

January 24, 2012

Senator Kevin Meyer
Alaska State Capitol, Room 103
Juneau, Alaska 99801

Re: Letter of Support for SB 140

Dear Senator Meyer,

The Advisory Board on Alcoholism and Drug Abuse appreciates your recognition of the need to regulate cathinone and similar substances marketed as "bath salts." These substances pose a serious risk to the health and welfare of Alaskans and should be Schedule IIA controlled substances.

Cathinone, methcathinone, and methylenedioxypyrovalerone (MPDV) produce amphetamine-like effects. Commonly marketed as "bath salts," these drugs can be inhaled, ingested, injected, or smoked. The expected effect is a sort of euphoria, but these chemicals also have dangerous effects. "Bath salts" substances have been reported to cause extreme anxiety and paranoia, delusional thinking, visual and auditory hallucinations leading to violent outbursts, self-mutilation, and suicidal thoughts and actions.

Nationwide, there were 6,072 calls to poison centers about designer drugs labeled as "bath salts" in 2011.[1] In 2010, that number was 303 calls.[2] This reflects the rapid increase in use of these synthetic drugs in the United States. In response, the U.S. Drug Enforcement Administration invoked its emergency scheduling powers in September 2011 to make possession and sale of mephedrone, MDPV, and methylone (common "bath salts" substances") illegal. This emergency regulation will expire in September 2012. State and city governments across the country are taking similar action through emergency powers, ordinances, and legislation in an effort to protect health and safety.[3]

The Advisory Board on Alcoholism and Drug Abuse supports SB 140 and we appreciate your work on behalf of Alaskans.

Sincerely,

Robert Coghill, Jr. Chairman
Advisory Board on Alcoholism and Drug Abuse

---

[1] American Association of Poison Control Centers report on "closed human exposures calls to poison centers about exposures to bath salts as of December 31, 2011," updated January 5, 2012. Available online at http://www.aapcc.org/dnn/Portals/0/Bath%20Salts%20Data%20for%20Website%201.5.2012.pdf.

[2] *Id.*

[3] Nevada's Board of Pharmacy just restricted "bath salts" substances through its emergency powers in January, 2012. Maine, Louisiana, Kentucky, Ohio, Delaware, and nearly three-quarters of U.S. states have acted to prohibit sale and/or possession of these substances. The Municipality of Anchorage passed an ordinance in October 2011 to prohibit manufacture, sale, and possession of these substances.

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Alaska lawmakers seek inexpensive crime solutions

By AUSTIN BAIRD
(01/24/12 13:23:29)

Lawmakers, prosecutors and law enforcement officers from around the state gathered Tuesday for a two-day summit that aims to identify cost-effective ways to fight crime and improve public safety across Alaska.

The Senate Judiciary Committee opened the summit with a presentation from Annie Pennucci, a researcher for the Washington State Institute for Public Policy. The institute is nonpartisan and established by the Washington Legislature to study the economic impacts of issues important to the state.

Pennucci told the bipartisan committee that a summary of 66 studies of 3- and 4-year-old low-income children she helped conduct for the Washington Legislature show a direct correlation between preschool for low-income children and lower crime rates.

Everything from high school graduation rates to out-of-home placement rates are also correlated, she said.

"It bends the curve significantly," said the committee's chairman, Sen. Hollis French, D-Anchorage, who has sponsored legislation that would expand education opportunities to pre-elementary aged children. French said early childhood education is not a cure-all but a part of an overall solution.

Other topics of discussion at the summit included how communities of varying sizes, from Anchorage to Palmer to rural villages, have fared as budget cuts have chiseled away resources available to departments.

Anchorage Police Chief Mark Mew asked the state for renewed support of community policing, for which a grant recently expired, and for other programs that he said have been effective at curtailing crime in Anchorage.

Another focus was on so-called "bath salts," which are synthetic drugs legally sold over-the-counter that mimic the highs from cocaine, ecstasy and other illicit substances. Bath salts have become a focus for lawmakers and will be the subject of a hearing before the committee Friday.

The legislature banned synthetic marijuana last year, and that was helpful, Mew said. "We have a misdemeanor ordinance (in Anchorage) for bath salts, but it really needs to be a felony," he said.

It's not clear whether any special initiatives or new legislation will result from the summit, but French has said it's important to bring together criminal justice experts to get a better sense of what is happening in the system as a way of considering catalysts for change.

The summit is scheduled to continue Wednesday, with speakers slated to include Walt Monegan, CEO of the Alaska Native Justice Center, and Nancy Haag of Stand Together Against Rape.

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Dangerous new designer drugs are showing up in Alaska

'BATH SALTS': Side effects can include seizures, paranoia, death.

By ROSEMARY SHINOHARA

(11/15/11 22:07:24)

A year after Anchorage led the state in outlawing a new street drug known as Spice, K2 or Spike, another set of new so-called "designer" drugs that are at least as dangerous is appearing in Alaska, a city prosecutor says.

The Spice-type drugs are synthetic marijuana.

The new drugs are chemical stimulants that mimic the effects of cocaine, ecstasy and methamphetamine, and are peddled under names like Pure Ivory, White Rush and Synergy.

The drugs are sometimes sold under the guise of "bath salts" or "plant food." Ingesting the powders and crystals causes side effects such as delusions, seizures, teeth grinding, paranoia, heart palpitations, blue extremities and, in some cases, death, assistant city prosecutor Jennifer Messick told Anchorage Assembly members at a work session earlier this month.

The Assembly last week made it illegal to sell, use or possess the chemical compounds found in the "bath salt" group of drugs in Anchorage. The federal Drug Enforcement Administration in October added the ingredients of the synthetic drugs to a list of controlled substances that are illegal to sell or possess in the United States.

Sen. Kevin Meyer, R-Anchorage, is planning to introduce a proposed state law banning the chemicals used in bath salts too.

A state law will help because the federal government "may not prosecute many of the lower-level cases that we and the state can," said Anchorage city attorney Dennis Wheeler.

But no one thinks these laws will totally erase the threat. The new rules are difficult to enforce and fresh versions of designer drugs can appear at any time.

"In just over a year, we went from five compounds in Spice to 400-something substances out there as of July," Messick said.

ARE THE DRUGS HERE?

So what's the evidence that the bath salt drugs -- synthetic stimulants Mephedrone, Methylone and a third known as MDPV -- are actually in Alaska?

Providence Alaska Medical Center psychiatric nurse practitioner Heather Brock said this year she's seen about one person a month who is sick enough from the bath salt family of drugs to be admitted to the hospital. They've either told her what they've taken or they've brought in the package, she said.

Other users may have just been seen in the emergency room.

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Senate committee to consider ban of 'bath salt' intoxicants

By AUSTIN BAIRD
Associated Press
Published: January 27th, 2012 08:16 AM
Last Modified: January 27th, 2012 08:24 AM

JUNEAU -- Alaska legislators today were to take up a bill that would ban a few substances sold over the counter and marketed as bath salts, which are a variety of chemical compounds that mimic effects of popular illicit drugs like cocaine and ecstasy.

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The Senate Judiciary Committee was to hear SB140, a bill co-sponsored by Republicans Kevin Meyer and Cathy Giessel, both of Anchorage, and Democrat Donald Olson from Nome.

Long-term side effects of bath salts are relatively unknown because few studies have been conducted.

The Alaska Legislature criminalized the similarly unknown synthetic marijuana last year, which was often packaged as incense and sold over the counter. Anchorage Police Chief Mark Mew said the same is needed for bath salts during this session.

"We have a misdemeanor ordinance (in Anchorage) for bath salts, but it really needs to be a felony," which would be the effect of listing bath salts on the state's schedule of controlled substances, he said.

Legislators in statehouses across the country are pushing for criminalization of the chemical substances that compose bath salts, and a federal bill cleared the U.S. House and is pending in the U.S. Senate Committee on the Judiciary. The Drug Enforcement Agency also exercised emergency scheduling authority last October to control some of the substances in question while federal legislation develops.

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Dr. Jeff Baurick, who works in the emergency room at Alaska Regional Hospital, said he's had one bath salt case in the past few months and has heard of a few other patients seen by one of the nine other ER doctors there.

People snort or swallow the drugs or even put them up their rectums, Brock said.

"People are confused, agitated, they have increased heart rates, a couple cases of arrhythmia," she said. "They're very paranoid, like you would see in any kind of stimulant."

The effects only last a few hours, she said. That leads to another problem.

"Because they're fast-on, fast-off, people are more likely to re-dose, which makes it more likely to overdose," Brock said.

There's no antidote, she said. Medical providers simply treat the symptoms: "You address the heart rate, the fever, the anxiety."

In at least one case, a person mixed a bath salt drug with cocaine, causing a bad reaction, she said. She couldn't be more specific due to privacy rules.

Messick said the drugs are appearing locally "quite a bit."

She said between Anchorage police and Valley emergency and law enforcement officials, reports are made just about daily that they're dealing with people showing the symptoms of having used the bath salt compounds.

In her talks in Anchorage schools, Messick has found students are aware of the new variety of drugs. But earlier this month, a School District spokeswoman said the district has had no incidents involving students.

"We may be getting on the front end of it," Anchorage Police Chief Mark Mew said. "We're looking at a situation where the evidence is anecdotal."

WHERE TO GET THEM

Bath salts are accessible through the Internet and are believed to have been available in some tobacco shops, Messick said. When she visited a couple of tobacco shops in East Anchorage after the feds made bath salts illegal last month, though, the store representatives said they didn't have any.

"We could go to jail," one of them told her.

But both shops offered packets of material called Spice, she said. The packets could have been synthetic marijuana, which both the municipality and the state made illegal over the past year.

The fact that Spice is still on the shelves illustrates another problem: enforcement.

Whether stores that are still offering items marketed as Spice are breaking the law is "open for debate," Messick said.

The ingredients on so-called Spice packets aren't listed and it's unclear if they contain the specific ingredients banned under state or city law.

The city law "casts a wide net if you market anything with the same effect," Messick said. "I think the concern is whether it's vague and overbroad."

Another enforcement issue: The city doesn't have a field test kit for either the synthetic marijuana drugs or the latest, so-called bath salt drugs, Chief Mew said. A field test would give officers probable cause to arrest someone for use of the drugs.

Users could still be arrested for driving under the influence under a city law that makes it illegal to drive if a person is impaired by any substance, Messick said.

And test kits might become available before long. Messick said a company in the Netherlands is producing them.

Reach Rosemary Shinohara at rshinohara@adn.com or 257-4340.

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HB

255

<TARGET><BILL>HB 255</BILL><SUBJECT>HB 255</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: January 27, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 2/10/12

The JUDICIARY Committee considered: **HB 255**

HOUSE BILL NO. 255
"An Act prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle."

HB 255-PROHIBIT DIALING OR TEXTING WHILE DRIVING

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB255 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

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GRUENBERG	Gruenberg	✓			
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MEMORANDUM February 9, 2012

SUBJECT: Definition of "installed" in CSHB 255(JUD)
(Work Order No. 27-LS1165\X)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Pamela Finley
Revisor of Statutes

Enclosed is the referenced draft CS. Please note that page 3, line 19 (the definition of "installed") makes no sense. If the definition at page 3, lines 19 - 20 is substituted for "installed" in subsection (d), that subsection would read as follows:

> (d) Subsections (a) and (b) of this section do not apply to devices and equipment **equipment in an emergency vehicle, whether permanent or removable** [INSTALLED]in an emergency vehicle **or to the viewing of authorized screen devices by police, fire, or emergency medical service personnel if the user of the equipment or device reasonably believes the information on the device is necessary to respond to a health, safety, or criminal matter**. In this subsection,
>
> **(1)** "emergency vehicle" means a police, fire, or emergency medical service vehicle**;**
>
> **(2) "installed" means equipment in an emergency vehicle, whether permanent or removable**.

If the intent is to exempt all devices and equipment in an emergency vehicle, whether permanent or removable, it would be better to say so directly and delete "installed". If you want changes to the CS, please let the drafter, Doug Gardner, know. (I am writing this instead of him only because he is very busy at the moment.)

PF:ljw
12-108.ljw

Enclosure

cc: Doug Gardner

27-LS1165\X
Gardner
2/8/12

adopted 2/10/12

CS FOR HOUSE BILL NO. 255(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GARA, THOMAS, GATTO, PEGGY WILSON, GRUENBERG, AND TUCK, Costello, Gardner

A BILL

FOR AN ACT ENTITLED

"An Act relating to screen devices in motor vehicles; prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle; and providing for an effective date."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is to conform and clarify that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner prohibited by AS 28.35.161 has been illegal since AS 28.35.161 was enacted and that the December 1, 2011, magistrate's decision in State v. Adams, 3KN-11-719 CR, is legally incorrect.

*** Sec. 2.** AS 28.35.161(a) is amended to read:

(a) A person commits the crime of driving **<u>while texting, while</u>**

<u>New Text Underlined</u> [DELETED TEXT BRACKETED]

communicating on a computer, or while [WITH] a screen device **is** operating if [(1)] the person is driving a motor vehicle**, and**

(1) [; (2)] the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion**, and** [; AND (3)] the monitor or visual display is operating while the person is driving**; or**

(2) the person is reading or typing a text message or other nonvoice message or communication on a cellular telephone, personal data assistant, computer, or any other similar means capable of providing a visual display that is in the view of the driver in a normal driving position while the vehicle is in motion and while the person is driving.

*** Sec. 3.** AS 28.35.161(b) is amended to read:

(b) A person may not install or alter equipment described in **(a)** [(a)(2)] of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

*** Sec. 4.** AS 28.35.161(c) is amended to read:

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for **voice** [VERBAL] communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

*** Sec. 5.** AS 28.35.161(d) is amended to read:

(d) Subsections (a) and (b) of this section do not apply to devices and equipment installed in an emergency vehicle **or to the viewing of authorized screen devices by police, fire, or emergency medical service personnel if the user of the equipment or device reasonably believes the information on the device is necessary to respond to a health, safety, or criminal matter**. In this subsection,

(1) "emergency vehicle" means a police, fire, or emergency medical service vehicle**;**

(2) "installed" means equipment in an emergency vehicle, whether permanent or removable.

*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

27-LS1165\X.1
Finley/Gardner
2/9/12

passed

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 255(JUD), Draft Version "X"

Page 3, line 13, following "vehicle":

Insert "**, whether removable or permanently installed,**"

Page 3, line 17:

Delete "**(1)**"

Page 3, lines 18 - 20:

Delete "**;**

(2) "installed" means equipment in an emergency vehicle, whether permanent or removable"

2/10/12

27-LS1165\X.2
Finley/Gardner
2/10/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 255(JUD), Draft Version "X"

Page 3, line 13, following "vehicle":

Insert "**, whether removable or permanently installed,**"

Page 3, line 17:

Delete "**(1)**"

Page 3, lines 18 - 20:

Delete "**;**

(2) "installed" means equipment in an emergency vehicle, whether permanent or removable"

27-LS1165\D.1
Gardner
2/7/12

Rep Gruenberg
M Amdt. 1
Obj. removed
Holmes

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 255( ), Draft Version "D"

Page 1, lines 6 - 12:

Delete all material and insert:

"* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is to conform and clarify that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner prohibited by AS 28.35.161 has been illegal since AS 28.35.161 was enacted and that the December 1, 2011, magistrate's decision in State v. Adams, 3KN-11-719 CR, is legally incorrect."

27-LS1165\D.4
Gardner
2/8/12

Amdt. 2

Maf: M

A M E N D M E N T

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 255( ), Draft Version "D"

withdrawn

Page 2, line 11, following "**driving**":

Insert "**or takes an affirmative act to access such data**"

27-LS1165\D.5
Gardner
2/8/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 255( ), Draft Version "D"

Amdt. 3
OK

Page 1, line 1:

Delete "**and**"

Page 1, line 4, following "**vehicle**":

Insert "**; and providing for an effective date**"

Page 3, following line 20:

Insert a new bill section to read:

"*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c)."

27-LS1165\X
Gardner
2/8/12

CS FOR HOUSE BILL NO. 255(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GARA, THOMAS, GATTO, PEGGY WILSON, GRUENBERG, AND TUCK, Costello, Gardner

A BILL

FOR AN ACT ENTITLED

"An Act relating to screen devices in motor vehicles; prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle; and providing for an effective date."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is to conform and clarify that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner prohibited by AS 28.35.161 has been illegal since AS 28.35.161 was enacted and that the December 1, 2011, magistrate's decision in State v. Adams, 3KN-11-719 CR, is legally incorrect.

*** Sec. 2.** AS 28.35.161(a) is amended to read:

(a) A person commits the crime of driving **<u>while texting, while</u>**

communicating on a computer, or while [WITH] a screen device **is** operating if [(1)] the person is driving a motor vehicle**, and**

(1) [; (2)] the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion**, and** [; AND (3)] the monitor or visual display is operating while the person is driving**; or**

(2) the person is reading or typing a text message or other nonvoice message or communication on a cellular telephone, personal data assistant, computer, or any other similar means capable of providing a visual display that is in the view of the driver in a normal driving position while the vehicle is in motion and while the person is driving.

* **Sec. 3.** AS 28.35.161(b) is amended to read:

(b) A person may not install or alter equipment described in **(a)** [(a)(2)] of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

* **Sec. 4.** AS 28.35.161(c) is amended to read:

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for **voice** [VERBAL] communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

*** Sec. 5.** AS 28.35.161(d) is amended to read:

(d) Subsections (a) and (b) of this section do not apply to devices and equipment installed in an emergency vehicle **or to the viewing of authorized screen devices by police, fire, or emergency medical service personnel if the user of the equipment or device reasonably believes the information on the device is necessary to respond to a health, safety, or criminal matter**. In this subsection,

(1) "emergency vehicle" means a police, fire, or emergency medical service vehicle**;**

(2) "installed" means equipment in an emergency vehicle, whether permanent or removable.

*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BILL THOMAS

House Bill 255
Sponsor Statement

Alaska's Ban on Texting, and Other Typing and Reading Words on Video Screens.

In December of 2011 one court ruled that Alaska's current law, which bans looking at video screens and increases the criminal penalties for injuries when they are caused by that conduct, was not worded clearly. Other courts have indicated they may rule similarly. The ruling stated that the current law did not bar texting while driving a moving vehicle.

This bi-partisan legislation reestablishes what the 2008 Legislature intended – that typing or reading messages on a video screen is covered by Alaska law as criminal conduct. It is widely recognized that texting while driving a vehicle can kill or severely injure innocent people, as well as the driver. This bill is crafted to remain consistent with the existing legislation. It exempts certain emergency uses and mapping devices, and simply adds that the law passed in 2008 banning using video screens in a moving vehicle also includes a ban on typing or reading on a computer, cell phone, or other video or computer screen in a moving vehicle. The language is written so that similar activities on social media sites will be covered, and prohibited while people are driving a vehicle.

The bill recognizes that other legislators have filed legislation on a separate subject – talking on and dialing cell phones while driving. Alaska currently has no per se ban on that activity. This bill does not address that issue at all. It leaves the debate on that subject for the bills on that subject that have been filed. The bill is simply aimed at clarifying the law passed in 2008 so that activity such as texting or reading texts is banned.

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501 • (907) 269-0106 • Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

convicted under (d) of this section. This subsection does not apply to a lessor of a vehicle if the lessor keeps a record of the name and address of the lessee. A violation of this subsection may not result in the loss of a driver's license or privilege to drive and does not constitute grounds for assessment of demerit points under AS 28.15.221 — 28.15.261. This subsection does not prohibit or limit the prosecution of a vehicle driver for violating (a) or (b) of this section. (§ 1 ch 8 SLA 1986; am § 10 ch 76 SLA 1987)

Revisor's notes. — In 2006, in (e) of this section, "AS 28.90.010(d)" was substituted for "AS 28.40.050(d)" to reflect the 2006 renumbering of AS 28.40.050.

Opinions of attorney general. — The 1987 amendment to this section, providing that the owner or lessee of an offending vehicle will now be guilty of an infraction, would be likely to survive constitutional challenge. Although generally a person may not be found guilty of an offense unless he or she acts with a "culpable mental state," AS 11.81.600(b)(2) provides that no culpable mental state need be proven if the legislature intended to "dispense with" such a requirement, and the legislature so intended here. June 11, 1987, Op. Att'y Gen.

Sec. 28.35.150. Unlawful to interfere with or destroy official traffic control device or highway construction; action by state for damages. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.155. Operation of vehicle with certain tires prohibited. (a) It is unlawful to operate a motor vehicle with studded tires or tires with chains attached on a paved highway or road from May 1 through September 15, inclusive, north of 60 North Latitude and from April 15 through September 30, inclusive, south of 60 North Latitude, except that at any latitude on a paved portion of the Sterling Highway a person may not operate a motor vehicle with studded tires or tires with chains attached from May 1 through September 15, inclusive. The commissioner of public safety shall by emergency order provide for additional lawful operating periods based on unusual seasonal or weather conditions. An emergency order adopted under this section is not subject to AS 44.62 (Administrative Procedure Act). Upon application, a special individual traction permit may be issued by the Department of Administration allowing the operation of a motor vehicle with studded tires or chains at any time at the discretion of the vehicle owner. The fee for the special individual permit is one-third of the biennial registration fee applicable to that class of vehicle under AS 28.10.421. The department may provide an appropriate sticker or other device identifying the vehicle to which the permit applies.

(b) In this section, "studded tire" means a tire with metal studs or spikes imbedded in the periphery of the tire surface, and protruding not more than one-fourth inch from the tire surface. (§ 9 ch 241 SLA 1976; am § 29 ch 94 SLA 1980; am § 1 ch 22 SLA 1996; am § 16 ch 44 SLA 1996; am E.O. No. 99 § 61 (1997))

Cross references. — For transitional provisions that relate to the amendments to subsection (a) made by § 16, ch. 44, SLA 1996, see § 20, ch. 44, 1996 in the Temporary and Special Acts.

Sec. 28.35.160. Unlawful injury to or destruction of traffic regulations or guidance device. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.161. Driving a motor vehicle with a screen device operating; unlawful installation of television, monitor, or similar device. (a) A person commits the crime of driving with a screen device operating if

(1) the person is driving a motor vehicle;

(2) the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion; and

(3) the monitor or visual display is operating while the person is driving.

(b) A person may not install or alter equipment described in (a)(2) of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for verbal communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

(d) Subsections (a) and (b) of this section do not apply to devices and equipment installed in an emergency vehicle. In this subsection, "emergency vehicle" means a police, fire, or emergency medical service vehicle.

(e) It is an affirmative defense to a prosecution under (b) of this section that the equipment installed or altered includes a device that, when the motor vehicle is being driven, disables the equipment for all uses except those described in (c) of this section.

(f) A person who violates (a) of this section is guilty of

(1) a class A misdemeanor, unless any of the circumstances described in (2) — (4) of this subsection apply;

(2) a class C felony if the person's driving causes physical injury to another person;

(3) a class B felony if the person's driving causes serious physical injury to another person;

(4) a class A felony if the person's driving causes the death of another person.

(g) A person who violates (b) of this section is guilty of a class A misdemeanor. (§ 1 ch 99 SLA 2008; am § 1 ch 42 SLA 2009)

Effect of amendments. — The 2009 amendment, effective September 18, 2009, added (c)(2)(I), and made related stylistic changes.

Effective dates. — Section 3, ch. 99, SLA 2008, makes this section effective September 1, 2008.

Sec. 28.35.170. Operation with more than three persons in driver's seat. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.175. Propane gas detector required. A person may not sell a recreational motor vehicle manufactured after 1990 or rent a recreational motor vehicle to another if the vehicle is equipped with a propane stove or propane heating device unless the vehicle is also equipped with a propane gas detector. (§ 1 ch 110 SLA 1990)

Sec. 28.35.180. Disobedience to signals of officer regulating traffic prohibited. A driver of a vehicle may not refuse to obey a lawful order or direction of a peace officer, firefighter, or authorized flagman regulating and directing traffic. A peace officer or

27-LS1165\D
Gardner
2/2/12

CS FOR HOUSE BILL NO. 255( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GARA, THOMAS, GATTO, PEGGY WILSON, GRUENBERG, AND TUCK, Costello, Gardner

A BILL

FOR AN ACT ENTITLED

"An Act relating to screen devices in motor vehicles; and prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is expressly to provide that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner proscribed by AS 28.35.161 is prohibited. It is the opinion of the legislature that the use of these devices in a manner proscribed by AS 28.35.161 is currently illegal in the state.

*** Sec. 2.** AS 28.35.161(a) is amended to read:

(a) A person commits the crime of driving **<u>while texting, while</u>**

communicating on a computer, or while [WITH] a screen device **is** operating if [(1)] the person is driving a motor vehicle**, and**

(1) [; (2)] the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion**, and** [; AND (3)] the monitor or visual display is operating while the person is driving**; or**

(2) the person is reading or typing a text message or other nonvoice message or communication on a cellular telephone, personal data assistant, computer, or any other similar means capable of providing a visual display that is in the view of the driver in a normal driving position while the vehicle is in motion and while the person is driving.

*** Sec. 3.** AS 28.35.161(b) is amended to read:

(b) A person may not install or alter equipment described in **(a)** [(a)(2)] of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

*** Sec. 4.** AS 28.35.161(c) is amended to read:

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for **voice** [VERBAL] communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

* **Sec. 5.** AS 28.35.161(d) is amended to read:

(d) Subsections (a) and (b) of this section do not apply to devices and equipment installed in an emergency vehicle **or to the viewing of authorized screen devices by police, fire, or emergency medical service personnel if the user of the equipment or device reasonably believes the information on the device is necessary to respond to a health, safety, or criminal matter**. In this subsection,

(1) "emergency vehicle" means a police, fire, or emergency medical service vehicle**;** utility vehicle MEA,

(2) "installed" means equipment in an emergency vehicle, whether permanent or removable.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 17, 2012

SUBJECT: Sectional Analysis of HB 255 (Work Order No. 27-LS1165\I)

TO: Representative Les Gara
Attn: Rose Foley

FROM: Doug Gardner
Director

You have requested a sectional summary of HB 255. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Section one of the bill amends the uncodified law of Alaska by adding a new section providing for a statement of purpose by the legislature regarding the bill. In essence, the statement of purpose reflects that while the legislature is of the opinion that AS 28.35.161 currently prohibits the use of a cellular telephone, computer, personal data assistant or any other similar means for texting or communicating while driving a motor vehicle, that the purpose of the bill is to further clarify that use of these types of devices in the manner currently provided by AS 28.35.161, is prohibited conduct.

Section 2. Section two of the bill adds the phrase "while texting, while communicating on a computer" to AS 28.35.162(a) to clarify that texting or communicating on a computer is included as prohibited conduct by the existing language of the bill." Section two of the bill also splits the offense into two prosecution theories of prohibited conduct. The first theory utilizes the existing language of the statute regarding the prohibited conduct of driving a motor vehicle while the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of the driver in a normal driving position while the vehicle is in motion and the monitor or visual display is operating while the person is driving. The second prosecution theory added by the bill by adding a new subsection (a)(2) to AS 28.35.161, prohibits the conduct of driving a motor vehicle while the person is reading or typing a text message or other nonvoice communication on a cellular telephone, personal data assistant, computer or any other similar means capable of providing a visual display that is in view of the driver in a normal driving position while the vehicle is in motion and the person is driving.

Section 3. Section three amends the existing language of AS 28.35.161(b) to make the existing language of this subparagraph, which restricts installation of equipment set out in either AS 28.35.161(a)(1) or 28.38.161(a)(2), consistent with the additional language added by section two of the bill.

Section 4. This section of the bill replaces the existing use of the term "verbal" with "voice," to clarify that this bill continues, as AS 28.35.161 does at present, to allow the conduct of for example "voice" communication on a cellular telephone or other device, as distinguished from the existing prohibited conduct as clarified by section two of the bill, which includes texting, typing a text message or reading a text message, watching television etc., while driving.

DDG:plm
12-026.plm

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB255**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB255-DOA-OPA-1-20-2012
Title: Prohibit Dialing or Texting While Driving
Sponsor: entatives Gara, Thomas, Gatto, P.Wilson, Gruenberg, Tuck (
Requester: House Transportation

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 01/20/2012 11:45 a.m.
Approved by: John Cramer, Deputy Commissioner — Date: 1/20/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB255

Analysis

This bill prohibits the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle.

The agency is not anticipating a significant impact to the current case load or fiscal cost increase with the passage of the legislation. However, the Office of Public Advocacy will monitor for a future potential fiscal impact. Therefore, at this time, the Agency submits a zero impact fiscal note.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB255**
Fiscal Note Number
Publish Date

Identifier (file name) HB255-DOA-PDA-1-23-12
Title Prohibit Dialing or Texting While Driving
Sponsor Representatives Gara, Thomas, Gatto, P. Wilson
Requester House Transportation

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner, Public Defender — Phone 907 334-4414
Division Public Defender Agency — Date/Time 1/20/12 3:05 PM
Approved by John Cramer, Deputy Commissioner — Date 1/23/2012
Department of Administration

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB255
2012 LEGISLATIVE SESSION

Analysis

This bill amends AS 28.35.161(a) by adding language that specifically prohibits texting or the use of a cellular phone, data assistant, computer or other device for non-voice communication while operating a motor vehicle, unless specifically authorized under this statute. This crime carries a range of penalties from a class A misdemeanor to a class A felony. Under this statute persons convicted of texting while driving face potential penalties of up to one year of imprisonment for a class A misdemeanor, up to five years of imprisonment for a class C felony, up to 10 years of imprisonment for a class B felony and up to 20 years of imprisonment for a class A felony.

The Department of Law presently views the conduct addressed by this bill to be prohibited under the current statute. Accordingly, District Attorneys in various communities have brought charges for texting while driving. Judicial officers across the state, however, are split on whether texting and driving is prohibited by the current statute. In some communities where judicial officers have concluded that texting and driving is not covered by the current statute, District Attorneys are no longer pursuing charges for texting and driving.

Specifically prohibiting texting and driving will result in the prosecution of cases that are not currently prosecuted by the Department of Law. Additionally, the increased prosecution and awareness is expected to increase enforcement across the state. The Public Defender Agency cannot reliably predict how many additional cases will be prosecuted and require public counsel, however. The Agency anticipates that increased prosecution and enforcement will result in a fiscal impact on the Agency. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 255**
Fiscal Note Number
() Publish Date

Identifier (file name) HB255-DOC-OC-01-20-12
Title "An Act prohibiting the driver of a motor vehicle from
Sponsor Gara, Thomas, Gatto, P.Wilson, Gruenberg, Tuck
Requester House Transportation Committee

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director
Division Dept of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Dept of Corrections

Phone 907-465-3339
Date/Time 01/20/12 2:45pm
Date 1/20/2012

(Revised 11/18/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 255

Analysis

This legislation has little to no fiscal impact on the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 255**
Fiscal Note Number
() Publish Date

Identifier (file name) HB255-ACS-TRC-01-20-12
Title Prohibit Dialing or Texting While Driving
Sponsor Representative Gara
Requester

Dept. Affected Alaska Court System
Appropriation Trial Courts
Allocation
OMB Component Number 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version of fiscal note

Prepared by Doug Wooliver, Deputy Administrative Director
Division Alaska Court System
Approved by Doug Wooliver for Christine Johnson, Administrative Director
Alaska Court System

Phone 907-463-4750
Date/Time 1-20-12 @ 11:30 am
Date 1/20/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 255

Analysis

House Bill 255 amends AS 28.35.161(a) and other statutes to specifically ban texting while driving and communicating on a computer while driving. Because the current law banning driving with a screen device operating has generally be interpreted to include by inference a ban on the behaviors specifically banned in HB 255, the court system does not anticipate any fiscal impact from the passage of this bill.

ANCHORAGE FIRE DEPARTMENT

Headquarters
100 East 4th Avenue
Anchorage, Alaska 99501
Phone (907) 267-4936 / Fax (907) 267-4977

Dan Sullivan
Mayor

Mark S. Hall
Fire Chief

Representative Les Gara
State Capital Bldg. Room 500
Juneau, AK 99801-1182

Ref: Amendment HB255

Representative Gara,

The Anchorage Fire Department fully supports AS 28.35.161, which makes the use of electronic devices unlawful by the operator of a motor vehicle, and the amendments as proposed in HB 255. Specifically, the provision to permit the use of electronic equipment by emergency personnel when needed as part of emergency response is sufficient to continue safe and effective operations by the fire department. Further, the Anchorage Fire Department agrees that operators of emergency apparatus should be restricted to only information that is applicable to the emergency response and no other exclusions should be permitted. The amendments as proposed allowing emergency providers to view necessary information on a wireless screen while driving, but not type back to the sender will provide the ability for the Anchorage Fire Department to continue providing the best possible emergency response using the latest technology, while also reducing risk to the operators of emergency apparatus and other drivers on the roadway.

Sincerely,

Mark S. Hall
Fire Chief
Municipality Of Anchorage

LESSMEIER & WINTERS
LAWYERS - LLC

8390 AIRPORT BOULEVARD
SUITE 104
JUNEAU, ALASKA 99801

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February 7, 2012

The Honorable Les Gara
Alaska House of Representatives
State Capitol, Room 500
Juneau, Alaska 99801-1182

Re: State Farm Support for HB 255

Dear Representative Gara:

State Farm, the largest insurer of autos in Alaska, strongly supports HB 255, which prohibits drivers from reading or typing a text message or other non-voice message on cell phones, computers or personal data assistants. The bill clarifies this conduct is illegal in Alaska and provides for stiff penalties as a deterrent. Statistics establish without a doubt this bill will immediately begin to reduce accidents, reduce property damage, help to keep insurance costs down and most importantly save lives.

Please include this letter of support in your bill file and in all committee hearings. If we can provide you any further information or assistance, please let me know.

Sincerely,

Sheldon E. Winters
Lobbyist for State Farm Insurance Companies

SEW/lg
Gara 2-7-12 letter of support.wpd

convicted under (d) of this section. This subsection does not apply to a lessor of a vehicle if the lessor keeps a record of the name and address of the lessee. A violation of this subsection may not result in the loss of a driver's license or privilege to drive and does not constitute grounds for assessment of demerit points under AS 28.15.221 — 28.15.261. This subsection does not prohibit or limit the prosecution of a vehicle driver for violating (a) or (b) of this section. (§ 1 ch 8 SLA 1986; am § 10 ch 76 SLA 1987)

Revisor's notes. — In 2006, in (e) of this section, "AS 28.90.010(d)" was substituted for "AS 28.40.050(d)" to reflect the 2006 renumbering of AS 28.40.050.

Opinions of attorney general. — The 1987 amendment to this section, providing that the owner or lessee of an offending vehicle will now be guilty of an infraction, would be likely to survive constitutional challenge. Although generally a person may not be found guilty of an offense unless he or she acts with a "culpable mental state," AS 11.81.600(b)(2) provides that no culpable mental state need be proven if the legislature intended to "dispense with" such a requirement, and the legislature so intended here. June 11, 1987, Op. Att'y Gen.

Sec. 28.35.150. Unlawful to interfere with or destroy official traffic control device or highway construction; action by state for damages. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.155. Operation of vehicle with certain tires prohibited. (a) It is unlawful to operate a motor vehicle with studded tires or tires with chains attached on a paved highway or road from May 1 through September 15, inclusive, north of 60 North Latitude and from April 15 through September 30, inclusive, south of 60 North Latitude, except that at any latitude on a paved portion of the Sterling Highway a person may not operate a motor vehicle with studded tires or tires with chains attached from May 1 through September 15, inclusive. The commissioner of public safety shall by emergency order provide for additional lawful operating periods based on unusual seasonal or weather conditions. An emergency order adopted under this section is not subject to AS 44.62 (Administrative Procedure Act). Upon application, a special individual traction permit may be issued by the Department of Administration allowing the operation of a motor vehicle with studded tires or chains at any time at the discretion of the vehicle owner. The fee for the special individual permit is one-third of the biennial registration fee applicable to that class of vehicle under AS 28.10.421. The department may provide an appropriate sticker or other device identifying the vehicle to which the permit applies.

(b) In this section, "studded tire" means a tire with metal studs or spikes imbedded in the periphery of the tire surface, and protruding not more than one-fourth inch from the tire surface. (§ 9 ch 241 SLA 1976; am § 29 ch 94 SLA 1980; am § 1 ch 22 SLA 1996; am § 16 ch 44 SLA 1996; am E.O. No. 99 § 61 (1997))

Cross references. — For transitional provisions that relate to the amendments to subsection (a) made by § 16, ch. 44, SLA 1996, see § 20, ch. 44, 1996 in the Temporary and Special Acts.

Sec. 28.35.160. Unlawful injury to or destruction of traffic regulations or guidance device. [Repealed, § 25 ch 144 SLA 1977.]

Sec. 28.35.161. Driving a motor vehicle with a screen device operating; unlawful installation of television, monitor, or similar device. (a) A person commits the crime of driving with a screen device operating if

(1) the person is driving a motor vehicle;

(2) the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion; and

(3) the monitor or visual display is operating while the person is driving.

(b) A person may not install or alter equipment described in (a)(2) of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for verbal communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

(d) Subsections (a) and (b) of this section do not apply to devices and equipment installed in an emergency vehicle. In this subsection, "emergency vehicle" means a police, fire, or emergency medical service vehicle.

(e) It is an affirmative defense to a prosecution under (b) of this section that the equipment installed or altered includes a device that, when the motor vehicle is being driven, disables the equipment for all uses except those described in (c) of this section.

(f) A person who violates (a) of this section is guilty of

(1) a class A misdemeanor, unless any of the circumstances described in (2) — (4) of this subsection apply;

(2) a class C felony if the person's driving causes physical injury to another person;

(3) a class B felony if the person's driving causes serious physical injury to another person;

(4) a class A felony if the person's driving causes the death of another person.

(g) A person who violates (b) of this section is guilty of a class A misdemeanor. (§ 1 ch 99 SLA 2008; am § 1 ch 42 SLA 2009)

Effect of amendments. — The 2009 amendment, effective September 18, 2009, added (c)(2)(I), and made related stylistic changes.

Effective dates. — Section 3, ch. 99, SLA 2008, makes this section effective September 1, 2008.

Sec. 28.35.170. Operation with more than three persons in driver's seat. [Repealed, § 20 ch 241 SLA 1976.]

Sec. 28.35.175. Propane gas detector required. A person may not sell a recreational motor vehicle manufactured after 1990 or rent a recreational motor vehicle to another if the vehicle is equipped with a propane stove or propane heating device unless the vehicle is also equipped with a propane gas detector. (§ 1 ch 110 SLA 1990)

Sec. 28.35.180. Disobedience to signals of officer regulating traffic prohibited. A driver of a vehicle may not refuse to obey a lawful order or direction of a peace officer, firefighter, or authorized flagman regulating and directing traffic. A peace officer or

print

Texting while driving: Legislature should clear up ambiguous law

12.27.11 - 11:50 pm
Editorial

Texting while driving is foolish.

It's dangerous.

It shows willful disregard for the safety of others.

Alaska's legislators and Gov. Sean Parnell apparently agreed on all of that when they approved a bill in 2008 outlawing texting while driving. At least, that's what they thought they were doing.

It turns out the law, according to a couple of judges, doesn't actually use the words "texting while driving." That led a Kenai judge to dismiss a case brought against a 21-year-old driver who had been charged under the law. And a judge in Fairbanks has advised magistrates to not accept cases brought under the law because of some ambiguity.

No one can possibly argue that texting while driving should be a permissible practice.

The fastest way to clear this up is for the Legislature to quickly approve clear language during its next session, which opens in January. The state is appealing the decision of the Kenai judge, but the judicial process can consume quite a bit of time before an issue is resolved. The Legislature can act quicker.

And it should.

The U.S. Centers for Disease Control and Prevention found in a 2010 study that 9 percent of U.S. drivers reported they "regularly" or "fairly often" text or email while driving. The agency also noted "Texting while driving is especially dangerous because it combines visual, manual and cognitive distractions."

The Legislature has already had the debate on this topic. There's no need to rehash the issue.

What is needed is a quick fix and some clear language so we can reduce the prevalence of texting while driving.

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National Conference of State Legislatures

LEGISBRIEF

BRIEFING PAPERS ON THE IMPORTANT ISSUES OF THE DAY

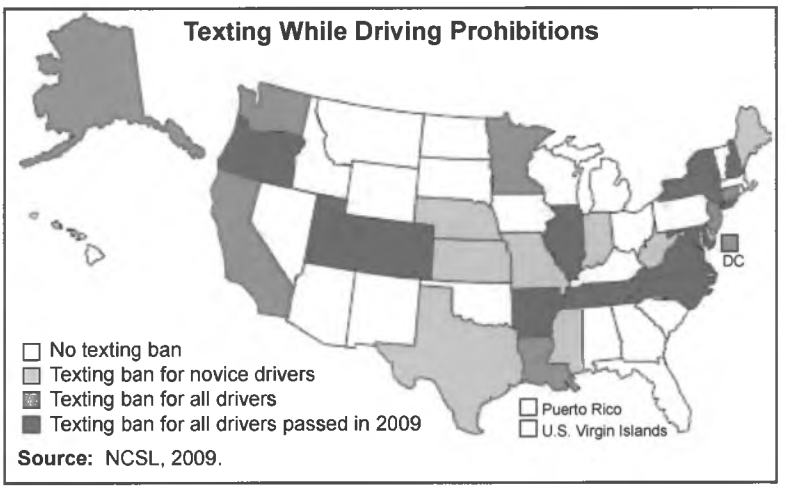
NOVEMBER-DECEMBER 2009 VOL. 17, NO. 48

Addressing Distracted Driving

By Melissa Savage

Driver inattention causes nearly 80 percent of vehicle crashes.

According to the National Highway Traffic Safety Administration, nearly 80 percent of vehicle crashes and 65 percent of near-crashes involve some form of driver inattention, often caused by tending to children in the back seat, talking with other passengers, or events happening outside the car. Talking on a cell phone and texting while driving have recently gained attention and have been the target of state legislation.



One trillion text messages were sent last year, according to the International Association for the Wireless Telecommunications Industry. That's up about 20 billion over the last three years. Many of these text messages were sent by drivers.

Only 20 states collect cell phone use information at crash scenes.

Tracking the problem can be difficult. Only 25 states collect cell phone use information at crash scenes. The National Occupant Protection Use Survey, conducted at randomly selected intersections by the U.S. Department of Transportation, found that 1 percent of observed drivers were manipulating a hand-held device, and 6 percent of observed drivers were using hand-held cell phones.

Studies using cameras and other tracking devices in personal vehicles found that drivers who send and receive text messages while driving had more than 20 times the risk of a crash or near crash than a driver who was not using a phone. Drivers who text messaged while driving took their eyes off the road for an average of 4.6 seconds during a 6-second interval; this equates to traveling the length of a football field at 55 mph without looking at the road. Talking on a cell phone while driving slightly increased the risk of a crash or near crash, but not to the same degree as text messaging.

No state completely bans phone use for all drivers.

State Action State distracted driving laws frequently are mislabeled as prohibitions on cell phones in the car. In fact, no state completely bans all phones for all drivers. Instead, state legislation usually addresses a range of issues, including particular wireless technologies and specific

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drivers. California, Connecticut, New York, New Jersey, Oregon, Washington and the District of Columbia prohibit all drivers from using hand-held phones. Other states have targeted only school bus drivers and teens. In 17 states and the District of Columbia, school bus drivers cannot use a cell phone while operating a bus; in 21 states and the District of Columbia, new drivers cannot use a cell phone while driving.

Every state has considered bills related to distracted driving.

Since 2000, legislatures in every state, the District of Columbia and Puerto Rico have considered bills related to distracted driving or, more specifically, to driver cell phone use. In 2009, legislators in 46 states considered 198 driver distraction bills. Maine's 2009 distracted driving law covers all types of distraction, not just cell phone use. The law defines "operation of a motor vehicle while distracted" as non-vehicle-operation activity by drivers; if they cannot safely operate the vehicle, they are violating the law.

The most common driver distraction measure—prohibiting texting while driving—was debated in 27 legislatures in 2009. As of September, 18 states and the District of Columbia outlaw text messaging while driving for all drivers. Eleven of those states passed laws in 2009.

Federal Action U.S. Transportation Secretary Ray LaHood convened a September 2009 summit to address the dangers of text messaging and other distractions behind the wheel. The summit, organized by the U.S. Department of Transportation's Research and Innovative Technology Administration, convened senior transportation officials; elected officials, including state legislators; safety advocates; law enforcement personnel; and academics to discuss how to combat distracted driving.

President Obama recently released Executive Order 13513, which prohibits federal employees from text messaging while driving vehicles owned, leased or rented by the federal government or privately owned vehicles on official government business. The order also prohibits federal employees from using federal government-supplied electronic equipment while driving. The Department of Transportation will propose three separate rulemakings to: 1) ban the use of cell phones and other electronic devices by rail operators; 2) restrict cell phone use and ban text messaging by truck and interstate bus operators; and 3) revoke the commercial driver's licenses of school bus drivers convicted of texting while driving.

Congress is considering a federal ban on texting while driving.

Congress also is considering a federal ban on texting while driving. Legislation introduced in both the U.S. House and Senate (H.R. 3535, S. 1536) would authorize withholding 25 percent of a state's highway funds if it fails to enact a law by a certain date to prohibit text messaging while driving. If passed, the federal legislation—Avoiding Life-Endangering and Reckless Texting by Drivers Act" (ALERT Drivers Act)—could authorize withholding a possible total of $4.4 billion from the states and the District of Columbia, based on 2009 apportionments.

A second bill (S. 1938) introduced in the U.S. Senate would create a new grant program to encourage states to enact legislation that bans texting while driving, requires drivers using a cell phone to use a hands-free device, and prohibits drivers under age 18 from using any cell phone while driving. The grant program would be funded by redirecting unused surpluses from the existing federal grant program to states for encouraging enactment of a primary seat belt law.

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Cell Phone Use and Texting While Driving Laws

Updated December 2011

A-C | D-H | I-L | M | N | O-R | S-U | V-W

STATES	HAND-HELD BAN	ALL CELL PHONE BAN	TEXTING BAN	ENFORCEMENT	CRASH DATA COLLECTION
Alabama	No	Drivers age 16 and 17 who have held an intermediate license for less than 6 months.	No	Not applicable	
Alaska	No	No	All drivers	Primary	Yes
Arizona	No	School bus drivers	No	Primary	
Arkansas	No	School bus drivers, drivers younger than 18	All drivers	Primary for texting by all drivers and cell phone use by school bus drivers; secondary for cell phone use by young drivers	Yes
California	All drivers	School and transit bus drivers and drivers younger than 18	All drivers	Primary	Yes
Colorado	No	Drivers younger than 18	All drivers	Primary	Yes
Connecticut	All drivers	Learner's permit holders, drivers younger than 18, and school bus drivers	All drivers	Primary	
Delaware	All drivers (effective 01/02/11)	Learner's permit and intermediate license holders and school bus drivers	All drivers (effective 01/02/11)	Primary	Yes
District of Columbia	All drivers	School bus drivers and learner's permit holders	All drivers	Primary	Yes
Florida	No	No	No	Not applicable	Yes
Georgia	Drivers younger than 18 (effective 07/01/10)	School bus drivers. Drivers younger than 18.	All drivers (effective 07/01/10)	Primary	Yes
Hawaii	No	No	No	Not applicable	
Idaho	No	No	No	Not applicable	Yes***
Illinois	Drivers in construction and school speed zones	Learner's permit holders younger than 19, drivers younger than 19, and school bus drivers	All drivers	Primary	Yes
Indiana	No	Drivers under the age of 18.	All drivers (effective 07/01/11).	Primary	Yes
Iowa	No	Learner's permit and intermediate license holders	All drivers	Secondary for texting	Yes
Kansas					

	No	Learner's permit and intermediate license holders	All drivers (effective 07/01/10)	Primary	Yes
Kentucky	No	Drivers younger than 18 (effective 07/13/10), School Bus Drivers.	All drivers (effective 07/13/10)	Primary (effective 07/13/10)	Yes
Louisiana	No	School bus drivers, learner's permit and intermediate license holders, drivers under age 18	All drivers	Primary	Yes
Maine**	No	Learner's permit and intermediate license holders	All drivers (effective 09/13/11)	Primary	Yes
Maryland	All drivers (effective 10/01/10), School Bus Drivers.	Learner's permit and intermediate license holders under 18. School bus drivers.	All drivers	Primary for texting	Yes
Massachusetts	Local option	School bus drivers, passenger bus drivers, drivers younger than 18.	All drivers (effective 09/30/10	Primary	Yes
Michigan	Local option	No	All drivers (effective 07/01/10)	Primary (effective 07/01/10)	Yes
Minnesota	No	School bus drivers, learner's permit holders, and provisional license holders during the first 12 months after licensing	All drivers	Primary	Yes
Mississippi	No	School bus drivers.	Learner's permit holders and intermediate license holders	Primary	Yes
Missouri	No	No	Drivers 21 years of age or younger	Primary	
Montana	No	No	No	Not applicable	Yes
Nebraska	No	Learner's permit and intermediate license holders younger than 18	Learner's permit and intermediate license holders younger than 18 All drivers	Secondary	Yes
Nevada	All drivers (effective 01/01/12)	No	All drivers (effective 01/01/12)	Not applicable	Yes
New Hampshire	No	No	All drivers	Primary	
New Jersey	All drivers	School bus drivers, and learner's permit and intermediate license holders	All drivers	Primary	Yes
New Mexico	Local option	Learners permit and intermediate license holders.	No	Not applicable	Yes
New York	All drivers	No	All drivers	Primary	Yes
North Carolina	No	Drivers younger than 18 and school bus drivers	All drivers	Primary	
North Dakota	Drivers younger than 18	Drivers younger than 18 (effective 01/01/12)	All drivers (effective 08/01/11)	Primary (effective 08/01/11)	Yes

	(effective 01/01/12)				
Ohio	Local option	No	No	Not applicable	
Oklahoma	Learner's permit and intermediate license holders, school bus drivers and public transit drivers (effective 11/01/10)	School Bus Drivers and Public Transit Drivers (effective 11/01/10).	Learner's permit holders, intermediate license holders, school bus drivers and public transit drivers (effective 11/01/10)	Primary	Yes
Oregon	All drivers	Drivers younger than 18	All drivers	Primary	Yes
Pennsylvania	Local option	No	All drivers	Primary	Yes
Rhode Island	No	School bus drivers and drivers younger than 18	All drivers	Primary	Yes
South Carolina	No	No	No	Not applicable	Yes***
South Dakota	No	No	No	Not applicable	Yes
Tennessee	No	School bus drivers, and learner's permit and intermediate license holders	All drivers	Primary	Yes
Texas	Drivers in school crossing zones	Bus drivers. Drivers younger than 18. (09/01/11)	Bus drivers when a passenger 17 and younger is present; intermediate license holders for first 12 months, drivers in school crossing zones	Primary	Yes
Utah	See footnote*	No	All drivers	Primary for texting; secondary for talking on hand-held phone	Yes
Vermont	No	Drivers younger than 18 shall not use any portable electronic device while driving.	All drivers	Primary	
Virgin Islands	Yes				Yes
Virginia	No	Drivers younger than 18 and school bus drivers	All drivers	Secondary; primary for school bus drivers	Yes
Washington	All drivers	Learners permit and intermediate license holders.	All drivers	Primary	Yes
West Virginia	No	Drivers younger than 18 who hold either a learner's permit or an intermediate license	Drivers younger than 18 who hold either a learner's permit or an intermediate license	Primary	
Wisconsin	No	No	All drivers (effective 12/01/10)	Primary (effective 12/01/10)	
Wyoming	No	No	All drivers	Primary	Yes
Total	All drivers: 9 states and District of Columbia.	School Bus drivers: 19 states and District of Columbia. Teen drivers: 30 states and District of Columbia.	All Drivers: 35 states and District of Columbia.	Primary for all drivers texting: 32.	36 and U.S. Virgin Islands and District of Columbia.

Source: AAA, Insurance Institute for Highway Safety, NCSL 2011.
Governor's Highway Safety Association

.* Utah considers speaking on a cell phone, without a hands-free device, to be an offense only if a driver is also committing some other moving violation (other than speeding).

** Maine has a law that makes driving while distracted a traffic infraction. 29-A M.R.S.A. Sec. 2117.

*** Listed as a part of contributing factors

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Kenai Judge Throws Out Texting-While-Driving Case

December 22, 2011 | By Matthew Simon | Channel 2 News

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KENAI, Alaska — A Kenai judge says the 2008 law intended to make texting-while-driving illegal is not enforceable.

The state's screen device law does not include the word "text." Lawmakers say by not mentioning texting in the part of the bill allowing people to talk on phones means it is an implied illegal action.

However, on Dec. 1 Magistrate Jennifer Wells cited the lack of the word texting as the specific reason for tossing out the case against a man charged with texting-while-driving.

"Whether the 25th Legislature did, indeed, intend the statute to prohibit texting, or whether the statute has gotten the reputation because legislators and law enforcement wish this were true, is perhaps irrelevant," Wells writes. "From the court's perspective, because A.S. 28.35.161 creates misdemeanor and felony penalties, it is particularly important that the statute be clear."

"And we all thought that included texting," says Rep. Les Gara, D-Anchorage. "We intended for that to include texting."

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If a state appeal of Wells ruling fails, Gara plans on making a proposal.

"Probably the smartest thing to do is, and the quickest way to fix this for the legislature, is find a criminal bill that's about to pass. Add an amendment to it that clarifies that we meant for texting to be illegal while you're driving."

The amendment, Gara says, would have language specifying all typing while driving is illegal.

For Rep. Mike Doogan, D-Anchorage, that is not good enough.

"All of the evidence we have is letting people talk on the cell phone while driving is a bad idea, Doogan says.

Like the National Transportation Safety Board, Doogan wants an all out ban on drivers using cell phones. His bill, and others like it, have stalled in Juneau.

"The first time there is a four car pileup that kills a bunch of people, that bill's going to pass," Doogan says. "But do I think it's going to pass before that, not really."

Gara says he is just trying to remove politics from the process by focusing on what lawmakers intended to originally accomplish.

"We should not allow people to text while they're driving," Gara says. "That leads to death. That leads to serious injury."

Anchorage Police Spokesperson Marleen Lammers says the department has only issued 10 screen violation tickets for this year.

Department of Law lawyers disagree with the Kenai judge. According to Gara their lawyers say they still intend to continue prosecuting cases, and most state courts will continue to hear them.

House Finance Co-Chair Bill Stolze, R-Chugiak, was one of the few lawmakers who voted against this law back in 2008.

"I voted that way because the law failed to keep up with changing technology," Stolze says. "I don't know if his (Gara) proposal is well thought out because we haven't been effective at trying to define technology."

House Speaker Mike Chenault, R-Nikiski, agrees with Gara, saying the law was intended to stop texting-while-driving and should be revised if there is any lingering confusion.

"I can see that happening, if there's a question in the law," Chenault says. "Rep. Gara's solution would work."

However, when it comes to other cell phone bills stalling in the legislature, Chenault says there are already existing laws protecting drivers.

"We don't need a law outlawing all cell phone use," Chenault says.

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Wed. Jan. 11 2:37 pm | 36° Overcast, light rain

Opinion

Tuesday, Jan. 10, 2012

It's time to explicitly ban texting while driving in Alaska

By **Charles Ward**

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A rather quirky decision by a Kenai judge last month created some wiggle room for those of us (yes, us, because I've done it too) who stupidly choose to text, email or Facebook while behind the wheel.

Fortunately, one of the first bills prefiled for consideration in the 2012 legislative session aims to tighten up any ambiguity in a law that certainly seemed on the surface to bar all kinds of silly behind-the-wheel activities, including texting.

Currently, Alaska state law prohibits driving if "the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion; and ... the monitor or visual display is operating while the person is driving." While the law does have exemptions — 11 in fact — for screens that provide information like the car's status, GPS information and people making voice calls, texting is not given an express exemption. For most folks, texting without looking at a screen is all but impossible. Siri and other voice recognition software might change that, and perhaps there are some touch typists for tiny keyboards, but those special cases are 1) unusual and 2) don't violate the intent of the law, which is to keep drivers' eyes on the road, not on an electronic device.

Nevertheless, Magistrate Jennifer Wells ruled the law as written wasn't enough to explicitly ban texting while driving, the Associated Press reported on Dec. 25, 2011. Usually, the terms "activist judge" and "legislating from the bench" are code for "the judge ruled against my side," but here, it seems Wells is reading vagueness into the law that just isn't there. The AP reported she believed the law was vague because California wrote two separate laws, one covering distracting screens and the other banning texting. Why Wells decided to be persuaded by California's solution to a

problem Alaska's legislators answered for their own state is for her to answer. But it strikes of reaching for a different solution to a problem the Alaska Legislature had already figured out. Simply put, anyone who looks at a screen to text should have run afoul of Alaska's statute, and been subject to a citation if caught.

Regardless of whether the ambiguity is real or imagined, hopefully it will no longer exist come the Legislature's adjournment in April (May? June?). Reps. Les Gara and Bill Thomas have introduced House Bill 255, which explicitly bans texting while driving. Hopefully, it winds its way through the Legislature this term and onto Gov. Sean Parnell's desk for his signature, because texting while driving is a practice I and every other driver needs to end. It creates a great danger — not only to ourselves, but others on the road.

Distracted driving is a contributing factor in half, or 3 million, of the traffic accidents in the U.S. in a given year, according to AAA. Car and Driver magazine conducted a June 2009 test that suggested texting while driving (even just reading the texts) can be more dangerous than drunken driving. There's simply no way to keep both eyes on the road when typing on a tiny keyboard or reading a screen, and the practice needs to not just stop, but be stopped by law enforcement because of the danger created to everyone on the road, not just the texter/driver.

Many driving laws are tradeoffs between safety and convenience, otherwise we'd be required to drive 10-ton roll cages at 5 mph down Egan Drive after a daily inspection by a state trooper. At one extreme, the National Transportation Safety Board recently called for the outright ban of all cell phone usage while driving — talking, texting, hands-free, the works. A complete ban would be overkill and would face incredibly tough sledding in state legislatures. But a ban on texting while driving would get rid of one of the worst road distractions out there, while still leaving the convenience of mobile communication as an option. Texting while driving has been banned once in Alaska, but if it takes different wording in a new law to make the prohibition stick, it's worth the Legislature's time. Let's hope we see quick action on the Gara/Thompson bill this term.

• Charles Ward is Deputy Managing Editor of the Juneau Empire. His views do not necessarily reflect the views of its editorial board.

0 0

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Police say driver in fatal accident was texting

By KYLE HOPKINS
(12/09/11 19:37:30)

The 19-year-old charged in a fatal Anchorage hit-and-run had been texting on her iPhone when her car struck and killed a village man on Easter Sunday, police say.

"OMG OMG OMG," Ashley Nichole Bashore texted to a friend shortly after the crash that knocked pedestrian Hubert Tunuchuk, 28, out of his shoes and into the intersection, according to paperwork filed Thursday by state prosecutors.

Instead of stopping or calling 911, prosecutors say, Bashore drove to a friend's house where she said her SUV had "hit a mangy Rottweiler without a collar."

Arrested Wednesday night following a months-long investigation, Bashore pleaded not guilty Thursday to three felonies: Criminally negligent homicide, leaving the scene of an accident and tampering with evidence.

The tampering charge stems from Bashore's attempt to delete text messages sent in the days after the April 24 collision, prosecutors say.

Bashore entered the courtroom in tears, attempting to hide her face with shackled hands. A bailiff warned a distraught woman in the gallery to stop trying to communicate with Bashore, who sat sobbing at the end of a line of prisoners. She pulled her prison shirt to her face, her fingernails painted a soft green.

Several of Tunuchuk's family members watched from the back of the room.

"Everybody's affected by what happened. Her family. My family. Everyone involved," said his aunt, Esther Stauffer. "I just feel so sorry for her. She's so young. If she had made the right choice when that happened, then perhaps we wouldn't be here today."

Esther's husband, Geoffrey, said he feels sorry for the 19-year-old too. But he's also angry.

"I feel like maybe she's just scared for herself. She tried to hide this and we lived the last six months not knowing if they were ever going to be able to charge the person," Geoffrey Stauffer said.

The village of Chefornak, a Yup'ik community of about 400 people in Western Alaska, sent Tunuchuk to the state vocational-technical school in Seward to study power plant operations. He was in Anchorage on April 24 with friends to celebrate Easter and planned to stay at the Stauffers' house, the couple said.

Early Sunday morning, Tunuchuk was intoxicated and walking behind two friends westbound on the Tudor Road overpass above the Seward Highway, according to a document filed by prosecutors. Had he been driving, his blood-alcohol level would have been above the legal limit, said traffic

investigator Michael Busey.

Tunuchuk was in the roadway, near the narrow sidewalk curb of the overpass, according to prosecutors. A Hyundai Sante Fe driven by Bashore approached heading eastbound, prosecutors say.

As Bashore came across the overpass, the front of the SUV struck Tunuchuk on the passenger side, prosecutors say. Tunuchuk was thrown into the intersection where the Seward Highway off-ramp meets Tudor. Busey could not say how far he traveled. At some point before or after the collision, the Sante Fe drove up onto the curb, the investigator said.

Someone called 911 at about 3:15 a.m. to report the incident, police said at the time.

Tunuchuk survived for about three hours, according to police.

"We thought at first he was going to make it. ... Unfortunately he just lost too much blood," said Geoffrey Stauffer, who along with his wife placed a cross at the scene of the crash. It's still there.

Police say Bashore fled the scene, driving to a friend's house and telling the story of hitting a dog. She smelled of marijuana following the accident, according to the police investigation. But Busey said there's no way to determine whether she was high the night of the collision.

Police had few leads at first, prosecutors said, but a piece of trim from the Sante Fe and a Crimestoppers tip soon led police to the vehicle. While Bashore is not the registered owner of the SUV, she drove it on a regular basis, Busey said.

Police seized Bashore's iPhone, finding that all texts sent before April 26, two days after the collision, had been deleted, according to prosecutors and police. A review of her phone records revealed Bashore was "likely texting immediately before or at the time of the collision," according to paperwork filed by prosecutors.

Bashore eventually told a friend that she had hit a person and did so because she was texting, according to the prosecutor's memo.

A profile for Bashore appears on exploretalent.com, a website where hopeful performers post resumes and photos. She wants to be a model and once appeared in a horror movie filmed in the Butte, the profile says. "I enjoy swimming, biking, instant messaging and texting with friends," the profile says.

An Anchorage grand jury handed up the three-count indictment of Bashore on Wednesday -- more than seven months after the hit-and-run. Busey and another traffic investigator arrested Bashore on Wednesday night at her home in West Anchorage, a police spokesman said.

Efforts to establish details of the crash, along with DNA testing, the phone seizure and review by prosecutors all contributed to the length of the investigation, Busey said.

"Putting it all together just takes time, unfortunately," he said.

Before her arrest in the hit-and-run, Bashore had no criminal record as an adult. Three months after the collision that killed Tunuchuk, she was ticketed for speeding more than 20 mph over the speed limit, court records show.

Tunuchuk was about two weeks from graduating from the power plant operations training, his aunt said. He had planned to spend a couple of months fishing in Bristol Bay before returning to the

village, she said.

Bashore's bail was set at $2,500 cash with a court-ordered third-party custodian required for release, a police spokesman said. Bashore is also forbidden from driving while on bail, he said.

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KTVA CBS 11 News Anchorage, AK

Print this article

Fairbanks Head-on Crash is Attributed to Drunken Texting

Originally printed at http://www.ktva.com/news/local/Fairbanks-Head-on-Crash-is-Attributed-to-Drunken-Texting--114660904.html

By Fairbanks Daily News-Miner
January 26, 2011

FAIRBANKS - An early morning head-on collision on Phillips Field Road is being blamed on an untimely text message by a suspected drunken driver.

Roger Dean Ostbloom, 40, was reportedly sending a text message from his phone on Sunday while driving his Ford F-150 pickup westbound and drifted into the oncoming lane of traffic. Ostbloom looked up and realized he was about to collide with a Chevy Avalanche.

Fairbanks Police arrived at 12:29 a.m. to find both vehicles with severe front-end damage.

Adam Strom, the driver of the Avalanche, suffered a broken femur in the accident and was taken to Fairbanks Memorial Hospital for surgery.

Ostbloom told police he was texting and saw the oncoming vehicle immediately before impact. Strom said he slowed in an attempt to avoid a collision.

Ostbloom, who was not hospitalized, also smelled of alcohol and had watery eyes and slurred speech, according to charging documents. A chemical test showed he had a breath-alcohol content of 0.097, slightly more than the legal limit of 0.08.

He was charged with driving a motor vehicle with a screen device operating, a law that makes texting while driving illegal. He was also charged with felony second-degree assault and driving under the influence of alcohol.

It's been illegal to text while driving in Alaska since 2008, but texting arrests remain uncommon in Alaska. Two local people were arrested for the offense last year, but neither was involved in an accident.

Cindy Cashen, administrator for the Alaska Highway Safety Office, said studies show texting while driving is a particularly risky form of "distracted driving." Authorities, however, are rarely in a position to blame texting as the primary cause of an accident.

"Unfortunately, the data doesn't show it's a very serious problem, but that's because it's very difficult to enforce," Cashen said.

Contact staff writer Jeff Richardson at 459-7518.

dailynews.com

nation and world

Many drivers admit to behavior they say is dangerous

By Ashley Halsey III
The Washington Post

Posted: 01/06/2012 12:00:00 AM PST

WASHINGTON — American drivers once again have identified their enemy as themselves.

When quizzed in an annual survey, they have admitted they often are guilty of the very behaviors they view as a menace on the road.

Almost everyone said that drunken driving was unacceptable, and three-quarters described drunken drivers as a serious threat. Yet 14 percent of them said that within the year, they had driven with an alcohol level probably near or above the legal limit, AAA's Foundation for Traffic Safety reported.

The June survey of 3,147 people used online technology said to create a representative cross-section of the U.S. population. People were asked about their driving habits in the month, or year, preceding that.

Cellphone use and sending text messages were dangerous, 94 percent said, but more than a third said they had read texts or e-mails while driving. A quarter of them also said they had sent messages. Two-thirds said they had talked on their cellphones, and a third said they do so regularly.

"This 'Do as I say, not as I do' attitude that persists among drivers needs to change before we can experience a traffic-safety culture where safe driving is the norm," Peter Kissinger, head of the foundation, said in a statement.

The foundation said that 74 percent of drivers felt it was unacceptable to go more than 15 mph above the speed limit on a freeway, but more than half admitted they had done that.

Although

94 percent said the same excessive speeding was unacceptable on a residential street, a quarter of them admitted they had gone more than 15 mph above the limit.

Nearly all drivers said that when a traffic light turns red, people should stop if they can do so safely, but 37 percent said they had run a red light.

Falling asleep behind the wheel was identified as a serious problem by 96 percent of drivers, but a third of drivers said they had nodded off at least once.

The safety value of a seat belt has been long established, and 86 percent of drivers agreed they should be used, but almost a quarter of drivers said they had not used one at least once in the month before they were surveyed. Nineteen percent said they had failed to do so more than once.

Recent federal data showed that 32,885 people

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were killed in vehicle crashes in 2010, the lowest number in 60 years. The drop has been attributed to better safety features in vehicles: seat-belt improvements, safer air bags, better vehicle stabilization, advancements in highway design, and high-profile campaigns against drunken and distracted driving.

"We are moving in the right direction when it comes to safety on our roads, but we need to do much more," Kissinger said. "Changing driver behaviors is not rocket science. It's harder."

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www.ktuu.com/news/alaska-state-texting-while-driving-bill-advances-20120210,0,3300942.story

ktuu.com

Alaska State Texting While Driving Bill Advances

By Jason Lamb

1:08 PM AKST, February 10, 2012

JUNEAU, Alaska

The state House Judiciary Committee approved a bill trying to clarify Alaska's driving while texting laws on Friday.

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According to committee chair Rep. Carl Gatto (R-Palmer), judges in Kenai and Fairbanks are not enforcing the current texting while driving law because it doesn't specifically mention "texting."

The new law includes the phrase "driving while texting."

Bill sponsor Rep. Les Gara (D-Anchorage) has said his new proposal would allow talking on the phone, including dialing a number and answering a call, but it would outlaw texting and associated activities like tweeting.

Texting while the car was stopped, like at a red light, would be allowed, Gara has said.

Rep. Bill Thomas (R-Haines) is also a prime sponsor of the bill.

Rep. Wes Keller (R-Wasilla) said he didn't approve of the bill, and recommended against its final passage in the House.

"Reading a text message is such a miniscule action -- to make it illegal, I just can't go there," Keller said.

He said if the texting while driving law was adopted, it may prompt outlawing other common in-car distractions like eating or adjusting the radio.

"There's just no chance," Gara said Friday in reaction to Keller's comments. He said "someone would be laughed out of the building" if they proposed bills that would ban things outlawing those types of distractions.

While Reps. Lance Pruitt (R-Anchorage) and Bob Lynn (R-Anchorage) expressed other concerns with the bill, they both recommended to pass the bill out of committee.

Reps. Max Gruenberg (D-Anchorage), Lindsey Holmes (D-Anchorage) and Gatto also voted to move the bill on to the Finance Committee.

Email Jason Lamb

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Melanie Lesh

From:	House Judiciary
Sent:	Thursday, February 09, 2012 1:21 PM
To:	Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Steve Thompson; Rep. Wes Keller; Rep. Max Gruenberg; James Waldo; 'Jane Pierson'; Jim Pound; Mike Coumbe; Mike Sica; Miles Brookes
Cc:	Rep. Les Gara; Rose Foley
Subject:	HB 255 Legislative Legal Svcs. interpretation of the definition of installed"
Attachments:	HB 255 Legislative Legal Services Memo.pdf; HB 255 CS X version.pdf

FYI: Please review the attached new (JUD) CS along with a memo from Pamela Finley, Legislative Legal, concerning a problem with the definition of "installed".

Melanie

Melanie Lesh
House Judiciary Committee Aide
Rep. Carl Gatto, Chair
State Capitol, Room 118
Juneau, Alaska 99801
(907)465-4990
Melanie.Lesh@legis.state.ak.us

Melanie Lesh

From: Rep. Les Gara
Sent: Thursday, February 09, 2012 12:30 PM
To: Rose Foley; Kaci Schroeder; Melanie Lesh; Rep. Carl Gatto; Rep. Bill Thomas; Rose Foley
Subject: Taxting amendments - solved I think.

Max is happy to withdraw his third amendment. That makes things a lot less complex. Thanks, Kaci, for your note. Bill and I had concerns witht hat amendment, as did some committee members. So that problem is gone.

Pam Finley, the revisor of statutes, is going to send us a technical clarification that has to do – not with substance – but how their drafting manual requires bills to be written. It actually relates to the former law's language, and not stuff we've added, but she just caught it.

It is along the lines of a memo she wrote to Rep. Gatto. I just spoke to her. Feel free to call if you want to know about that but, basically, she just wants to move the location of the word "installed" – that's the part of the law where we let emergency personnel use equipment that's been "installed" in a vehicle. We presume that if a first responder department installs equipment, it must be important to their work, so we let them use it.

But Max's bigger amendment is gone.

Hope we're all OK with that. I really don't care about Pam's amendment that much, but it seems proper to follow her advice on drafting style.

Thanks. Les

Any concerns?

From: Rose Foley
Sent: Thursday, February 09, 2012 11:20 AM
To: Rep. Les Gara
Subject: FW: "affirmative act"

From: Kaci Schroeder
Sent: Thursday, February 09, 2012 11:05 AM
To: Rose Foley
Subject: RE: "affirmative act"

It seems like it would be VERY difficult to narrow down to encompass the targeted activity. Also, I think Rep. Thomas thought the bill was supposed to be just a clarification of what was already in the books and this amendment seems to create a new crime (taking an affirmative act to check text messages). I think Rep. Pruitt and Rep. Holmes had excellent points in committee.

Rep. Thomas isn't too thrilled with that amendment.

The other amendments seemed very good. Maybe Rep. Gruenberg would be happy with 2 out of 3?

Kaci Schroeder Hotch
Chief of Staff
Office of Representative Thomas
State Capitol, Rm 505
Juneau, Alaska 99801
(907) 465-3732
fax: (907) 465-2652
"A certain amount of opposition is of great help to a man.
Kites rise against, not with the wind."
-John Neal

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

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REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

DATE: February 2, 2012

TO: Suzie Lowell, Chief Clerk
Alaska House of Representatives

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

RE: House Judiciary Committee Hearing Notice

House Judiciary Committee Agenda

Wednesday, February 8, 2012 at 1:00 p.m. in Room 120.

+*HB 253 CATHINONE BATH SALTS

+ HB 255 PROHIBIT DIALING OR TEXTING WHILE DRIVING

+*HB 299 CIVIL LEGAL SERVICES FUND

+*HB 303 SUSPENDED IMPOSITION OF SENTENCE

Friday, February 10, 2012 at 1:00 p.m. in Room 120

Bills Previously Heard

27-LS1165\D.1
Gardner
2/7/12

passed
2/8/12

AMENDMENT #1

OFFERED IN THE HOUSE

TO: CSHB 255( ), Draft Version "D"

Page 1, lines 6 - 12:

Delete all material and insert:

"*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is to conform and clarify that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner prohibited by AS 28.35.161 has been illegal since AS 28.35.161 was enacted and that the December 1, 2011, magistrate's decision in State v. Adams, 3KN-11-719 CR, is legally incorrect."

27-LS1165\D.4
Gardner
2/8/12

AMENDMENT #2 W/d

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 255( ), Draft Version "D"

Page 2, line 11, following "**driving**":

Insert "**or takes an affirmative act to access such data**"

27-LS1165\D.5
Gardner
2/8/12

AMENDMENT #3

Passed 2/8/12

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 255( ), Draft Version "D"

Page 1, line 1:

Delete "**and**"

Page 1, line 4, following "**vehicle**":

Insert "**; and providing for an effective date**"

Page 3, following line 20:

Insert a new bill section to read:

"*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c)."

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BILL THOMAS
(ADDITIONAL CO-SPONSORS)

Sponsor Statement

Alaska's Ban on Texting, and Other Typing and Reading Words on Video Screens.

In December of 2011 one court ruled that Alaska's current law, which bans looking at video screens and increases the criminal penalties for injuries when they are caused by that conduct, was not worded clearly. Other courts have indicated they may rule similarly. The ruling stated that the current law did not bar texting while driving a moving vehicle.

This bi-partisan legislation reestablishes what the 2008 Legislature intended – that typing or reading messages on a video screen is covered by Alaska law as criminal conduct. It is widely recognized that texting while driving a vehicle can kill or severely injure innocent people, as well as the driver. This bill is crafted to remain consistent with the existing legislation. It exempts certain emergency uses and mapping devices, and simply adds that the law passed in 2008 banning using video screens in a moving vehicle also includes a ban on typing or reading on a computer, cell phone, or other video or computer screen in a moving vehicle.

The bill recognizes that other legislators have filed legislation on a separate subject – talking on and dialing cell phones while driving. Alaska currently has no per se ban on that activity. This bill does not address that issue at all. It leaves the debate on that subject for the bills on that subject that have been filed. The bill is simply aimed at clarifying the law passed in 2008 so that activity such as texting or reading texts is banned. The language is written so that similar activities on social media sites will be covered, and prohibited while people are driving a vehicle.

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

HOUSE BILL NO. 255

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES GARA AND THOMAS

Introduced: 1/6/12
Referred: Prefiled

A BILL

FOR AN ACT ENTITLED

on an electronic device

"An Act prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is expressly to provide that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner proscribed by AS 28.35.161 is prohibited. It is the opinion of the legislature that the use of these devices in a manner proscribed by AS 28.35.161 is currently illegal in the state.

*** Sec. 2.** AS 28.35.161(a) is amended to read:

(a) A person commits the crime of driving **while texting, while communicating on a computer, or while** [WITH] a screen device **is** operating if [(1)]

the person is driving a motor vehicle**, and**

(1) [; (2)] the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion**, and** [; AND (3)] the monitor or visual display is operating while the person is driving**; or**

(2) the person is reading or typing a text message or other nonvoice message or communication on a cellular telephone, personal data assistant, computer, or any other similar means capable of providing a visual display that is in the view of the driver in a normal driving position while the vehicle is in motion and while the person is driving.

*** Sec. 3.** AS 28.35.161(b) is amended to read:

(b) A person may not install or alter equipment described in **(a)** [(a)(2)] of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

*** Sec. 4.** AS 28.35.161(c) is amended to read:

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for **voice** [VERBAL] communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor

vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BILL THOMAS

House Bill 255
Expected Witnesses

Expected Testimony

- Rep. Les Gara, bill presentation

Available for Questions

- Anne Carpeneti, District Attorney's Office
- Doug Gardner, Legislative Legal Services
- Lieutenant Tom Dunn, Alaska State Troopers, Bureau of Highway Patrol

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Representative_Les_Gara@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BILL THOMAS

House Bill 255
Expected Witnesses

Expected Testimony

- Rep. Les Gara, bill presentation
- Mark Hall, Fire Chef, Anchorage Fire Department
- Bob Griffiths, Executive Director, Alaska Association of Chiefs of Police offnet #

Available for Questions

- Anne Carpeneti, District Attorney's Office
- Doug Gardner, Legislative Legal Services

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Representative_Les_Gara@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE BILL THOMAS
REPRESENTATIVE LES GARA

To: Representative Gatto
From: Representative Bill Thomas
Representative Les Gara
Re: HB 255 Hearing Request
Date: January 27, 2012

Dear Representative Gatto:

We respectfully request a hearing on HB 255 in the House Transportation Committee. Accompanying this request are the required materials for the bill hearing.

Rose Foley, aide to Rep. Gara, is the contact person for this legislation. She can be reached at 465-2647.

Please contact either office if you need any additional information or have any questions.

Sincerely,

Representative Bill Thomas

Representative Les Gara

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

Melanie Lesh

From: Rose Foley
Sent: Friday, February 03, 2012 3:27 PM
To: Melanie Lesh
Subject: HB 225 CS
Attachments: CS D version 2.2.12.pdf; HB 255 Expected Witnesses H (JUD).pdf

Hi Melanie,

Attached is the CS we discussed yesterday (or was it the day before?), and an updated list of expected witnesses. I'm sure you know this, but I made an appointment for Rep. Gara to meet with Rep. Gatto on HB 255 and HB 303 on Tuesday of next week at 11:00 am. Please let me know if you need anything else in the meantime.

Thank you, and happy Friday!

Rose Foley

Aide to Representative Les Gara
State Capitol, Room 500
Juneau, AK 99801
p - (907) 465-2647
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LEGAL SERVICES

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STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM December 30 2011

SUBJECT: Texting While Driving Bill Versions
(Work Order Nos. 27-LS1149\M and 27-LS1165\M)

TO: Representative Les Gara

FROM: Doug Gardner
Director

Please find enclosed three versions of the bill we've been working on regarding texting while driving. These versions need your review, and you should let us know which version you would like to prefile, and also call to our attention any changes so they can be made as soon as possible. The bill versions are:

1. Texting with SIS version 27-LS1149\M
2. Texting only version *without* the "stationary vehicle" exclusion 27-LS1165\B
3. Texting only version *with* the "stationary vehicle" exclusion 27-LS1165\M

As with any multiple version project, please review the drafts enclosed to make sure I've covered all the issues in the bill drafts that you wanted to address. Call if you have questions.

DDG:plm
11-361.plm

Enclosures

27-LS1165\B
Gardner
12/28/11

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE GARA

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting the driver of a motor vehicle from reading or typing a text message or other nonvoice message or communication on a cellular telephone, computer, or personal data assistant while driving a motor vehicle."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATEMENT OF PURPOSE. The purpose of this Act is expressly to provide that the use of a cellular telephone, computer, personal data assistant, or any other similar means for texting or communicating in a manner proscribed by AS 28.35.161 is prohibited. It is the opinion of the legislature that the use of these devices in a manner proscribed by AS 28.35.161 is currently illegal in the state.

*** Sec. 2.** AS 28.35.161(a) is amended to read:

(a) A person commits the crime of driving **<u>while texting, while communicating on a computer, or while</u>** [WITH] a screen device **<u>is</u>** operating if [(1)]

the person is driving a motor vehicle**, and**

(1) [; (2)] the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion**, and** [; AND (3)] the monitor or visual display is operating while the person is driving**; or**

(2) the person is reading or typing a text message or other nonvoice message or communication on a cellular telephone, personal data assistant, computer, or any other similar means capable of providing a visual display that is in the full view of the driver in a normal driving position while the vehicle is in motion and while the person is driving.

(deleted from latest version)

*** Sec. 3.** AS 28.35.161(b) is amended to read:

(b) A person may not install or alter equipment described in **(a)** [(a)(2)] of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

*** Sec. 4.** AS 28.35.161(c) is amended to read:

(c) Subsections (a) and (b) of this section do not apply to

(1) portable cellular telephones or personal data assistants being used for **voice** [VERBAL] communication or displaying caller identification information;

(2) equipment that is displaying only

(A) audio equipment information, functions, and controls;

(B) vehicle information or controls related to speed, fuel level, battery charge, and other vehicle safety or equipment information;

(C) navigation or global positioning;

(D) maps;

(E) visual information to

(i) enhance or supplement the driver's view forward, behind, or to the sides of the motor vehicle for the purpose of maneuvering the vehicle; or

(ii) allow the driver to monitor vehicle occupants seated behind the driver;

(F) vehicle dispatching and response information for motor

vehicles providing emergency road service or roadside assistance;

(G) vehicle dispatching information for passenger transport or freight or package delivery;

(H) information for use in performing highway construction, maintenance, or repair or data acquisition by the Department of Transportation and Public Facilities or a municipality; or

(I) information for use in performing utility construction, maintenance, repair, or data acquisition by a public utility; in this subparagraph, "public utility" has the meaning given in AS 42.05.990.

CS FOR HOUSE BILL NO. 22(TRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE TRANSPORTATION COMMITTEE

Offered: 3/9/11
Referred: Judiciary, Finance

Sponsor(s): REPRESENTATIVES MUÑOZ AND HERRON, Gruenberg

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting the use of a cellular telephone when driving a motor vehicle; and providing for an effective date."

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

* **Section 1.** AS 28.35 is amended by adding a new section to read:

Sec. 28.35.165. Prohibited use of cellular telephone. (a) A person may not use a cellular telephone when driving a motor vehicle on a highway or vehicular way or area.

(b) This section does not apply to a person

(1) using a cellular telephone for emergency purposes, including an emergency call to a law enforcement agency, fire department, or other emergency services agency or entity; or

(2) 18 years of age or older using a cellular telephone by hands-free mode.

(c) In this section,

(1) "emergency" has the meaning given in AS 42.20.150;

(2) "hands-free mode" means use of a cellular telephone for listening or talking by means of a speaker function, headset, or earpiece without holding the telephone.

(d) A person who violates this section is guilty of an infraction and may be punished as provided under AS 28.90.010.

* **Sec. 2.** This Act takes effect July 1, 2011.

HOUSE BILL NO. 22

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES MUÑOZ AND HERRON

Introduced: 1/18/11
Referred: Transportation, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting the use of a cellular telephone when driving a motor vehicle; and providing for an effective date."

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

*** Section 1.** AS 28.35 is amended by adding a new section to read:

Sec. 28.35.165. Prohibited use of cellular telephone. (a) A person may not use a cellular telephone when driving a motor vehicle on a highway or vehicular way or area.

(b) This section does not apply to a person using a cellular telephone

(1) for emergency purposes, including an emergency call to a law enforcement agency, fire department, or other emergency services agency or entity; or

(2) that has a voice-activated or hands-free mode or configuration if the telephone is used in a voice-activated or hands-free manner.

(c) A person who violates this section is guilty of an infraction and may be punished as provided under AS 28.90.010.

* **Sec. 2.** This Act takes effect July 1, 2011.

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

TO: Representative Carl Gatto
Judiciary Chair

CC: Sarah Munson
Committee Aide

FROM: Representative Cathy Muñoz

DATE: March 9, 2011

RE: Explanation of Changes to CS for HB22 (TRA)

The House Transportation Committee adopted an amendment to HB22 which would prohibit the use of cell phones for individuals under the age of 18 (including prohibiting the use of hands-free devices and a speaker function). Committee members stated teen drivers are more at risk for causing a collision due to their inexperience of driving - this has also been sighted in numerous studies. For those 18 years of age and over the use of a hands-free device is still permitted while operating a motor vehicle to accommodate commercial drivers, tour operators and other to allow flexibility.

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REPRESENTATIVE_CATHY_MUNOZ@LEGIS.STATE.AK.US

HB

262

<TARGET><BILL>HB 262</BILL><SUBJECT>HB 262</SUBJECT><COMM>HJUD27</COMM></TARGET>

27-LS1016\I
Gardner
2/17/12

CS FOR HOUSE BILL NO. 262( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE CISSNA

A BILL

FOR AN ACT ENTITLED

"An Act relating to the offense of interference with access to transportation facilities, when a person conditions access to a transportation facility on consent to certain physical contact or to an electronic process that produces an image that exposes or reveals certain physical characteristics of the person."

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

*** Section 1.** AS 11.76 is amended by adding a new section to read:

Sec. 11.76.118. Interference with access to transportation facilities. (a) A person commits the offense of interference with access to transportation facilities if the person, as a condition for access to a transportation facility, requires another person to consent or otherwise submit to

(1) physical contact by any person touching directly or through clothing the genitals, buttocks, or female breast of the person seeking access; or

(2) any electronic process that produces an electronic image of the person seeking access that exposes or reveals a physical characteristic that is normally

hidden by clothing and is not normally visible to the public.

(b) The defense of justification provided in AS 11.81.420 is not available in a prosecution under this section.

(c) Interference with access to transportation facilities is a class A misdemeanor.

This is language contained in HB 321 that is currently in House Transportation. This amendment essentially pulls that bill from House Trans.

27-LS1016\I.1
Gardner
2/18/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE CISSNA

TO: CSHB 262( ), Draft Version "I"

Page 1, line 4, following "**person**":

Insert "**; requiring certain airports in the state to apply for the federal security screening opt-out program; providing reimbursement to a municipality that applies for the federal security screening opt-out program; and providing for an effective date**"

Page 2, following line 5:

Insert new bill sections to read:

"*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICATION FOR FEDERAL SECURITY SCREENING OPT-OUT PROGRAM. (a) The Department of Transportation and Public Facilities shall, by December 31, 2013, apply for the federal security screening opt-out program under 49 U.S.C. 44920 for those airports under the control of the Department of Transportation and Public Facilities that are subject to federal security screening requirements.

(b) A municipality that operates an airport in the state that is subject to federal security screening requirements shall, by December 31, 2013, apply for the federal security screening opt-out program under 49 U.S.C. 44920.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REIMBURSEMENT. Subject to appropriation, the Department of Transportation and Public Facilities shall reimburse a municipality that is required to submit an application under sec. 2(b) of this Act for the reasonable costs, as determined by the Department of Transportation and Public Facilities, of applying for the federal security screening opt-out

program under 49 U.S.C. 44920. If appropriations are not sufficient fully to fund reimbursements under this section, the amount available shall be distributed pro rata among eligible municipalities.

* **Sec. 4.** Sections 2 and 3 of this Act take effect immediately under AS 01.10.070(c)."

State Privatization of Airport Security Screening

Choice to 'Opt-Out' of TSA Administered Program

In early December of 2012 the U.S. Department of Homeland Security installed and opened the additions of X-Ray scanners to four Alaskan Airports. Concern has been building throughout the United States during the year and a half since the initial installations of invasive scanning machinery and physical examination of passengers by equipment that may give dangerous radiation and physical touch and inspection by medically untrained employees.

During the many months since those airport procedures began, first in the lower United States, and for several months in Alaska -- constituents continue communication to Legislators about personal losses of carry-on items, and inappropriate touch and treatment by personnel.

Alaskans fly eight times more often than the national average. While the TSA has published some data regarding the physical effects of scanners on airline passengers, many questions remain unanswered. We have supplied research written by the Alaskan Legislative Research, for Congress, other reports and articles.

Opt out option: This amendment adds a new section to Alaska's unmodified law to requiring all Alaska airports covered by TSA invasive screening to complete the attached form by December 31, 2013. That gives the Department over a year to complete preparation to complete the form attached. That form requires:

1) Basic Airport information (address, owner, airport authority, alternate contact

2) Indicate if requesting airport or managing authority seeks to be the qualified vender

3) Need clear and substantial advantage for TSA to allow this (these) a clear and substantial advantage to do so. "New and innovative ideas and opportunities to manage TSA's operations more efficiently, while maintaining our high standards and meeting the treats of today and the future. Please explain how private screening at your airport would provide a clear and substantial advantage to TSA's security operations (attach all supporting documentation)."

4) Does the airport have any scheduled activities planned within the next 2 years, such as, major construction, etc? Please elaborate.

5) Does the airport authority have other airports under its jurisdiction or in its region submitting applications for privatized screening?

6) Please provide any additional information to be considered during the evaluation of this application.

7) Authorized representative Signature

Also attached are the airports that would fall within the group of airports in Alaska under the jurisdiction of the TSA oversight of the security process.

HB Opt-Out also requires those the Department of Transportation and Public Facilities apply for the Federal Security Screening opt-out program by December 31, 2013. (b) Requires any airport operated by a municipality in the state that requires TSA coverage apply for the opt-out program by December 31, 2013.

Section 2 of the bill requires the Department of Transportation and Public Facilities to reimburse a municipality the reasonable costs of applying for the opt-out program.

Alaska Certificated Airports with TSA Screeners*, February 2012

The airport owner is responsible for maintaining and operating the airport. TSA is responsible for screening passengers.

	Airport	Address
	State of Alaska Owned, Maintained, & Operated Certificated Airports	
1	Adak	PO Box 1952, Adak AK 99546
2	Anchorage Int'l	PO Box 190649, Anchorage AK 99519
3	Barrow	PO Box 367, Barrow AK 99723
4	Bethel	PO Box 505, Bethel AK 99559
5	Cordova	PO Box 598, Cordova AK 99574
6	Deadhorse	Pouch 340002, Prudhoe Bay AK 99634
7	Dillingham	PO Box 250, Dillingham AK 99576
8	Fairbanks Int'l	6450 Airport Way, Ste 1, Fairbanks AK 99709
9	Gustavus	PO Box 239, Gustavus AK 99826
10	King Salmon	PO Box 65, King Salmon AK 99613
11	Kodiak	1500 Anton Larson Rd, Kodiak AK 99615
12	Kotzebue	PO Box 55, Kotzebue AK 99725
13	Nome	PO Box 1048, Nome AK 99762
14	Petersburg	PO Box 1108, Petersburg AK 99833
15	Sitka	605 Airport Road, Sitka AK 99835
16	Wrangell	PO Box 1351, Wrangell AK 99929
17	Yakutat	PO Box 186, Yakutat AK 99689
	State Owned, but Leased and Operated by the Borough Certificated Airports	
18	Ketchikan Int'l	1000 Airport Terminal Way, Ketchikan AK 99901
	Municipally Owned, Maintained, & Operated Certificated Airports	
19	Juneau Int'l	1873 Shell Simmons Dr, Juneau AK 99801
	Privately Owned, Maintained, and Operated Certificated Airports	
20	Red Dog	Red Dog airport uses TSA certified Tech Cominco employees as screeners with Alaska Airlines' ground security observers.

* These airports receive jet passenger service.

Source: DOT&PF, Division of Statewide Aviation

Print Instructions

TRANSPORTATION SECURITY ADMINISTRATION

Application to Participate in the Screening Partnership Program

This application notifies the Transportation Security Administration (TSA) of an airport's intent to participate in the Screening Partnership Program (SPP). Airport operators may submit this application at any time.

The SPP was created in part to spur new and innovative ideas and opportunities to manage TSA operations more efficiently. Given the level of participation in the current program, and in order to maximize TSA's effectiveness as a Federal counterterrorism security agency, TSA is not inclined at this time to expand the Screening Partnership Program unless there are clear and substantial advantages to do so. Therefore, your application must explain how private screening at your airport will provide those clear and substantial advantages, while maintaining our high standards and meeting the threats of today and the future.

Acceptance of this application does not guarantee the requesting airport that a contract for private security screening will be awarded. In accordance with the Aviation and Transportation Security Act (ATSA), the decision to award a private security screening contract is at the discretion of the TSA Administrator.

If a requesting airport is seeking to become its own provider of private security screening services, please indicate this on "Question1" of the application. Note, however, that airports interested in providing their own private security screening services must qualify and compete according to criteria determined by the TSA Office of Acquisition.

TSA intends to select private security screening companies through an impartial competitive process. Airports granted privatization must transition to the private security screening company selected.

GENERAL INSTRUCTIONS:

- A separate application must be submitted for each individual airport location.
- An authorized representative of the airport or the airport owner must execute the application.
- The application requisite documentation must be completed in full to be considered for acceptance by TSA. Incomplete applications will delay the process.
- The application must be received at TSA Screening Partnership Program (SPP). (see Application Process Information)
- Please provide a copy of your application to the Federal Security Director for your airport.
- If your application includes Sensitive Security Information or confidential business information, please indicate in writing so that the information will be protected from public disclosure as appropriate. Further information regarding TSA policies and procedures for safeguarding and control of SSI is available at at www.tsa.gov or http://www.tsa.gov.

APPLICATION PROCESS INFORMATION

The application can be submitted at any time, it is open enrollment. To download a copy of the **Screening Partnership Program Application** from the TSA website, please visit the following link: http://www.tsa.gov.

If completing the application electronically, be sure to save this data file locally with a unique name before-e-mailing the application. The application can be submitted by several different methods, all shown below.

- **Paper submissions:** Send the original signed copy of the application to this address:

  Transportation Security Administration
  Attention: TSA-29, Screening Partnership Program, Room E9-205S
  601 South 12th Street
  Arlington, Virginia, 20598

- **Electronic submissions (electronic mail / e-mail):**

  Submit the application to: opt-out@tsa.dhs.gov

- **Facsimile submission:**

  Submit application to the following e-fax number (571) 227-1941

- **Application assistance:**

  To obtain telephone assistance regarding the application contact (571) 227-1861

Print Form | Submit by E-mail

TRANSPORTATION SECURITY ADMINISTRATION

Application to Participate in the Screening Partnership Program

Application date: _____

Application pages submitted: _____

AIRPORT APPLICATION INFORMATION (please review instructions before completing)
Attach all supporting documentation to the application; use a separate sheet if more detail is needed.

If completing the application electronically, (all questions are fillable) be sure to save this data file locally with a unique name before e-mailing the application.

Basic Airport Information

Airport name _____

FAA Airport code (three (3) letter identifier) _____

Airport address _____

Airport owner _____

Airport authority / operator _____

Primary contact (Airport authority / operator authorized to submit application)

Name _____

Contact position _____

Contact telephone number & cellular number _____

Contact mailing address _____

Contact facsimile number _____

Contact electronic mail (e-mail) address _____

Alternate contact

Name _____

Contact position _____

Contact telephone number & cellular number _____

Contact mailing address _____

Contact facsimile number _____

Contact electronic mail (e-mail) address _____

TRANSPORTATION SECURITY ADMINISTRATION

Application to Participate in the Screening Partnership Program

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1. **Indicate if the requesting airport or managing authority seeks to be the qualified vendor providing private security screening services. (Mark X or highlight YES or NO)**

a. _____ **if YES, the airport will need to apply under the methodology and criteria published by TSA to become a qualified vendor.**

b. _____**If NO, the requesting airport does not seek to be the provider of private security screening services.**

2. **TSA has determined that the best way to maximize its effectiveness as a Federal counterterrorism security agency is to expand the Screening Partnership Program only where there would be a clear and substantial advantages to do so. However, the Agency is open to new and innovative ideas and opportunities to manage TSA's operations more efficiently, while maintaining our high standards and meeting the threats of today and the future. Please explain how private screening at your airport would provide a clear and substantial advantage to TSA's security operations (attach all supporting documentation).**

3. **Does the airport have any scheduled activities planned within the next 2 years, such as, major construction, planned area conferences, etc? If yes, please elaborate.**

4. **Does the airport authority have other airports under its jurisdiction, or in its region, that will be submitting applications for privatized screening? If so, please list the other airports. (If yes, an application will need to be submitted separately for each airport).**

5. **Please provide any additional information you would like TSA to consider during the evaluation of this application.**

Upon execution of this application, the authorized representative, (specified as the primary contact in this document), for the operator of the airport, (specified under basic airport information in this document) hereby requests the TSA Administrator to accept this application to have the screening of passengers and property at the airport, as cited under section 44901 of the Aviation and Transportation Security Act, to be carried out by the screening personnel of a qualified private screening company under a contract entered into with the TSA Administrator.

Print / Signature

Date of execution

What impacts? Transportation Security Administration in Alaska

Installation of TSA full-body scanners is imminent at Alaska's key airports.

- Alaskans fly eight times more than the national average;
- TSA screening procedures created in D.C. do not consider the unique Alaskan lifestyles and travel situations;
- Potential dangers from scanners and pat-down searches may occur with new equipment and procedures. Alaska must investigate any risk that occurs for the safety of the traveling public. You, the airline passenger, are invited to give three minutes testimony with your experience, concerns and questions needed to safeguard your constitutional rights.

Wednesday, November 16, 2011
11 a.m. to 1:30 p.m.

Anchorage Legislative Information Office, 716 West 4th Ave., Room 220; Statewide LIO offices, check for their schedules. Call 907-269-0190 or 800-922-3875 for additional information and for toll-free teleconference phone number if calling in with your 3 minute testimony.

Legislative Health Caucus

Legislative Health Caucus

November 16, 2011

Senator Donny Olson and Representative Sharon Cissna, co-Chairs of the Legislative Health Caucus, opened the meeting with a description of the TSA issue and why it impacts Alaskans to a greater extent than the other 48 states, with Hawaii being in a similar situation as Alaska. 'We are different due to the vastness of our state, how very remote parts of the state are, and our separation from the continental United States. These are some of the reasons Alaskans travel an average of eight times more than citizens in other states. We would like to look at the changes that are coming to our airports and what we can and cannot do within the law.'

Anmei Goldsmith, Assistant AG with the Alaska Department of Law, introduced a handout she had prepared (see attachment) and briefly reviewed it for the audience.

- "Procedures" are whatever procedures the TSA decides are necessary. The regulations don't actually specify the procedures. The TSA issues "Standard Operating Procedures" that will apply when you go to the airport. SOPs are not public documents. You only know what the procedure is going to be when you get to the airport and you are subjected to it. These procedures are considered sensitive security information therefore the TSA has made the details of the procedures secret.
- "Enforcement" says you can be fined up to $10,000 for violation of a regulation, but TSA officers don't actually have authority to arrest you for crimes. That's why local police officers are there at the security check points.
- "Challenging" the TSA orders or procedures: There is a review statue that allows a person to apply for review by going to the U.S. Court of Appeals. Many people have filed lawsuits, but all that Ms. Goldsmith has seen have been filed in U.S. Federal District Court and so far they have been thrown out on jurisdictional grounds because the statute says you have to file in the Court of Appeals. One is up on appeal to the 11th Circuit Court of Appeals. That's the case to watch to see if it will be accepted. So far no plaintiff has tried filing with the U.S. Court of Appeals.

Rep. Cissna commented that law abiding citizens run into problems at the airport because the TSA does not make the procedures known. Travelers, therefore, unknowingly, break the rules. 'Couldn't there be signs at the airport?' Ms. Goldsmith explained that, per the TSA's regulations, making the procedures known weakens security.

Rep. Cissna reminded that 'Alaska's constitution says the state has an obligation to provide for the health and welfare of the state. It's very specific about that protection. [Article 7.4. Public Health – The legislature shall provide for the promotion and protection of public health. Article 7.5. Public Welfare – The legislature shall provide for public welfare.] If the state does not like the TSA regulations, what choices do we have?'

Ms. Goldsmith said that the federal government has pre-empted the field of airline travel security. 'They have taken over control of that field of law. If a state were to try to enact a law in that same area, a court would probably strike it down. In the case of Texas, their bill would have made it illegal for anyone (including the TSA) to touch another person in certain ways. The U.S. Attorney in Texas wrote the legislators a letter that said that the TSA would shut down all flights into and out of Texas if they passed the bill before them. That's where the bill ended in Texas. The federal government is very powerful. They have control over airline travel. There is probably not a legal answer the state can do. There may be a political answer.'

Rep. Cissna said, 'part of the legal answer would be the court.' Ms. Goldsmith responded that 'part of the review statute would allow a person who has been injured, or harmed in some way, by an order of the TSA, to sue in court.' Rep. Cissna asked, "Could the state sue?" Ms. Goldsmith said, 'that is a really good question.' "I think it is within the realm of possibilities, but without anyone having done it before, Alaska would be forging new ground."

Ms. Goldsmith suggested, "The political answer is, change the law. We elected the people who enacted this law and we, theoretically we have the power to convenience those people to change it or try to elect different people who we think would do it differently."

Thomas Brown, co-director of Alaskans' Freedom to Travel, asked what would prevent the TSA from coming into Alaska and putting agents in ferry terminals, small airports and our weigh stations on the highways? Ms. Goldsmith answered that 'she doesn't think there is anything to prevent them because they do have authority to oversee security in other modes of transportation so, theoretically, they could come to a ferry terminal. Possibly if the terminal only served intrastate routes, they may not have authority.'

Ms. Goldsmith explained that she paraphrased the law in the handout, but while 'in the text it does focus on air travel, it also provides authority for the TSA to oversee other modes of transportation. They would probably have to adopt regulations and develop other procedures to do so.'

Rep. Cissna said Congress adopts regulations and develops procedures. 'Does the TSA have the right to, independent of any kind of oversight, actually change all regulations?' Ms. Goldsmith said, 'the agency adopts the regulations so congress gives them the authority, by statute, and then the agency adopts regulations within certain parameters. The regulation process is public as required by law, but the TSA has a special ability to adopt secret procedures. They are not regulations and they are not subject to public comment and notice periods. That's because of security. The people who enacted the legislation that allowed the TSA to have that type of power believed it was important, to keep people safe.'

Patricia Anderson, co-director of Alaskans' Freedom to Travel, suggested that, 'basically, the TSA was given carte blanche on any form of transportation as long as they change their SOPs?'

Ms. Goldsmith said, 'the SOPs can be quite broad, but they have to be within the parameters of the regulation. Which is quite broad. This one that I quote says, "No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter." But, what are the procedures that control access? It's whatever the TSA adopts pursuant to the regulation that allows them to keep their procedures secret.'

Cheryl Hummey of Barrow, AK, is speaking for herself though she works in a domestic violence and sexual assault shelter. She is a frequent flier. 'One, you only fly in and out of Barrow.' She also flies more than anyone else she works with. She's very concerned about both the scanners and pat-downs. 'I'm speaking more about scanners today. The procedures are invasive. Are the images saved? I find that to be very suspect. These procedures draw out from a person thoughts, fears, past experiences, trauma that we have no idea of. I question whether the safety that we're supposedly going to get from this, and I say supposedly going to get because I think it's a very fake sense of security, I don't know that that outweighs the damage to my body that is going to happen. I'm also uncomfortable with the notion

of "how far can we go", "what can we get away with"? I don't think that is a way we want to live our lives. This goes against protecting the health and welfare of our citizens. It's a false sense of we're going to get more health or welfare, when really we're losing it. I commend the state for standing up to TSA. When more states do so, we'll change the federal government and stop this.'

Virginia Walsh of Barrow, AK, works for Arctic Women in Crisis, a domestic violence shelter, but she is here speaking for herself. 'I feel the pat-downs are implemented poorly and without proper training for their agents. If the pat-downs are not done properly they can be humiliating, uncomfortable and certainly traumatizing, especially for children and adults who have been victims of trauma in the past. For the most part they seem unnecessary when you look at who's receiving a good portion of these hand searches. I'm also very concerned about the possibility of full body scanners which appear to be imminent in Alaska. Little research on the risk of cancer has been conducted in the United States. Studies in Europe have concluded that wide spread use of even low level radiation poses an unacceptable health risk. Especially in Alaska where we fly eight times more than the national average, I'm very concerned about the health risks of the scanners.'

David Levy is with the Alaska Mobility Coalition. 'Moving people in Alaska is a major challenge.
We are very unique. People utilize ferries, buses, vans, snow machines, dogsleds and everything in between to get where they need to go. We also use air carriers. A couple of years ago Gov. Palin signed an administrative order to form a task force on coordinating transportation in the state. The task force came out with their initial report in the spring of 2010 with some recommendations. A new administrative order was signed and they will have follow up recommendations as well. One of the things they discovered is that it is a particular challenge for people coming from remote communities into centers, hub communities, for medical care. Sometimes when they have to travel by small plane and arrive in Anchorage for medical care, there may not be anyone to meet them or they may have a language barrier.'

Rep. Cissna brought up the problems that people have had in being medivaced Outside for emergency medical care, returning on regular airline flights as passengers after critical treatments and having to endure pat-downs of bandages and incisions, removal of bandages, medical equipment taken apart for inspection and returned without being properly reassembled. Mr. Levy said, 'from the prospective of AMC, the TSA is a consequence of a broader issue in our state which is a lack of transportation. If there were more transportation options in our state, if there were more coordinated transportation options in our state, people would have the choice
to use air service or ferries or other forms of transportation. I think that is something for this committee to look at as part of an overall plan in dealing with the TSA.'

Rich Sewell is with the Department of Transportation, Division of Statewide Aviation, where he is an aviation policy planner. 'One of my favorite statistics is 82% of our communities in Alaska are off of the road system. When you start thinking about that, it's a staggering number. Their only access is through aviation, for medical services, for dental services, for pretty much all of the urban needs that they have. We have a total of, I think, nineteen rural hub airports such as King Salmon and Bethel that are owned by the state of Alaska and get jet traffic. Of course Fairbanks, Anchorage and Juneau are international airports and then there are a variety of city owned airports such as Kenai and Soldotna. The North Slope Borough may own 5 or 6 airports up there. Overall we have something in the ball park of 400 public airports in Alaska. DOT owns 253 airports now. So the scope of the

Mr. Brown had a question for the DOT representative. 'The AFTT group has concluded that in order to affect change within the TSA this will be a political or judicial process. As such we need to make people aware of these issues, make people aware that there is a process they can go through to change things. That means we have to raise awareness within the public. What are the limits to private citizens going into the airport to hand out pamphlets or things like that?' Rich Sewell said he does not know, but he would do some research to bring to the AFTT meeting.

Rep. Cissna asked Ms. Goldsmith if she recalled how many times the State of Alaska has filed lawsuits against the federal government. Ms. Goldsmith named a few. She said 'it has done so many times. There are stringent restrictions on when, where and how another entity can sue them.'

Thomas Brown commented on the TSA's blog admission that 'neither the AIT machines nor the pat-downs would have caught the 9-11 highjackers, the shoe bomber or the underwear bomber. Considering that the procedures are not effective against the threats for which they were created, would that be a legal challenge to get them to stop what they are doing, or at least get a court order for an internal or independent review of what they're doing?'

Ms. Goldsmith said, "Yes, but to date no court has been willing to do that. Theoretically, the review statute says you would have to file with the U.S. Court of Appeals." 'That doesn't mean that there isn't a creative lawyer who could make the argument that that statute doesn't apply.'
"But, I think you're right, if the search procedures that are in place wouldn't actually have caught any of the known threats to airline security that we've actually experienced, then how can these be an effective means of screening passengers?" 'No court has actually asked and answered that question yet. No court has addressed that question since 2001, since the new procedures have been in place. No court has sat down and looked at the question of whether these new procedures actually screen the bad guys.'

Roberta Leavitt, member and chairman of the North Slope Borough Health Board spoke of her personal experience with the TSA procedures. 'This is hard to talk about, but I'm going to talk about it anyway. Being a victim of sexual abuse and having the TSA people say that you need a pat-down, it triggers the memories, the memories come back for up to four days after the TSA incident happens. They say it's only a pat-down, but it isn't. Having somebody touch you when you're a nine year old child and then you still have these memories when you're a forty year old adult and have the TSA people bring these memories back to life makes you not want to fly, makes you not want to travel. I've been on basketball trips, volleyball trips, gymnastic trips, my children have been on band trips and you know, their parents aren't going to be there when something like this is happening. I was nine years old when I was a victim and it comes back after being patted down. The parents aren't going to be there with that chaperone and it's going to trigger that person. I don't have kids in school any more, but I sure do know how it feels to hide that from an adult and have to go through that in school, during a school trip. It's a scary thing. Even the scanner. I had to go through a scanner in Denver. Putting my hands up and having that thing go through. People can see. They saw my whole body, that x-ray thing. That didn't feel right to me. You know, when you go to the hospital and have a x-ray, nobody can see those, but when you're out at the airport, that line, I stood in that line for almost two hours and I could see. I could see those x-

aviation system for Alaska is a quantum leap bigger than any in the Lower 48. We are, by far, the largest owner of airports. I think the closest is Idaho with maybe 35. We're kind of like the 800 lb. gorilla. It was alluded to that the TSA has control of access to the national air space, called NAS and if Fairbanks or Anchorage were not to have the TSA screening they could exclude airplanes from flying into the national air space. It's a very important function, but the DOT is more like a landlord to the TSA. We provide space for the TSA to do the security screening, but the DOT, ourselves, provides law enforcement officers for general security. Those people at Fairbanks and Anchorage are not local police, they are state legal enforcement officers. So the state or DOT is really an observer of this rather than providing any kind of enforcement. It's a complicated issue. The state has intrastate travel. There is no security provided for those flights. They are planes that carry up to 30 passengers.'

Rep. Cissna believes that because of the larger planes that fly intrastate such as Anchorage to Fairbanks passengers will have to go through screening with the new procedures.

Thomas Brown, co-director of Alaskans' Freedom to Travel, presented some questions, the first returning to the possibility of the TSA putting agents in ferry terminals and small airports. Ms. Goldsmith replied that it is possible they might go into areas that service interstate transportation such as some of the ferry terminals and small hub airports. The TSA wouldn't have authority at a rural airport unless there was a flight that originated there and went on to Seattle or outside of the state.

Rich Sewell said that 'the TSA is screening already at most of the hub airports that have jet traffic. The island of Adak has a certificated airport that gets two flights a week and so Alaska Airlines flies out there. They pick up passengers. The TSA officers fly out there on the flight, get off, set up their equipment, screen the passengers, get back on the plane and they fly back to Anchorage.' Ms. Goldsmith commented, 'And we pay for it.' Mr. Sewell added that the agents are paid for their time from the time they leave Anchorage until they return.

Rep. Cissna added that it's also hard to come up with the true cost. She has asked the Commissioner of DOT for the true accounting. 'I want to know what the cost is at the airports that are state property and what is the cost to keep that space out of commercial use and have it used by the TSA. The state flies those agents to Adak. What is the cost? There's more in terms of cost that we're shouldering here. What of the person who is harmed? So many times the state is required to give help to that person who cannot afford it. What are the financial costs and the social costs?'

Mr. Brown's next question had to do with the prohibited items on the TSA list. One is replicas of weapons such as a jeweled belt buckle that looks like a half of a grenade that was confiscated from a woman. He asked when we might 'expect transparency and accountability in the training procedures? The training is secret.' Ms. Goldsmith said 'since none of the SOPs are public, it is really hard to tell.'

Thomas Brown also asked about a recent court decision that stated the TSA did not comply with a public comment period. Ms. Goldsmith responded that 'the court agreed that the SOPs should have gone through the public comment period, but they could have an out because even if the law didn't say that they could be kept confidential, there is another provisional law that would allow them to adopt procedures without going through the comment period. The court didn't offer an opinion as to whether the TSA could use that other legal provision so the court's opinion was a step in the right direction, but it didn't go far enough.'

rays of other people. Even at the airport in Anchorage. There's no private place for a pat-down. They just pat you down in front of everybody and as a victim, that's like, holy cow, that's not good, that's not right. There needs to be more privacy. Another issue, privacy, as a victim you don't want to be put into a room with another man. Even with a lady. A lady can trigger that same touch as the perpetrator and you still have that. You still have that, oh that yuk, for how many days later. Hm. I thank you for hearing other people's cries about this and glad that Linda got ahold of me to come on. It's hard to talk about, because I am a victim of this and I don't, I try to be strong and to be on the health board and try and make things better, but I see these things happening and I don't want to see these things happening to young kids, or to any other victim, to tell you the truth. I'm sorry. I don't mean to cry. This is something true to my heart.'

Senator Olson: "Co-chair Cissna, you can tell by the passion and certainly the upheaval that's going on within, that it's a very hard situation . . . . and we're subject to that because it's the only way we can get in and out of Barrow is by going through a TSA screening."

Rep. Cissna said 'that is one of the hopes that, we have a constitution and that constitution says, in both the state and federal, that freedom is something we have a right to. I was thirteen when a tough experience happened to me and my husband knows how it affected me. So don't apologize. This is happening across the country. It's not any one community, it's nationwide that we're dealing with this. Our state is different in the difficulties we go through and there are so many of us who have to travel a great deal. We don't have a choice. This is a huge problem and it's one you personally are carrying as are many in your community and you're working with those people. What Sen. Olson and I have to do, as elected officials, is, we have to listen to you and we have to do everything in our power to make this right. It's going on across the country and there are enough of us that I think that if we use the laws that exist we can make a difference. That's what I believe. You're giving us working orders. Thank you.'

Roberta Leavitt said, 'It hurts to have to admit it again, but the nightmares have to stop for victims from what they're doing. There's got to be a different way to do it [Security Screening] and it can't be fixed until somebody speaks out. I thank you guys for doing this.'

Sen. Olson said, 'Thanks to people like Roberta, we're starting to see the ill effects of what's happening and we, as legislators, need to take this message to the people we influence and see if we can have it changed. Otherwise there's this whole upheaval that people go through and, as she says, it stays with her for days. This does not do her wellbeing any good.'

Patrick Reinhart, Anchorage, is here to speak from his personal experience with the TSA. He is missing a foot. He does a lot of traveling and has gone through the entire screening process. When they changed the rules, he got tired of it and it just got a little too personal so he now takes his prosthesis, shoe and all, off, puts it on the conveyor belt and walks through on his stump. Once the prosthesis and metal is off his body, he doesn't have to have the additional screening process.

Thomas Brown asked to make a final statement. Mr. Brown said he lived most of his life around terrorist activity abroad. He said he was embarrassed when he went back to Germany this summer. 'You could tell who the Americans were at the airports. They were the ones automatically taking their shoes off and spread eagling so someone could put their hands on them. That's just embarrassing. We're Americans. We should stand for more than that.'

Roberta Leavitt said she had spoken out of personal experience today, they are seeing funding cuts that will take away from the mental health side so they won't be able to address the issues as well as they should. On the personal side, you do have to include the nightmares that come with the touches of those TSA people.'

Rep. Cissna closed the meeting with assurances that this issue will be kept in the forefront.

Attached is the report given from L. Anmei Goldsmith, Assistant AG, Alaska Department of Law, Presenter at the November 16th Legislative Health Caucus.

Legal Underpinnings of the TSA's Search Authority

Statutes

- The Aviation and Transportation Security Act (ATSA) created the Transportation Security Administration (TSA). *Public Law No. 107-71,* enacted Nov. 19, 2001 *(became 49 USC § 114 et. seq.)*
- TSA provides screening of all passengers and property including checked baggage carried aboard passenger aircraft operated by an air carrier or foreign air carrier. *49 USC § 44901.*

Regulations

- "No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter." *49 C.F.R. Part 1540.107(a).*

"The Procedures Being Applied to Control Access to That Area or Aircraft Under This Subchapter" (Screening)

- Standard Operating Procedures (SOPs) set forth the procedures and standards that must be followed in TSA's security operations.
- Primary Screening:
    - Walking through metal detector or Advanced Imaging Technology (AIT)
    - Placing carry-on baggage through x-ray
- Secondary Screening:
    - Pat-down
    - Wanding with a handheld metal detector
    - Opening and searching carry-on baggage

Sensitive Security Information (SSI)

- SSI is information *obtained or developed in the conduct of security activities*, the disclosure of which *TSA determines* would:
    - constitute an unwarranted invasion of privacy
    - reveal trade secrets or privileged confidential information
    - *be detrimental to the security of transportation. 49 CFR § 1520.5.*
- SSI includes:
    - *Security programs*
    - *Security directives*
    - *Security measures*

L. Anmei Goldsmith, Assistant AG, Alaska Department of Law
anmei.goldsmith@alaska.gov

- "Covered persons" must disclose SSI only to covered persons who have a *need to know*, unless otherwise authorized in writing by TSA. *49 CFR § 1520.9.*

Enforcement

- A person may be liable for a monetary civil penalty arising from a violation of TSA statutes and/or regulations. *49 USC § 46301.*
  - $10,000 per violation against individuals.
  - No civil penalty may exceed $50,000 in a single action against an individual
- TSA may order presence of local law enforcement personnel at any secure area of the airport as necessary. *49 USC § 44903(h).*

Lawsuits Over AIT and Pat-Downs

Blitz v. Napolitano, M.D. of North Carolina
- Humiliating "grope search"
- Dismissed for lack of jurisdiction

Durso v. Napolitano, District of Columbia
- Aggressive pat-down of breast cancer survivor
- Aggressive pat-down of male passenger with genital injury
- 12-year-old girl forced through AIT scanner without parental consent
- Dismissed for lack of jurisdiction

Ventura v. Napolitano, District of Minnesota
- Pat-downs due to hip replacement
- Need to travel frequently for work
- Dismissed for lack of jurisdiction

Roberts v. Napolitano, District of Columbia
- *AIT scans and pat-downs of pilots*
- Dismissed for lack of jurisdiction

Fielder v. Napolitano, District of Colorado
- Fielder and family declined AIT scanner but were required to undergo pat-down
- Dismissed on plaintiff's request

Redfern v. Napolitano, District of Massachusetts
- Plaintiffs refused AIT scanner but were required to undergo pat-downs
- Dismissed for lack of jurisdiction

Corbett v. US, S.D. of Florida
- AIT scanners and pat-downs
- Dismissed for lack of jurisdiction
- Appealed to 11th Circuit Court of Appeals
- http://tsaoutofourpants.wordpress.com/2011/11/10/appeal-fully-briefed/

"[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation [pursuant to ATSA] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides…" *49 U.S.C. § 46110(a)*

The Court of Appeals has "exclusive jurisdiction to affirm, amend, modify or set aside any part of [such an] order." *49 U.S.C. § 46110(c)*

received 2/29/2012 PS

Jim Hanlen
2633 E. 17th Ave
Anchorage, AK 99508
907 277 0969
28 February 2012

House Judiciary Committee
Attn: Chairman C. Gatto
State Capitol Building
Room 120
Juneau AK 99801

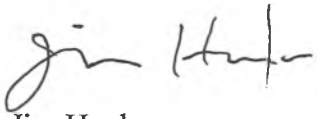
Dear Sir:

Please endorse the bills that Sharon Cissna has proposed to limit TSA. Allow them to be voted on.

Please consider and introduce on your own, hiring a more professional TSA staff for Alaska.

There are alternatives to scanners. What about explosive sniffing dogs? What about training to profile?

Sincerely,



Jim Hanlen

cc. Rep Sharon Cissna

Alaska State Legislature
House of Representatives

Alaska State Capitol
Juneau, Alaska 99801-1182
1-800-922-3875 (toll free)
1-907-465-4588 (fax)

Interim Address
716 West Fourth Avenue
(phone) 1-907-269-0190
(fax) 1-907-269-0193

Representative Sharon Cissna
District 22

Memorandum

DATE: February 2, 2012
TO: House Judiciary Chair and Committee Members
FROM: Representative Sharon Cissna
RE: Hearing Request for House Bill 262

As the Sponsor of House Bill 262, I would like to respectfully request a hearing in the Judiciary Committee. HB 262 makes it a class A misdemeanor for any person, including a Transportation Security Agent, to condition access to a public building or transportation facility on requiring a person to submit to a physical examination or an electronic process that produces an electronic image of the person that shows body irregularities not normally visible to the public.

In addition to requesting a hearing date for HB 262, I would also request from the Committee a teleconference site and video conferencing equipment in the LIO office in Anchorage. It is anticipated that there will be several representatives from the Alaskans Freedom to Travel, USA group who will be testifying on the many benefits of HB 262.

Thank you for your consideration of this request.

Attached:

Current Version of the Bill
Sponsor Statement
Sectional Analysis

Requested:

Fiscal Notes
Research
Support & Opposition Letters

E-mail: Representative_Sharon_Cissna@legis.state.ak.us

Melanie Lesh

From: Rep. Carl Gatto
Sent: Monday, February 13, 2012 3:51 PM
To: Melanie Lesh
Subject: FW: Support for HB 262 - Passenger Security: Transport Facility

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From: Diane Schenker [mailto:diane.schenker@gmail.com]
Sent: Monday, February 13, 2012 3:11 PM
To: Rep. Carl Gatto
Cc: Diane Schenker
Subject: Support for HB 262 - Passenger Security: Transport Facility

Dear Representative Gatto,

Thank you for scheduling a House Judiciary Committee hearing for HB 262 (Passenger Security: Transport Facility, sponsored by Rep. Sharon Cissna). I strongly support this bill and urge you not only to hear it and pass it to the next committee, but also to co-sponsor it and do whatever you can to ensure it passes during this session.

Please protect Alaskans from being forced to submit to full body scanners that the TSA has refused to have independently tested to document effects on health. Please protect us from being "randomly" or otherwise subjected to a "pat down" that meets the definition of sexual assault under Alaska law, but for the fact that the victim supposedly "consents" to the assault as a condition of boarding a plane. The only way we can protect ourselves from the risks and assaults presented by the TSA is to avoid air travel altogether. This is unrealistic in Alaska where many of us must fly as a condition of our employment, or to get essential medical care, or even to visit our own Legislature. We need you to protect our rights and our bodies from being violated by the TSA by passing HB 262.

Sincerely,

Diane Schenker
9700 Basher Drive
Anchorage, AK 99507
diane.schenker@gmail.com

HB

267

<TARGET><BILL>HB 267</BILL><SUBJECT>HB 267</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]HOUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: February 13, 2012 **FURTHER REFERRA**

Date of Committee Action: 2/20/12

The JUDICIARY Committee considered: **CSHB 267(L&**

CS FOR HOUSE BILL NO. 267(L&C)
"An Act relating to the Real Estate Commission; and providing for an effective date."
HB 267-REAL ESTATE SALES LICENSE

Recommends it be replaced with [ ] HCS *or* **[X] CS** *for* HB267 (JUI
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	CED			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	-			
	Keller			X	
	Thompson	X			
	Holmes	X			
	Pruitt	X			
Chair:	GATTO			X	
Chair:					

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: April 5, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 4/6/12

The JUDICIARY Committee considered: **CSSB 151(JUD)**

CS FOR SENATE BILL NO. 151(JUD)
"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

SB 151-FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

Recommends it be replaced with [ ] HCS *or* [X] CS *for* SB 151 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
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DHS
LWF
LAW
LEG
MVA
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DPS
REV
DOT
UA

NEW **FISCAL NOTES** *FN# is assigned by Chief Clerk's Office				
*FN#	List by Dept(s):	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
FN#	List by Dept(s):	Fiscal	Indet.	Zero
2	CRT			✓
3	Adm			✓
4	COR			✓
5	Law		✓	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Grunenberg	–			
	Keller	X			
	Pruitt	X			
Chair:	Thompson	X			
Chair:					

Vice

27-LS1111\B.2
Martin
2/17/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE MUÑOZ

TO: CSHB 267(L&C)

Page 4, following line 4:

Insert a new bill section to read:

"* **Sec. 2.** AS 08.88.305 is amended by adding a new subsection to read:

(b) A person licensed as an associate real estate broker or a real estate salesperson may not be employed to perform activities requiring licensure under this chapter for more than one licensed real estate broker."

Renumber the following bill sections accordingly.

(d) The commission shall mail all notices pertaining to a license or recovery fund action taken under this chapter or a regulation adopted under this chapter to the current address or addresses of a licensee obtained under this section. Proof of notice provided under this subsection satisfies due process notice requirements. (§ 1 ch 95 SLA 1964; am § 14 ch 28 SLA 1974; am § 26 ch 167 SLA 1980; am § 20 ch 45 SLA 1998; am § 7 ch 106 SLA 2004; am §§ 8, 9 ch 113 SLA 2008)

Effect of amendments. — The 2008 amendment, effective March 1, 2010, inserted "in the state" in the last sentence of subsection (a), and substituted "recovery" for "surety" in subsection (d).

Sec. 08.88.300. [Repealed, § 3 ch 95 SLA 1964.]

Sec. 08.88.301. Change of location. Before a real estate broker changes the location of the broker's principal office or of a branch office, the broker shall notify the commission of the new address and any other office changes on a form provided by the commission and pay the applicable fees. (§ 1 ch 95 SLA 1964; am § 15 ch 28 SLA 1974; am § 27 ch 167 SLA 1980; am § 21 ch 45 SLA 1998)

Sec. 08.88.305. Multiple business operations. A person licensed as a real estate broker may own, operate, or be employed by multiple corporations, partnerships, or other business organizations engaging in activities for which a license is required under this chapter, provided that each business organization is registered with the commission, and that the principal offices of all of the business organizations share a single physical address. (§ 7 ch 51 SLA 2007)

Sec. 08.88.310. [Repealed, § 3 ch 95 SLA 1964.]

Sec. 08.88.311. Branch offices. (a) A branch office shall be under the direct supervision of a real estate associate broker whose principal place of business is that office and who is licensed under this chapter. An associate broker may serve in the capacity of direct supervisor at only one office.

(b) A branch office shall bear and be advertised only in the name of the principal office but may also indicate that it is a branch office. (§ 1 ch 95 SLA 1964; am § 8 ch 108 SLA 1970; am § 16 ch 28 SLA 1974; am § 1 ch 174 SLA 1976; am § 22 ch 45 SLA 1998)

Sec. 08.88.320. [Repealed, § 3 ch 95 SLA 1964.]

Sec. 08.88.321. Possession and display of license certificates. (a) The license certificate of a real estate broker shall be displayed in the broker's principal office.

(b) The license certificate of each licensee working in the broker's principal office shall be displayed in that office.

(c) The license certificate of the designated associate broker who is in charge of a branch office and the certificate of each licensee working in a branch office shall be displayed in the branch office indicated as the office of the licensees' employment in the registration required under AS 08.88.291.

(d) Certificates displayed under this section must be displayed where they are available for public clients and customers to verify the current active status of licensees working in the office. (§ 1 ch 95 SLA 1964; am § 23 ch 45 SLA 1998)

Sec. 08.88.330. [Repealed, § 3 ch 95 SLA 1964.]

Sec. 08.88.331. Making of transactions. An active real estate salesperson or associate real estate broker may perform activities for which a real estate license is required only through the real estate broker who employs or contracts with the licensee.

Sec. 08.88.910. Application to independent contractors.

The provisions of this chapter that apply to employment relationships and employees also apply to contracting relationships and independent contractors.

Per Rokeberg

Already in the law

Alaska Real Property Coalition

Post Office Box 220661
Anchorage, AK 99522-0661
907.350.5780

DATE: February 20, 2012

TO: Rep. Carl Gatto, Chairman of the Judiciary Committee and Members of the Committee

FROM: Norman Rokeberg, Executive Director of ARPC

The Alaska Real Property Coalition ("ARPC") is a new and growing group of Alaskan's interested in private and public property issues.

The ARPC supports the concepts and substance of CSHB 267 (L&C).

Thank you for your consideration and service.

The ARPC is a non-profit corporation with an advisory board of people from across the state.

e-mail: akrpco@gmail.com website: akrpc.com

REPRESENTATIVE CATHY MUÑOZ

HB267: Real Estate Sales Licensees

House Bill 267 resolves three areas of concern identified by members of the Alaska Realtors Association. The purpose of the bill is to offer clarity to statutes that regulate real estate activity performed by realtors and the Alaska Real Estate Commission.

First, HB 267 provides the ability for the Alaska Real Estate Commission (AREC) to designate a licensee to administer closing down a real estate brokerage for medical reasons or for violation of law. It allows the AREC to designate a licensed realtor to manage the closing of the brokerage if there is not a licensed broker available to perform the task. State law does not allow the Commission the flexibility to assign this important task to an appropriate, active licensee. As a practical matter and to avoid conflict of interest it is in the best interest of parties involved to allow AREC to designate a licensee to perform these duties.

Next, HB 267 clarifies the intent of the statute that licensed assistants may only work for the brokerage in which they are licensed. This resolves an unintended oversight in current law that could be interpreted to permit a licensed assistant to work in multiple brokerages.

Finally, this bill would allow a licensee to share a portion of their commission with a charity. This would allow a realtor to waive their commission if they are selling property of a charity or to donate a portion of their commission to a charity and not violate AS 08.88.401.

These three changes will help clarify the intent of the law and promote charitable giving.

Contact: Terry Harvey 907-465-5392

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

February 6, 2012

Subject: Change to HB 267 in (H) L&C

There was one change made to HB 267 in the form of an adopted amendment by the House Labor & Commerce Committee on February 6, 2012. This change was due to a drafting oversight. On page 3, line 16: the Alaska Real Estate Commission was incorrectly referred to as a board instead of a commission. The word board was changed to commission.

CS FOR HOUSE BILL NO. 267(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 2/8/12
Referred: Rules

Sponsor(s): REPRESENTATIVES MUÑOZ AND OLSON, Lynn, Costello

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Real Estate Commission; and providing for an effective date."

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

*** Section 1.** AS 08.88.071(a) is amended to read:

(a) The commission shall

(1) determine whether applicants meet requirements for licenses under this chapter and issue licenses to those who qualify;

(2) prepare and grade examinations;

(3) after hearing, have the authority to suspend or revoke the license of a licensee or impose other disciplinary sanctions authorized under AS 08.01.075 on a licensee who

(A) with respect to a real estate transaction

(i) made a substantial misrepresentation;

(ii) made a false promise likely to influence, persuade, or induce;

(iii) in the case of a real estate broker, pursued a

flagrant course of misrepresentation or made a false promise through another real estate licensee;

(iv) has engaged in conduct that is fraudulent or dishonest;

(v) violates AS 08.88.391;

(vi) violates AS 08.88.396;

(B) procures a license by deceiving the commission, or aids another to do so;

(C) has engaged in conduct of which the commission did not have knowledge at the time the licensee was licensed demonstrating the licensee's unfitness to engage in the business for which the licensee is licensed;

(D) knowingly authorizes, directs, connives at, or aids in publishing, distributing, or circulating a material false statement or misrepresentation concerning the licensee's business or concerning real estate offered for sale, rent, or lease, or managed in the course of the licensee's business in this or any other state or concerning the management of an association in the course of a licensee's business in this or another state;

(E) if a real estate broker, wilfully violates AS 08.88.171(d) or 08.88.291;

(F) if an associate real estate broker, claims to be a real estate broker, or, if a real estate salesperson, claims to be a real estate broker or associate real estate broker;

(G) if a real estate broker, employs an unlicensed person to perform activities for which a real estate license is required;

(H) if an employed real estate licensee of a real estate broker, fails immediately to turn money or other property collected in a real estate transaction over to the employing real estate broker; or

(I) fails to carry and maintain errors and omissions insurance with terms and conditions established by the commission under AS 08.88.172;

(4) prosecute, through the Department of Law, violations of the provisions of this chapter or lawful regulations adopted under this chapter;

(5) release for publication in a newspaper of general circulation in the locale of the offending person's principal office registered with the commission notice of disciplinary action taken by the commission against a person licensed under this chapter;

(6) issue a temporary permit to the personal representative of the estate of a deceased real estate broker or to another person designated by the commission with the approval of the personal representative of the estate in order to secure proper administration in concluding the affairs of the decedent broker's real estate business;

(7) issue a temporary permit to **a licensee designated by the commission for the purpose of securing proper administration, temporarily managing, or concluding the affairs of the real estate business of a broker if**

(A) an investigation produces substantial evidence that the broker has misappropriated trust funds;

(B) the real estate license of the broker is suspended; or

(C) the broker is incapacitated because of a traumatic event or medical condition, as defined in regulations adopted by the commission;

(8) issue a temporary permit to the personal representative of a legally incompetent real estate broker or to another person designated by the commission with the approval of the personal representative of the broker in order to secure proper administration in temporarily managing the real estate business of the broker;

(9) [(8)] establish and periodically revise the form of the seller's property disclosure statement required by AS 34.70.010;

(10) [(9)] have the authority to levy civil fines as established in this chapter;

(11) [(10)] revoke the license of a broker, associate broker, or real estate salesperson who is convicted of a felony or other crime committed while licensed under this chapter that, in the judgment of the commission, affects the ability of that person to practice as a broker, associate broker, or real estate salesperson competently and safely or who is convicted of forgery, theft, extortion, conspiracy to

defraud creditors, or fraud; notwithstanding AS 08.88.171, a person whose license is revoked under this paragraph is not qualified to obtain or renew a license under AS 08.88.171(a) - (c) until seven years have elapsed since the person completed the sentence imposed for the conviction.

*** Sec. 2.** AS 08.88.398 is amended to read:

Sec. 08.88.398. Licensed assistants. A licensed real estate salesperson or licensed associate real estate broker may act as a licensed assistant to **another licensed salesperson or associate real estate broker** [A REAL ESTATE LICENSEE OTHER THAN THE BROKER WHO EMPLOYS THE SALESPERSON OR ASSOCIATE BROKER] if

(1) **the licensed assistant and the salesperson or associate broker are both employed by the same broker;**

(2) the employment arrangement between the licensed assistant and the **salesperson or associate real estate broker** [OTHER LICENSEE] is in writing and conforms to the applicable state and federal regulations regarding employment;

(3) [(2)] the employment of the licensed assistant is approved in writing by the broker **who employs both the salesperson or associate real estate broker and** [OF THE LICENSEE WHO EMPLOYS] the **licensed** assistant;

(4) [(3)] the **salesperson or associate real estate broker** [LICENSEE] who employs the **licensed** assistant agrees to be responsible for paying the licensed assistant's wages and appropriate taxes and completing the appropriate state and federal tax forms; and

(5) [(4)] the broker of the **salesperson or associate real estate broker** [LICENSEE] who employs the **licensed** assistant agrees to be liable for the actions of the licensed assistant.

*** Sec. 3.** AS 08.88.401(e) is amended to read:

(e) The prohibition of (d)(1) of this section does not prohibit

(1) payments by a licensee to a person licensed to perform real estate activities in another jurisdiction if the other person has assisted the licensee in the performance of an act for which a license is required by this chapter; [OR]

(2) payments from a real estate licensee to a principal as part of the

resolution of a dispute regarding the terms of a transaction or regarding the property transferred**; or**

(3) contributions from a licensee to a charitable organization and advertisement of the licensee's intent to make the charitable donation.

*** Sec. 4.** This Act takes effect July 1, 2012.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 23, 2012

SUBJECT: Sectional Summary for HB 267 (Work Order No. 27-LS1111\M)

TO: Representative Cathy Muñoz
Attn: Terry Harvey

FROM: Hilary Martin
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1: Amends AS 08.88.071(a) to require the Real Estate Commission to issue a temporary permit to a licensee designated by the commission to administer, manage, or conclude the affairs of a broker's real estate business if (1) an investigation produces substantial evidence that the broker has misappropriated trust funds, (2) the license of the broker is suspended, or (3) the broker is incapacitated because of a traumatic event or medical condition.

Section 2: Amends AS 08.88.398 to clarify language regarding the role of a licensed real estate salesperson or licensed real estate broker when acting as a licensed assistant to another licensed salesperson or associate real estate broker. It also requires that the licensed assistant and the salesperson or associate broker be employed by the same broker.

Section 3: Allows a licensee to contribute part of a fee, commission, or other compensation received through a real estate transaction to a charitable organization and allows the licensee to advertise the intent to make the charitable donation.

Section 4: Makes the bill effective on July 1, 2012.

HVM:ljw
12-036.ljw

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 267**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB267-DCCED-CBPL-01-21-12
Title: Real Estate Sales Licensees
Sponsor: Representative Munoz
Requester: House Labor and Commerce Committee

Dept. Affected: DCCED
Appropriation: Corps, Bus & Professional Licenses
Allocation: Corps, Bus & Professional Licenses
OMB Component Number: 2360

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Don Habeger, Director — Phone: 465-2536
Division: Corporations, Business and Professional Licensing — Date/Time: 1/21/2012 9:00am
Approved by: JoEllen Hanrahan, Director Administrative Services — Date: 2/3/2012
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 267

Analysis

HB 267 allows the Alaska Real Estate Commission to designate a licensee to administer closing down a real estate brokerage for misappropriation of the trust account(s), medical reasons such as broker incapacitation, or suspension of the broker's license. HB 267 clarifies the intent of the statute that licensed assistants may only work for the brokerage in which they are licensed.

This bill has zero fiscal impact on the division.

a licensed. Money is coming from the commissions. The Broker is paid; the commission is dispersed to the non-licensee. Mr. Somers stated that the law whether it's stated clearly or not it implies that the brokerages can receive checks from Title companies as legal entities because it says brokerages can be legal entities. Mr. Somers didn't think that licensees could hold themselves out as legal entities-unless it clears the legal department. Ms. Burke doesn't want to give the impression that the Commission is providing tax advice on legal entities. Ms. Davis and Ms. Swires both stated that they didn't see a problem with paying the licensee's legal entity.

On a motion by DuVal , seconded by Swires, and passed, it was

RESOLVED to move for public comment proposed regulation 12 AAC 64.068.

DuVal, Burke, Flyum, Swires, Davis in favor; Mr. Somers opposed. Motion passed.

Brokerage Violations of Outside Brokers. Agenda Item 11(d)
Discuss letter received from Prudential Jack White Vista Broker Gregg Gunnarson conveying his concerns about brokerage offices that are basically "broom closets" but their real office is outside the state and they potentially have never set foot in the state. Mr. DuVal stated that the new language in the proposed regulations may tighten this process and deal with the concern for commerce in the form of commissions leaving the state. Ms. Walsh indicated that she met with Mr. Gunnarson, Mr. Johnson and Mr. Woods who primarily work in commercial real estate. Mr. DuVal thinks that the new regulation that is proposed today will address their concerns. 12 AAC 64.990 defines the term "within the state".

Start of discussion

Making of Transactions 08.88.331. Agenda 11(e)
Ms. Jaquie Rosenthal, Broker of ReMax Associates of Fairbanks and North American Properties requested that the Commission consider allowing for her to go back and forth between her two brokerages. Mr. Somers said her question is really can she co-list? Because, person from office A can't walk across the hall to office B and work without co-brokering. Everyone has to have their own files. Chairman Cole said he didn't think she was asking to co-list. He thought Ms. Rosenthal was asking to engage in management contracts with licensees. He indicated that there is language in our regulations (statute) now that you can hire another licensee with a management agreement between that Broker and the licensee and you and that licensee can work for you in your office.

Commission members stopped discussion to address issues with Chief Investigator Quinten Warren.

On a motion by Davis, seconded by Swires, and passed unanimously, it was

RESOLVED to go into Executive session Per AS 44.62.310(c) (2).

All in favor; Motion passed.

Into Executive Session: 3:05 p.m.
Out of Executive Session: 4:03 p.m.

On a motion by Davis, seconded by Swires, and passed unanimously, it was

RESOLVED to come out of Executive session

All in favor; motion passed.

Making of Transactions 08.88.331, Agenda Item 11(e) - Continued

Chairman Cole asked the Commission members to look at 08.88.398 Licensed Assistant. He interpreted the statute as allowing for a Broker to hire a licensed person through a contract with that licensee's current Broker. Mr. Somers said maybe it means that, however Mr. Somers indicated that it was put in place by the Legislature to allow for team members to pay a licensee within that team-within that same office. Mr. DuVal said we could go on about this issue for a long time and instead asked that the members look at 08.88.331 Making of a Transaction and answer Ms. Rosenthal's question. Mr. Somers stated that you can't crossover he referenced 08.88.291 that a licensee can do real estate business "only through a principal office or from a branch registered by the broker by whom the licensee is employed." Chairman Cole disagreed with Mr. Somers interpretation of 08.88.398. Mr. DuVal asked the members to focus on Ms. Rosenthal's question and provide her with the answer. Mr. DuVal stated that co-listing was okay. Members said this is acceptable. Brokerages are allowed to co-list. All laws must be followed and consumer pamphlets need to include all licensees involved. Mr. DuVal stated that the lessor would need to agree to both companies involved in leasing the property? Mr. Somers indicated yes and the Broker needs to get the thought out of her head that another licensee from the other company can "go over and help out at the other company". Mr. DuVal stated that there needs to be separate records for each company. Ms. Rosenthal will be advised that brokerages are allowed to co-list properties but their records must be maintained properly and all laws followed by each office. AREC consumer pamphlet will need to list every licensee involved so the seller can see who is representing them. There is no cross-over on maintenance of the files either.

Regulations for Recovery Fund, Agenda Item 11(f)

Commission members reviewed the proposed regulations for approval to continue through the regulation process.

RESOLVED to come out of executive session

All in favor; Motion passed.

Out of executive session 1:10 p.m.

On a motion duly made by Mr. DuVal, seconded by nobody, it was

RESOLVED to move into executive session Per AS 44.62.310 (c)(2) to speak with Gayle Horetski, Assistant Attorney General.

Motion was withdrawn.

Agenda Item 7b cont.
New Applicants
Kristy Miller
Ms. Horetski introduced herself and thanked the Commission members for taking their time to speak with her. Ms. Wall-Rood gave a quick review of Kristy Miller's application by endorsement regarding the statutes pertaining to that seven years must have lapsed from the date a person completed their sentence imposed upon conviction. Ms. Horetski stated that since the sentence was set aside, in reality there was no sentence. If there is no sentence, the seven years does not apply. Ms. Horetski along with the Commission members reviewed statute 12.55.085 provided by Ms. Wall-Rood which was obtained from the Alaska Legal Resources. Ms. Horetski stated that this is a legal issue and should be researched. She also suggested that the application either should be tabled until the next meeting or grant the application. Ms. Walsh asked if a mail ballot or a teleconference at a later time would be appropriate. Ms. Horetski stated that it is up to the Commission members if they have reviewed the application and came to a decision, the only hesitation is the legal issue that might be okay. Mr. Somers asked if we can throw the seven years issue out or it would be seven years from the conviction if there is no sentence. Ms. Horetski stated that there was no sentence upon the conviction and if the Commission is comfortable with the interpretation that there was no sentence imposed then there is no seven years restriction.

Agenda Item 8a
Statute Review 08.88.398 License Assistant
Ms. Horetski reviewed statute 08.88.398 and House Bill 33 with the Commission regarding a licensed assistant. Ms. Horetski stated that in the statute it doesn't say that there are two different brokers involved. This language was adopted in 1998, in Section 32, Chapter 45. It was originally introduced in 1997 and the language on License Assistant in Section 398 was not in the bill. A series of hearings were held and there was a break in the session. The next version of the bill, which was adopted January 1998 at the next Legislative session, the changes were incorporated over the interim and in that version of the bill the language appeared. In other versions of the bill the language was repeated, it was not altered. Since there is no copy of the memorandum file, all they have to go by is sectional analysis, the bill itself and the statement from the Chair at that time as to what this means. Ms. Horetski apologizes to the Commission that she is not able to provide much assistance regarding this matter.

ALASKA ASSOCIATION OF REALTORS, INC.
4205 Minnesota Drive Anchorage, Alaska 99503
Telephone (907) 563-7133 Fax (907) 561-1779
www.alaskarealtors.com

January 20, 2012

The Honorable Cathy Munoz
Alaska State Legislature
120 4th Street
State Capitol, Room 3
Juneau, Alaska 99801-1182

RE: HB 267 - "An Act relating to the Real Estate Commission; and providing for an effective date."

Dear Representative Munoz,

The Alaska Association of REALTORS® with over 1,600 members statewide would like to express our appreciation for your sponsoring House Bill 267 to address issues of concern to our members. House Bill 267 resolves three problems identified by our members.

First, HB 267 provides the Alaska Real Estate Commission (AREC) to designate a licensee to administer closing down a real estate brokerage for medical reasons or for violation of law. This allows the AREC to designate a licensed Realtor to manage the closing of the brokerage if there is no licensed broker available to perform the task.

Next, HB 267 clarifies the intent of the statute that licensed assistants may only work for the brokerage in which they are licensed. This resolves an untended oversight in current law that could be interpreted to permit a licensed assistant to work in multiple brokerages, which was never intended to be allowed.

Finally, this bill would allow a realtor to share a portion of their commission with a charity. This would allow a realtor to waive their commission if they are selling property of a charity or to donate a portion of their commission to a charity and not violate AS 08.88.401.

We believe these three changes will help clarify the intent of the law and promote charitable giving.

Thank you for your assistance in resolving these issues.

Sincerely,

Joni Schneider

Joni Schneider, ABR, GRI
2012 President

REALTOR is a registered mark which identifies a professional in real estate who subscribes to a strict Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS.

BATES & ASSOCIATES, REALTORS

"Integrity in Real Estate"

January 24, 2012

The Honorable Cathy Munoz
Alaska State Legislature
120 4th Street
State Capitol, Room 3
Juneau, Alaska 99801-1182

RE: HB 267 - "An Act relating to the Real Estate Commission; and providing for an effective date."

Dear Representative Munoz,

I want to personally thank you for introducing HB 267, which effectively addresses three problem areas as identified by the Alaska Association of Realtors, and the real estate brokerage community.

The bill you introduced allows the Alaska Real Estate Commission the authority to designate a licensee to manage the affairs of a broker who is unable to conduct business either due to medical reasons, or for violation of the statutes and regulations.

It also clearly defines statute, allowing licensed assistants to work only in the brokerage where they are licensed.

Finally, the proposed bill allows licensees to make charitable contributions from their commissions without violating AS 0.88.401.

I know your efforts on behalf of the real estate licensees of the State of Alaska are greatly appreciated. Thank you so much!

Sincerely,

Anita Bates

Anita Bates, CRS, GRI
Broker
907-244-6188

P. O. Box 241163, Anchorage, Alaska 99524

January 20, 2012

The Honorable Cathy Munoz
Alaska State Legislature
120 4th Street
State Capitol, Room 3
Juneau, Alaska 99801-1182

RE: HB 267 - "An Act relating to the Real Estate Commission; and providing for an effective date."

Dear Representative Munoz,

The Alaska Association of REALTORS® with over 1,600 members statewide would like to express our appreciation for your sponsoring House Bill 267 to address issues of concern to our members. House Bill 267 resolves three problems identified by our members.

First, HB 267 allows the AREC to designate a licensee to manage the closing of the brokerage if there is no licensed broker available to perform the task.

Next, HB 267 clarifies the intent of the statute that licensed assistants may only work as an assistant for a licensee in the brokerage in which they are licensed. This resolves an unintended oversight in current law that could be interpreted to permit a licensed assistant to work in multiple brokerages, which was never intended to be allowed.

Finally, this bill would allow a licensee to waive the commission if selling a property owned by a legitimate Charitable organization as designated by IRS or to donate a portion of their commission to a charitable organization without violating AS 08.88.401.

We believe these three changes will help clarify the intent of the law and promote charitable giving.

Thank you for your assistance in resolving these issues.

Sincerely

Eva Loken
Associate Broker, Prudential Jack White Vista

2d CS FOR HOUSE BILL NO. 267(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MUÑOZ AND OLSON, Lynn, Costello, Neuman

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Real Estate Commission; relating to temporary permits issued by the Real Estate Commission; relating to licensed assistants who are employed by other real estate licensees; relating to contributions by a real estate licensee to a charitable organization; and providing for an effective date."

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

*** Section 1.** AS 08.88.071(a) is amended to read:

(a) The commission shall

(1) determine whether applicants meet requirements for licenses under this chapter and issue licenses to those who qualify;

(2) prepare and grade examinations;

(3) after hearing, have the authority to suspend or revoke the license of a licensee or impose other disciplinary sanctions authorized under AS 08.01.075 on a licensee who

(A) with respect to a real estate transaction

(i) made a substantial misrepresentation;

(ii) made a false promise likely to influence, persuade, or induce;

(iii) in the case of a real estate broker, pursued a flagrant course of misrepresentation or made a false promise through another real estate licensee;

(iv) has engaged in conduct that is fraudulent or dishonest;

(v) violates AS 08.88.391;

(vi) violates AS 08.88.396;

(B) procures a license by deceiving the commission, or aids another to do so;

(C) has engaged in conduct of which the commission did not have knowledge at the time the licensee was licensed demonstrating the licensee's unfitness to engage in the business for which the licensee is licensed;

(D) knowingly authorizes, directs, connives at, or aids in publishing, distributing, or circulating a material false statement or misrepresentation concerning the licensee's business or concerning real estate offered for sale, rent, or lease, or managed in the course of the licensee's business in this or any other state or concerning the management of an association in the course of a licensee's business in this or another state;

(E) if a real estate broker, wilfully violates AS 08.88.171(d) or 08.88.291;

(F) if an associate real estate broker, claims to be a real estate broker, or, if a real estate salesperson, claims to be a real estate broker or associate real estate broker;

(G) if a real estate broker, employs an unlicensed person to perform activities for which a real estate license is required;

(H) if an employed real estate licensee of a real estate broker, fails immediately to turn money or other property collected in a real estate transaction over to the employing real estate broker; or

(I) fails to carry and maintain errors and omissions insurance with terms and conditions established by the commission under AS 08.88.172;

(4) prosecute, through the Department of Law, violations of the provisions of this chapter or lawful regulations adopted under this chapter;

(5) release for publication in a newspaper of general circulation in the locale of the offending person's principal office registered with the commission notice of disciplinary action taken by the commission against a person licensed under this chapter;

(6) issue a temporary permit to the personal representative of the estate of a deceased real estate broker or to another person designated by the commission with the approval of the personal representative of the estate in order to secure proper administration in concluding the affairs of the decedent broker's real estate business;

(7) issue a temporary permit to **a licensee designated by the commission for the purpose of securing proper administration, temporarily managing, or concluding the affairs of the real estate business of a broker if**

(A) an investigation produces substantial evidence that the broker has misappropriated trust funds;

(B) the real estate license of the broker is suspended; or

(C) the broker is incapacitated because of a traumatic event or medical condition, as defined in regulations adopted by the commission;

(8) issue a temporary permit to the personal representative of a legally incompetent real estate broker or to another person designated by the commission with the approval of the personal representative of the broker in order to secure proper administration in temporarily managing the real estate business of the broker;

(9) [(8)] establish and periodically revise the form of the seller's property disclosure statement required by AS 34.70.010;

(10) [(9)] have the authority to levy civil fines as established in this chapter;

(11) [(10)] revoke the license of a broker, associate broker, or real

estate salesperson who is convicted of a felony or other crime committed while licensed under this chapter that, in the judgment of the commission, affects the ability of that person to practice as a broker, associate broker, or real estate salesperson competently and safely or who is convicted of forgery, theft, extortion, conspiracy to defraud creditors, or fraud; notwithstanding AS 08.88.171, a person whose license is revoked under this paragraph is not qualified to obtain or renew a license under AS 08.88.171(a) - (c) until seven years have elapsed since the person completed the sentence imposed for the conviction.

*** Sec. 2.** AS 08.88.398 is amended to read:

Sec. 08.88.398. Licensed assistants. A licensed real estate salesperson or licensed associate real estate broker may act as a licensed assistant to **another licensed salesperson or associate real estate broker only** [A REAL ESTATE LICENSEE OTHER THAN THE BROKER WHO EMPLOYS THE SALESPERSON OR ASSOCIATE BROKER] if

(1) **the licensed assistant and the salesperson or associate broker are both employed by the same broker;**

(2) the licensed assistant is not employed to perform activities requiring licensure under this chapter for more than one licensed real estate broker;

(3) the employment arrangement between the licensed assistant and the **salesperson or associate real estate broker** [OTHER LICENSEE] is in writing and conforms to the applicable state and federal regulations regarding employment;

(4) [(2)] the employment of the licensed assistant is approved in writing by the broker **who employs both the salesperson or associate real estate broker and** [OF THE LICENSEE WHO EMPLOYS] the **licensed** assistant;

(5) [(3)] the **salesperson or associate real estate broker** [LICENSEE] who employs the **licensed** assistant agrees to be responsible for paying the licensed assistant's wages and appropriate taxes and completing the appropriate state and federal tax forms; **and**

(6) [(4)] the broker of the **salesperson or associate real estate broker** [LICENSEE] who employs the **licensed** assistant agrees to be liable for the actions of

the licensed assistant.

*** Sec. 3.** AS 08.88.401(e) is amended to read:

(e) The prohibition of (d)(1) of this section does not prohibit

(1) payments by a licensee to a person licensed to perform real estate activities in another jurisdiction if the other person has assisted the licensee in the performance of an act for which a license is required by this chapter; [OR]

(2) payments from a real estate licensee to a principal as part of the resolution of a dispute regarding the terms of a transaction or regarding the property transferred**; or**

(3) contributions from a licensee to a charitable organization and advertisement of the licensee's intent to make the charitable donation.

*** Sec. 4.** This Act takes effect July 1, 2012.

2/29/12 OK (conceptual Gruenberg #2)

27-LS1111\B.2
Martin
2/17/12

withdrawn Thompson

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE MUÑOZ

TO: CSHB 267(L&C)

as a new subsection

Page 4, following line 4:

Insert a new bill section to read:

"* **Sec. 2.** AS 08.88.305 is amended by adding a new subsection to read:

~~(b) A~~ person licensed as an associate real estate broker or a real estate salesperson ~~may not be~~ is not employed to perform activities requiring licensure under this chapter for more than one licensed real estate broker."

Renumber the following bill sections accordingly.

Final CS:

((added it as (2) instead of (b)).

Rep. Lynn 'diff. verb' so 'contracted with'?

[employ see .910

27-LS1111\B.1
Martin
2/14/12

AMENDMENT #3 OK

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 267(L&C)

Page 1, line 1, following "**Commission;**":

Insert "**relating to temporary permits issued by the Real Estate Commission; relating to licensed assistants who are employed by other real estate licensees; relating to contributions by a real estate licensee to a charitable organization;**"

Requested final 4 D's 2/20/12

27-LS1111\B.3
Martin
2/20/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 267(L&C)

Page 1, line 1, following "**Commission;**":

Insert "**relating to temporary permits issued by the Real Estate Commission; relating to employment of licensees by brokers; relating to licensed assistants who are employed by other real estate licensees; relating to contributions by a real estate licensee to a charitable organization;**"

CS FOR HOUSE BILL NO. 267(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 2/8/12
Referred: Rules

Sponsor(s): REPRESENTATIVES MUÑOZ AND OLSON, Lynn, Costello

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Real Estate Commission; and providing for an effective date."

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

*** Section 1.** AS 08.88.071(a) is amended to read:

(a) The commission shall

(1) determine whether applicants meet requirements for licenses under this chapter and issue licenses to those who qualify;

(2) prepare and grade examinations;

(3) after hearing, have the authority to suspend or revoke the license of a licensee or impose other disciplinary sanctions authorized under AS 08.01.075 on a licensee who

(A) with respect to a real estate transaction

(i) made a substantial misrepresentation;

(ii) made a false promise likely to influence, persuade, or induce;

(iii) in the case of a real estate broker, pursued a

flagrant course of misrepresentation or made a false promise through another real estate licensee;

(iv) has engaged in conduct that is fraudulent or dishonest;

(v) violates AS 08.88.391;

(vi) violates AS 08.88.396;

(B) procures a license by deceiving the commission, or aids another to do so;

(C) has engaged in conduct of which the commission did not have knowledge at the time the licensee was licensed demonstrating the licensee's unfitness to engage in the business for which the licensee is licensed;

(D) knowingly authorizes, directs, connives at, or aids in publishing, distributing, or circulating a material false statement or misrepresentation concerning the licensee's business or concerning real estate offered for sale, rent, or lease, or managed in the course of the licensee's business in this or any other state or concerning the management of an association in the course of a licensee's business in this or another state;

(E) if a real estate broker, wilfully violates AS 08.88.171(d) or 08.88.291;

(F) if an associate real estate broker, claims to be a real estate broker, or, if a real estate salesperson, claims to be a real estate broker or associate real estate broker;

(G) if a real estate broker, employs an unlicensed person to perform activities for which a real estate license is required;

(H) if an employed real estate licensee of a real estate broker, fails immediately to turn money or other property collected in a real estate transaction over to the employing real estate broker; or

(I) fails to carry and maintain errors and omissions insurance with terms and conditions established by the commission under AS 08.88.172;

(4) prosecute, through the Department of Law, violations of the provisions of this chapter or lawful regulations adopted under this chapter;

(5) release for publication in a newspaper of general circulation in the locale of the offending person's principal office registered with the commission notice of disciplinary action taken by the commission against a person licensed under this chapter;

(6) issue a temporary permit to the personal representative of the estate of a deceased real estate broker or to another person designated by the commission with the approval of the personal representative of the estate in order to secure proper administration in concluding the affairs of the decedent broker's real estate business;

(7) issue a temporary permit to **a licensee designated by the commission for the purpose of securing proper administration, temporarily managing, or concluding the affairs of the real estate business of a broker if**

(A) an investigation produces substantial evidence that the broker has misappropriated trust funds;

(B) the real estate license of the broker is suspended; or

(C) the broker is incapacitated because of a traumatic event or medical condition, as defined in regulations adopted by the commission;

(8) issue a temporary permit to the personal representative of a legally incompetent real estate broker or to another person designated by the commission with the approval of the personal representative of the broker in order to secure proper administration in temporarily managing the real estate business of the broker;

(9) [(8)] establish and periodically revise the form of the seller's property disclosure statement required by AS 34.70.010;

(10) [(9)] have the authority to levy civil fines as established in this chapter;

(11) [(10)] revoke the license of a broker, associate broker, or real estate salesperson who is convicted of a felony or other crime committed while licensed under this chapter that, in the judgment of the commission, affects the ability of that person to practice as a broker, associate broker, or real estate salesperson competently and safely or who is convicted of forgery, theft, extortion, conspiracy to

only way you can get paid
is by working for one broker

licensing paperwork.

defraud creditors, or fraud; notwithstanding AS 08.88.171, a person whose license is revoked under this paragraph is not qualified to obtain or renew a license under AS 08.88.171(a) - (c) until seven years have elapsed since the person completed the sentence imposed for the conviction.

*** Sec. 2.** AS 08.88.398 is amended to read:

Sec. 08.88.398. Licensed assistants. A licensed real estate salesperson or licensed associate real estate broker may act as a licensed assistant to **another licensed salesperson or associate real estate broker** [A REAL ESTATE LICENSEE OTHER THAN THE BROKER WHO EMPLOYS THE SALESPERSON OR ASSOCIATE BROKER] if

(1) the licensed assistant and the salesperson or associate broker are both employed by the same broker;

(2) the employment arrangement between the licensed assistant and the **salesperson or associate real estate broker** [OTHER LICENSEE] is in writing and conforms to the applicable state and federal regulations regarding employment;

(3) [(2)] the employment of the licensed assistant is approved in writing by the broker **who employs both the salesperson or associate real estate broker and** [OF THE LICENSEE WHO EMPLOYS] the **licensed** assistant;

(4) [(3)] the **salesperson or associate real estate broker** [LICENSEE] who employs the **licensed** assistant agrees to be responsible for paying the licensed assistant's wages and appropriate taxes and completing the appropriate state and federal tax forms;

(5) [(4)] the broker of the **salesperson or associate real estate broker** [LICENSEE] who employs the **licensed** assistant agrees to be liable for the actions of the licensed assistant; and

*** Sec. 3.** AS 08.88.401(e) is amended to read:

(e) The prohibition of (d)(1) of this section does not prohibit

(1) payments by a licensee to a person licensed to perform real estate activities in another jurisdiction if the other person has assisted the licensee in the performance of an act for which a license is required by this chapter; [OR]

(2) payments from a real estate licensee to a principal as part of the

27-LS1111\B.1
Martin
2/14/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 267(L&C)

Page 1, line 1, following "**Commission;**":

Insert "**relating to temporary permits issued by the Real Estate Commission; relating to licensed assistants who are employed by other real estate licensees; relating to contributions by a real estate licensee to a charitable organization;**"

Melanie Lesh

From: Terry Harvey
Sent: Friday, February 17, 2012 5:38 PM
To: Melanie Lesh
Subject: Munoz amendment Hb 267
Attachments: HB267 Munoz Amendment (H)JUD.pdf

It was brought to our attention just today by our drafter of 267 that some additional clarifying language could be helpful regarding the licensed assistant only being allowed to work for 1 brokerage at a time. This amendment just came in to us. We would like to offer it on Monday. Terry

Terry Harvey, Committee Aide
House Community & Regional Affairs
Rep. Cathy Munoz, Chair
(907)465 5392

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 23, 2012

SUBJECT: Sectional Summary for HB 267 (Work Order No. 27-LS1111\M)

TO: Representative Cathy Muñoz
Attn: Terry Harvey

FROM: Hilary Martin
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1: Amends AS 08.88.071(a) to require the Real Estate Commission to issue a temporary permit to a licensee designated by the commission to administer, manage, or conclude the affairs of a broker's real estate business if (1) an investigation produces substantial evidence that the broker has misappropriated trust funds, (2) the license of the broker is suspended, or (3) the broker is incapacitated because of a traumatic event or medical condition.

Section 2: Amends AS 08.88.398 to clarify language regarding the role of a licensed real estate salesperson or licensed real estate broker when acting as a licensed assistant to another licensed salesperson or associate real estate broker. It also requires that the licensed assistant and the salesperson or associate broker be employed by the same broker.

Section 3: Allows a licensee to contribute part of a fee, commission, or other compensation received through a real estate transaction to a charitable organization and allows the licensee to advertise the intent to make the charitable donation.

Section 4: Makes the bill effective on July 1, 2012.

HVM:ljw
12-036.ljw

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 267**
Fiscal Note Number
() Publish Date

Identifier (file name) HB267-DCCED-CBPL-01-21-12
Title Real Estate Sales Licensees
Sponsor Representative Munoz
Requester House Labor and Commerce Committee

Dept. Affected DCCED
Appropriation Corps, Bus & Professional Licenses
Allocation Corps, Bus & Professional Licenses
OMB Component Number 2360

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by Don Habeger, Director — Phone 465-2536
Division Corporations, Business and Professional Licensing — Date/Time 1/21/2012 9:00am
Approved by JoEllen Hanrahan, Director Administrative Services — Date 2/3/2012
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

LEGAL SERVICES

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MEMORANDUM February 17, 2012

SUBJECT: Legality of restricting real estate agents to one broker (CSHB 267(L&C); Work Order No. 27-LS1111\B)

TO: Representative Carl Gatto
Attn: Melanie Lesh

FROM: Hilary Martin
Legislative Counsel

You have asked me to research the legality of sec. 2 of CSHB 267(L&C), specifically the legality of restricting an agent to one broker. Your request included other questions that are more in the nature of policy decisions (e.g. "too much power?"), and are therefore not addressed in this memo.

Section 2 of CSHB 267(L&C) amends AS 08.88.398, relating to licensed assistants. The amended language allows a licensed real estate salesperson or licensed associate real estate broker to act as a licensed assistant to another licensed salesperson or associate real estate broker if the licensed assistant and the salesperson or associate broker are both employed by the same broker.

Licensing statutes in general restrain a profession, in that certain requirements must be met in order to practice that profession. For example, a dental hygienist may only practice under the supervision of a licensed dentist.[1] The statutes governing electrical and mechanical administrators limit the administrator to working for just one registered contractor.[2]

Assuming that the language of the bill does prohibit a licensee from working for more than one employer, the bill could raise due process concerns. The Alaska Supreme Court has stated that "[a]lthough the right to practice one's profession is protected by the due process clause, it is not 'fundamental,' and it may be regulated so long as those regulations are reasonably related to a legitimate purpose."[3] Therefore, the state would

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[1] AS 08.32.140.

[2] AS 08.40.130, AS 08.40.280.

[3] *Squires v. Alaska Bd. of Architects, Engineers, & Land Surveyors*, 205 P.3d 326, 340 (Alaska 2009).

just have to show that the restriction on working just for one broker is reasonably related to a legitimate purpose for the statute to pass a due process analysis.

As a general note for your information, I did discover that at least a few other states restrict the ability of a real estate licensee to work for other brokers. In Minnesota, a "salesperson must be licensed to act on behalf of a licensed broker and may not be licensed to act on behalf of more than one broker in [the] state during the same period of time."[4] In Georgia, a "salesperson or community association manager shall not act as a licensee for any broker other than the broker holding the salesperson's or community association manager's license. . . ."[5] In Nevada, "no real estate broker-salesperson or salesperson may be associated with or employed by more than one broker or owner-developer at the same time."[6]

In a telephone conversation with Melanie on February 16, 2012, she indicated that there was a concern that the bill does not actually restrict a licensed assistant to working for only one broker, and she asked whether the original statutory language is clear that a licensee may only work for one broker at a time.

In my opinion, neither current statutes nor CSHB 267(L&C) is clear about whether a real estate licensee may be employed by more than one broker.

The current language in AS 08.88.398 states: "A licensed real estate salesperson or licensed associate real estate broker may act as a licensed assistant to a real estate licensee other than the broker who employs the salesperson or associate broker. . . ." This language is unclear about who a licensed assistant could work for. The phrase "other than the broker who employs the salesperson or associate broker" could mean a separate broker than the one the licensed assistant currently works for, so that a licensed assistant could work for broker A, and then could work as a licensed assistant for a real estate salesperson who works for broker B, without the licensed assistant being an employee of broker B. The language could also mean that the licensee could work as a licensed assistant for someone in a brokerage that is not the broker. So, a licensed assistant could work for a real estate salesperson and they could both be employees of broker A, but the licensed assistant could not work as a licensed assistant for broker A. The proposed language for this section in CSHB 267(L&C) clarifies that the licensed assistant and the licensed real estate salesperson or associate real estate broker must both work for the same broker. The proposed language would not prevent someone who works for two brokers from working as a licensed assistant to a real estate salesperson or licensed associate real estate broker for each broker. For example, a real estate licensee

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[4] Minn. State. § 82.63(4) (2011).

[5] Ga. Code Ann. § 43-40-19(d) (2010).

[6] Nev. Rev. Stat. § 645.520(3) (2011).

could work for two brokers, broker A and B. The licensee could be a licensed assistant to a real estate salesperson or associate real estate broker for a person in broker A's office, and then also work as a licensed assistant for someone in broker B's office. The licensed assistant would have to work for both broker A and broker B for this arrangement to comply with the proposed language to AS 08.88.398.

The current perception of some people that there is a prohibition on a licensee working for more than one broker likely comes from the laws and regulations regarding license certificates and the posting of those certificates. In AS 08.88.291(a), a licensed real estate broker must inform the commission of the person's principal office and any real estate licensees employed at that office. Under AS 08.88.321, the license certificate of a real estate broker must be displayed in that broker's principal office, and the license certificate of each licensee working in the broker's principal office shall be displayed in that office. Under AS 08.88.321(d), "certificates displayed under this section must be displayed where they are available for public clients and customers to verify the current active status of licensees working in the office."

Under 12 AAC 64.075(a), a licensee may not be involved in real estate activities until the broker sends a notice of employment to the commission, and the individual's license is delivered to the broker. Under subsection (b), a licensee has to request a license transfer from one broker to another, and the terminating broker must sign and date the front of the license certificate. The licensee has to provide the new employing broker a copy of the signed certificate and complete an application for a license transfer in order to work for the new broker.

The statutes together with the regulations all imply that a licensee may only work for one broker at a time. Although nowhere in statute does it clearly state that a licensee may only work for one broker at a time, current license restrictions, including requiring an application to transfer from one broker to another, strongly imply that a licensee may only work for one broker at a time.

If I may be of further assistance, please advise.

HVM:ljw
12-137.ljw

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE REAL ESTATE COMMISSION

In the Matter of	)	
	)	
HENRY S. BARTOS	)	OAH No. 08-0054-REC
	)	Board Case No. 3000-04-012
	)	

DECISION AND ORDER

I. Introduction

This is a civil disciplinary proceeding to address alleged misconduct by Henry S. "Hank" Bartos of Fairbanks, Alaska, who holds Real Estate Broker License No. 11409. After a hearing addressing a six-count Accusation, violations of real estate law have been proven with respect to two transactions. The violations support sanctions against Mr. Bartos consisting of a reprimand, a civil fine, and a requirement for remedial training.

A. Procedural History

The Department of Commerce, Community & Economic Development's Division of Corporations, Business and Professional Licensing ("Division") commenced this proceeding by an Accusation issued January 24, 2008. The matter was referred to the Office of Administrative Hearings to conduct a hearing and prepare a recommended decision.

The Chief Administrative Law Judge assigned the case to Administrative Law Judge James T. Stanley. The parties stipulated that the matter would not be heard, nor a recommended decision issued, within the 120-day period normally allowed under AS 44.64.060(d).[1] Mr. Stanley scheduled a hearing in Fairbanks for July of 2008, subsequently delayed at the request of Mr. Bartos to the latter part of August.

Mr. Stanley conducted a four-day hearing, with testimony from sixteen witnesses and approximately 3000 pages of exhibits taken into evidence. Mr. Stanley subsequently resigned from state employment. He was not able to prepare a proposed decision before his employment ended.

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[1] As required to make such a stipulation effective (*see* AS 44.64.060(d)), the Chief Administrative Law Judge concurred.

On January 26, 2009 the Chief Administrative Law Judge assigned the undersigned to complete the case. A telephonic status conference was held on February 13, 2009 to explore with the parties the best way to move forward. Counsel for both sides requested that the undersigned not consult with Mr. Stanley to learn his subjective impressions from the hearing, and this request has been honored.[2]

Counsel for Mr. Bartos requested that all non-telephonic witnesses be heard again in the presence of the new administrative law judge, essentially starting the hearing anew. Counsel for the Division requested that no new testimony be taken and that all credibility judgments be made based on the recorded testimony alone. After listening to the recording and reviewing all of the evidence, I grant the Division's request and deny Mr. Bartos's request.[3]

B. Evidence and Citations

This case encompasses conduct that spans several years. The period straddles significant changes in Alaska's real estate laws. All references in this decision to statutes and regulations, unless otherwise specified, are to the statutes and regulations in effect at the time of the conduct alleged to be illegal in the particular count in question.

All of the proffered exhibits (Division 1-30 and Bartos A-X) were admitted. Objections to Division 5-8, 11, 12, 14-16, 22, and part of 10 were overruled at the hearing; the balance came in without objection.

This is a case governed by the Administrative Procedure Act, AS 44.62.330 – 640.[4] In such cases, relevant hearsay evidence is generally admissible, but it can only be used "to

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[2] Apart from casual remarks about the length of the hearing and the fact that the testimony was conflicting, Mr. Stanley did not speak to me about the evidence prior to reassignment nor afterward. I have not seen Mr. Stanley's notes from the hearing. Mr. Stanley left no draft decision.

[3] The recording, while of low quality at times due to electronic interference, is clear enough that I could, with some effort and repeat listening, hear every word of all testimony of all witnesses. I believe the recorded testimony and its relationship to the exhibits gives me a substantial basis on which to make the necessary credibility judgments.

I note that use of a recording by a replacement hearing officer has been deemed sufficient to accord due process to the parties in cases where the person who originally heard the evidence is no longer available. *See Chocknok v. State, CFEC*, 696 P.2d 669, 676 n.10 (Alaska 1985). Taking further live testimony would impose enormous expense on both sides, and would run the risk of losing accuracy in situations where witnesses would, by virtue of prior rehearsal, be able to better anticipate cross-examination.

I note that it is only Mr. Bartos who desired additional live testimony, and that for the only two allegations on which I am inclined to find against Mr. Bartos I have essentially accepted his testimony, and that of his fact witnesses, at face value. Conversely, while I am inclined to make an important credibility judgment against the Division on the critical Count VI, the Division has made the election not to seek a further opportunity to offer evidence on that count.

[4] AS 44.62.330(a)(11) makes the act applicable to this case.

supplement or explain direct evidence;" it is "not sufficient by itself to support a finding unless it would be admissible over objection in a civil action."[5] In some cases heard by this office, there is a stipulation or order prior to the hearing that specifies how this restriction will be administered, such as a requirement that hearsay that is not flagged by means of an objection will not be subject to the restriction. There was no arrangement of that kind in this case, and the result is that a number of items in the record, regardless of whether their hearsay nature was addressed in the hearing, are usable only in a supplementary or explanatory role. This is true of the interview transcripts offered by the Division, as well as the expert reports submitted by both sides.

C. Burden of Proof

This is a disciplinary proceeding in which the Division seeks sanctions against an individual who already holds a license. The Administrative Procedure Act places the burden of proof on the Division in such a case.[6] The Division must prove each required element of each violation by a preponderance of the evidence.[7]

II. Overall Factual Background

Henry S. "Hank" Bartos started working in the real estate business in 1987.[8] He passed the examination for a broker's license in 1995 and became a broker shortly thereafter.[9] He remained a licensed broker in good standing at all times through the events at issue in this case.[10]

The events of interest in this case begin in 2002. At that time, Hank Bartos was president and majority shareholder in Hank Bartos Realty, Inc., an Alaska corporation.[11] Lori Schooley, his primary business associate in recent years, was a minority shareholder and the treasurer of that corporation.[12] Hank Bartos Realty, Inc. owned a franchise that did business as Century 21 Gold Rush, which had a main office in central Fairbanks and a branch in North Pole.[13] Mr. Bartos worked from the Fairbanks office and was the broker-in-charge.[14] Ms. Schooley worked

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5 AS 44.62.460(d).
6 AS 44.62.460(e)(1).
7 *See id.*
8 Direct exam of Bartos.
9 Ex. 10 at REC 470, 476.
10 Ex. 10.
11 Ex. 29; direct and cross-exam of Bartos; cross-exam of Schooley.
12 *Id.;* Ex. 4 at REC 175.
13 Ex. 25; cross-exam of Schooley.
14 *See* Ex. 25 at REC 1908.

in the same office as an associate broker and as franchise-wide office manager. As office manager, her duties included financial management of the overall enterprise.[15]

For a short time beginning in August of 2003, the Century 21 franchise operated a second branch on the west side of Fairbanks.[16] Although there was some testimony about them at the hearing, the North Pole and west side branches are not relevant to any of the counts of the Accusation.

In 2003 Hank Bartos Realty, Inc. acquired a new franchise to open a Coldwell Banker office in Fairbanks. Coldwell Banker is a different real estate brand from Century 21, although both national master franchises were owned at that time by a single entity, Cendant Corporation. There is some precedent in Alaska for a single local entity or person to own two real estate franchises operating under different names.[17] The acquisition of a different brand occurred with knowledge of Cendant Corporation and of the Division (then called the Division of Occupational Licensing).[18] The Coldwell Banker office opened in early January of 2004, with Lee O'Hare as the supervising broker.[19] Its registered name was Coldwell Banker Gold Country.[20]

The Century 21 and Coldwell Banker offices held joint sales meetings. As is the case in MLS (Multiple Listing Service) meetings attended by licensees from many real estate offices, there is a potential for client confidences to be divulged during such multi-office meetings, and some participants were concerned about this possibility.[21] On the other hand, the joint sales meetings had the potential to be of great benefit to clients by getting the word out about properties on the market, and these Century 21-Coldwell Banker meetings began at a time when MLS was not as active as it might be in accomplishing that function.[22]

Financial management of the Coldwell Banker office, such as payment of commission checks and operation of a central trust account, fell under the overall office manager duties of Lori Schooley, the treasurer of the holding company.[23] Coldwell Banker transaction files were

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15 *E.g.*, direct exam of Schooley.

16 Direct exam of Shuster.

17 Direct exam of Royse.

18 *E.g.*, Ex 25 at REC 1931.

19 Direct exam of O'Hare.

20 Ex. 26 at REC 2005.

21 *E.g.*, direct exam of O'Hare and Burrows. Although there was a great deal of testimony at the hearing about the joint sales meetings, no count of the Accusation addresses that issue and the Division has not isolated any specific allegation of misconduct during the meetings.

22 Cross-exam of Schooley.

23 *E.g.*, testimony of Schooley and O'Hare.

duplicated and held both at Coldwell Banker and at a common storage site with Century 21,[24] although there is no evidence that Century 21 licensees had access to Coldwell Banker files or vice versa.

On April 5, 2004 Lee O'Hare resigned as broker at the Coldwell Banker office.[25] Lori Schooley registered as broker of record for Coldwell Banker Gold Country in her stead, remaining in that capacity until 2006.[26]

When he began to contemplate operating a Coldwell Banker franchise, it was Hank Bartos's plan to operate it through a limited liability company called Gold Standard Real Estate Services, LLC. Both he and Schooley seem to have begun to think of Hank Bartos Realty, Inc. as "Gold Standard" by 2004. The actual process of setting up the LLC was unhurried, however, and it was not organized until August of 2005. It apparently took over the franchises of the previous holding company within the next year or two. Ownership percentages in the new holding company were essentially unchanged, with Bartos holding a 70% interest and Schooley the remainder.[27]

III. The Counts of the Accusation

A. Count I (Role of Lori Schooley)

The first count of the accusation is premised on the allegation that Lori Schooley continued to function as Hank Bartos's "licensed assistant" at Century 21 after she became the broker at Coldwell Banker in April of 2004. (As will be discussed in part III-A-2, a "licensed assistant" is a real estate licensee who acts as a subordinate assisting another licensee with transactions by performing duties for which a license is required.) The division contends that such an arrangement would place Bartos, as the broker of the Century 21 office, in violation of five legal requirements.

1. Facts

Lori Schooley registered as broker of the Coldwell Banker Gold Country office on April 7, 2004.[28] She remained in that capacity until late 2006 or early 2007. There is no dispute that, concurrently with her work as broker at Coldwell Banker, she continued as the administrative

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24 Direct and cross-exam of O'Hare; direct exam of Schooley.
25 Ex. 26 at REC 1993.
26 Ex. 26 at REC 2008, 2020.
27 Ex. 25, 26, 30; direct exam of Bartos; testimony of Schooley (whole paragraph).
28 Ex. 26 at REC 2008.

office manager for all of the offices owned by Hank Bartos Realty, Inc., overseeing the staff support in those offices and writing checks for office disbursements.[29] It is also undisputed that she continued to administer the business of the holding company, Hank Bartos Realty, Inc., of which she was the treasurer.[30] She was paid a salary for this work.[31] The disputed factual question is whether Ms. Schooley *also* functioned as a "licensed assistant" to Mr. Bartos in connection with the transactions of Century 21 Gold Rush. There were several discrete elements of the Division's case addressed to this issue. They will be numbered so they can be referred to easily in later discussion.

(1) Check and business card, May 2004. The Division proved that on May 3, 2004 (shortly after she had assumed the Coldwell Banker duties), Lori Schooley wrote a check on the general account bearing a Century 21 logo to pay a former Century 21 salesperson for a commission earned on a Century 21 transaction.[32] The Division proved that on that occasion Ms. Schooley included with the check a business card showing herself as a Century 21 "sales associate."[33]

(2) Write up offer, August 2004. The Division proved that on one occasion in August of 2004, Hank Bartos agreed with a Century 21 client upon an offer that the client wished to present, but was unable to get together with the client before going out of town for a short time. He asked Schooley to meet with the client and write up and present the offer on his behalf, and she did so; he then completed the rest of the transaction.[34] Coldwell Banker was already the listing office in the transaction.

(3) Occasional substitute broker. The Division proved that Ms. Schooley infrequently filled in as supervising broker at Century 21 when Bartos was out of town for short periods, primarily on occasional weekends in the summer when Bartos liked to attend dog shows.[35]

(4) Kendrick Court transaction, 2005. The Division proved that Ms. Schooley became involved in a mid-2005 transaction involving 389 Kendrick Court in Fairbanks, even though Coldwell Banker Gold Country was neither the listing nor selling office for the property. She

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29 Direct and cross-exam of Schooley; direct and ALJ exam of Richardson. All checks for all offices were apparently written on a consolidated account.

30 *Id.*

31 ALJ exam of Schooley upon recall.

32 Direct exam of Shuster; Ex. 13 at REC 739.

33 *Id.*

34 Cross-exam of Bartos; Ex. 20. This is the Sprucewood Court transaction, discussed at more length in connection with Count III.

35 Cross-exam of Bartos; ALJ exam of Schooley.

acted on behalf of Century 21 Gold Rush, the listing office. The Kendrick Court property was one that had come into the Century 21 inventory before Schooley went to Coldwell Banker, and so she was familiar with it.[36]

389 Kendrick Court was a Cendant Corporation relocation property. These were properties for which Cendant, then the owner of the master franchises for both Century 21 and Coldwell Banker, had a contractual commitment (typically to an employer such as Alyeska Pipeline) to relocate the owner, market the property, and buy the property if it did not sell.[37] Cendant relocation properties required unique procedures and paperwork, for which Schooley had special training.[38] Cendant knew her and wanted to work with her.[39] 389 Kendrick Court had permafrost problems and seems to have been a difficult property to market, and Cendant appears to have been a disgruntled client.[40]

Schooley was extensively involved in the transaction, working closely with Cendant over a period of several months,[41] making herself available to discuss a pending offer,[42] and even stating on one occasion that "I [Schooley] will be happy to reassign this property to another agent within Century 21 Gold Rush."[43] In correspondence with Cendant, Century 21 staff referred to her as Hank Bartos's "assistant."[44]

(5) Commission sharing. Perhaps the most arresting item of proof offered by the Division on the "licensed assistant" issue was a transcript of sworn testimony Hank Bartos gave in a deposition on September 27, 2005.[45] On that occasion, Bartos testified as follows:

> Q. (by Mr. Wallace) You make any money as a broker for Century 21 Gold Rush?
>
> A. No.
>
> Q. Have you ever?
>
> A. Yes. From time to time.
>
> Q. When is the last time you made any money as a broker for Century 21 Gold Rush?

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36 Cross-exam of Schooley.
37 Direct exam of Schooley and Sandberg.
38 *Id.*; redirect exam of Schooley.
39 Cross-exam of Schooley.
40 Ex. 22 at REC 1360-61.
41 Ex. 22.
42 Ex. 22 at REC 1378; cross-exam of Schooley.
43 Ex. 22 at REC 1360.
44 Ex. 22 at REC 1368.
45 Ex. 4. The testimony was given in a deposition connected with *Packard v. Bartos,* No. 4FA-04-1389 CI (Fairbanks Superior Court), a lawsuit related to the matters addressed in Count VI.

A. Again, I don't understand the question. You know, the way I get paid is when I do a transaction, I don't pay any cost to the agency. My advertising fees and everything else is paid by the agency.

If a transaction that I'm involved in closes, then I get a – you know, whatever that commission split is, split with Schooley on a 70/30 basis.

Q. Is Lori Schooley a broker?

A. Yes.

* * *

Q. . . . Does Lori Schooley get paid, make any money as a broker for Century 21 Gold Rush?

A. She gets paid a 30 percent of transactions that I do, and she gets paid a monthly stipend for the number of hours that she puts in. She's also the supervising broker at Coldwell Banker. And since we couldn't pay her, we gave her 30 percent of the business.

Q. But the business itself doesn't make any money, right?

A. Well, that's – that's – that's the facts. Hopefully, it won't always be that way, but that's – that's the way it is in this competitive market. You'll find that most real estate brokers in this town don't make a lot of money.[46]

Read literally, this testimony seems to indicate that Ms. Schooley shared directly in Hank Bartos's Century 21 commissions in 2005, a year when she was the broker at Coldwell Banker.

At the hearing in this case, Bartos flatly denied that this was so:

Q. (by Mr. Auth) [Quotes deposition testimony] Is that correct?

A. Well it depends on how you're looking at it. As a Century 21 broker, if I had been in a transaction and she assisted on it, she would get paid 30 percent of my transactions. But when she became the broker over at Coldwell Banker, that ceased. She – she was not my assistant anymore and she didn't get paid anything for transactions.

Q. Well this deposition was taken at the time when Schooley was the broker at Coldwell Banker, correct? September 27, 2005, correct?

A. Yes. But, she was not my assistant, and – she got paid a salary for being the broker then. She didn't get 30 percent, you know, of my commissions. She got 30 percent ownership in the company, that was her compensation. But she got the short end of that stick because the company has never made a profit.

Q. But you say in the answer, in the present tense, she gets paid a 30 percent of transactions that I do. That's what you said in the deposition. Correct?

A. When she was -- was my assistant.

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[46] Ex. 4 at REC 174-5. As an admission, the deposition testimony is not hearsay and is not subject to the restriction on hearsay in AS 44.62.460(d).

Q. That's not what you say there. You're speaking in the present tense.

A. Well, I think you need to look at the big picture and what the big question was. It – I didn't read it, hear it that way. She got 30 percent of the company because I couldn't pay her what she was worth. She was not my assistant, she was not getting 30 percent of my transactions. I -- I don't know what I need to do to make that any clearer.[47]

The Division did not ask Lori Schooley, the financial person for Hank Bartos Realty, Inc., about whether or in what way she shared in Century 21 commissions after she went to Coldwell Banker. It did not use Commission subpoena power or other means to obtain financial records that would put the question to rest. Although the question is close, I find that the Division did not prove that Lori Schooley shared in Hank Bartos's Century 21 commissions after she became broker at Coldwell Banker, except insofar as she received indirect benefit as a shareholder in the holding company.

2. Analysis

The Division contends that Lori Schooley served as Hank Bartos's "licensed assistant" at Century 21 after she became broker at Coldwell Banker. Alaska real estate law refers to "licensed assistants," but does not define the term.[48] From the context, the term denotes a person who, in a subordinate role, assists another person who also holds a real estate license with transactions by performing duties "for which a license is required."[49]

The Division proved items (1) through (4) above, failing to prove item (5). Items (1) through (3) cannot fairly be said to place Lori Schooley in the role of Hank Bartos's licensed assistant. Item (1) showed only that Schooley, the treasurer of Hank Bartos Realty, Inc., wrote the checks for all of the affiliated entities, including Century 21 Gold Rush—not an activity requiring a license—and that on one occasion only a few weeks after her move, she used an outdated business card. Item (2), although it presented problems that will be addressed in another count, fundamentally put her in the role of a fellow broker filling in for Bartos while he was out of town, not in the role of a licensed assistant. Item (3) placed her in the traditional role of a broker watching another broker's office during a brief absence. There was uncontroverted testimony at the hearing that this is a common arrangement,[50] and it is one that the

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47 Cross-exam of Bartos (hearing audio file 4 at 1:57:08 – 1:59:23).

48 *See* AS 08.88.398.

49 *See id.*; 12 AAC 64.140(b) ("unlicensed assistant" may not be assigned duties "for which a license is required").

50 Direct exam of Royse.

Commission's regulations appear to contemplate;[51] in any event, the arrangement did not make Schooley a licensed assistant.

Item (4) did place Schooley in the licensed assistant role, albeit in only a single transaction. In the Kendrick Court transaction Schooley functioned as, and was held out as, Hank Bartos's "assistant" as she performed functions, including some requiring licensure, over the course of several months. Bartos was not unavailable during this entire period and she was not serving as his substitute. The remainder of this discussion will focus on the legality of the licensed assistant arrangement proven in item 4.

The Division contends that Schooley's licensed assistant role violated a long list of statutes and regulations, taken up one at a time below:

Violation of AS 08.88.398. This is the only provision of law directly addressing licensed assistants. It allows a salesperson or associate broker to "act as a licensed assistant to a real estate licensee other than the broker who employs the salesperson or associate broker" if four conditions are met, including that the employment arrangement be "in writing" and that it be "approved in writing by the broker of the licensee who employs the assistant."[52] The Division apparently alleges that Schooley's arrangement with Bartos violated AS 08.88.398 because it did not comply with these two of the four conditions.[53]

The problems with this legal theory are several. First, the Division did not inquire whether Schooley and Bartos's employment arrangement, if any, was in writing, and did not prove that it was not. Second, the Division also did not prove that Hank Bartos's broker—who would be Hank Bartos himself—did not approve the arrangement in writing. Third and most fundamentally, AS 08.88.398 only regulates the circumstances under which associate brokers and salespeople can act as licensed assistants; it speaks to the consensual arrangement between supervising brokers that must accompany such an arrangement. Lori Schooley was neither an associate broker nor a salesperson, but rather was a broker in her own right. AS 08.88.398 does not address or regulate the circumstance where a broker acts as licensed assistant to another

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[51] 12 AAC 64.077 refers to "the broker or an associate broker designated by the registered broker to supervise transactions or licensees during the broker of record's absence." This regulation requires notification of the Commission *if* this designated broker is to "sign for the broker of record on a license application," but it does not otherwise require Commission involvement in such temporary coverage arrangements.

[52] AS 08.88.398(1) and (2).

[53] Accusation at 3.

broker. This does not mean that it is always permissible for brokers to enter into such an arrangement, but any illegality does not flow from AS 08.88.398.

Violation of AS 08.88.291. Closer to the mark is the Division's reliance on the basic requirements found in AS 08.88.291(a). That provision required Hank Bartos, as the registrant of the Century 21 Gold Rush office, to "inform the commission of . . . the names of the real estate licensees who are employed at each office." When Bartos permitted Schooley to function as a licensed assistant with respect to the Kendrick Court transaction, he did not amend his registration to indicate that she was doing the work of the Century 21 office,[54] creating a potential problem with this requirement. However, it has not been established that he *employed* Lori Schooley in connection with this work, and the reporting requirement in AS 08.88.291(a) relates to licensees "employed" at each office. As used in AS 08.88, "employ" ordinarily seems to denote to hire for compensation.[55] It has only been established that Lori Schooley was compensated for her work as a broker at Coldwell Banker and for her office management duties. Her *ad hoc* assistance on the troublesome and unusual Kendrick Court transaction may have been uncompensated, and thus may have been performed simply as one broker assisting another as a courtesy. A single transaction conducted on that basis would not violate AS 08.88.291(a).

Violation of AS 08.88.321(b). This statute requires that the "license certificate of each licensee working in the broker's principal office shall be displayed in that office." The Division has specifically alleged that Bartos violated this provision in connection with Schooley's role. However, the Division did not seek, and did not obtain, any testimony about whether Schooley's license was displayed at Century 21.[56] Insofar as we can tell, moreover, Schooley did most or virtually all of the Kendrick Court work from the Coldwell Banker office.[57] The Division made no effort to prove otherwise.

Violation of 12 AAC 64.075(a). This regulation prohibits an individual from being involved in "activities requiring licensure under AS 08.88 until the individual's employing broker signs and delivers to the commission a notice of employment of the individual and the individual's license certificate is delivered to the broker by the licensee or the commission." The

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54 *See* Ex. 25.

55 No variant on the word "employ" is defined in the chapter, but the word is used in at least one context that clearly involves compensation: AS 08.88.398(3) (licensed assistant may only be employed if person assisted takes responsibility for "wages and appropriate taxes").

56 It might be quite reasonable to speculate that it was not, but in the absence of any evidence, no finding can be made. It is the Division's responsibility to establish each element of every violation it alleges.

57 Ex. 22 at REC 1342, 1352, 1355, 1372-4.

prohibition is directed at individuals who have "employing brokers." Thus, if Schooley was indeed employed by Bartos in connection with Kendrick Court, there might conceivably be a violation by Schooley. The regulation is not directed at the employing broker, and therefore there could not be a violation of this particular regulation by Bartos.

Violation of 12 AAC 64.110(e)(6). 12 AAC 64.110(e) requires brokers, "before operating any office or branch office, [to] register the office or branch office with the commission on a form provided by and approved by the commission." Subparagraph (6), the provision the Division alleges that Mr. Bartos violated, requires the broker to place on that form the "name and license number of all licensees employed by the broker at the office." As noted above, the Division did not prove that Ms. Schooley was "employed" at the Century 21 office.

Summary regarding Count I: In connection with the conduct at issue in Count I, the Division has not shown that, in the single proven instance where Lori Schooley acted as Hank Bartos's licensed assistant, her role represented a violation of any existing legal stricture that applied to Hank Bartos.

B. Count II (Role of Noelle Childress)

Count II focuses on an arrangement by which a real estate salesperson at the Coldwell Banker office conducted Century 21's property management business for a time. The Division contends that Hank Bartos's responsibility for this arrangement placed him in violation of six statutes and regulations.

1. Facts

From early 2005 until approximately December of 2006, Noelle Childress was a licensed real estate salesperson who hung her license at Coldwell Banker Gold Country, under the supervision of Lori Schooley. Nonetheless, beginning in December of 2005 and continuing for the ensuing year, she performed all property management duties for the Century 21 franchise.[58] The work included attempting to rent real property and collection of rents from tenants of real property.[59] The Coldwell Banker franchise did no property management work; all property management work Ms. Childress did was Century 21 work.[60]

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58 Ex. 14 at 801; Ex. 16; cross-exam of Bartos and Schooley.

59 ALJ exam of Bartos; Ex. 13 at 726.

60 Cross-exam of Schooley; *see also* Ex. 13 at REC 726 (Century 21 ads for rental properties listing Childress as the contact).

It is undisputed that Ms. Childress physically performed this work at and from the Coldwell Banker office, not at or from the Century 21 office.[61] She began doing the work when Century 21 lost its property manager and no licensees in that office wanted to take over the task, with the expectation that it would be a temporary arrangement.[62] Either before or quite soon after she took over, Bartos and Schooley made a business decision to phase out the property management work. Century 21 divested most of the property management business, retaining about ten properties that either belonged to Hank Bartos or belonged to Stryker Brigade personnel deployed to Iraq, whom Bartos and Schooley did not wish to burden with the task of finding a new property manager.[63] The phase-out was prolonged somewhat by the extension of the Stryker deployment,[64] and was not complete by the end of 2006.[65] During the phase-out period, the work consumed about ten hours per week of Ms. Childress's time.[66]

Although the question was never explored directly at the hearing, one must infer that Ms. Childress did the Century 21 property management work at Hank Bartos's behest. The direct instruction to Ms. Childress to do so came from Lori Schooley and a person named Mike Cooper.[67] However, in his testimony Mr. Bartos referred to the arrangement as something "we did" as a "joint venture" between the brokerages because "I" [Bartos] did not wish to leave a soldier in Iraq without a manager.[68] Moreover, as the broker of the Century 21 office, Mr. Bartos would have had ultimate control over the handling of the Century 21 property management contracts.

2. Analysis

The Division has suggested six legal provisions that, in its view, Bartos violated by his involvement in the property management arrangement. They are addressed one at a time below.

Violation of AS 12.64.550(a). The work Noelle Childress did for Century 21 from December 2005 to December 2006, which included attempting to rent real property and collection of rents from real property for others, involved property management real estate

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61 *E.g.*, cross-exam of Schooley
62 Ex. 16 at 926; cross-exam of Schooley.
63 Re-direct exam of Schooley; cross-exam, re-direct exam, and ALJ exam of Bartos.
64 *Id.*
65 Ex. 16 at 926.
66 Redirect exam of Schooley.
67 Ex. 16 at 926.
68 Cross-exam of Bartos.

transactions for which a real estate license is required.[69] Since 1994, a Board regulation, 12 AAC 64.550, has required that "[a] licensee engaged in property management shall conduct property management activity in the registered name of the real estate company with which the licensee is affiliated."[70] There are no exceptions to this requirement for short-term assignments, part-time work, winding down a business, or any other circumstance (these circumstances may affect how much discipline, if any, should be imposed, but they do not bear on the underlying legality of the conduct). In 2005-2006, the "registered name" of the real estate company with which Noelle Childress was affiliated was Coldwell Banker Gold Country.[71] Accordingly, Noelle Childress was prohibited by regulation from doing Century 21's property management work—and working in name of Century 21—while she hung her license at Coldwell Banker.

In this discipline case the sole respondent is Hank Bartos, and therefore the question is whether Mr. Bartos's conduct in this arrangement, as opposed to that of Noelle Childress, was contrary to 12 AAC 64.550. The first question is whether that regulation applies to Bartos at all, since he is a broker and would not in common parlance be referred to as a real estate "licensee," and the regulation only restricts "licensees." In the real estate statutes and their implementing regulations, the term "licensee" encompasses brokers "unless the context clearly excludes brokers."[72] The context of 12 AAC 64.550, the regulation requiring licensees to "conduct property management activity in the registered name of the real estate company with which the licensee is affiliated" does not clearly exclude brokers, and therefore Hank Bartos was subject to the regulation's restrictions.

It does not follow, however, that Mr. Bartos violated the regulation. Hank Bartos caused the property management activities contracted to his office, Century 21 Gold Rush, to be managed by Noelle Childress at the Coldwell Banker office. Had Childress managed them in the name of Coldwell Banker, there might be a violation of this regulation by Bartos (and none by Childress). But Childress managed them in the name of Century 21, which was in fact the "registered name of the real estate company with which" Bartos was affiliated. Thus, *Bartos* did not, directly or indirectly, conduct property management activity in the registered name of any

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69 *See* AS 08.88.161; AS 08.88.900(a); AS 08.88.990(11) [cited as of 2005-2006; now renumbered AS 08.88.990(13)].

70 12 AAC 64.550(a).

71 *See* Ex. 26 at REC 2008, 2017-8; Ex. 28; 12 AAC 64.112.

72 AS 08.88.990(10) [cited as of 2005-2006; now renumbered AS 08.88.990(12)].

real estate company other than the one with which he was affiliated. Hence, the circumstances proved by the Division do not represent a violation of 12 AAC 64.550 *by Mr. Bartos*.

Violation of 12 AAC 64.550(b). This subsection provides, in relevant part, that "[a] licensee may not conduct property management activity for another person without a prior written property management contract." No evidence was presented at the hearing to show that any properties were managed without prior written property management contracts.

Violation of 12 AAC 64.075(a). This regulation prohibits an individual from being involved in "activities requiring licensure under AS 08.88 until the individual's employing broker signs and delivers to the commission a notice of employment of the individual and the individual's license certificate is delivered to the broker by the licensee or the commission." The prohibition is directed at individuals who have "employing brokers." Noelle Childress was such an individual, but Hank Bartos was not.

Violation of 12 AAC 64.110(e)(6). 12 AAC 64.110(e) requires brokers, "before operating any office or branch office, [to] register the office or branch office with the commission on a form provided by and approved by the commission." Subparagraph (6), the provision the Division alleges that Mr. Bartos violated, requires the broker to place on that form the "name and license number of all licensees employed by the broker at the office." The Division has not explained how Bartos may have violated this provision. To be sure, in registering the Century 21 office at which he was broker, he did not list Ms. Childress as a licensee employed by him at that office. But Ms. Childress was not a licensee employed by him, nor was she at that office. This circumstance forms part of the reason that her activity was illegal—for her—under 12 AAC 64.550(a), but there was no violation of 12 AAC 64.110(e)(6) by Bartos when he accurately failed to list her as a licensee employed by him at the Century 21 office.

Violation of AS 08.88.321(b). This statute requires that the "license certificate of each licensee working in the broker's principal office shall be displayed in that office." It is undisputed that Ms. Childress, during the relevant period, was working in the Coldwell Banker office. There is no evidence that her license certificate was not displayed there.

Violation of AS 08.88.291(a). The first sentence of AS 08.88.291(a) reads: "A person licensed as a real estate broker shall, by registering with the commission, inform the commission of the person's principal office and of any branch offices of the person's real estate business and include in the information the names of the real estate licensees who are employed at each

office." Hank Bartos appears to have done this during the relevant period,[73] or if he did not, any failure was not related to the Childress work at issue in Count II.

The second sentence of AS 08.88.291(a) reads: "A real estate licensee may do real estate business only through a principal office or from a branch office registered by the broker by whom the licensee is employed." By doing real estate business "through" the Century 21 office, Noelle Childress may have violated this provision. The provision is a prohibition that only addresses licensees. Although, as noted above, the term "licensees" in AS 08.88 ordinarily encompasses brokers, it does not encompass brokers if "the context clearly excludes brokers."[74] With respect to this particular sentence of § 291(a), the context clearly excludes brokers because the sentence is about licensees "employed" by a "broker." Thus, the sentence does not apply to Hank Bartos, a broker.

The final sentence of AS 08.88.291(a) reads: "Failure of a real estate broker to maintain a place of business or to inform the commission of its location and the names and addresses of all real estate licensees employed at each location by the broker is grounds for the suspension or revocation of the broker's license." This sentence applies to Bartos, but he appears to have complied with it during the relevant period.[75]

Summary regarding Count II: In connection with the conduct at issue in Count II, the Division appears to have proved impermissible activity by Noelle Childress.[76] It has not, however, shown that any of the conduct represented a violation of any existing legal stricture that applied to Hank Bartos. It may be regrettable that Mr. Bartos would place one of Ms. Schooley's licensees in a position where the licensee would be out of compliance with the laws that applied to the licensee, but there does not seem to have been a statute or regulation on the books in 2005-2006 that would expose Mr. Bartos to discipline for doing so.

C. Count III, First Allegation (Website)

Count III is almost entirely devoted to a 2004 transaction regarding Sprucewood Court No. 13 in Fairbanks. That transaction is addressed in Part III-D below. A sentence early in the count raises a different issue, however: it alleges that "the website for Coldwell Banker at one

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73 Ex. 25; *see especially* Ex. 25 at 1931 (indicating full disclosure to the commission staff; staff subsequently permitted registration on multiple forms).

74 AS 08.88.990(10) [cited as of 2005-2006; now renumbered AS 08.88.990(12)].

75 Ex. 25.

76 Ms. Childress, who was not a party to this proceeding, would not be bound by findings made in this proceeding and may contest them in any proceeding to which she is a party.

time identified Bartos as the 'owner/broker,' even though he was the broker of Century 21 only." This is said to be an example of treating Coldwell Banker and Century 21 "as one company with several branches."[77]

1. Facts

At some point prior to May of 2006, the Coldwell Banker Gold Country website listed "Hank Bartos" as "Owner/Broker."[78] It also listed Lori Schooley as "Managing Broker."[79] The site displayed the Coldwell Banker name and logo, but apparently did not contain any reference to Century 21.

There is no evidence regarding how long the website persisted in this form; the evidence establishes only that it appeared this way at one unspecified instant in time. There is no evidence regarding who caused the website to display Mr. Bartos as "Owner/Broker," or regarding whether Mr. Bartos was aware of what was on the website. The Division neither sought nor obtained any testimony on these matters during the hearing.

2. Analysis

A real estate licensee may not "falsely claim to be licensed and authorized to practice under this chapter."[80] Mr. Bartos, though licensed, was not authorized to practice as the broker of the Coldwell Banker office. Therefore, the claim on the Coldwell Banker website was false. The evidence does not establish, however, that it was Mr. Bartos who made the claim.

A real estate licensee may not advertise real estate "without including in the advertisement the broker's business name registered with the department."[81] If the Coldwell Banker website advertised real estate (it seems reasonable to speculate that it did, but there is no evidence of that fact in the record), then it did so without including Mr. Bartos's business name that was registered with the department. The evidence does not establish, however, that Mr. Bartos was responsible for placing this advertisement.

Because of the lack of evidence connecting Mr. Bartos to the appearance of the Coldwell Banker website at the one, perhaps fleeting, moment in time when it displayed his name, no violation has been established.

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77 Accusation at 5.
78 Ex. 13 at 732; cross-exam of Schuster.
79 *Id.* at 733.
80 AS 08.88.401(h)(5) [as of 2004 and thereafter].
81 12 AAC 64.130(8) [as of 1998 and thereafter].

D. Count III, Second Allegation (Sprucewood Court)

1. Facts

In the summer of 2004, Coldwell Banker Gold Country was the listing office for a condominium unit at Sprucewood Court in Fairbanks. Bill Burrows was the listing agent. The testimony at the hearing gave a detailed history of the listing, but only the following facts are relevant to the violations alleged in the Accusation.

The seller was William St. Pierre. After entertaining prior offers from prospective buyers Nancy Viale and Eric Morman, St. Pierre eventually accepted a second offer from Viale. The executed Purchase Agreement listed Coldwell Banker Gold Country as the listing office and Bill Burrows as listing agent; it listed Century 21 Gold Rush as the selling office and "Lori Schooley/ Hank Bartos" on the line for selling agent.[82] Schooley, of course, was also the associate broker in charge of Mr. Burrows's office.

Ms. Schooley wrote the offer that became the Earnest Money Agreement and Purchase Agreement while she was "filling in" for Mr. Bartos when he was out of town.[83] She did so at Hank Bartos's express request; he asked, "Would you in my stead have this offer signed and presented."[84] Bartos handled the rest of the transaction on his own.[85]

The second page of the Earnest Money Agreement and Purchase Agreement was entitled "Consensual Dual Agency Agreement."[86] It provided that "The Buyer and Seller hereby give their consent to dual agency . . . . One company, C-21 Gold Rush/Coldwellbanker, will be representing the interests of both parties to this agreement." There was a boldface line, "I hereby consent to Consensual Dual Agency as described above," below which Viale signed as buyer and "L Schooley for Hank Bartos" signed as her "agent." No one signed on behalf of the seller on the signature line under the consent language, but St. Pierre entered his initials at the bottom of the document.

Lower down on the page there was a section beginning, "THE FOLLOWING AGENCY IS HEREBY CONFIRMED". It recited:

> As of 8-16-2004 the agent(s), Hank Bartos, of Century 21 Gold Rush is/are the agent(s) of (check one):

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82 Ex. 20 at REC 1113.
83 ALJ exam of Schooley.
84 Cross-exam of Bartos.
85 Cross-exam of Schooley.
86 Ex. 20 at REC 1112.

☐ The SELLER, exclusively

☒ The BUYER, exclusively

☒ SELLER AND BUYER (DUAL AGENCY)

Two boxes were marked. As shown above, the marks were machine-made rather than handwritten exes. Viale and "L Schooley for Hank Bartos" signed on the buyer and selling agent lines below this disclosure; the seller and listing agent lines were unsigned. As noted previously, St. Pierre initialed the bottom of the page.

This document was prepared by Ms. Schooley when she was representing the buyer in Hank Bartos's stead.[87] She checked the two boxes deliberately, apparently using the first to capture her view of the role of the Century 21 office and the second because of the "umbrella" (her word) role of the holding company.[88] Coldwell Banker agent Burrows acknowledged at the hearing that the document was confusing.[89] He did not spend much time reviewing it since this was a second offer from Viale and since he would have assumed his broker knew how to fill the form out correctly.[90]

The file did contain a document with St. Pierre's full signature that related to dual agency. This was an "Agency Disclosure" that St. Pierre and Burrows signed at the time of listing.[91] It described three kinds of agency—agent of the seller, agent of the buyer, and dual agency—and then had the following "Acknowledgement of Agency Disclosure:"

_____ of Coldwell Banker Gold Country will be working with me as (check one):

☐ a seller's agent, exclusively

☐ a buyer's agent, exclusively

☒ a dual agent, provided the other principal party agrees in writing.

The blank was not filled in. The ex was handwritten on this document. St. Pierre and Burrows were the only signatories. The signatures were dated April 28, 2004. At that time, the Century 21 office was not involved with the property; its involvement came later, when Viale entered the picture as a potential buyer.

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87 ALJ questioning of Schooley.

88 Cross-exam of Schooley.

89 Redirect exam of Burrows. Ms. Schooley would not acknowledge at the hearing that the document is confusing.

90 *Id.*

91 Ex. 20 at REC 1128.

The seller, William St. Pierre, was an experienced buyer and seller of real estate. He expressly discussed with Mr. Burrows the fact that "one company" was representing both buyer and seller in the final transaction, and he can be expected to have understood the dual agency role.[92] The buyer, Nancy Viale, had previously dealt with Ms. Schooley in an express dual agency situation (an earlier offer Viale had submitted on Sprucewood Court without Century 21 involvement) and she understood both Ms. Schooley's position as Burrows' supervisor and the fact that Century 21 and Coldwell Banker were co-owned.[93]

2. Analysis

Count III alleges the following illegal conduct by Bartos regarding the Sprucewood Court transaction:

(i) that Bartos had a conflict of interest because $2100 went to Coldwell Banker and $2100 to Century 21 in the transaction, and they failed to disclose that conflict;

(ii) that Bartos participated in a dual agency relationship with the buyer and seller but failed to disclose the dual agency.

For reasons that will become apparent, these two allegations will be evaluated in reverse order.

Disclosure of dual agency. In the Sprucewood Court transaction, Hank Bartos purported to be representing the buyer, and he delegated the initial stage of the transaction to Lori Schooley. The evidence is uncontroverted that he had given her authority to act and sign on his behalf.[94] Accordingly, he is responsible for her conduct. In so acting in his stead, she was doing more than the ministerial task of simply signing a document Bartos had prepared based on his authorization. She was developing the document herself, meaning that she was performing skilled professional services on behalf of Ms. Viale.

Since Lori Schooley was also Mr. Burrows's supervising broker, and Burrows represented the seller, she was on both sides of the transaction, and a dual agency existed. Alaska Statute 08.88.396 governed such relationships at the time of the Sprucewood Court transaction.[95] That statute permitted a licensee to represent both the prospective seller and prospective buyer "only after the licensee informs both the seller . . . and the buyer . . . of the

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92 Cross-exam of Burrows.

93 Direct and cross-exam of Schooley.

94 Direct and ALJ exam of Schooley; cross-exam of Bartos.

95 The statute "applies only to acts that occur before January 1, 2005." AS 08.88.396(f).

dual agency representation and obtains written consent to the dual agency representation from both principals."[96]

Ms. Schooley, on Mr. Bartos's behalf, did make a timely written dual agency disclosure at the outset of this transaction. It claimed, however, both that Mr. Bartos was representing "the buyer, exclusively" and "seller and buyer (dual agency)." These are contradictory statements, and they render the disclosure defective. Moreover, Ms. Schooley did not obtain, as the statute requires, "written consent to the dual agency representation from both principals." She obtained a signature only from the buyer. The seller's signature line under the sentence "I hereby consent to Consensual Dual Agency as described above" has been left blank.

Ms. Schooley explains the missing consent from St. Pierre by speculating that "maybe Bill [Burrows] forgot" to get the signature.[97] It was not fundamentally Burrows's responsibility to get the signature, however. The statute requires the licensee who will have the dual agency role to "obtain[]" the needed consent, and it was the Schooley/Bartos combination who were acting in the dual agency role.

Counsel for Mr. Bartos appears to suggest that the April 28, 2004 "Agency Disclosure" that St. Pierre and Burrows signed suffices as a written consent by St. Pierre.[98] That document, though not completely filled out and thus perhaps of no value at all, was at most only a consent for Burrows and Coldwell Banker to assume a dual agency role in certain circumstances. It did nothing to authorize Century 21, Hank Bartos, or Lori Schooley as Hank Bartos's designated representative (and thus acting for Century 21), to assume a dual agency role.

The Sprucewood Court transaction represented a violation of AS 08.88.396 by Mr. Bartos.[99]

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96 AS 08.88.396(c).

97 Cross-exam of Schooley.

98 *See* Ex. 20 at REC 1128, discussed above.

99 This conclusion and the one regarding AS 08.88.391 that follows immediately below were reached without reliance on the testimony of either side's expert witness at the hearing. The Division's expert provided little analysis of this transaction, and seemed not to have read one of the controlling statutes carefully. Mr. Bartos's expert gave a blanket opinion that Bartos and Schooley had acted correctly in the transaction, and then admitted on cross-examination that he had not reviewed the transaction documents before rendering the opinion. Reviewing the fully-executed Earnest Money Agreement and Purchase Agreement (Ex. 20 at REC 1111 to 1119) on the stand, he vehemently maintained that it was merely the buyer's offer, repeatedly overlooking the seller's initials on every page and the seller's signature on REC 1118. The opinion of such an expert is not helpful in an adjudicative proceeding.

Conflict of interest. Alaska Statute 08.88.391 is the provision the Division alleges Mr. Bartos violated by failing to disclose a conflict of interest. At the time of the transaction, AS 08.88.391(c) defined a "conflict of interest" as follows:

> In this section, "conflict of interest" is when a licensee
>
> (1) has a present ownership or leasehold interest in the property that is the subject of a transaction;
>
> (2) is whole or part owner of a business interest in the property being marketed or considered for purchase or lease;
>
> (3) represents a relative, as defined in AS 08.88.900(a), or a person with whom the licensee has a financial relationship if the relative or person has a present financial interest in the property being marketed or considered for purchase or lease;
>
> (4) receives compensation from someone other than a party to the contract or another party having a financial interest in the transaction;
>
> (5) receives compensation for community association management while simultaneously engaged as a property manager for a unit within the community association.

There is no evidence that Hank Bartos had an ownership or leasehold interest in the subject property, so subparagraph (1) does not apply. There is no evidence that he had a business interest in the property, so subparagraph (2) does not apply. It has not been shown that he represented a relative or person with whom he had a financial relationship in the sense contemplated by subparagraph (3). There is no evidence that he received compensation for community association management, so subparagraph (5) does not apply. Insofar as the Division has articulated a theory to make section 391 applicable to Mr. Bartos in this transaction, it seems to rely on subparagraph (4): that he was receiving "compensation from someone other than a party to the contract or another party having a financial interest in the transaction."[100]

Because of ambiguous wording around the disjunctive "or," subparagraph (4) can be read in two alternative ways. It can be read to provide that a conflict of interest occurs when a licensee either (i) receives compensation from someone other than a party to the contract or (ii) receives compensation from another party having a financial interest in the transaction. Alternatively, it can be read to provide that a conflict of interest occurs when a licensee (i) receives compensation from someone other than a party to the contract or (ii) receives

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100 Ex. 17 at 7 (Division's expert report, relied on here solely as a statement of position); cross-exam of Sandberg.

compensation from someone other than another party having a financial interest in the transaction.[101] The Real Estate Commission has consistently read this subparagraph (4) by the first interpretation, such that a licensee has a disclosable conflict whenever the licensee receives compensation from a party having a financial interest in the transaction who is different from the licensee's principal.[102] This gives the conflict of interest statute substantial overlap with the dual agency statute, and any dual agency involving compensation to one party's licensee from the other party to the transaction represents a conflict of interest for that licensee. In this case, Bartos/Schooley filled a dual agency role, and they received compensation from St. Pierre through the Coldwell Banker commission, and so they had a conflict with respect to Viale.

Conflicts of interest are not prohibited, but they must be disclosed.[103] At the time of the Sprucewood Court transaction, the statute required that the licensee "disclose that conflict of interest at the time of initial substantive contact with the principals or agents of the principals and confirm the conflict of interest in writing to the principals or agents of the principals involved in the transaction as soon as possible after the initial substantive contact."[104]

Ms. Schooley did make a written disclosure relating to her dual agency contemporaneously with the initial substantive contact, but the disclosure is self-contradictory and therefore defective. Accordingly, she had an undisclosed conflict of interest while acting on behalf of Hank Bartos. Because she was acting as Bartos's delegee in the transaction, the conflict is his conflict as well.[105]

The Sprucewood Court transaction represented a violation of AS 08.88.391 by Mr. Bartos.

E. Count IV (Rex Lane)

Count IV is very similar to the main allegation in Count III. It focuses on a second transaction likewise involving Burrows, Schooley, and Bartos.

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101 The Division's expert appeared to acknowledge this ambiguity. Cross-exam of Sandberg.

102 This interpretation is implicit in *In re Mehner,* No. 3002-02-005 (Alaska Real Estate Commission, adopted March 4, 2004), Amended [Decision] at 35-36 (dual agency created a conflict of interest under § 391); *In re Yoon,* No. 3004-95-011 (Alaska Real Estate Commission, adopted Sept. 10, 2003), [Decision] at 22; and *Moore v. Yoon,* No. S97-009 (Alaska Real Estate Commission, adopted June 25, 1998), [Decision] at 55. The 1998 decision is of limited value because it predated the current definition of "conflict of interest" in § 391. It was affirmed in *Yoon v. Alaska Real Estate Comm.,* 17 P.3d 779 (Alaska 2001).

103 The current language of AS 08.88.391(a) limits disclosure to "persons adversely affected by the conflict." The version of § 391(a) in effect in 2004 was not limited in this way.

104 Former AS 08.88.391(a) [1998-2004].

105 Note that the role of a delegee places her in a different capacity from Noelle Childress in Count II, whose violation could not be imputed or transferred to Bartos.

1. Facts

In late 2004, Coldwell Banker Gold Country served as the listing office for a residential property at 722 Rex Lane in Fairbanks. Bill Burrows was again the listing agent. As in the case of Sprucewood Court, the testimony at the hearing gave a detailed history of the listing and an associated commission dispute between Mr. Burrows and Ms. Schooley, but only the following facts are relevant to the violations alleged in the Accusation.

The sellers were Charles and Elizabeth Slocum, and the buyer was Loretta Overway. Ms. Overway came to the transaction represented by Amy Gappa of Century 21 Gold Rush, whose supervising broker was Hank Bartos. The executed Purchase Agreement listed Coldwell Banker Gold Country as the listing office and Bill Burrows as listing agent; it listed Century 21 Gold Rush as the selling office and Amy Gappa as the selling agent.[106]

Ms. Gappa wrote the offer that became the Purchase Agreement. The second page of the Purchase Agreement was entitled "Consensual Dual Agency Agreement."[107] It provided that "The Buyer and Seller hereby give their consent to dual agency . . . . One company, Century 21/Coldwell Banker, will be representing the interests of both parties to this agreement." There was a boldface line, "I hereby consent to Consensual Dual Agency as described above," below which all three principals and both agents signed.

Lower down on the page there was a section beginning, "THE FOLLOWING AGENCY IS HEREBY CONFIRMED". It recited:

> As of 11/16/2004 the agent(s), Amy Gappa/Bill Burrows, of Century 21 Gold Rush is/are the agent(s) of (check one):
>
> ☐ The SELLER, exclusively
>
> ☐ The BUYER, exclusively
>
> ☒ SELLER AND BUYER (DUAL AGENCY)

In contrast to the Sprucewood Court agreement, only one box was marked. As shown above, the marks were machine-made rather than handwritten exes. All principals and both agents signed on the appropriate lines below this disclosure.

Ms. Gappa presented the dual agency agreement to her client, Ms. Overway, because of Hank Bartos's ownership interest in both real estate offices involved in the transaction. Although she does not have a detailed recollection of the surrounding discussions, it is more

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106 Ex. 21 at REC 1154.

107 *Id.* at REC 1153.

likely than not that she told the buyers the reason she was asking them to sign the agreement. They signed voluntarily.[108] There was no testimony at the hearing regarding how the agreement was explained to the Slocums.

There was a dispute in connection with the closing of the Rex Lane transaction, the fundamental nature of which is disputed.[109] The dispute was eventually resolved by reducing the Coldwell Banker commission by the amount in dispute, and the reduction was then deducted from Mr. Burrows's share of that commission.[110] Both the buyer and the sellers obtained the deal they expected from the transaction; no financial adjustments were made at their expense.[111]

2. Analysis

Considerable testimony was taken at the hearing to establish or refute the notion that licensee Bill Burrows was treated unfairly by Bartos and Schooley in connection with the Rex Lane commission. Neither in the Accusation nor elsewhere, however, has it been contended that this alleged unfairness, which did not affect any of the principals to the transaction, is a basis for discipline under the real estate statutes and regulations. The Accusation instead alleges, as in the case of Sprucewood Court, that Bartos had an undisclosed dual agency role and an undisclosed conflict of interest in connection with the Rex Lane transaction.

The Rex Lane transaction had no parallel to the situation at Sprucewood Court in which Ms. Schooley, on behalf of Mr. Bartos, wrote an offer for the buyer while simultaneously supervising the seller's agent. The dual agency role allegedly played by Bartos in the Rex Lane transaction related only to the common ownership of the Century 21 and Coldwell Banker offices. Insofar as this circumstance alone created a dual agency, it was disclosed and consented to in a document signed by all three principals. The document did not have the fundamental internal contradiction and missing signatures that the same document had in the Sprucewood Court transaction. Moreover, insofar as the Division elicited testimony on the subject, the disclosure and consent document seems to have been adequately explained to the principals. The

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108 Cross-exam and ALJ exam of Gappa.

109 Mr. Burrows, a Division witness, alleges that it was a mistake by Ms. Gappa in drafting the contract such that an additional $2400 was due above what had been intended. Other witnesses allege that it was a mistake by Burrows in advertising that the property was in a fire service area when in fact it was not, so that the fire insurance premium due at closing was higher than expected. The eventual resolution involved a commission adjustment. The actual evidence of the amount of the adjustment, Division Exhibit 21 at 1146-7, is illegible. If one accepts the Division's allegations in Count IV, the adjustment appears to have been $2810, a figure that does not perfectly match the Burrows explanation. It is possible that both explanations played a role.

110 Direct exams of Burrows, Schooley, and Gappa.

111 *Id.*

Division has not met its burden of proving that Mr. Bartos had an undisclosed or unconsented dual agency in connection with the Rex Lane transaction.

If there was a dual agency for Rex Lane, it may have created a conflict of interest that would likewise require disclosure. If so, disclosure took place. Because the disclosure occurred "at the time of initial substantive contact with the principals or agents of the principals," it was timely under AS 08.88.391(a). The Division has not met its burden of demonstrating an undisclosed conflict of interest in connection with the Rex Lane transaction.

F. Count V (Constitution Drive--Inadequate Supervision)

Count V is the first of two counts devoted to a 2002 transaction and its aftermath. The distinguishing feature of the transaction was that the files of the real estate offices involved proved not to contain copies of an AS 34.70.010 disclosure statement that ought to have been present.

1. Facts

In 2002, Ed King of Century 21 Gold Rush assisted Dale and Nadia Packard in their search for a home to purchase. The Packards were first-time homebuyers without business sophistication.[112] On September 20, 2002, King wrote and placed an essentially full-price offer on behalf of Dale Packard (only) on a residence at 804 Constitution Drive in Fairbanks, acting as agent for Mr. Packard exclusively.[113] The sellers accepted the offer and it became the fully executed Earnest Money Receipt and Purchase Agreement for the property.[114] The transaction closed in late October of 2002.[115]

Prior to marketing the Constitution Drive property, the sellers prepared an AS 34.70.010 disclosure statement.[116] On the disclosure, the sellers indicated that they were aware of "flooding, drainage, or grading problems," and they included a description of the problems and of the corrective action they had taken.[117] The statement was probably available at the house when the Packards viewed it prior to the submission of Mr. Packard's offer.[118]

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112 Direct exam of Dale Packard; Ex. B.
113 Ex. 3 at REC 090-91.
114 Ex. 3 at REC 089-096.
115 Ex. 3.
116 Direct exam of Harshman.
117 Ex. 3 at REC 086, 088.
118 *Id.*

There is no direct evidence that Mr. Packard received the disclosure before the transaction closed. He reports that when King showed him the house, King mentioned that the listing packet (which presumably contained the disclosure) was on the kitchen table, but that he did not know what a listing packet was and did not take one.[119] In any event, if Packard received the disclosure at any point prior to closing, his agent (King) did not make him appreciate its significance and Mr. Packard did not retain a copy.[120]

When the transaction closed and thereafter, neither the listing nor selling agent had possession of a copy of the disclosure bearing a signature or initials of the buyer.[121] The Century 21 file was closed out and went to archives lacking any copy at all of the disclosure; not even a copy without the buyer's signature was in the file.[122] Nonetheless, the disclosure was expressly referenced in the Earnest Money Receipt and Purchase Agreement drafted by King and incorporated as part of the agreement.[123] Accordingly, by lacking a copy of the disclosure the Century 21 Gold Rush file lacked the complete Earnest Money Receipt and Purchase Agreement.

If a disclosure form had existed bearing the signature of not only the sellers but the buyer as well, it would ordinarily have become part of the file of both the listing office[124] and the selling office.[125] Because neither the selling nor listing office files contained such a document, I infer that no such document existed.[126]

At the time of the Constitution Drive transaction, it was the practice of Century 21 Gold Rush to place a checklist in each transaction file. The checklist was the front page of the file. The agent conducting the transaction filled out the checklist, marking items off as the file was assembled. The components in a file were supposed to be assembled behind the checklist in a certain order.[127]

There was a system to have brokers check behind the salespeople who completed the checklists and assembled the files, consisting of two components. The first component was review by Hank Bartos, who was the supervising broker, sometimes with supplemental review

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119 Cross-exam of Packard.

120 Inference from direct and cross-exam testimony of Packard and from Packard's actions in 2004.

121 *E.g.*, direct exam of Harshman.

122 *E.g.*, direct exam of Bartos.

123 Ex. 3 at REC 096.

124 Cross-exam of Harshman.

125 *See, e.g.*, Ex. 3 at REC 162 (Century 21's standard checklist for files).

126 *Cf.* Alaska R. Evid. 803(7) commentary. Also supporting this inference, but of much less significance, is the fact that Mr. Packard does not remember signing a disclosure form. Direct exam of Packard.

127 Cross-exam of Bartos (primary source for whole paragraph).

by a staff person designated by him such as Krystal Richardson, the receptionist. With an experienced agent—King, the agent handling Constitution Drive, was considered an experienced agent—file checking might consist of a periodic "spot check." Bartos admits that he "didn't like checking files," and a review by him, if it occurred, might consist only of seeing if items were checked on the checklist and a "thumb through" of the file. If he found errors in a file, he would fine the salesperson $100. He had an arrangement with Richardson whereby if she was given a file to review and she found an error, she would receive $50 of the $100 fine levied.[128] In 2002, the first component of the broker review process occurred post-closing.[129]

The second component in 2002 was a review by Lori Schooley, then an associate broker. She would review the file at the time of distribution of commissions and would not issue a check without reviewing the file. Her review was also post-closing.[130]

No witness at the hearing could recall what kind of review, if any, the Constitution Drive file received. This is natural in light of the passage of time and the large number of transactions that go through an office such as Century 21 Gold Rush. When it was retrieved in 2004, the file contained the standard checklist, with a check next to "AS 34.70 signed by Buyer and Seller" and another check next to "AS 34.70 State Disclosure,"[131] even though there was no disclosure in the file.

2. Analysis

At the time of the Constitution Drive transaction, the Commission's regulation on broker supervision of licensees, 12 AAC 64.125, read as follows:

> (a) Failure of a broker or associate broker to adequately supervise the activities of licensees for whom they are responsible is grounds for disciplinary action against the
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> (1) employing broker;
>
> (2) licensee designated by the broker to manage a branch office; or
>
> (3) broker or associate broker designated by the broker of record to supervise transactions or licensees during the broker of record's absence.
>
> (b) Adequate supervision of a licensee includes

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128 *Id.* (primary source for whole paragraph to this point). Bartos's testimony at the hearing was equivocal as to whether he reviewed all or merely most files. In 2005, he testified that he reviewed "most of them." Ex. 4 at REC 180.

129 Cross-exam of Bartos.

130 *E.g.*, Ex. 4 at 180.

131 Ex. 3 at REC 162.

(1) reviewing and approving all real estate agreements; and

(2) communicating office policies to affiliated licensees.

(c) Repealed 7/16/94.

(d) Repealed 7/16/94.

(e) A broker or associate broker may use computer, modem, or facsimile communications to review and approve documents of licensees for whom they are responsible. All transaction records must be maintained in the real estate office where the supervised licensee is registered with the commission.[132]

At that time, therefore, a supervising broker was required to review and approve all real estate agreements. In light of the overall purpose of the real estate licensing statutes and regulations to protect consumers, the only reasonable interpretation of this regulation is to infer that the required review and approval must occur while the transaction is active and any problems can readily be rectified, not after the transaction has closed and recorded.

The missing disclosure form was an expressly referenced part of the Earnest Money Receipt and Purchase Agreement for 804 Constitution Drive. Had Hank Bartos, the supervising broker, reviewed that agreement, he would have noted that the disclosure was missing. Since he did not note that the disclosure was missing and let the transaction close, it is likely that he did not review the Earnest Money Receipt and Purchase Agreement. His failure to do so was a violation of 12 AAC 64.125 as it existed in 2002.

G. Count VI (Constitution Drive—Forgery)

Subsequent to the Constitution Drive transaction, serious problems developed with the home, which made the contents of the disclosure important to determining potential liability. The Division alleges that when Century 21 Gold Rush was asked for a copy of the disclosure, Hank Bartos obtained a copy from the listing broker and forged Mr. Packard's signature and initials on the document before giving the document to Mr. Packard.

1. Undisputed Facts

On Easter Sunday of 2004, the Packards had a severe flooding problem at their home. They called their insurance company. An adjuster came to the house and mentioned that the house was sinking. He suggested that they consult an attorney, and they did so shortly thereafter. The attorney asked them for the AS 34.70 disclosure statement. Once they learned what a

[132] Former 12 AAC 64.125 [1994 – 2004]. Subparagraph (b)(1) was substantially amended effective January 1, 2005.

disclosure statement was, they were not able to find it among their papers. On advice of the attorney, Mr. Packard requested a copy from Century 21 Gold Rush, which had represented him in the purchase.[133]

Ed King had left Century 21 by this time, so the request was handled by Bartos. Century 21 had no copy of the disclosure in its file when the file was initially retrieved from archives.[134] Bartos requested and obtained a copy from the listing broker on April 21, 2004.[135] That copy had only the sellers' signatures and initials. Bartos apparently made efforts to obtain a completely executed copy from other sources—the title company and lender—as well, but without success.[136]

Three days after Packard's request, a copy of the disclosure was supplied to him at Century 21 Gold Rush.[137] Hank Bartos and the Century 21 relocation director, Audra McGhee, were present when he received the document.[138] The document, which was a photocopy, appeared to bear Packard's signature on the last page and his initials on each page.

Audra McGhee was terminated from her relocation director position two days after the document was provided.[139] About three weeks later, in cooperation with an attorney representing Packard, Audra McGhee accused Hank Bartos of forging Packard's signature and initials on the document by using a copier to transfer them from another source.[140] There is presently no dispute that the document was in fact a forgery.[141]

Some background regarding McGhee's role in the office helps to put later events in context. Audra McGhee had met Hank Bartos in the fall of 2003 when she was looking for a house. She wound up renting a house from Bartos. She wanted a part-time job, and he gave her one as a receptionist and relocation director, starting about the first of the year in 2004. Her role in assisting Bartos grew, she began to handle some of his calendaring and providing other assistance, and, eventually, she moved her desk into the same office with him. The expansion of

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133 Direct exam of Packard. Although he does not so indicate in his testimony now, Mr. Packard was apparently simultaneously seeking the document from the listing broker. Direct exam of Harshman.

134 Direct exam of Bartos.

135 Ex. 3 at REC 071.

136 Direct exam of Bartos.

137 Direct exam of Packard. By Packard's testimony the date would be Thursday, April 22, 2004.

138 Direct and cross-exam of Packard.

139 *E.g.*, cross-exam of Schooley. McGhee, who was in the process of obtaining her real estate license, was offered the opportunity to continue as a licensee. Nonetheless, the separation from the relocation position does not seem to have been cordial. *Id.*; direct exam of McGhee.

140 Ex. 3 at REC 0063-65.

141 Cross-exam of Bartos ("generally accepted"; "we all agree").

her role took place over the course of only a few months of employment. As her role increased, her relationship with Bartos's longtime business partner, Lori Schooley, deteriorated. Although he does not seem to have done much to prevent this situation from developing, Bartos at all times fundamentally regarded Schooley as his right-hand person; McGhee was simply a promising and hard-working recruit to him.[142]

2. Disputed Facts and Discussion

Century 21 Gold Rush supplied a client with a document on which someone in the real estate office had apparently forged the client's signature. The foreseeable result of doing so, in this instance, would be to mislead the client and undermine the client's potential redress against parties (including Century 21 Gold Rush) who might be liable for his purchasing the Constitution Drive home without knowledge of the disclosure's contents, only to discover later that the house still had problems that had been alluded to in the disclosure. Supplying a forged document in these circumstances would be an extraordinary breach of duty by Century 21 Gold Rush, and would subject any licensee involved to the most severe sanctions available to the Commission.[143]

Mr. Bartos admits that the document has been demonstrated to be a forgery, but denies that he forged it or caused it to be forged. By his account, he was puzzled when Ed King's transaction file did not contain the disclosure, particularly since it was checked off on the file checklist, and he engaged in a search to find it from outside sources, as well as having staff look for it within the office. At some point he told McGhee to "get Lori over here" to search for the missing item. The next time Bartos came in, he says McGhee told him she had the signed disclosure form, and he told her to go ahead and give it to the Packards.[144]

Audra McGhee offered a different account in mid-May of 2004. She reported that on the morning of April 22, 2004, as she was working at her desk in the office she shared with Hank Bartos, she noticed that he was engrossed in an activity that had him repeatedly using her tape dispenser. He was cutting paper with a pocket knife and taping the pieces to other documents. He asked if he could borrow her scissors. She asked him what he was doing and, when he did not answer, asked, "Are you forging documents?" He replied, "Yes, haven't you ever done this before? She answered, "No," and then went to the front desk, borrowed scissors from Krystal Richardson, and brought them to Mr. Bartos. When she returned she happened to notice that the

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142 Testimony of McGhee, Bartos, Schooley, and Richardson.

143 *See* AS 08.88.071(a)(3)(A)(iii) and (iv).

144 Testimony of Bartos.

signatures he was taping were those of Dale Packard. She reported that Bartos remarked that Ed King had "screwed up" and failed to get the signatures he should have. She said she asked, "What are you going to do when the original documents are asked for?," to which Bartos replied, "I am going to shred them and say that I don't know what happened to the originals."[145] She said that Bartos then "made a new set of documents for Mr. Packard"—presumably using the copier—and that this was something she "observed."[146]

Two days after this conversation allegedly occurred, Lori Schooley (in her role as office manager for all of the affiliated offices) discharged McGhee from her relocation director position.[147] Schooley attributes this action to problems with job performance, not getting along well in the office, and a desire not to have McGhee do the relocation work once she became licensed because of a possible conflict. She says, however, that the job performance problems were not disqualifying "for Hank," and so McGhee was given the option to continue working for Century 21 in the capacity of an agent.[148] McGhee was unhappy with this turn of events and had a series of telephone conversations with Bartos about her employment situation on April 25 and 26, which she recorded. She admits that the subject of forgery "never came up" in these conversations.[149] However, on May 12, 2004, she wrote to Bartos:

> On April 24th, two days after I confronted you about your forgery of the Packard documents, Lori Schooley terminated my employment as Relocation Director; she said she acted with your authority. The next day, in a telephone conversation with me, you confirmed that I was terminated. You told me the next day, Monday the 26th, that I could return to Century 21 only as a real estate agent . . . .
>
> I have taken time to consider my situation and the situation in which the Packards find themselves. I have decided that I cannot accept employment as a real estate agent with you and your office. I simply am unwilling to be associated with the standards of the office and of you.[150]

When she wrote the letter, she was already in contact with the Packards and their attorney, and had committed her version of events to an affidavit of the same date.

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145 Ex. 3 at REC 063-65 (May 12, 2004 affidavit of Audra McGhee). As will be discussed below, her 2009 testimony was not perfectly consistent with this earlier account.

146 The quotations are from Ex. 3 at REC 064. She has not specifically testified that he used the copier to make the new set of documents, but this is implied in her testimony.

147 Direct exam of Schooley.

148 Direct and cross-exam of Schooley.

149 Cross-exam of McGhee.

150 Ex. 3 at REC 068.

The McGhee account is directly questioned by Krystal Richardson, the receptionist, who likewise claims a specific memory of the day in question.[151] Richardson says it was unusual for people to borrow her scissors and she remembers McGhee doing so. However, she does not recall Bartos being in the office at the time, and believes she would have noticed if Bartos was using the copier, which was right by her desk. She is not sure Bartos would have known how to use the copier, because he "usually" needed help when he wanted to make copies.[152]

More significantly, the account has internal oddities that make it hard (though not impossible) to accept. The letter of May 12 is curious. It refers to a confrontation, and yet by McGhee's more detailed account the confrontation consisted of her fetching the scissors to assist with the task, accompanied by a little conversation. It suggests that her termination was linked to the supposed confrontation about forgery, and yet the forgery had not "come up" in previous, recorded conversations about why she was terminated. Moreover, there are two versions of the account, the one given in 2004 and the one given at the hearing, and while both are highly detailed the details do not match in some respects.[153] It would be natural for McGhee to forget some details over the course of four years, but the fact that she provided the details again (rather than indicating a failure of memory), but related them differently, slightly undermines her credibility.

McGhee seems to have reacted to the termination with some bitterness. It came at a time when she had rapidly been developing a close business relationship with the chief of the organization. That individual then quite suddenly yielded to Schooley's desire to end the close association. Some individuals might bear a grudge and develop a motive to strike back at Bartos in this situation.

As support for McGhee's account, the Division relied on testimony from Colleen Harshman, the listing broker. Ms. Harshman related behavior by Bartos that she judged as odd: After Mr. Packard had called her multiple times about the disclosure, she asked Century 21 for a copy. The Century 21 office faxed over a copy, but it was just the one she had, with no buyer signature. She called Bartos and told him she needed a copy with the buyer's signature. He

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151 Direct exam of Richardson. She committed the recollection to writing about eight months after the event in an affidavit connected with the Packard lawsuit mentioned above in note 45. Ex. 3.

152 *Id.*

153 For example, the means by which she determined it was Packard documents being altered differs between the 2004 affidavit and her 2008 testimony on cross-examination.

responded, "Well, would you send me a copy so I know what it looks like?" She sent it, and shortly thereafter got a copy back with the buyer's signature and initials.[154]

Harshman's account would be very troubling with respect to Mr. Bartos, except that it was later established that the entire exchange took place on May 17, 2004.[155] By May 17, Audra McGhee had already sent Bartos the letter alluding to "forgery of the Packard documents."[156] The exchange with Harshman was therefore consistent with Bartos attempting to see if the copy of the disclosure he had been given by his staff was consistent with versions of that document held by others.

Likewise to bolster the McGhee account, the Division offered Mr. Packard's testimony,[157] which implied that he found Bartos's behavior unusual as well. He perceived that he was put off by Bartos when he requested the disclosure statement. While the delay may have seemed to Packard simply a stratagem to provide time to forge a replacement, however, it is consistent with Bartos simply conducting a search of multiple sources to try to locate a document that was oddly missing—which is essentially Bartos's description of how he reacted.

Mr. Bartos's account is not wholly without credibility issues of its own. For example, Bartos (in response to a leading question from his counsel) agreed that McGhee's May 12 letter was to him just "a wingnut letter" and indicted that he neither understood nor paid attention to it. Yet the letter referred to a transaction in which he had just recently been looking for a particular document, and it is hard to believe he would not have surmised that she might be accusing him of forging that document. Indeed, his exchange with Harshman on May 17 suggests that he did have that concern. More broadly, in testimony on other matters in this proceeding (he offered extensive testimony on many topics), Bartos betrayed a tendency to stretch the truth on occasion,

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154 Direct exam of Harshman. Ms. Harshman, a telephonic witness, was somewhat credible, but she undermined her overall credibility by flatly denying that she had any concern that her agency might be sued by Packard during this period. Cross-exam of Harshman. Certainly, a listing office that has received a disclosure from its seller, but that cannot show that it delivered the disclosure to the buyer, has potential exposure to liability regarding matters that were in the disclosure but were not communicated to the buyer. Ms. Harshman was an experienced broker and could be expected to understand this exposure.

155 Direct exam of Harshman; Ex. 3 at REC 066-67.

156 Ex. 3 at REC 068.

157 At times, Packard's testimony was troubling as well. For example, he described with a wealth of detail how he had caught a glimpse of Audra McGhee as an observer behind an obstruction when he met with Bartos to receive the documents, but Bartos had not introduced them. When cross-examined, he had to admit that on a previous occasion he had said they were introduced. Direct and cross-exam of Packard.

or perhaps to lapse into being a raconteur, providing glib answers without being careful about perfect accuracy.[158]

On balance, however, the Division has not carried its burden of convincing me that the core of McGhee's account is more credible than the core of Bartos's. Accordingly, I cannot find that Hank Bartos forged Dale Packard's signature and initials on the Constitution Drive disclosure statement, and therefore no violation by Mr. Bartos has been proven with respect to Count VI.

IV. Sanction

The Division has proven violations in connection with Count III (undisclosed conflict and dual agency for Sprucewood Court) and Count V (inadequate supervision for Constitution Drive). They are wholly independent of one another and will be addressed separately below.

In assessing discipline for violations of the statutes and regulations it administers, the Commission is required to "seek consistency."[159] One prior decision and one prior settlement approval of this Commission involving conduct with some parallels to Count III are discussed in the section relating to that count. So far as the undersigned is aware, this Commission has not considered any other discipline cases involving facts at all similar to those presented here, and neither party has cited any comparable cases.

A. Count III

The two violations found in Count III were failure to properly disclose a dual agency relationship and failure to properly disclose a conflict of interest. The conflict and the dual agency were simply different features of the same error; that is, there was a single wrongful act that was illegal in two ways.

Both violations were violations of provisions of AS 08.88, and therefore for each of them the Commission has authority to impose the sanction of revocation or suspension of the license.[160] The Commission also has authority to impose any other disciplinary sanction or

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158 Examples would be his testimony about obtaining Royse's prior blessing for his business model (Royse testimony on cross-exam established that this was an exaggeration) and some of his varying characterizations of his broker review process and of the roles over time of the two holding companies.

159 AS 08.01.075(f).

160 12 AAC 64.130(11) [both present version and version in effect in 2002] (Commission may suspend or revoke for "acting in violation of the provisions of AS 08.88"); AS 08.88.071(a)(3)(A)(v) and (vi) [both present version and version in effect in 2002].

combination of sanctions, including censure or reprimand, license limitations or conditions, requirements for education or peer review, probation, or a fine.[161] Fines are limited to $5000.[162]

The misconduct proved in Count III was at the low end of seriousness for conduct of its type. It presented the following mitigating factors:

- The licensee did not wholly fail to make a written disclosure of dual agency or conflict of interest, but rather made a carelessly inadequate and defective written disclosure.
- Oral disclosure to both the buyer and the seller appears to have been generally adequate.
- There was no fraud and no attempt to gain financial advantage through the nondisclosure.
- There was no harm to the principals in the transaction.
- The misconduct was performed on Mr. Bartos's behalf by a delegee, without his prior knowledge or approval. While Bartos was responsible for what Schooley did as his stand-in, the fact that he did not write the defective disclosure himself slightly lessens concern about his own competence.

In the 2004 discipline case entitled *In re Mehner*,[163] this Commission addressed a much more serious failure to disclose dual agency and conflict of interest that lacked all of these mitigating factors (except perhaps deliberate fraud) and that was accompanied by substantial misrepresentations that constituted independent violations. There was considerable financial harm to a consumer directly flowing from the misconduct. The Commission imposed a 120-day suspension on account of the "numerous violations,"[164] imposed a year of probation, required remedial education on dual agency and conflict of interest, and levied a fine of $20,000.[165] It is possible to determine that $5,000 of the total fine was levied for the violation of the dual agency disclosure requirement[166] and to infer that the remedial education order sprang from that violation; it is not possible to determine how much, if any, of the suspension or probation related to it.

A counterpoint to *Mehner* is the Commission's recent action in *In re Enoch*.[167] *Enoch* was a memorandum of agreement, or settlement, approved by the Commission, and therefore

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161 AS 08.88.071(a)(3); AS 08.01.075.
162 AS 08.01.075(a)(8).
163 Case No. 3002-02-005 (Real Estate Commission, adopted March 4, 2004).
164 *Id.* at 60.
165 *Id.* at 61.
166 *Id.* at 57.
167 Case No. 3004-07-010 (Real Estate Commission, adopted Feb. 1, 2008).

carries less weight than a contested decision, but such memoranda provide a sense of how the Commission has weighed violations in the past.[168] The misconduct in *Enoch* was threefold: two instances of failure to disclose a conflict of interest under AS 08.88.391 and one instance of delayed deposit of earnest money. For the three violations in the aggregate, the Commission imposed a fine of $1000 with $750 suspended, a reprimand, one year of probation, and six hours of education on relevant topics.[169] In the formal reprimand language, the Commission noted the following important circumstance: "it is recognized that these violations were technical in nature with no evidence to suggest any intent to misrepresent the facts and/or the terms of the transaction."[170]

The misconduct proven under Count III of this case is quite close to *Enoch* in severity—as in that case there are two dual agency/conflict disclosure violations—but this instance lacks the additional element, present in *Enoch*, of mishandling earnest money. In the interest of simplicity and finality,[171] it may be advisable to forego probation but to substitute additional monetary sanction for the lack of probation. An appropriate sanction for Count III would be a civil fine of $1000, a reprimand to be placed in Mr. Bartos's licensing file, and a requirement of at least one-half day (3 hours) of approved continuing education on ethics for real estate professionals that includes significant instruction on the topic of avoidance and disclosure of conflicts of interest.

B. Count V

Count V represented a single instance of inadequate supervision of a subordinate licensee. Mr. Bartos failed to carry out a duty that the Commission had expressly assigned to him by regulation. His failure may well have had real financial consequences to a client of his office, by causing him to proceed with a transaction with insufficient information about a serious

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168 *Cf In re Ness,* OAH No. 04-0250-DEN (Board of Dental Examiners, adopted May 2, 2006), op. at 34-36 (considering prior memoranda of agreement but noting their limitations), *aff'd in relevant part,* No. 3AN-06-8587CI (Alaska Superior Ct.) [published at http://aws.state.ak.us/officeofadminhearings/Documents/DEN/DEN040250.pdf].

169 A decision from another jurisdiction that is in the same vein is *In re Di Censo and Sutton Group Tower Realty Inc.* (Real Estate Council of Ontario, Jan. 28, 2004) (licensee fined $3000 in aggregate for five relatively minor violations, three of which related to inadequate disclosure of dual agency, without fraud or apparent harm to clients).

170 *Enoch, supra,* MOA at 5.

171 The Division has had several years of intensive focus on Mr. Bartos. Probation would prolong that preoccupation, perhaps in a way that would be healthy for neither the staff nor Mr. Bartos. Cf. Ex. 5-8, 11-12, 15-16.

defect in the property he was purchasing.[172] While only one specific failure has been proven, the failure occurred because Century 21 Gold Rush had a practice of deferring broker reviews until after closing, a practice that prevented compliance with 12 AAC 64.125 as it then existed.

The undersigned has found no Commission decisions or settlements in Alaska with facts at all similar to those in Count V. The only out-of-state case found is *In re Di Censo and Sutton Group Tower Realty Inc.,*[173] a Canadian decision in which a brokerage was fined $2000 for failing to supervise a licensee to prevent errors including inadequate dual agency disclosure and for failing to maintain an adequate transaction file.[174] *Di Censo* does not seem to have involved any harm to the client.

At the hearing, Mr. Bartos related with some relish and pride his practice of fining licensees for each error found after the fact in their transaction files. In this case, he failed to prevent a very serious error in a transaction file by neglecting the supervisory review assigned to him by law. A substantial monetary penalty to address this omission will serve the same deterrent purpose served by Mr. Bartos's internal fining system.

The broker's share of the selling office commission received on the Constitution Drive transaction appears to have been about $1400.[175] An appropriate sanction for Mr. Bartos's failure to adequately perform the broker role would be (i) a civil fine of double that amount, $2800 and (ii) inclusion of the Count V violation in the reprimand mentioned in the preceding section.

V. Conclusion and Order

The Division proved violations of applicable law in connection with Counts III and V of the Accusation, as detailed above. Upon adoption of this Decision, the Commission imposes the following disciplinary sanctions against licensed broker Henry S. Bartos:

A. CIVIL FINE

Respondent shall pay a fine of $1000 with respect to Count III and a fine of $2800 with respect to Count V, for a total civil penalty of $3800. The payment shall be in cash, certified check, or money order payable to "State of Alaska," delivered to counsel for the Division of

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172 *See* facts found under Count VI.

173 *Supra* note 169.

174 This is a different aspect of the case from the one discussed in note 169. Separate sanctions were ordered against the licensee and the supervising brokerage.

175 *See* Ex. 3 at REC 159-60.

Corporations, Business and Professional Licensing within 90 days of adoption of this Decision and Order.

B. REPRIMAND

The following reprimand shall be placed in Respondent's license file in the form of this Decision and Order:

> **The Real Estate Commission hereby reprimands you, Henry S. Bartos, for failing to disclose dual agency and conflict of interest as required by law. The Commission recognizes that these violations were technical in nature, without intent to misrepresent the facts or the terms of the transaction. The Commission further reprimands you for failing to provide adequate supervision of a licensee as required by law.**

C. ADDITIONAL EDUCATION

In addition to the continuing education/competency requirements under Alaska law for his license, Respondent shall within 12 months of adoption of this Decision and Order attend and satisfactorily complete no less than three hours of education dealing with ethics for real estate professionals that includes significant instruction on the topic of avoidance and disclosure of conflicts of interest. The course curriculum must be approved by the Commission's agent prior to the Respondent registering for the course or courses. After completion of the course or courses, the certificates of satisfactory completion are to be provided to the Commission's agent. All costs are the responsibility of Respondent.

Dated this 19th day of March, 2009.

Kay L. Howard *for*
Christopher Kennedy
Deputy Chief Administrative Law Judge

Adoption as Modified

The Real Estate Commission:

in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation as set out below;

in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set out below; and

in accordance with AS 44.64.060, otherwise adopts the forgoing Decision and Order.

Modifications:

1. Although the Commission recognizes that the word "employed" has several definitions, the Commission interprets the word "employed" in AS 08.88.291(a) and 12 AAC 64.110(e)(6) to mean "to commission or entrust with the performance of certain acts or functions or with the management of one's affairs" (see Black's Law Dictionary, 5th ed.), as the meaning most in keeping with the purpose of that statute and that regulation.

2. In light of item 1, the Commission finds that, with respect to Count I, Mr. Bartos violated AS 08.88.291(a) and 12 AAC 64.110(e)(6) in connection with factual findings (2) and (4) on pages 6-7 of the Decision and Order.

3. In light of item 1, the Commission finds that, with respect to Count II, Mr. Bartos violated AS 08.88.291(a) and 12 AAC 64.110(e)(6) in his use of Noelle Childress to conduct Century 21's property management business.

4. For the misconduct under Count I, the Commission imposes a fine of $1000 and requires 6 hours of education as specified in item 10 below.

5. For the misconduct under Count II, the Commission notes the long duration and the deliberate nature of the improper arrangement, imposes a fine of $2500, and requires 6 hours of education as specified in item 10 below.

6. For the misconduct under Count III, the Commission imposes a fine of $1000 (as recommended by the administrative law judge) and requires 6 hours of education as specified in item 10 below. The sanction is imposed solely for failure to disclose dual agency. No sanction is imposed for failure to disclose conflict of interest.

7. For the misconduct under Count V, the Commission notes the serious consequences of the failure to supervise, imposes a fine of $5000 and requires 12 hours of education as specified in item 10 below.

8. In light of the number, seriousness, and pattern of violations, the Commission imposes (a) a suspension of 60 days to commence on the effective date of this decision as provided in AS 44.62.520, and (b) license probation of one year to commence upon completion of the suspension.

9. All fines are payable in the manner set forth in part V-A of the Decision and Order.

10. The education required in items 4-7 above (a) shall be in addition to the continuing education/competency requirements under Alaska law for Mr. Bartos's license; (b) shall be completed within 12 months of the effective date of this Decision and Order; (c) shall be attended and satisfactorily completed; (d) shall be approved by the Commission's agent prior to the Respondent registering for the course or courses. It shall include no less than six hours of education dealing with ethics for real estate professionals. After completion of the course or courses, the certificates of satisfactory completion are to be provided to the Commission's agent. All costs are the responsibility of Respondent.

11. The following reprimand shall be placed in Respondent's license file in the form of this Decision and Order:

> **The Real Estate Commission hereby reprimands you, Henry S. Bartos, for failing to comply with AS 08.88.291(a) and 12 AAC 64.110(e)(6), for failing to disclose dual agency as required by law, and for failing to provide adequate supervision of a licensee as required by law.**

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 18th day of June, 2009.

ALASKA REAL ESTATE COMMISSION

By: *Signed*
Signature
Bradford Cole
Name
Chairman – Alaska Real Estate Commission
Title

[This document has been modified to conform to technical standards for publication.]

Melanie Lesh

From: Mimi Rothchild <mrothchild@gci.net>
Sent: Thursday, February 16, 2012 3:48 PM
To: Melanie Lesh
Subject: Clarification (I hope) on the issue
Attachments: IndustryIssues.pdf

Hi Melanie,
I hope the attached first page gives a little more clarification. If not, please let me know or contact Sandy Eherenman directly. (I left her contact info below.)

Since a licensed assistant must be first and foremost a licensee, the following applies. There can only be one principal broker.

Sec. 08.88.291. Location; contact information.

(a) A person licensed as a real estate broker shall, by registering with the commission, inform the commission of the person's principal office and of any branch offices of the person's real estate business and include in the information the names of the real estate licensees who are employed at each office. A real estate licensee may do real estate business only through a principal office or from a branch office registered by the broker by whom the licensee is employed. Failure of a real estate broker to maintain a place of business in the state or to inform the commission of its location and the names and addresses of all real estate licensees employed at each location by the broker is grounds for the suspension or revocation of the broker's license.

(b) Each licensee under this chapter is responsible for ensuring that the commission has current contact information for the licensee for two years after the lapse, expiration, surrender, suspension, or revocation of the license.

(c) In addition to the information provided under (a) of this section, a licensee shall provide the commission with a current mailing address and, if active, the address of the broker employing the licensee.

(d) The commission shall mail all notices pertaining to a license or recovery fund action taken under this chapter or a regulation adopted under this chapter to the current address or addresses of a licensee obtained under this section. Proof of notice provided under this subsection satisfies due process notice requirements.

The wording for this bill is because Brokers want to permit their licensees to hire their own assistants and pay them on their own instead of through the Broker. The licensed assistant will still have to have their license hanging in the principal Broker's office because the Broker is still ultimately responsible for the actions of the licensed assistant.

Please let me know if there are still questions. Errol Champion, our current Board President will be in on Monday to testify and Ruth Blackwell is also available until tomorrow morning if you have further questions.

All the best,
Mimi

Mimi Rothchild
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From: Sandy Eherenman [mailto:seherenman@alaskarealtors.com]
Sent: Thursday, February 16, 2012 3:29 PM
To: 'Mimi Rothchild'
Subject: Question

Hi Mimi,
The first page should help answer the question.

Sandy Eherenman, RCE
Chief Executive Officer
Alaska Association of Realtors
(907)563-7133
seherenman@alaskarealtors.com

Project: Clarify legislative intent of HB33 from 1998. Employment of licensed assistants.

Proposal: Add language to as 08.88.398 and .401

Rationale: Part of HB 33 addressed the rise in demand of licensed assistants and the fact that AS 08.88.401(b)(2) stated that a licensee could only accept fees and commissions related to licensed activities from their employing broker. Licensees wanted to pay their assistants themselves. HB 33 added .398 to outline how and when this could happen. HB 33 also added a clause to the end of .401(b)(2) that states "except that the wages of a person who is engaged as a licensed assistant under AS 08088.398 may be accepted by the person from the assistant's employer." As license law is very clear elsewhere that it is illegal to perform licensed activities unless they are through the broker where your license hangs , the bill did not restate it. Some licensees are taking this to mean that they can employ a licensed assistant to perform licensed activities who works at a different brokerage, regardless of what the law states elsewhere in statute. Either all the other laws need to be changed or we need to clarify this law.

Proposed Language:

AS 08.88.398 Licensed Assistants. A licensed real estate sales person or licensed associate broker may act as a licensed assistant to a real state licensee other than the broker who employs the sales person or associate broker if

Add new section (5): The licensed assistant is licensed under the broker who employs the licensee who employs them.

AS 08.88.401 Prohibited Conduct and Penalties.

Under (b)(2), add a clause at the end (in italics) (Bold clause is from 1998 change) "A person who is an associate broker or a real estate salesperson licensed in this state may accept a fee or commission for performance of an act for which a license is required by this chapter only from the licensee's employing broker, **except that the wages of a person who is engaged as a licensed assistant under AS 08.88.398 may be accepted by the person from the person's employer,** *as long as they are all licensed under the same broker.*

ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE STANDING COMMITTEE
February 6, 2012
3:23 p.m.
DRAFT

MEMBERS PRESENT

Representative Kurt Olson, Chair
Representative Craig Johnson, Vice Chair
Representative Mike Chenault
Representative Steve Thompson
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Dan Saddler
Representative Bob Miller

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 92(FIN)
"An Act relating to dental hygienists, dentists, dental assistants, dental hygiene, and dentistry."

- MOVED HCS CSSB 92(L&C) OUT OF COMMITTEE

HOUSE BILL NO. 267
"An Act relating to the Real Estate Commission; and providing for an effective date."

- MOVED CSHB 267(L&C) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 92
SHORT TITLE: DENTISTS/DENTAL HYGIENISTS/ASSISTANTS
SPONSOR(s): SENATOR(s) EGAN

02/21/11	(S)	READ THE FIRST TIME - REFERRALS
02/21/11	(S)	L&C, FIN
02/24/11	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/24/11	(S)	Heard & Held
02/24/11	(S)	MINUTE(L&C)
03/01/11	(S)	L&C AT 2:00 PM BELTZ 105 (TSBldg)
03/01/11	(S)	Moved CSSB 92(L&C) Out of Committee
03/01/11	(S)	MINUTE(L&C)

03/07/11	(S)	L&C RPT CS 3DP SAME TITLE
03/07/11	(S)	DP: EGAN, DAVIS, PASKVAN
03/30/11	(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/30/11	(S)	Heard & Held
03/30/11	(S)	MINUTE(FIN)
04/04/11	(S)	FIN RPT CS 6DP 1NR SAME TITLE
04/04/11	(S)	DP: HOFFMAN, STEDMAN, THOMAS, EGAN, MCGUIRE, ELLIS
04/04/11	(S)	NR: OLSON
04/04/11	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/04/11	(S)	Moved CSSB 92(FIN) Out of Committee
04/04/11	(S)	MINUTE(FIN)
04/07/11	(S)	TRANSMITTED TO (H)
04/07/11	(S)	VERSION: CSSB 92(FIN)
04/08/11	(H)	READ THE FIRST TIME - REFERRALS
04/08/11	(H)	L&C, FIN
01/27/12	(H)	L&C AT 3:15 PM BARNES 124
01/27/12	(H)	Heard & Held
01/27/12	(H)	MINUTE(L&C)
02/06/12	(H)	L&C AT 3:15 PM BARNES 124

BILL: HB 267
SHORT TITLE: REAL ESTATE SALES LICENSEES
SPONSOR(s): REPRESENTATIVE(s) MUNOZ, OLSON

01/17/12	(H)	PREFILE RELEASED 1/13/12
01/17/12	(H)	READ THE FIRST TIME - REFERRALS
01/17/12	(H)	L&C
02/06/12	(H)	L&C AT 3:15 PM BARNES 124

WITNESS REGISTER

DANA OWEN, Staff
Senate Labor & Commerce Committee, Senator Dennis Egan, Chair
Juneau, Alaska
POSITION STATEMENT: Testified on behalf of Senator Dennis Egan, Chair, Senate Labor & Commerce Committee, during the discussion of SB 92.

REPRESENTATIVE CATHY MUNOZ
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HB 267 as prime sponsor of the bill.

ERROL CHAMPION, President
Southeast Alaska Board of Realtors;

Member, Board of Directors
Alaska Association of Realtors
Juneau, Alaska
POSITION STATEMENT: Testified during the discussion of HB 267.

DON HABEGER, Director
Division of Corporations, Business, and Professional Licensing
Department of Commerce, Community, & Economic Development (DCCED)
Juneau, Alaska
POSITION STATEMENT: Provided information and answered questions during the discussion of HB 267.

KONRAD JACKSON, Staff
Representative Kurt Olson
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Explained the amendment to HB 267 on behalf of the prime bill sponsor, Representative Kurt Olson.

ACTION NARRATIVE

3:23:24 PM

CHAIR KURT OLSON called the House Labor and Commerce Standing Committee meeting to order at 3:23 p.m. Representatives Johnson, Thompson, Holmes, and Olson were present at the call to order. Representative Chenault arrived as the meeting was in progress.

3:23:41 PM

^#sb92

SB 92-DENTISTS/DENTAL HYGIENISTS/ASSISTANTS

DRAFT

3:23:48 PM

CHAIR OLSON announced that the first order of business would be CS FOR SENATE BILL NO. 92(FIN), "An Act relating to dental hygienists, dentists, dental assistants, dental hygiene, and dentistry."

CHAIR OLSON stated that this bill was previously heard and public testimony is closed. He reported that the bill had been held in committee to obtain clarification on the repealers in the bill. He said he was satisfied that everything is in order.

3:24:52 PM

DANA OWEN, Staff, introduced himself and said he was available for questions.

REPRESENTATIVE HOLMES asked for clarification that the committee previously adopted two amendments to SB 92.

CHAIR OLSON answered yes.

3:25:35 PM

The committee took an at-ease from 3:25 p.m. to 3:28 p.m.

3:28:20 PM

REPRESENTATIVE HOLMES moved to report CSSB 92(FIN), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, the HCSSB 92(L&C) was reported from the House Labor & Commerce Standing Committee.

The committee took an at-ease from 3:28 p.m. to 3:30 p.m.

^#hb267 - One referral
DRAFT

HB 267-REAL ESTATE SALES LICENSEES

3:30:35 PM

CHAIR OLSON announced that the final order of business would be HOUSE BILL NO. 267, "An Act relating to the Real Estate Commission; and providing for an effective date."

3:30:43 PM

REPRESENTATIVE CATHY MUNOZ, Alaska State Legislature, explained HB 267 would clarify the statutes that pertain to real estate practice. She stated that she has collaborated with the Alaska Association of Realtors in drafting this bill. This bill would accomplish three things. First, Section 1 of the bill would amend AS 08.88.071 (a), to require the Real Estate Commission issue a temporary permit to a licensee designated by the commission to administer, manage, or conclude the affairs of a broker's real estate business if: (1) an investigation produces substantial evidence that the broker has misappropriated trust funds; (2) the license of the broker is suspended; or (3) the broker is incapacitated because of a traumatic event or medical condition. Under current law, the Real Estate Commission (REC) would appoint another broker; however, in some areas of the state, a limited number of brokers practice. This provision would also allow the commission to issue a temporary agreement to a real estate agent to step in and conclude the business affairs. This provision would apply in instances in which only one or two brokers in an area would be called on to step in and conclude the business when the practice is in jeopardy due to health issues or issues that pertain to the actual practice of the specific brokerage.

3:33:04 PM

REPRESENTATIVE MUNOZ stated that second, this bill would clarify language regarding the role of a licensed real estate salesperson or licensed real estate broker. It would limit licensed assistants to only work for one brokerage, which is unclear in current law; however, it is very important to have a licensed assistant be limited to work for only one brokerage to ensure that proprietary information is kept confidential and to ensure that information about a real estate transaction cannot be shared with more than one brokerage. Third, this bill would allow a licensee to use a portion of an agent's commission to donate to a charitable organization. She characterized this as a housekeeping provision.

AG's opinion

3:34:16 PM

REPRESENTATIVE HOLMES referred to Section 2 of HB 267, which adds one new subsection. She referred to page 4, line 4, and noted that she did not see an "and" or an "or" between paragraph 4 and 5. She asked whether the list is meant to be inclusive and all five paragraphs would need to be met.

REPRESENTATIVE MUNOZ asked for clarification on the specific language.

REPRESENTATIVE HOLMES referred to Section 2, page 4, line 4, and read, "A licensed real estate salesperson or licensed associate real estate broker may act as a licensed assistant to another licensed salesperson or associate real estate broker if..." She added that the "if" was followed by paragraphs (1),(2),(3),(4),(5). She inquired as to whether the condition would apply to all paragraphs: (1), (2), (3), (4), and (5); or if the condition of only paragraph (1) or (2) or (3) or (4) or (5) needed to be met. She reiterated her question by asking whether the condition of only one paragraph in Section 2 needed to be met or if all five conditions must be met by the licensed real estate salesperson or licensed associate real estate broker.

REPRESENTATIVE MUNOZ offered her belief that all five paragraphs were necessary, but deferred to the Alaska Association of Realtors to confirm.

3:36:37 PM

ERROL CHAMPION, President, Southeast Alaska Board of Realtors; Member, Board of Directors, Alaska Association of Realtors, thanked the chair for sponsoring the bill.

CHAIR OLSON reported that all of his questions had been addressed before he signed on as joint prime sponsor of the bill.

MR. CHAMPION mentioned that he has also submitted written comments to the committee.

CHAIR OLSON asked him to confirm Representative Holmes's question pertaining to Section 2.

MR. CHAMPION responded that Section 2 would require all five paragraphs to be met. He said, "If you don't cross over the threshold of (1), you can't make it to (2), to (3), to (4), to (5)...."

3:38:04 PM

DON HABEGER, Director, Division of Corporations, Business, and Professional Licensing, Department of Commerce, Community, & Economic Development (DCCED), introduced himself.

3:38:40 PM

REPRESENTATIVE CHENAULT referred to the zero fiscal note in members' packets. He asked for the number of incidents for misappropriation of trust accounts or medical reasons that have arisen with brokers.

MR. HABENGER said the current executive administrator of the REC indicated only one incident against a broker has occurred in seven years. Thus, the division felt any necessary work could easily be absorbed in the current work load.

REPRESENTATIVE CHENAULT asked for the average cost of an investigation.

MR. HABENGER recalled a recent incident in Ketchikan, which he characterized as a litmus test. He explained that it was necessary to investigate a broker and licensees paid for the investigation. He related that due to the investigation costs, in part, the division suggested increases in licensee fees for the next renewal period. He offered that the one incident did not represent a huge impact to licensees.

3:40:34 PM

REPRESENTATIVE HOLMES inquired as to whether the department was comfortable with the bill.

MR. HABENGER answered yes.

3:41:34 PM

KONRAD JACKSON, Staff, Representative Kurt Olson, Alaska State Legislature, introduced himself. He referred to an amendment in members' packet. He stated that the proposed amendment would correct a minor drafting error.

3:42:19 PM

REPRESENTATIVE HOLMES moved to adopt Amendment 1, labeled 27-LS1111\M.1, Martin, 1/24/12, which read:

Page 3, line 16:
Delete "**board**"
Insert "**commission**"

There being no objection, Amendment 1, was adopted.

3:43:01 PM

CHAIR OLSON, after first determining no one else wished to testify, closed public testimony on HB 267.

3:43:12 PM

REPRESENTATIVE HOLMES moved to report HB 267, as amended out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, the CSHB 267(L&C) was reported from the House Labor and Commerce Standing Committee.
#

3:43:35 PM

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 3:43 p.m.

HB

269

<TARGET><BILL>HB 269</BILL><SUBJECT>HB 269</SUBJECT><COMM>HJUD27</COMM></TARGET>

Representative Lindsey Holmes

House Bill 269 Sponsor Statement
An Act relating to the amendment of a declaration that creates a common interest community.

In 1986 Alaska adopted the Common Interest Ownership Act found in AS 34.08. This law was based on the 1982 version of the Uniform Common Interest Ownership Act ("UCIOA") that served as a model for condominium statutes around the country. Since then, the national UCIOA has been revised more than once, with the most recent version in 2008. However, Alaska's law has not been similarly updated. HB 269 takes one section of the updated UCIOA and incorporates it into Alaska's law.

When a developer begins construction of a common interest community such as a condominium development they have to specify a timeline for the continued development of the project. Under current law, if a developer and the homeowners association of a common interest community want to extend the timeline for these development rights it takes a unanimous vote of the homeowners.

Achieving a unanimous vote, even for a project with overwhelming support is problematic at best. In the 1994 version of the UCIOA this problem was addressed by modifying the threshold to a super-majority of 80% of the homeowners. HB 269 would mirror this change. An 80% threshold for modifying the timeline for development rights will still require extremely strong support, but will not require a prohibitively difficult unanimous vote.

This update to Alaska's law is especially important now due to the recent difficulties in the economy. With the new economics of the housing market, development rights are often the only valuable remaining part of many projects, but without this change communities and developers may be unable to extend the timelines for those development rights, which would decrease the value of these projects and discourage participation by banks as lenders. HB 269 will ensure that those communities and developers will have the necessary tools in statute to address this issue and keep Alaska's economy moving forward.

Please join me in supporting HB 269 to protect and strengthen Alaska's housing industry.

State Capitol, Juneau, Alaska 99801 · (907) 465-4919 · Fax: (907) 465-2137
Rep.Lindsey.Holmes@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 269**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB269-DCCED-DCRA-03-14-12
Title: Common Interest Communities
Sponsor: Representative Holmes
Requester: House Labor & Commerce

Dept. Affected: DCCED
Appropriation: Community & Regional Affairs
Allocation: Community & Regional Affairs
OMB Component Number: 2879

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Scott Ruby, Director — Phone: 269-4569
Division: Community and Regional Affairs — Date/Time: 3/14/12 9:00 AM
Approved by: Susan K. Bell, Commissioner — Date: 3/14/2012
Commerce, Community, and Economic Development

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 269

Analysis

HB 269 modifies the Common Interest Ownership Act to allow for 80% of the homeowners to vote on development rights versus the current law that requires a unanimous vote. This conforms to the recently updated Federal Uniform Common Interest Ownership Act.

There is no anticipated fiscal impact to the Division as a result of this legislation.

Alaska State
Home Building Association

April 2, 2012

The Honorable Lindsey Holmes
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99811

SUBJECT: Support for HB269, common interest community

Dear Representative Holmes:

This letter is to provide a statement of support for House Bill 269, an Act relating to the amendment of a declaration that creates a common interest community.

Following our annual legislative visits in Juneau, the Alaska State Home Building Association (ASHBA) Legislative Committee discussed HB269. The consensus of the Committee was to support the bill, and to provide this letter.

To summarize, we have all reviewed the bill and the sponsor statement. A unanimous vote of a homeowners association is a level of achievement that can amount to an unreasonable impediment for developing a project. HB269 strikes a balance by setting an 80% threshold.

This bill will help both developers and owners in a common interest community to exercise their rights and opportunities, and we hope it will pass the legislature this session.

Sincerely,

Chas Edwardson

Charles Edwardson, Chairman
ASHBA Legislative Committee

8301 Schoon, Ste 200 • Anchorage, Alaska 99518
Phone (907) 644-4190 • FAX (907) 522-3757
Website: www.buildersofalaska.com • E-mail: info@buildersofalaska.com

SECTION 2-117. AMENDMENT OF DECLARATION.

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110, the association under Section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113, or certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by subsections (d), (f), (g), and (h), the declaration, including any plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, unless the declaration specifies a different percentage for all amendments or for specific subjects of amendment. If the declaration requires the approval of another person as a condition of its effectiveness, the amendment is not valid without that approval.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the common interest community is located and is effective only upon recordation. An amendment, except an amendment pursuant to Section 2-112(a), must be indexed [in the grantee's index] in the name of the common interest community and the association and [in the grantor's index] in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this [act], no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, or change the allocated interests of a unit, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this [act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the

association designated for that purpose or, in the absence of designation, by the president of the association.

(f) An amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units only by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be affected by the amendment . An amendment approved under this subsection must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.

(g) The time limits specified in the declaration pursuant to Section 2-105(a)(8) within which reserved development rights must be exercised may be extended, and additional development rights may be created, if persons entitled to cast at least 80 percent of the votes in the association, including 80 percent of the votes allocated to units not owned by the declarant, agree to that action. The agreement is effective 30 days after an amendment to the declaration reflecting the terms of the agreement is recorded unless all the persons holding the affected special declarant rights, or security interests in those rights, record a written objection within the 30-day period, in which case the amendment is void, or consent in writing at the time the amendment is recorded, in which case the amendment is effective when recorded.

(h) A provision in the declaration creating special declarant rights that have not expired may not be amended without the consent of the declarant.

(i) If any provision of this [act] or of the declaration requires the consent of a holder of a

security interest in a unit as a condition to the effectiveness of an amendment to the declaration, that consent is deemed granted if a refusal to consent in a record is not received by the association within 60 days after the association delivers notice of the proposed amendment to the holder at an address for notice provided by the holder or mails the notice to the holder by certified mail, return receipt requested, at that address. If the holder has not provided to the association an address for notice, the association shall provide notice to the address in the security interest of record. Notwithstanding this section, an amendment to the declaration that affects the priority of a holder's security interest or the ability of that holder to foreclose its security interest may not be adopted without that holder's consent in a record if the declaration requires that consent as a condition to the effectiveness of the amendment.

(j) If the declaration contains a provision requiring that amendments to the declaration may be adopted only by the vote or agreement of unit owners of units to which more than 80 percent of the votes in the association are allocated, the amendment is approved:

(1) if:

(A) unit owners of units to which at least 80 percent of the votes in the association are allocated vote for or agree to the proposed amendment;

(B) no unit owner votes against the proposed amendment; and

(C) notice of the proposed amendment is delivered to the unit owners holding the votes in the association which have not voted or agreed to the proposed amendment and no written objection to the proposed amendment is received by the association within 60 days after the association delivers notice; or

(2) unit owners of units to which at least 80 per cent of the votes in the association are allocated vote for or agree to the proposed amendment but at least one unit owner objects to the proposed amendment and, pursuant to an action brought by the association in [insert appropriate court] against all objecting unit owners, the court finds that the objecting unit owners do not have an interest, different in kind from the interests of the other unit owners, that the voting requirement of the declaration was intended to protect.

First American Title

TERRY E. BRYAN
VICE PRESIDENT
ALASKA STATE MANAGER

February 20, 2012

Honorable Representative Kurt Olson

Chairman, House Labor & Commerce Committee

120 4th Street, Room 24

State Capital

Juneau, AK 99801

First American Title Insurance Company has operated as a Title Insurance Company and as a Title Insurance Limited Producer within the State of Alaska for more than 35 years. Currently we conduct business with 11 direct operations while simultaneously supporting a network of Agents that employ Alaskan throughout the state. We provide Title Insurance product and services as well as escrow services to Alaskans in every city, village and borough within our great state.

First American Title fully supports HB 269 "An Act relating to the amendment of a declaration that creates a common interest community".

Respectfully Submitted,

Terry E. Bryan

Vice President and Alaska State Manager

3035 C Street, Anchorage, AK 99503
TEL 907.561.1844 • FAX 907.561.1948
terbryan@firstam.com • www.firstam.com

[redacted]HOUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: April 2, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 4/6/12

The JUDICIARY Committee considered: **HB 269**

HOUSE BILL NO. 269
"An Act relating to the amendment of a declaration that creates a common interest community."
HB 269-COMMON INTEREST COMMUNITIES

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 269 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Titl**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	CED			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Saxton	✓			
	Keller			X	
	Holmes	X			
Chair:	Thompson	X			
Chair:					

27-LS1125\M
Bullock
4/5/12

m Rep Keller
obj. LH

CS FOR HOUSE BILL NO. 269(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE HOLMES

A BILL

FOR AN ACT ENTITLED

"An Act relating to the amendment of a declaration that creates a common interest community."

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

*** Section 1.** AS 34.08.250(a) is amended to read:

(a) Except for amendments that may be executed by a declarant under AS 34.08.170(b) or 34.08.180, [OR] by the association under AS 34.08.140(d), 34.08.160(c), 34.08.200(a), 34.08.210, or 34.08.740, or by certain unit owners under AS 34.08.160(b), 34.08.200(a), 34.08.210(b), or 34.08.260(b), and except as limited by (d) **or required by (f)** of this section, a declaration, including any required plats and plans, may be amended only by vote or agreement of unit owners of units comprising either at least 67 percent of the allocated interests in the association or a larger percentage specified in the declaration. A declaration may not specify a smaller number unless all of the units are restricted exclusively to nonresidential use.

*** Sec. 2.** AS 34.08.250(d) is amended to read:

(d) Except to the extent expressly permitted or required **in** [BY OTHER PROVISIONS OF] this chapter, an amendment may not create or increase special declarant rights, increase the number of units, **or** change the boundaries of a unit, the allocated interests of a unit, or the uses to which a unit is restricted, in the absence of unanimous consent of the unit owners.

*** Sec. 3.** AS 34.08.250 is amended by adding a new subsection to read:

(f) The time limits specified in a declaration described under AS 34.08.130(a)(8) may be extended and additional development rights created if persons entitled to cast at least 80 percent of the votes in the association, including 80 percent of the votes allocated to units not owned by the declarant, agree to the extension or additional development rights. The agreement is effective 30 days after an amendment to the declaration reflecting the terms of the agreement is recorded unless all persons holding special declarant rights affected by the amendment or security interests in those rights

(1) record a written objection within the 30-day period, in which case, the amendment is void; or

(2) consent in writing when the amendment is recorded, in which case, the amendment is effective when recorded.

Representative Lindsey Holmes

House Bill 269 Sponsor Statement
An Act relating to the amendment of a declaration that creates a common interest community.

In 1986 Alaska adopted the Common Interest Ownership Act found in AS 34.08. This law was based on the 1982 version of the Uniform Common Interest Ownership Act ("UCIOA") that served as a model for condominium statutes around the country. Since then, the national UCIOA has been revised more than once, with the most recent version in 2008. However, Alaska's law has not been similarly updated. HB 269 takes one section of the updated UCIOA and incorporates it into Alaska's law.

When a developer begins construction of a common interest community such as a condominium development they have to specify a timeline for the continued development of the project. Under current law, if a developer and the homeowners association of a common interest community want to extend the timeline for these development rights it takes a unanimous vote of the homeowners.

Achieving a unanimous vote, even for a project with overwhelming support is problematic at best. In the 1994 version of the UCIOA this problem was addressed by modifying the threshold to a super-majority of 80% of the homeowners. HB 269 would mirror this change. An 80% threshold for modifying the timeline for development rights will still require extremely strong support, but will not require a prohibitively difficult unanimous vote.

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Please join me in supporting HB 269 to protect and strengthen Alaska's housing industry.

legal - "not automatic Condo assoc. has to vote to Δ its rules & by laws."

Δ threshold vote. %

Q. Rep. Keller - Constitutional issues? Dept. of Law

State Capitol, Juneau, Alaska 99801 · (907) 465-4919 · Fax: (907) 465-2137
Rep.Lindsey.Holmes@legis.state.ak.us

HOUSE BILL NO. 269

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE HOLMES

Introduced: 1/17/12
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to the amendment of a declaration that creates a common interest community."

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

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*** Sec. 3.** AS 34.08.250 is amended by adding new subsections to read:

(f) By vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated or a larger percentage specified in the declaration, an amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons that may occupy units. The amendment must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.

(g) The time limits specified in a declaration described under AS 34.08.130(a)(8) may be extended and additional development rights created if persons entitled to cast at least 80 percent of the votes in the association, including 80 percent of the votes allocated to units not owned by the declarant, agree to the extension or additional development rights. The agreement is effective 30 days after an amendment to the declaration reflecting the terms of the agreement is recorded unless all persons holding special declarant rights affected by the amendment or security interests in those rights

(1) record a written objection within the 30-day period, in which case, the amendment is void; or

(2) consent in writing when the amendment is recorded, in which case, the amendment is effective when recorded.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 269**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB269-DCCED-DCRA-03-14-12
Title: Common Interest Communities
Sponsor: Representative Holmes
Requester: House Labor & Commerce

Dept. Affected: DCCED
Appropriation: Community & Regional Affairs
Allocation: Community & Regional Affairs
OMB Component Number: 2879

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Scott Ruby, Director — Phone 269-4569
Division: Community and Regional Affairs — Date/Time 3/14/12 9:00 AM
Approved by: Susan K. Bell, Commissioner — Date 3/14/2012
Commerce, Community, and Economic Development

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 269
2012 LEGISLATIVE SESSION

Analysis

HB 269 modifies the Common Interest Ownership Act to allow for 80% of the homeowners to vote on development rights versus the current law that requires a unanimous vote. This conforms to the recently updated Federal Uniform Common Interest Ownership Act.

There is no anticipated fiscal impact to the Division as a result of this legislation.

Melanie Lesh

From: yuri morgan <yuri@gci.net>
Sent: Monday, April 02, 2012 3:08 PM
To: Melanie Lesh
Subject: Testimony on HB269 - common interest communities

Hi Melanie:

Joe Beedle, President & CEO of Northrim Bank, would like to call in to testify in support of HB269 - Common Interest Communities - in House Judiciary this Wednesday, April 4th beginning at 1:00PM.

Thank you for providing me with the off-net number, which I will forward on to Mr. Beedle.

Thanks, and please let me know if you have any questions.

yuri
388.8611

HB

278

<TARGET><BILL>HB 278</BILL><SUBJECT>HB 278</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

received
3/16/2012
1:52 pm PS

State Capitol, Suite 422
Juneau, AK 99801-1182
Phone: 465-4939
Fax: 465-2418
Toll Free: (800) 465-4939
Representative_Pete_Petersen@legis.state.ak.us

716 W. 4th Ave, Suite 380
Anchorage, AK 99501-2133
Phone: 269-0265
Fax: 269-0264

Representative Pete Petersen

Serving Northeast Anchorage and Muldoon

Memorandum

March 16, 2012

To: Rep. Carl Gatto
Chair, House Judiciary Committee

From: Rep. Pete Petersen P.P.

Re: Second Hearing Request for House Bill 278

I respectfully request that House Bill 278 be scheduled for a second hearing in the House Judiciary Committee. My office has been working diligently, and we believe that we have addressed the concerns that came up during the previous hearing. Attached you will find an explanation of the changes, a proposed committee substitute, and answers to questions that were raised during the hearing.

Please feel free to contact me or my aide, Monica Southworth, at 465-4939 with any thoughts, questions, or ideas.

Thank you for your consideration.

27-LS1197\I
Gardner
3/15/12

CS FOR HOUSE BILL NO. 278( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE PETERSEN

A BILL

FOR AN ACT ENTITLED

"An Act allowing as a condition of probation for a defendant convicted of certain sex offenses a prohibition against the defendant's residing at a residence where installed outdoor recreational equipment suitable for use by children under 16 years of age is located on the property."

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

*** Section 1.** AS 12.55.100(e) is amended to read:

(e) In addition to other conditions imposed on the defendant, while on probation and as a condition of probation

(1) for a sex offense, as described in AS 12.63.100, the defendant

(A) shall be required to submit to regular periodic polygraph examinations;

(B) may be required to provide each electronic mail address, instant messaging address, and other Internet communication identifier that the defendant uses to the defendant's probation officer; the probation officer shall

forward those addresses and identifiers to the Alaska state troopers and to the local law enforcement agency;

(2) if the defendant was convicted of a violation of AS 11.41.434 - 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the defendant may be required to refrain from

(A) using or creating an Internet site;

(B) communicating with children under 16 years of age;

(C) possessing or using a computer; or

(D) residing within 500 feet of school grounds; in this subparagraph, "school grounds" has the meaning given in AS 11.71.900;

(3) if the probation condition in (e)(2)(B) or (D) of this section is imposed on the defendant, the defendant shall, as a condition of probation, provide notice to the defendant's probation officer before or not later than 24 hours after moving into a residence where installed outdoor recreational equipment designed or intended primarily for use by children under 16 years of age is present on the property.

Alaska State Legislature

State Capitol, Suite 422
Juneau, AK 99801-1182
Phone: 465-4939
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716 W. 4th Ave, Suite 380
Anchorage, AK 99501-2133
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Representative Pete Petersen

Serving Northeast Anchorage and Muldoon

Changes between version A and version B

March 14, 2012

In AS 12.55.100(e), removed section (2)(D) which stated "residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property;"

And added a section (3) which states "if the probation condition in (e)(2)(B) or (D) of this section is imposed on the defendant, the defendant shall, as a condition of probation, provide notice to the defendant's probation officer before or not later than 24 hours after moving into a residence where recreational equipment designed or intended primarily for use by children under 16 years of age is present on the property."

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March 14, 2012

To: Members of the House Judiciary Committee

From: Rep. Pete Petersen

RE: HB 278 Sex Offender Probation Conditions

During the last hearing, there was concern about the applicability of the law. We have narrowed the language so it is much more specific to individuals who are already required to refrain from living within 500 feet of a school and/or from communicating with an individual under the age of 16. In addition, when looking at AS 12.55.100(e)(2), this law applies to defendants convicted of a violation of AS 11.41.434-11.41.455, AS 11.61.125-11.61.128, or a similar offense in another jurisdiction. AS 11.41.434 defines sexual abuse of a minor in the first degree, second degree, third degree, fourth degree, online enticement of a minor, and unlawful exploitation of a minor. These laws solely deal with individuals who have sexually abused minors. If an individual sexually offends another adult, this bill would not be applicable.

Other questions are addressed below.

What about sex offenders with children? The new language of the bill will simply require the defendant to report. If the defendant has children, and is living in a location where there is installed recreational equipment, they will have to report the equipment's presence to the probation officer. In addition, the committee substitute states that if a defendant has been required to refrain from communicating with children under 16 years of age or residing within 500 feet of school grounds, then they will be required to disclose the fact that there is equipment on the property that would be suitable for children.

Will the defendant have to uninstall equipment? The committee substitute removes this problem. The defendant will not be required to remove the equipment. The defendant will be required to disclose the existence of the equipment on the property of his or her residence to the probation officer. The probation officer will decide the appropriate course of action.

Would the state have to compensate the defendant for the equipment? No. The defendant will not be required to remove the equipment.

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What if the defendant moves into a low-income housing unit and there is already a playground installed on the property? Given the new language of the bill, the defendant would be required to report this. Should the probation officer or treatment provider see this as a threat of recidivism, they would follow with the appropriate action.

What about a snowmobile/ATV? The language of the bill talks specifically about equipment that would be suitable for use of children under the age of 16. Snowmobiles are not designed or intended primarily for use by children under the age of 16.

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An Act allowing as a condition of probation for a defendant convicted of certain sex offenses a prohibition against the defendant's residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property.

This act will amend the current statute AS 12.55.100(e) to include a provision that will prevent individuals registered as a sex offender to live in a residence where outdoor equipment is located on the property. This act will give judges the opportunity to restrict specific sex offenders from having any item a child would want to play on like a trampoline or a jungle gym. These items can be used to lure children into a situation where a past offender could create a relationship with the child, leading to a repeat offense. Under current law, registered sex offenders may be required to refrain from using or creating a web site, communicating with children less than 16 years of age, possessing or using a computer, and residing within 500 feet of a school.

The state of Alaska does not apply austere residence restrictions to sexual offenders. This act will add a minor residence restriction to prevent sexual recidivism by offenders. This act affects only individuals who have previously committed sexual offenses.

This is an important addition that would increase the safety of children and would reduce initial contact between children and sex offenders. By reducing the chance of an interaction, we reduce the chance of a sexual offender repeating his or her crime. This act will provide the courts with a tool they do not currently have when dealing with sex offenders.

Thank you for your consideration on this issue.

HOUSE BILL NO. 278

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE PETERSEN

Introduced: 1/13/12
Referred: Prefiled

A BILL

FOR AN ACT ENTITLED

"An Act allowing as a condition of probation for a defendant convicted of certain sex offenses a prohibition against the defendant's residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property."

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

*** Section 1.** AS 12.55.100(e) is amended to read:

(e) In addition to other conditions imposed on the defendant, while on probation and as a condition of probation

(1) for a sex offense, as described in AS 12.63.100, the defendant

(A) shall be required to submit to regular periodic polygraph examinations;

(B) may be required to provide each electronic mail address, instant messaging address, and other Internet communication identifier that the defendant uses to the defendant's probation officer; the probation officer shall

forward those addresses and identifiers to the Alaska state troopers and to the local law enforcement agency;

(2) if the defendant was convicted of a violation of AS 11.41.434 - 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the defendant may be required to refrain from

(A) using or creating an Internet site;

(B) communicating with children under 16 years of age;

(C) possessing or using a computer;

(D) residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property; or

(E) [(D)] residing within 500 feet of school grounds; in this subparagraph, "school grounds" has the meaning given in AS 11.71.900.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 278**
Fiscal Note Number
Publish Date

Identifier (file name) CSHB278-DOC-OC-02-25-12
Title "An Act allowing as a condition of probation for a defendant convicted of certain sex offenses a prohibition..."
Sponsor Representative Petersen
Requester (H)JUD

Dept. Affected DOC
Appropriation Admin & Support
Allocation Commissioner's Office
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director
Division Department of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 2/25/12 3:30 PM
Date 2/25/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 278

Analysis

Area restrictions are a new condition of probation for sex offenders, therefore the department currently has no data on previous violation/offenses and is unable to estimate the number of future area restriction violations that will occur.

If passed, the Department of Corrections will closely monitor the future fiscal impacts of this legislation.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 278**
Fiscal Note Number
() Publish Date

Identifier (file name)	HB278-LAW-CRIM-02-23-12	Dept. Affected	Law
Title	An Act allowing as a condition of probation for a defendant convicted of certain sex offenses...	Appropriation	Criminal
		Allocation	Criminal Justice Litigation
Sponsor	REPRESENTATIVE PETERSEN		
Requester	(H) Judiciary	OMB Component Number	2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Eileen Donahue, Division Operations Manager	Phone	465-5427
Division	Administrative Services	Date/Time	2/23/12 5:00 PM
Approved by	Michael C. Geraghty, Attorney General	Date	2/23/2012
	Department of Law		

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 278

Analysis

The bill gives the sentencing court discretion, when sentencing a defendant convicted of sex offenses against children, to order the defendant, as a condition of probation, not to reside where outdoor recreation equipment for children under 16 is located on the property.

The fiscal impact to Department of Law is zero.

Victims for Justice

January 27, 2012

The Honorable Pete Petersen
House of Representatives
Alaska State Legislature, State Capitol
Juneau, Alaska 99801

RE: House Bill 278, Sex Offenders

Dear Representative Petersen:

The Board of Directors of Victims for Justice supports House Bill 278.

Victims for Justice is a victim advocacy agency. We advocate for victims of all violent crimes, and we share your concern for the victims and potential victims of pedophile sex offenders.

We believe the addition of paragraph (2) (D), to AS 12.55.100 (e), allowing the court to require that certain felons refrain from residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property, is a reasonable provision. The permissive nature of this language will allow the court to make such requirements when the nature of the offender, and previous offenses, suggests it, but will not overburden law enforcement, probation and parole officers in cases where it doesn't apply.

Regards,

Susan Sullivan

Susan Sullivan
Executive Director

1057 West Fireweed Lane, Suite 101 • Anchorage, AK 99503 • 907-278-0977 • Toll Free 1-888-835-1213 • Fax 907-258-0740 • www.victimsforjustice.org

APOA

ALASKA PEACE OFFICERS ASSOCIATION

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Anchorage

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Mark Pearson, President
Kenai Peninsula Chapter
Kenai

Bob Griffiths, President
Mat-Su Chapter
Wasilla

Thecla LaLonde, President
Wrangell Chapter
Wrangell

February 10, 2012

Representative Pete Petersen
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Petersen:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing HB 278 an act allowing as a condition of probation for a defendant convicted of certain sex offenses a prohibition against the defendant's residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property.

The APOA Executive Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

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

Sincerely,

John Lucking, Jr.
State President

PO Box 240106
Anchorage AK 99524

907 277 0515
f 907 272 5355

Sex Offenders

Notes:
Includes information about all offenders in the OTIS database who have listed as their most serious charge an offense that would unambiguously identify them as a registerable sex offender.

Distribution of Sex Offenders
December 31, 2009

In-State Institutions	Female	Male	Total
Anchorage CCE	-	26	26
Anchorage CCW	-	55	55
Anvil Mountain CC	1	9	10
Fairbanks CC	-	9	9
Hiland Mountain CC	5	-	5
Ketchikan CC	-	6	6
Lemon Creek CC	-	28	28
Mat-Su Pretrial	-	10	10
Palmer Minimum CC	-	37	37
Palmer Medium CC	-	46	46
Spring Creek CC	-	82	82
Wildwood CC	-	27	27
Wildwood Pretrial	-	4	4
Yukon-Kuskokwim CC	-	16	16
Total	*6*	*355*	*361*
Out-of-State Institutions			
Hudson CC - Colorado	-	239	239
Total	-	*239*	*239*
CRC's			
Glenwood Center	1	-	1
Total	*1*	-	*1*
Total All	**7**	**594**	**601**

Demographic Information for Sex Offenders
December 31, 2009

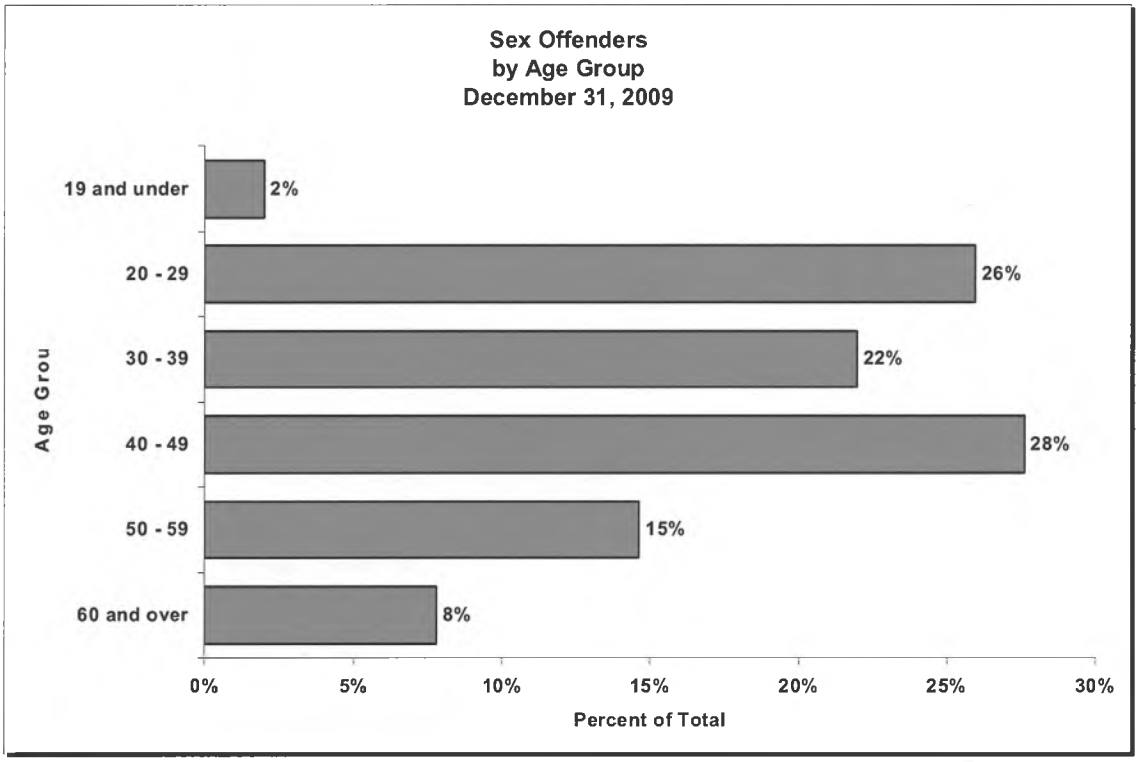
Ethnicity	Female	Male	Total
Asian/Pacific Island	-	11	11
Black	-	23	23
Caucasian	4	225	229
Hispanic	-	10	10
Alaska Native	3	316	319
Unknown	-	9	9
Total	**7**	**594**	**601**

Age Group (Years)	Female	Male	Total
19 and Under	-	12	12
20 - 24	-	81	81
25 - 29	1	74	75
30 - 34	1	57	58
35 - 39	2	72	74
40 - 44	1	94	95
45 - 49	1	70	71
50 - 54	-	58	58
55 - 59	1	29	30
60 - 64	-	25	25
65 and over	-	22	22
Total	**7**	**594**	**601**
Mean Age	***41.03***	***40.10***	***40.11***
Median Age	***39.46***	***40.07***	***40.07***

Length of time from admission			
6 months or less	4	138	142
7 months - 12 months	1	75	76
13 months - 24 months	-	108	108
25 months 36 months	1	73	74
37 months or more	1	200	201
Total	**7**	**594**	**601**
Mean Length (months)	***23.14***	***35.76***	***35.61***
Median Length (months)	***6.00***	***21.00***	***21.00***

Offense Classifications for Sex Offenders
December 31, 2009

Offense Level	Female	Male	Total	Pct
Felony	6	592	598	99.5%
Misdemeanor	1	2	3	0.5%
Total	**7**	**594**	**601**	**100.0%**



Registerable Sex Offenses	Female	Male	Total
Attempted Sex Abuse 1	-	13	13
Attempted Sex Abuse Minor 2	-	15	15
Attempted Sex Assault 1	-	6	6
Attempted Sex Assault 2	-	7	7
Distribute Child Pornography	-	4	4
Incest	-	2	2
Indecent Exposure 1	-	1	1
Indecent Exposure 2	-	1	1
Online Enticement of a Minor	-	2	2
Possess Child Pornography	-	17	17
Sex Abuse Minor 1	4	143	147
Sex Abuse Minor 2	2	136	138
Sex Abuse Minor 3	-	7	7
Sex Assault 1	-	152	152
Sex Assault 2	-	68	68
Sex Assault 3	-	19	19
Solicitation Sex Abuse 2	-	1	1
Soliciting Prostitution	1	-	1
Total	**7**	**594**	**601**

Sex Offenders

Notes:
Includes information about all offenders in the ACOMS database who have listed as their most serious charge an offense that would unambiguously identify them as a registerable sex offender as specified under AS 12.63.100.

Counts and Percents of Sex Offenders by Location and Offender Sex: December 31, 2010

In-State Institutions	Female	Female Percent	Male	Male Percent	Total	Total Percent
ANCHORAGE CCE	0	0.00%	20	6.90%	20	6.73%
ANCHORAGE CCW	0	0.00%	37	12.76%	37	12.46%
ANVIL MTN CC	0	0.00%	11	3.79%	11	3.70%
FAIRBANKS CC	0	0.00%	8	2.76%	8	2.69%
HILAND MTN CC	5	71.43%	0	0.00%	5	1.68%
KETCHIKAN CC	0	0.00%	4	1.38%	4	1.35%
LEMON CREEK CC	1	14.29%	35	12.07%	36	12.12%
MATSU PRETRIAL	0	0.00%	5	1.72%	5	1.68%
PALMER-MED CC	0	0.00%	36	12.41%	36	12.12%
PALMER-MIN CC	0	0.00%	15	5.17%	15	5.05%
SPRING CREEK CC	0	0.00%	82	28.28%	82	27.61%
WILDWOOD CC	0	0.00%	24	8.28%	24	8.08%
WILDWOOD PRETRIAL	1	14.29%	4	1.38%	5	1.68%
YUKON-KUSKOKWIM CC	0	0.00%	9	3.10%	9	3.03%
TOTAL	**7**	**100.00%**	**290**	**100.00%**	**297**	**100.00%**

Out-of-State	Female	Female Percent	Male	Male Percent	Total	Total Percent
HUDSON CF	0	0.00%	247	100.00%	247	100.00%
TOTAL	**0**	**0.00%**	**247**	**100.00%**	**247**	**100.00%**

CRC's	Female	Female Percent	Male	Male Percent	Total	Total Percent
NORTH STAR CTR	0	0.00%	1	100.00%	1	100.00%
TOTAL	**0**	**0.00%**	**1**	**100.00%**	**1**	**100.00%**

	Female	Female Percent	Male	Male Percent	Total	Total Percent
TOTAL ALL	**7**	**1.28%**	**538**	**98.72%**	**545**	**100.00%**

Counts and Percents of Sex Offenders by Race/Ethnicty and Offender Sex: December 31, 2010

Race/Ethnicity	Female	Female Percent	Male	Male Percent	Total	Total Percent
ALASKA NATIVE	0	0.00%	257	47.68%	257	47.16%
ASIAN/PACIFIC IS	0	0.00%	11	2.04%	11	2.02%
BLACK	2	33.33%	30	5.57%	32	5.87%
HISPANIC/LATINO	0	0.00%	11	2.04%	11	2.02%
WHITE	4	66.67%	221	41.00%	225	41.28%
OTHER	0	0.00%	4	0.74%	4	0.73%
UNKNOWN	1	0.00%	4	0.93%	5	0.92%
TOTAL	**7**	**100.00%**	**538**	**100.00%**	**545**	**100.00%**

Counts and Percentages of Sex Offenders by Age Group and Offender Sex: December 31, 2010

Age Group	Female	Female Percent	Male	Male Percent	Total	Total Percent
19 and under	0	0.00%	19	3.53%	19	3.49%
20-24	1	14.29%	75	13.94%	76	13.94%
25-29	2	28.57%	73	13.57%	75	13.76%
30-34	0	0.00%	49	9.11%	49	8.99%
35-39	2	28.57%	53	9.85%	55	10.09%
40-44	1	14.29%	71	13.20%	72	13.21%
45-49	1	14.29%	79	14.68%	80	14.68%
50-54	0	0.00%	44	8.18%	44	8.07%
55-59	0	0.00%	35	6.51%	35	6.42%
60-64	0	0.00%	21	3.90%	21	3.85%
65 and over	0	0.00%	19	3.53%	19	3.49%
TOTAL	**7**	**100.00%**	**538**	**100.00%**	**545**	**100.00%**

Counts and Percentages of Sex Offenders by Length of Time from Admission and Offender Sex: December 31, 2010

Months In	Female	Female Percent	Male	Male Percent	Total	Total Percent
6 months or less	1	14.29%	97	18.03%	98	17.98%
7 months - 12 months	1	14.29%	67	12.45%	68	12.48%
13 months - 24 months	1	14.29%	88	16.36%	89	16.33%
25 months - 36 months	0	0.00%	72	13.38%	72	13.21%
37 months or more	4	57.14%	214	39.78%	218	40.00%
TOTAL	**7**	**100.00%**	**538**	**100.00%**	**545**	**100.00%**

Counts and Percentages of Sex Offenders by Offense Level and Offender Sex: December 31, 2010

Offense Level	Female	Female Percent	Male	Male Percent	Total	Total Percent
Felony	7	100.00%	534	99.26%	541	99.27%
Misdemeanor	0	0.00%	4	0.74%	4	0.73%
Total	**7**	**100.00%**	**538**	**100.00%**	**545**	**100.00%**

Counts of Offenses for Sex Offenders by Offense Description, and Offender Sex: December 31, 2010

Offense Description	Female	Female Percent	Male	Male Percent	Total	Total Percent
ATTEMPTED SEX ABUSE I	0	0.00%	17	3.16%	17	3.12%
ATTEMPTED SEX ABUSE MINOR 2	0	0.00%	26	4.83%	26	4.77%
ATTEMPTED SEX ASSAULT 1	0	0.00%	6	1.12%	6	1.10%
ATTEMPTED SEX ASSAULT 2	0	0.00%	21	3.90%	21	3.85%
ATTEMPTED SEX ASSAULT 3	0	0.00%	1	0.19%	1	0.18%
DISTRIBUTE CHILD PORNOGRAPHY	0	0.00%	2	0.37%	2	0.37%
EXPLOITATION OF A MINOR	1	14.29%	1	0.19%	2	0.37%
INCEST	0	0.00%	4	0.74%	4	0.73%
INDECENT EXPOSURE 1	0	0.00%	1	0.19%	1	0.18%
INDECENT EXPOSURE 2	0	0.00%	2	0.37%	2	0.37%
ONLINE ENTICEMENT OF A MINOR	0	0.00%	1	0.19%	1	0.18%
POSSESS CHILD PORNOGRAPHY	0	0.00%	19	3.53%	19	3.49%
SEX ABUSE MINOR 1	2	28.57%	115	21.38%	117	21.47%
SEX ABUSE MINOR 2	1	14.29%	126	23.42%	127	23.30%
SEX ABUSE MINOR 3	1	14.29%	12	2.23%	13	2.39%
SEX ASSAULT 1	2	28.57%	105	19.52%	107	19.63%
SEX ASSAULT 2	0	0.00%	62	11.52%	62	11.38%
SEX ASSAULT 3	0	0.00%	16	2.97%	16	2.94%
SOLICITATION SEX ABUSE 2	0	0.00%	1	0.19%	1	0.18%
TOTAL	**7**	**100.00%**	**538**	**100.00%**	**545**	**100.00%**

Understanding Sex Offenders: An Introductory Curriculum

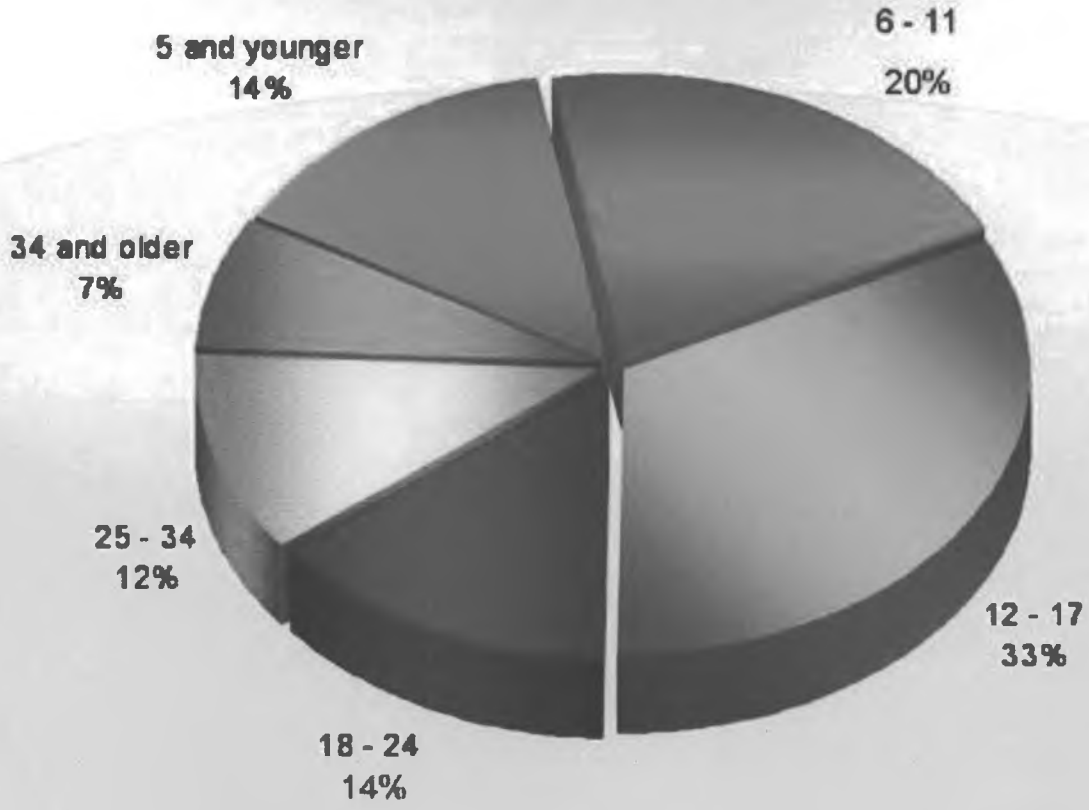
Section 2: The Nature and Scope of Sex Offending

Incidence and Prevalence

- 302,100 women and 92,700 men are forcibly raped in the U.S. each year.
- 1 in 6 women and 1 in 33 men in the U.S. have experienced rape.
- 1 in 4 girls and 1 in 7 boys have been sexually assaulted.

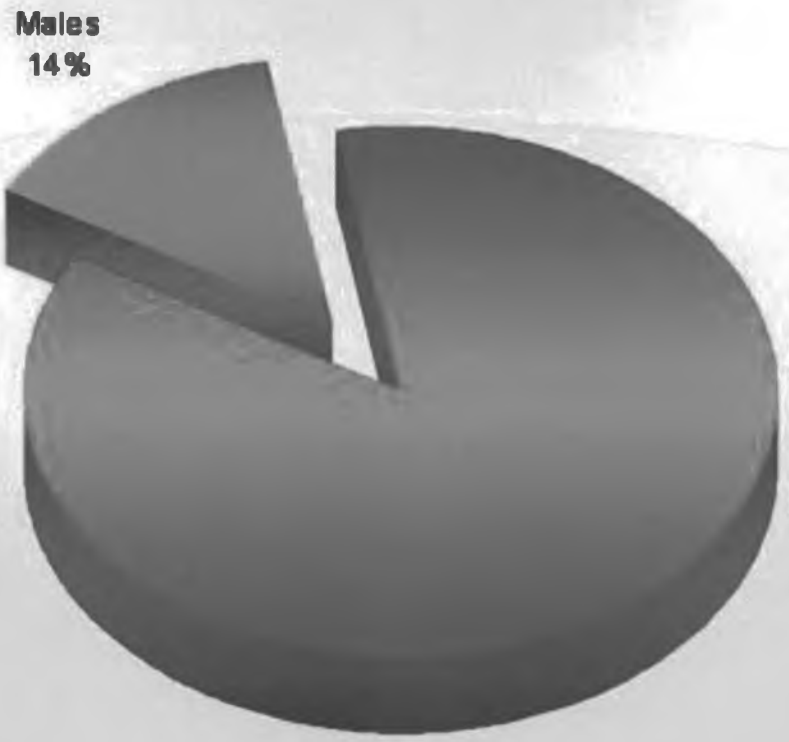
(Finkelhor, 1994; Tjaden & Thoennes, 1998)

Age of Victims



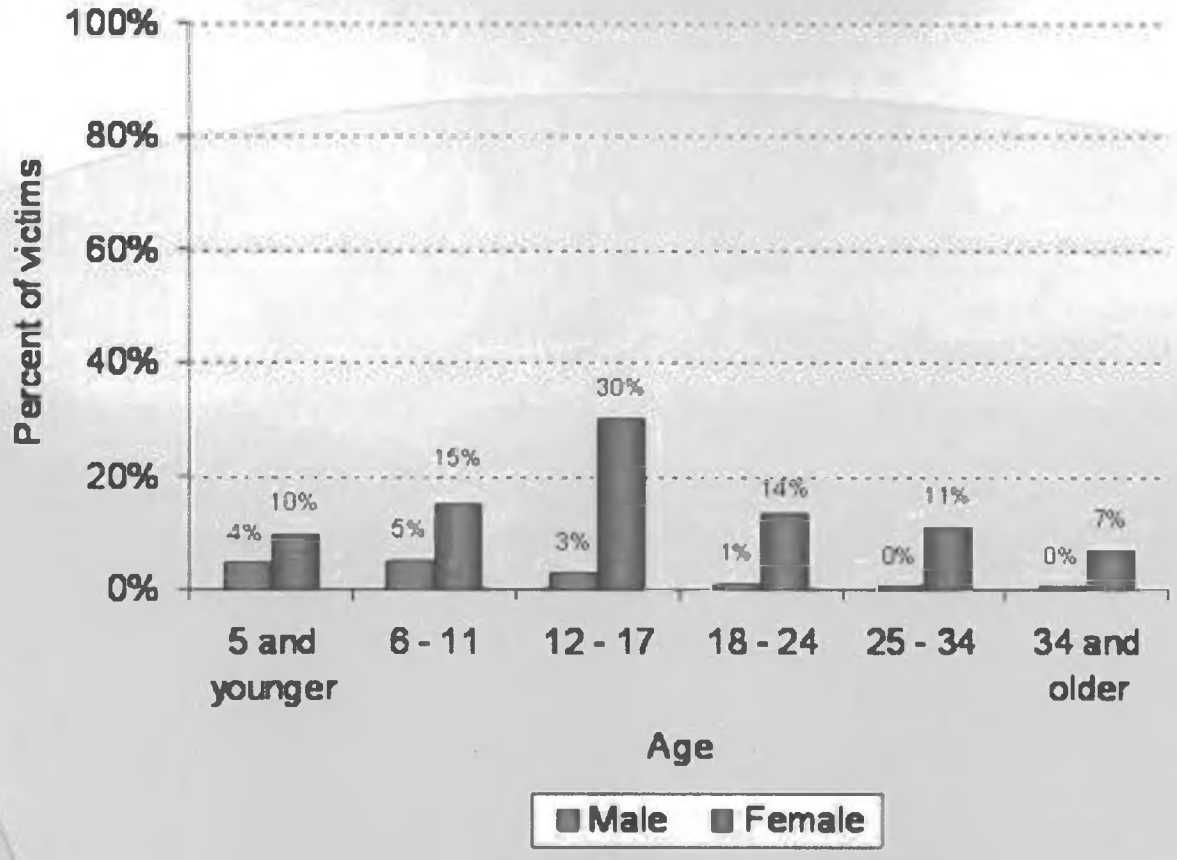
(Snyder, 2000)

Gender of Victims



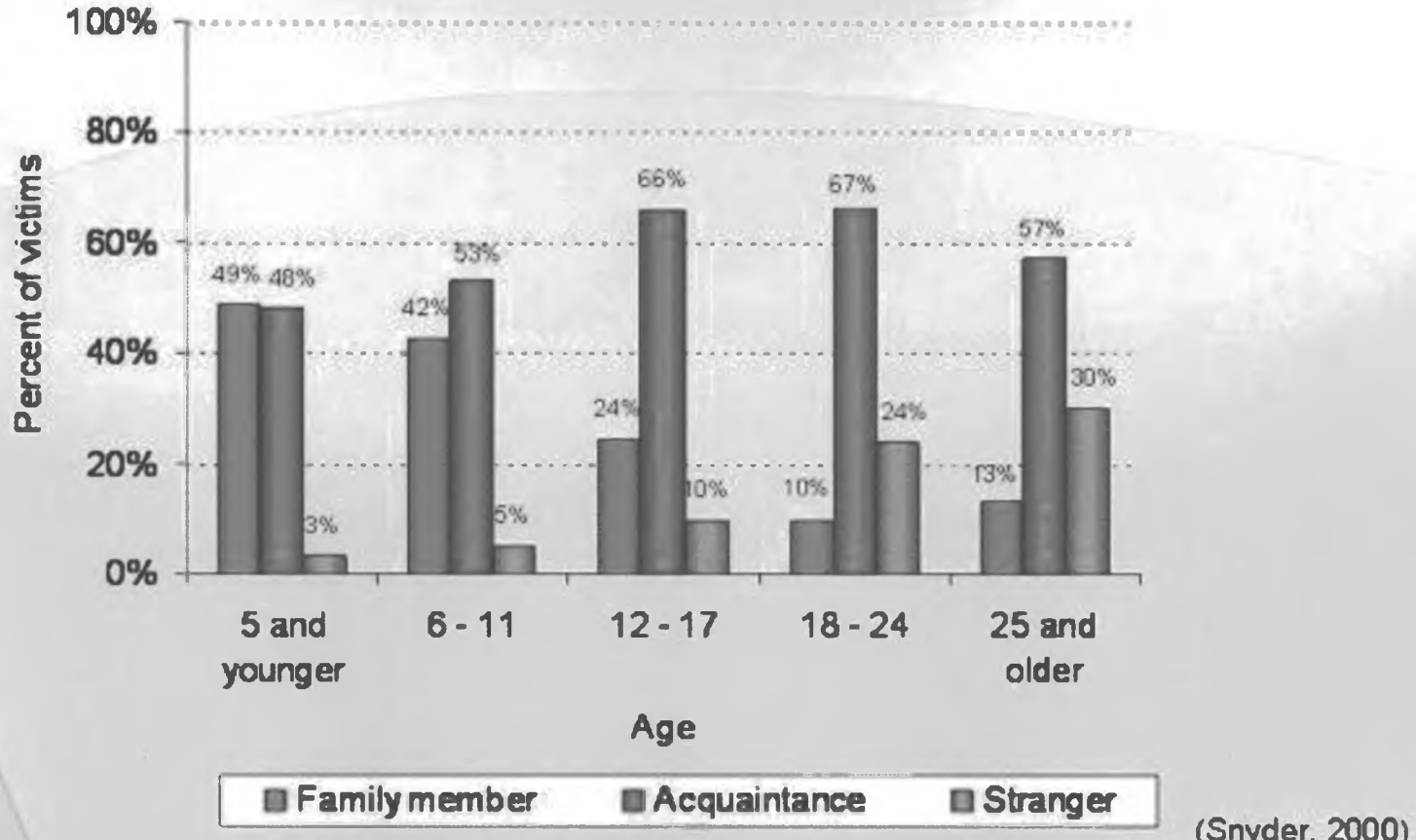
(Snyder, 2000)

Age of Victims by Gender



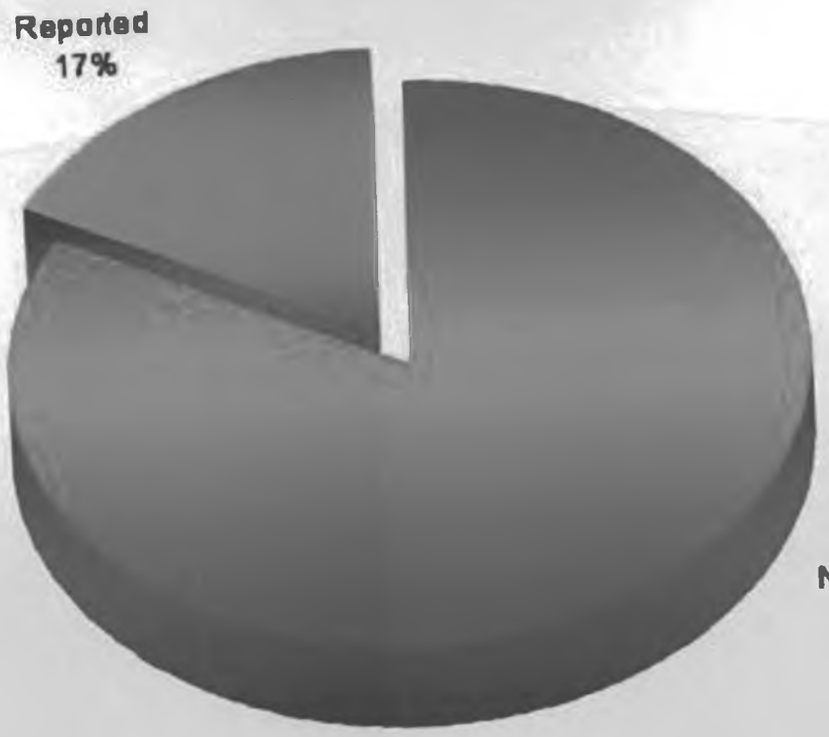
(Snyder, 2000)

Victim/Offender Relationship by Age



(Snyder, 2000)

Reporting Rates



(Tjaden & Thoennes, 1998)

Reasons for Not Reporting

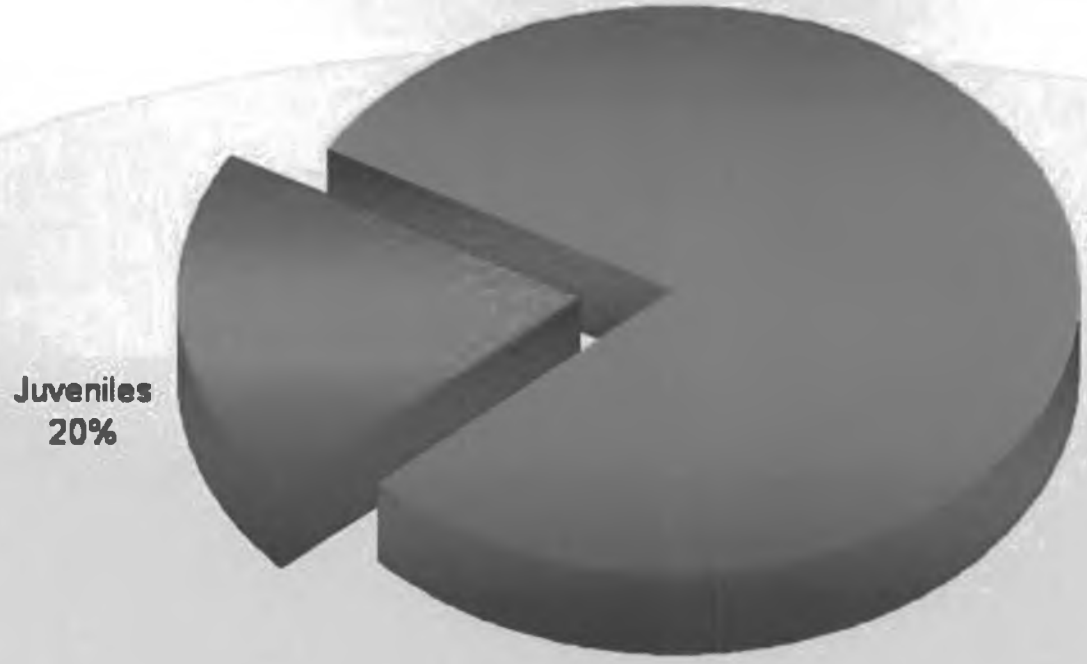
- Belief that nothing can be done
- Fear of or care for the offender
- Consider the assault a private matter
- Self-blame, or worry that others will blame them
- Fear that others will not believe them
- Unsure about what happened

Arrests of Sex Offenders

- 26,066 arrests for forcible rape
- 90,913 for other sex offenses

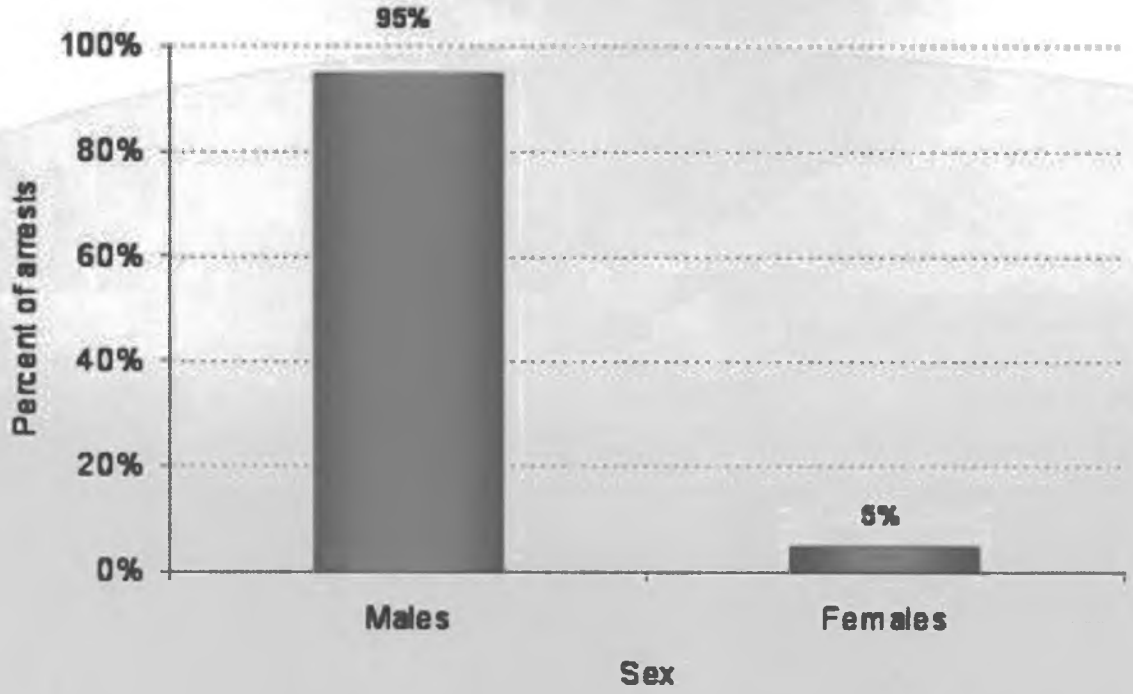
(Federal Bureau of Investigation, 2005)

Arrests by Age



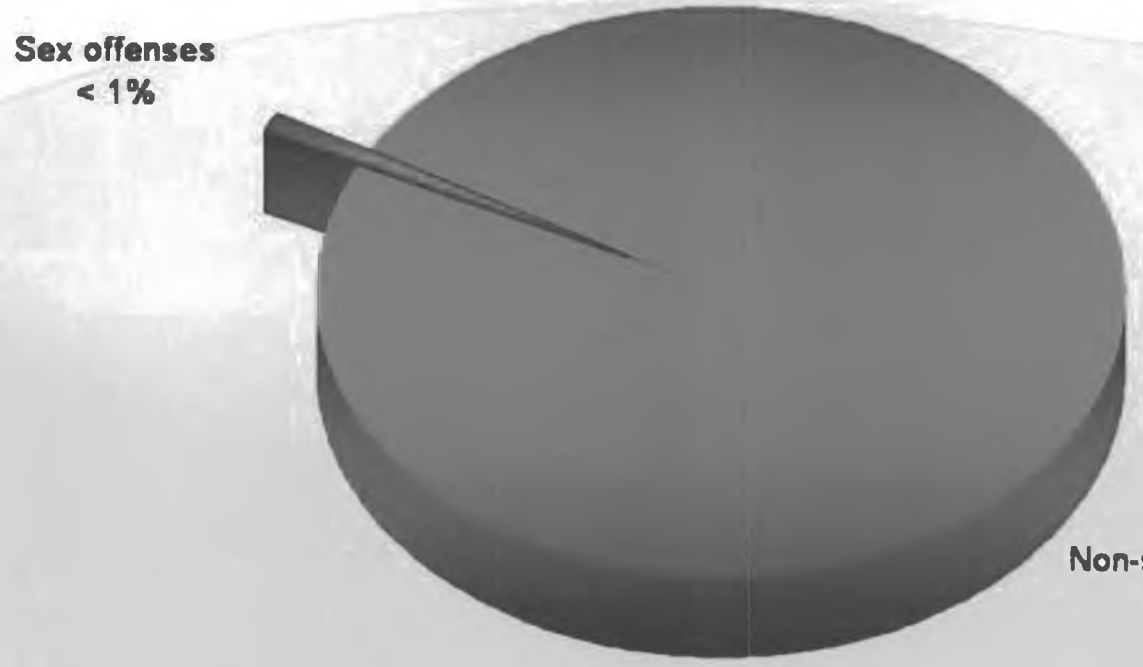
(Federal Bureau of Investigation, 2005)

Arrests by Sex



(Federal Bureau of Investigation, 2005)

Arrests by Offense Type



(Federal Bureau of Investigation, 2005)

Convicted Sex Offenders

- Comprise 10 to 30% of our prison populations
- 150,000 incarcerated throughout the country
- 170,000 are under the authority of correctional agencies

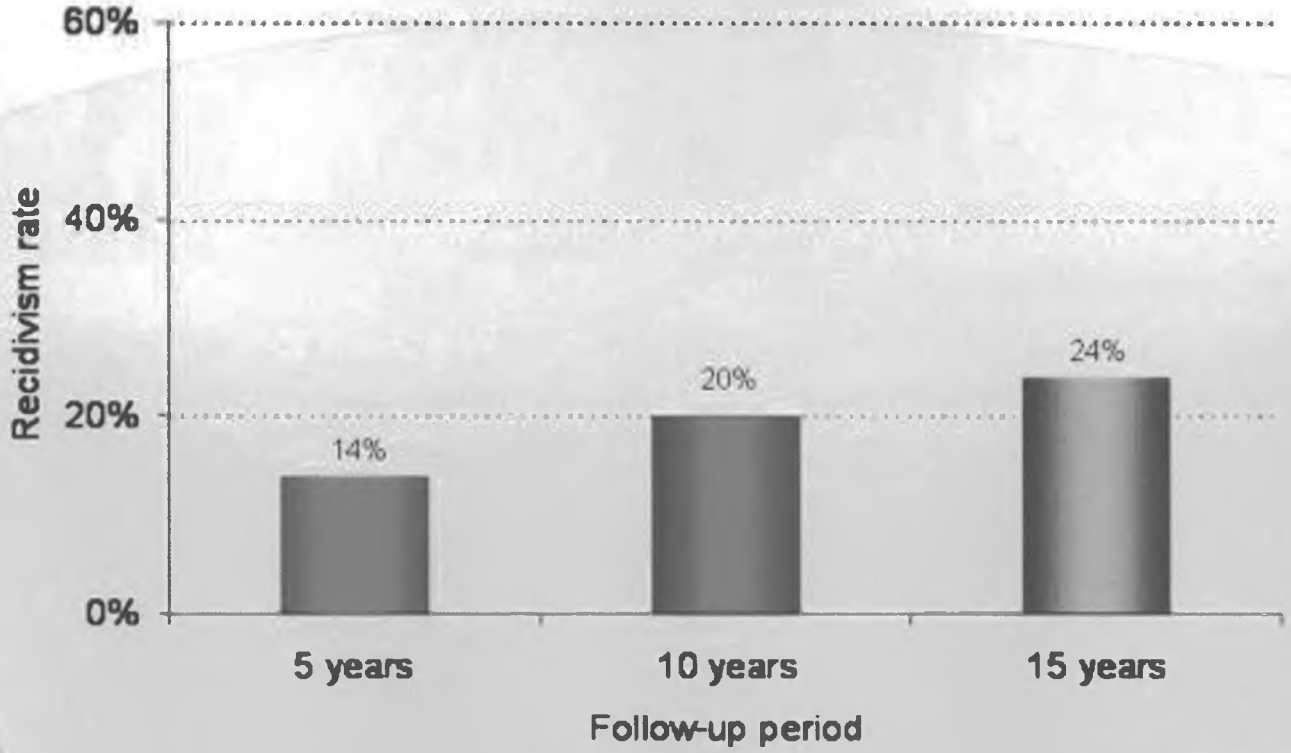
(Bynum, Huebner, & Burgess-Proctor, 2002; Glaze & Palla, 2005; Greenfeld, 1997; Harrison & Beck, 2003, 2006)

Undetected Offenses

- Sex crimes for which offenders are arrested may not be their first or only crime.

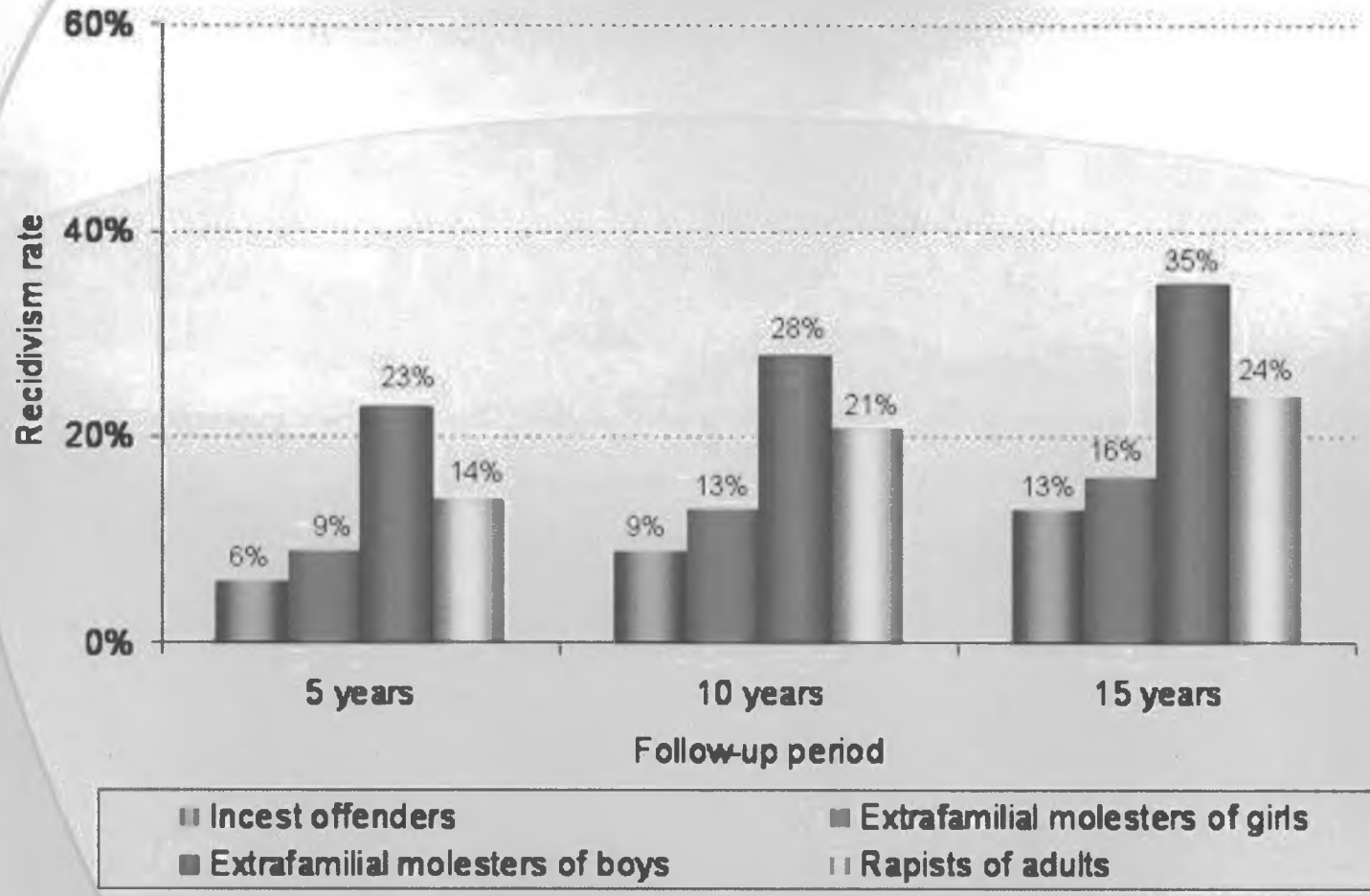
- Crossover potential exists also:
  - Some incest offenders may offend outside the family.
  - Some non-incest offenders may offend within the family.
  - Some child molesters may rape adults.
  - Some rapists may molest children.

Observed Recidivism Rates Over Time



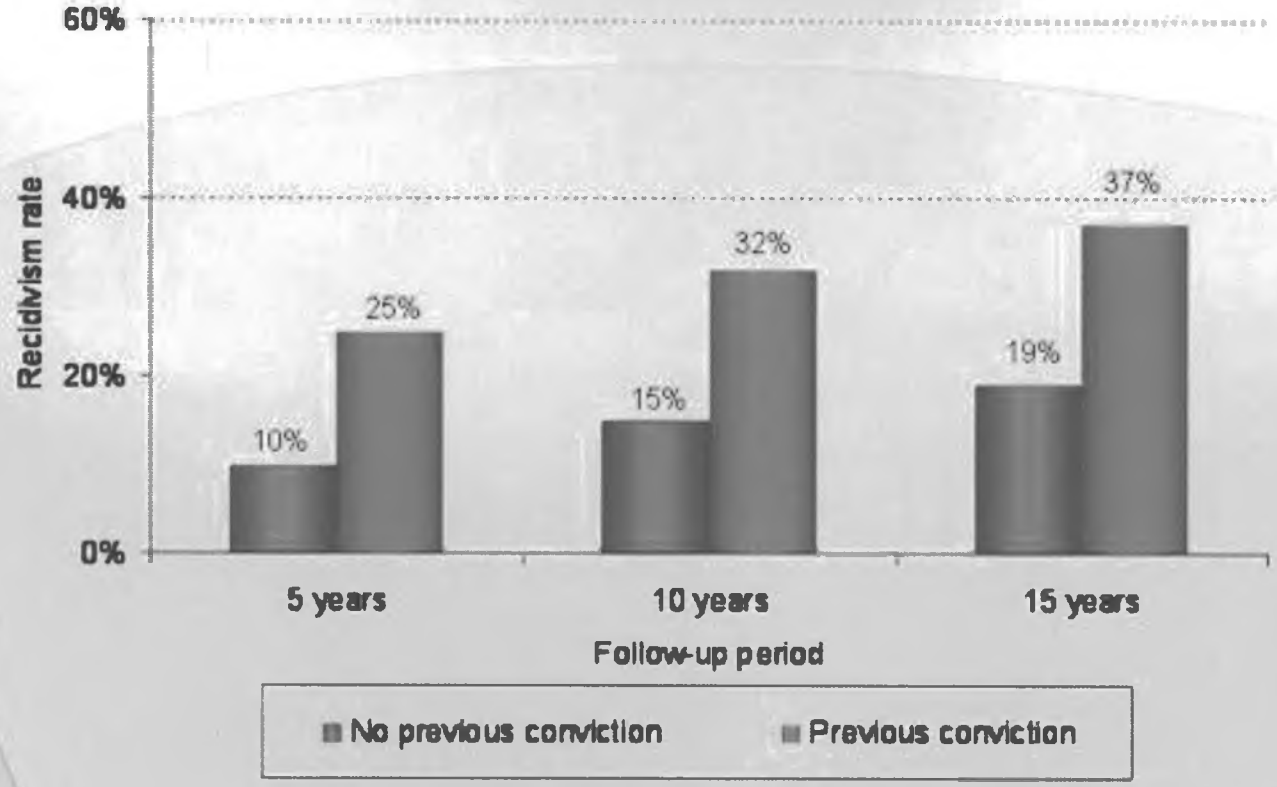
(Harris & Hanson, 2004)

Recidivism Rates by Type of Sex Offender



(Harris & Hanson, 2004)

Recidivism Rates: Previous Conviction vs. No Previous Conviction



(Harris & Hanson, 2004)

27-LS1197\M
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2/23/12

CS FOR HOUSE BILL NO. 278( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE PETERSEN

tabled

A BILL

FOR AN ACT ENTITLED

"An Act allowing as a condition of probation for a defendant convicted of certain sex offenses a prohibition against the defendant's residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property."

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

*** Section 1.** AS 12.55.100(e) is amended to read:

(e) In addition to other conditions imposed on the defendant, while on probation and as a condition of probation

(1) for a sex offense, as described in AS 12.63.100, the defendant

(A) shall be required to submit to regular periodic polygraph examinations;

(B) may be required to provide each electronic mail address, instant messaging address, and other Internet communication identifier that the defendant uses to the defendant's probation officer; the probation officer shall

forward those addresses and identifiers to the Alaska state troopers and to the local law enforcement agency;

(2) if the defendant was convicted of a violation of AS 11.41.434 - 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the defendant may be required to refrain from

(A) using or creating an Internet site;

(B) communicating with children under 16 years of age;

(C) possessing or using a computer;

(D) installing outdoor recreational equipment suitable for use by children under 16 years of age on the defendant's property or at the defendant's residence; or

(E) [(D)] residing within 500 feet of school grounds; in this subparagraph, "school grounds" has the meaning given in AS 11.71.900.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

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REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

DATE: February 24, 2012

TO: Suzie Lowell, Chief Clerk
Alaska House of Representatives

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

RE: House Judiciary Committee Agenda

****

Monday, February 27, 2012 at 1:00 p.m. in Room 120

*+HB 278 SEX OFFENDER PROBATION CONDITIONS Heard + Held

Bills Previously Heard:

+HB 221 PUBLIC DEFENDER APPOINTMENT PROCEDURES H.O

February 27, 2012

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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Anchorage, AK 99503
(907) 258-0044
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JUNE PINNELL-STEPHENS, Fairbanks
NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
STUDENT ADVISOR

Re: House Bill 278
ACLU Review of Legal Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony regarding House Bill 278, relating to the conditions of probation.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

HB 278, as proposed, would allow and encourage the imposition of parole and probation conditions prohibiting certain sex offenders from "residing at a residence where outdoor recreational equipment suitable for use by children under 16 years of age is located on the property." We have several concerns with the proposed legislation, outlined in greater detail below, and urge a Do Not Pass vote by Members of the Committee.

Issues Relating to Housing of Sex Offenders

Fundamentally, HB 278 may be counterproductive in achieving the presumed public safety goals intended. In practice, it is extremely difficult for most sex offenders to obtain housing, whether as a result of being listed on the sex offender registry itself, or owing to a variety of regulations

prohibiting them from accessing public housing or public subsidies for housing that would act as a safety net for others.[1]

However, when sex offenders cannot find a fixed residence, the whole purpose of the registry is defeated. Public safety is actually decreased by having a transient population of sex offenders living in shelters and parks. In fact, many sex offenders (and far too many recent criminal offenders generally) are released to homeless shelters, or even to living in the woods and parks in and around large cities like Anchorage, Juneau, and Fairbanks.

The preferred solution would support rehabilitation, which includes getting a job, getting a stable home, and avoiding the misconduct and related factors that led to the offense, which may include drugs or alcohol. Without having a stable home, it is difficult to keep a job or stay sober.

Unfortunately, the current bill would force many sex offenders from their homes and disrupt the rehabilitation process.

The Proposed Bill Would Leave Many Renters With No Option But to Move Out of Difficult-to-Obtain Housing

HB 278 would allow parole and probation conditions prohibiting sex offenders from residing at locations with children's recreational equipment on the property. However, a sex offender renting a property may have no control over whether there is recreational equipment on the property. If a sex offender is currently renting a home with a swing set in the backyard, his only option will be to move out, with no guarantee that he will find new housing. Most landlords would not permit a tenant to demolish a fixed part of the property that increases the property's value. This bill will simply be another factor in the continuing cycle of homelessness for sex offenders, a cycle which inhibits rehabilitation and thwarts public safety.

The Bill also would allow prohibitions on sex offenders from living where recreational equipment is "on the property," which on its face could prohibit a sex offender from living in an apartment building or complex where any playground equipment lies, even if the equipment is distant from the offenders actual apartment. In such a circumstance, the offender will again have little choice but to move out of the premises; a large apartment complex is not going to demolish its playground equipment simply for the benefit of one resident.

/ / /

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1. This occurs, despite the fact that sex offenders, relative to other criminal offenders, actually have a lower recidivism rate than other offenders. Alaska Judicial Council, *Criminal Recidivism in Alaska*, at 4 (2007) (showing that property offenders were rearrested at a 67% rate; violent crime offenders at a 60% rate; drug offenders at a 52% rate; and sex offenders at a 39% rate).

A Balance of Public Safety Interests Would Limit the Scope of the Bill to Recreational Equipment Within the Control of the Sex Offender

The problems outlined above all reflect situations under the proposed bill in which the sex offender's only option would be to move out. A narrower bill that limited its reach only to circumstances where the sex offender has control over the recreational equipment would be more reasonable, and avoid leaving sex offenders with no choice but moving from a home. A bill which allowed probation and parole conditions prohibiting sex offenders from ***installing*** recreational equipment on their property would focus, appropriately, on the conduct of the sex offender, rather than punishing those who happen to live at a location where recreational equipment is present.

The Discretionary Nature of the Conditions Will Not Lead to Individualized Enforcement in an Already Overloaded Justice System

The probation and parole conditions are theoretically discretionary and not mandatory. And if case loads allowed, a responsive probation/parole officer could took the time to carefully review each case, and craft specific conditions to the individual probationer or parolee's circumstances to avoid these problems. Unfortunately, parole and probation officers supervise large numbers of parolees and probationers.[2] And some parole and probation officers do not see their function as helping parolees or probationers rehabilitate themselves; some see their function as waiting to "catch" the parolee or probationer to return them to prison. In such an environment, expecting officers to enforce conditions of release in ways narrowly tailored to each instance is unreasonable.

Most likely, this condition will be imposed on most or all of the probationers and parolees falling within its scope and enforced with little consideration of individual circumstances. Such enforcement will lead to increased homelessness, increased instability for probationers and parolees, an increased risk of reoffending, and diminish public safety. No evidence has been put forward as to the frequency by which sex offenders use such equipment to lure children, or how many offenders would be displaced by such a policy.

Conclusion

For the reasons above, the ACLU urges the committee to reject HB 278.

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2. Roughly 100 probation and parole agents supervise almost 6,000 probationers and parolees. Alaska Department of Corrections, Offender Profile 2010, at 62 (showing 5797 probationers or parolees in 2010); State of Alaska, FY2013 Governor's Operating Budget, Department of Corrections Statewide Probation and Parole Component Budget Summary at 6 (showing 107 probation/parole agent positions).

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
Representative Max Gruenberg, Representative_Max_Gruenberg@legis.state.ak.us
Representative Lindsey Holmes, Representative_Lindsey_Holmes@legis.state.ak.us
Representative Mike Hawker, Representative_Mike_Hawker@legis.state.ak.us

27-LS1197\M
Gardner
2/23/12

CS FOR HOUSE BILL NO. 278( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE PETERSEN

11 tabled 2-27-12

A BILL

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Alaska State Legislature

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Anchorage, AK 99501-2133
Phone: 269-0265
Fax: 269-0264

Representative Pete Petersen
Serving Northeast Anchorage and Muldoon

List of Invited Testimony

February 24, 2012

To: Rep. Carl Gatto
Chair, House Judiciary Committee

From: Rep. Pete Petersen

Re: List of Invited Testimony

Please see the following list of individuals that we have invited to testify on HB 278.

Nancy Meade, Alaska Court System
Carmen Gutierrez, Department of Corrections
Susan Sullivan, Victims for Justice

Please feel free to contact me, or my aide Monica Southworth, at 465-4939 with any questions, thoughts, or ideas.

Alaska State Legislature

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Phone: 269-0265
Fax: 269-0264

Representative Pete Petersen

Serving Northeast Anchorage and Muldoon

Memorandum

January 17, 2012

To: Rep. Carl Gatto
Chair, House Judiciary Committee

From: Rep. Pete Petersen

Re: Hearing Request for House Bill 278

I respectfully request that House Bill 278 be scheduled for a hearing in the House Judiciary Committee. Please feel free to contact me or my aide, Monica Southworth, at 465-4939 with any thoughts, questions, or ideas.

Attached you will find a background packet for House Bill 278 including the current version of the bill, a sponsor statement, support information, and support letters.

Thank you for your consideration.

HB

287

<TARGET><BILL>HB 287</BILL><SUBJECT>HB 287</SUBJECT><COMM>HJUD27</COMM></TARGET>

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

received
2/7/2012

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr.

DATE: February 7, 2012

RE: HB 287: Absentee Voting

****

Please consider this memorandum as a request for the House Judiciary Committee to schedule a hearing on House Bill 287. Accompanying this memo are the following documents:

- Sponsor Statement
- Sectional Analysis
- Explanation of Changes
- CS for House Bill 287(STA) (27-LS1211\E)
- Letters of Support from
  - Alaska Commission on Aging
  - AARP
- Expected witnesses include:
  - Gail Fenumiai, Director, Division of Elections
  - Libby Bakalar, Department of Law Elections specialist
  - Pat Luby, AARP
- Teleconference sites:
  - Anchorage LIO

Thank you for considering my request for a hearing on House Bill 287. Please contact my legislative aide, Ted Madsen, at 465-2840 with any questions.

Alaska State Legislature

House of Representatives

Member
Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

CS for House Bill 287 (27-LS1211\E):

"An Act providing that an absentee ballot application submitted by a voter or on behalf of a voter is valid through the following two general elections; providing that an absentee ballot application for a voter who submits an absentee ballot application and then votes an absentee ballot is valid through the two general elections following the election at which the ballot is cast; and providing for an effective date."

Sponsor Statement

Currently, most voters must request a ballot each time they vote by mail. Under AS 15.20.081(i) uniformed service members and qualified overseas voters receive a ballot for the following two general elections after they apply for a by mail ballot. This bill will extend the same right to all Alaskans. Under the bill, a vote by mail ballot application from a qualified voter will be valid through the next two general elections. Furthermore, each time the voter casts a ballot by mail, the application will continue to be valid through the next two general elections. If the voter casts a ballot in a manner other than by mail, the vote by mail application will no longer be valid. Additionally, if the by mail ballot is returned to the Division of Elections as "undeliverable," the division need no longer send a ballot to that voter at that address.

(i) An absentee ballot application submitted by an absent uniformed services voter or by an absent overseas voter qualifying under AS 15.05.011 is valid through the next two regularly scheduled general elections for federal office after the date the application is submitted. In this subsection, "absent uniformed services voter" has the meaning given in 42 U.S.C. 1973ff-6.

Alaska State Legislature

House of Representatives

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Transportation

Representative Max F. Gruenberg, Jr.
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Email:
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CS for House Bill 287 (27-LS1211\E):

"An Act providing that an absentee ballot application submitted by a voter or on behalf of a voter is valid through the following two general elections; providing that an absentee ballot application for a voter who submits an absentee ballot application and then votes an absentee ballot is valid through the two general elections following the election at which the ballot is cast; and providing for an effective date."

Sectional Analysis

- **Section 1:**
  - Repeals and reenacts AS 15.20.081(i) to allow all voters to receive mail ballots for two general election cycles. Should the voter cast a mail ballot, he/she will receive mail ballots through the next two general elections.
- **Section 2:**
  - Provides an effective date of January 1, 2013

Alaska State Legislature

House of Representatives

Member
Standing Committees:
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Rules
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Transportation

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
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Session:
Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

CS for House Bill 287 (27-LS-1211\E):

"An Act providing that an absentee ballot application submitted by a voter or on behalf of a voter is valid through the following two general elections; providing that an absentee ballot application for a voter who submits an absentee ballot application and then votes an absentee ballot is valid through the two general elections following the election at which the ballot is cast; and providing for an effective date."

Explanation of Changes from "B" version to "E" version

Section 1 of the "B" version was deleted on the recommendation of the Department of Revenue.

Section 2 of the "B" version (now section 1 of the "E" version) has been modified to allow for the repeal and reenactment of that subsection to remove language that would otherwise be redundant.

Section 2 of the "E" version has been added to provide an effective date of January 1, 2013. This was done on the recommendation of the Division of Elections, so as not to place an undue burden upon the division during the 2012 election cycle.

Additionally, the bill title was made more specific.

STATE OF ALASKA

DEPT. OF HEALTH & SOCIAL SERVICES

Alaska Commission on Aging

SEAN PARNELL, GOVERNOR

P.O. BOX 110693
JUNEAU, ALASKA 99811-0693
PHONE: (907) 465-3250
FAX: (907) 465-1398

February 6, 2012

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice Chair
House Judiciary Committee
Alaska State Capitol, Rooms 118 & 428
Juneau, AK 99801-1182

Subject: Support for HB 287, Absentee Voting

Dear Chair Gatto & Vice Chair Thompson:

The Alaska Commission on Aging (ACoA) is pleased to offer our support for HB 287 that would allow qualified citizens to have absentee voting status for a period of two elections. Representative Max Gruenberg authored the bill and it is co-sponsored by Representative Petersen.

The right to vote and have a voice is an undeniable right for every United States citizen. Getting to the polls to vote can be a problem for elderly individuals with physical disabilities, the homebound, rural elders with limited access to transportation, or disabled Alaskan adults of any age. HB 287 will help make voting easier by allowing them to qualify for absentee voting status for a period of two elections.

The ACoA supports HB 287 to give absentee voting rights to individuals who have disabilities that prevent them from going to the polls to vote. Thank you for your support of this important legislation. Please feel free to contact Denise Daniello, ACoA's executive director, by phone (465-4879) or email (denise.daniello@alaska.gov) should you have questions or require additional information.

Sincerely,

Sharon Howerton-Clark
Chair, Alaska Commission on Aging

Sincerely,

Denise Danieilo
ACoA Executive Director

Cc: Representative Keller
Representative Lynn
Representative Pruitt
Representative Holmes
Representative Chenault
Representative Gruenberg
Representative Petersen

AARP Alaska
3601 C Street
Suite 1420
Anchorage, AK 99503

T 1-866-227-7447
F 907-341-2270
TTY 1-877-434-7598
www.aarp.org/ak

January 31, 2012

Honorable Bob Lynn, Chair
House State Affairs Committee
Alaska Capitol, Room 108
Juneau, AK 99801-1182

Dear Chair Lynn:

RE: HB 287 (Gruenberg)--Support

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House State Affairs Committee to support HB 287, authored by your Committee colleague Representative Max Gruenberg.

HB 287 would allow qualified citizens to have absentee voting status for a period of two elections. AARP believes the right to vote is the most basic of all political rights.

Normal aging and disabilities often interfere with a citizen's ability to exercise his or her right to vote. If someone has a physical problem that prevents their ability to vote on a regular basis and they qualify for an absentee ballot, it will be much easier if they can be given absentee voting rights for two more elections, if they so choose.

AARP recommends an "AYE" vote on HB 287.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Thank you for your consideration.

Sincerely,

Marie Darlin

Marie Darlin, Coordinator
AARP Capital City Task Force
415 Willoughby Avenue, Apt. 506
Juneau, AK 99801
586-3637 (voice)
463-3580 (fax)

CC: Vice-Chair Wes Keller
Representative Peggy Wilson
Representative Paul Seaton
Representative Max Gruenberg
Representative Pete Peterson
Representative Kyle Johansen

Alaska State Legislature

House of Representatives

Member
Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

Interim:
716 W 4th Avenue, Rm 350
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Phone: (907) 269-0123
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Session:
Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Bill 287[1]:
An Act Relating to Absentee Voting
Sponsor Statement

Currently, most voters must request a ballot each time they vote absentee. Under AS 15.20.081(i) uniformed service members and qualified overseas voters receive a ballot for the following two general elections after they apply for an absentee ballot. This bill will extend the same right to all Alaskans. Under the bill, an absentee ballot application from a qualified voter will be valid through the next two general elections. Furthermore, each time the voter casts an absentee ballot, the application will continue to be valid through the next two general elections. However, if the absentee ballot is returned to the Division of Elections as "undeliverable," the division will need no longer send a ballot to that voter at that address.

[1] On the recommendation of the Department of Revenue, Section 1 of the bill has been removed in a blank CS.

HB

291

<TARGET><BILL>HB 291</BILL><SUBJECT>HB 291</SUBJECT><COMM>HJUD27</COMM></TARGET>

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 23, 2012

SUBJECT: HB 291, relating to the posting of notices at U.S. Post Offices (Work Order No. 27-LS1074\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee

FROM: Pamela Finley
Revisor of Statutes

HB 291 has been referred to the House Judiciary Committee. I would appreciate your scheduling the bill for a hearing at your earliest convenience.

The bill amends four statutes to delete a requirement that certain public notices be posted at a post office. The reason for this is that, since at least August 2007, the U.S. Postal Service has prohibited the posting of nongovernmental notices on postal service property. See enclosed postal service bulletin. The statutes amended are AS 03.35.030 (petitions concerning controlled livestock districts), AS 34.35.175(d) (personal property lien sales), AS 34.45.050(b) (consignee and bailee lien sales), and AS 43.20.270(d) (tax lien sales). It is offered as a special revisor's bill---rather than part of the regular revisor's bill---because there are different ways to fix the problem, which involve different policy choices. The bill as drafted simply deletes the requirement that a notice be posted at the post office. In this respect, it follows section 1, ch. 62, SLA 2010, which deleted the requirement from AS 09.35.140 (concerning sales on execution).

If you have any questions, please contact me (465-6656).

PF:ljw
12-039.ljw

Enclosure

Susan, call the roll.

Next up before the Committee is:

HB 296 –

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

Sponsored by the House Judiciary Committee.

Presenting HB 296 is Representative Max Gruenberg.

Available for questions via teleconference:

- Doug Gardner, Legislative Legal Services Division. We also have with us on teleconference today
- Leslie Houston is online, she is the Director of the Division of Administration, Dept. of Corrections.

((Carl ~ Nancy Mead, General Counsel with the Court System sent an email relaying that the Court has no position on the bill, a copy is on members' desks.... Nancy said: 'I wanted to let you know that the court has no position on the bill, but normally I would attend the hearing because it does say that it indirectly amends a court rule. Unfortunately, I have a conflict tomorrow, and need to be in another hearing at the same time. Please feel free to call me or let me know if I can answer any questions about it. "))

Bill
Presentation

There is one amendment before us. Can I have a Motion to bring amendment, titled 'D.2' is before us.

Rep. ? Move to adopt amendment 1.

Rep. ? Object for purposes of discussion.

Discussion of amendment 1

Rep ? Do you maintain your objection to adoption of Amendent 1?

Seeing no further objection Amendment 1 is adopted.

Does the committee have any further questions for Rep. Gruenberg?

Seeing there are no further questions for Rep. Gruenberg...

I would like to open up public testimony.

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Close public testimony.

That brings HB 296 back before the committee for discussion. Are there any further questions for the sponsor?

Is there any further discussion on HB 296?

We are going to hold HB 296 for the week, work on it, and plan to take it up again on Friday, February 10th.

At _____ p.m., I adjourn today's meeting of the House Judiciary Committee (GAVEL OUT).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SEAN PARNELL, GOVERNOR

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

January 24, 2012

Representative Carl Gatto, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: HB 291 -- Public Notices Posted at Post Offices

Dear Representative Gatto:

The Department of Law has reviewed HB 291 -- Public Notices Posted at Post Offices.

The bill presents no legal issues.

Sincerely,

RICHARD SVOBODNY
ACTING ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

RXS:DEB:pav

cc: Kathryn Kurtz, Assistant Revisor of Statutes, Legislative Affairs Agency
Heather Brakes, Legislative Director, Office of the governor
Cori Badgley, Legislative Liaison, Civil Division

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 291**
Fiscal Note Number
() Publish Date

Identifier (file name) HB291-LAW-CIV-01-27-12
Title An Act relating to the posting of notices at United States post offices.
Sponsor Rules by request of Legislative Council
Requester (H) Judiciary

Dept. Affected Law
Appropriation Civil
Allocation Legislation/Regulations
OMB Component Number 2209

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Approved by Richard Svobodny, Acting Attorney General
Department of Law

Phone 465-5427
Date/Time 1/27/12 4:00 PM
Date 1/27/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 291
2012 LEGISLATIVE SESSION

Analysis

HB 291 deletes the posting of notices at United States post offices. HB 291 should have no fiscal impact on Department of Law.

Rules and Regulations Governing Conduct on Postal Service Property

Applicability

These rules and regulations apply to all real property under the charge and control of the U.S. Postal Service®, to all tenant agencies, and to all persons entering in or on such property. These rules and regulations must be kept posted at a conspicuous place on all such property. These rules and regulations shall not apply to:

a. Any portions of real property, owned or leased by the Postal Service™, that are leased or subleased by the Postal Service to private tenants for their exclusive use.

b. With respect to restrictions on soliciting, electioneering, collecting debts, vending, and advertising on sidewalks along the street frontage of Postal Service property falling within the property lines of the Postal Service that are not physically distinguishable from adjacent municipal or other public sidewalks and any paved areas adjacent to such sidewalks that are not physically distinguishable from such sidewalks.

Recording Presence

Except as otherwise ordered, properties must be closed to the public after normal business hours. Properties also may be closed to the public in emergency situations and at such times as may be necessary for the orderly conduct of business. Admission to properties when closed to the public may be limited to authorized individuals who may be required to sign the register and display identification when requested by Security Force personnel or other authorized individuals.

General Restrictions

Preservation of Property

Littering, spitting, creating any hazard to persons or things, throwing articles of any kind from a building, climbing upon the roof or any part of the building, or willfully destroying, damaging, or removing any property or any part thereof is prohibited.

Conformity with Signs and Directions

All persons in and on property shall comply with official signs of a prohibitory or directory nature and with the directions of Security Force personnel or other authorized individuals.

Inspection

Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. However, items brought directly to a Postal Service facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided by the *Administrative Support Manual*, part 274. A person arrested for violation of this part may be searched incident to the arrest. Vehicles and their contents brought into, while on, or being removed from restricted nonpublic areas are subject to inspection. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both may be denied entry. After entering the area without objection, consent to inspection shall be implied. A full search of the person and the vehicle driven or occupied by that person may accompany an arrest.

Specific Restrictions

Disturbances

Disorderly conduct, or conduct that creates loud and unusual noise or obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or that otherwise tends to impede or disturb the public employees in the performance of their duties or otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on Postal Service property is prohibited.

Gambling

Participating in games for money or other personal property, the operation of gambling devices, the conduct of a lottery or pool, or the selling or purchasing of lottery tickets is prohibited on postal premises. This does not apply to state lottery tickets at vending facilities operated by licensed blind persons where such lotteries are authorized by state law.

Alcoholic Beverages, Drugs, and Smoking

Anyone under the influence of alcohol or any drug that has been defined as a "controlled substance" may not enter Postal Service property or operate a motor vehicle on Postal Service property. The possession, sale, or use of any "controlled substance" (except when permitted by law) or the sale or use of any alcoholic beverage (except as authorized by the Postmaster General or designee) on Postal Service premises is prohibited. The term "controlled substance" is defined in Title 21, *United States Code* section 802. Smoking is prohibited in all Postal Service buildings and office space, including public lobbies.

Soliciting, Electioneering, Collecting Debts, Vending, and Advertising

Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, displaying or distributing commercial advertising, soliciting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations), and impeding entrance to or departure from Post Offices™ are prohibited on Postal Service property. These prohibitions do not apply to the following:

a. Commercial or nonprofit activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act.

b. Posting notices on employee bulletin boards as authorized by Title 39 *Code of Federal Regulations* (CFR) 243.2.

c. The solicitation of U.S. Postal Service and other federal military or civilian personnel for contributions by recognized agencies as authorized by the *Manual on Fund Raising Within Federal Service*, issued under Executive Order 12353.

Public Assembly and Public Address

Leafleting, distributing literature, picketing, and demonstrating by members of the public are prohibited in lobbies and other interior areas open to the public. Public assembly and public address, except when conducted or sponsored by the Postal Service, are prohibited in lobbies and other interior areas open to the public.

Depositing Literature

Depositing or posting of handbills, flyers, pamphlets, signs, posters, placards, or other literature (except official Postal Service and other governmental notices and announcements) on the grounds, walks, driveways, parking and maneuvering areas, exteriors of buildings, and other structures, or on the floors, walls, stairs, racks, counters, desks, writing tables, window ledges, or furnishings in interior public areas on Postal Service premises is prohibited. This does not apply to the following:

a. Posting notices on employee bulletin boards as authorized by 39 CFR 243.2.

b. Interior space assigned to tenants for their exclusive use.

Photographs for News, Advertising, or Commercial Purposes

Photographs for news purposes may be taken in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings except where prohibited by official signs or Security Force personnel or other authorized personnel or a federal court order or rule. Other photographs may be taken only with the permission of the local postmaster or installation head.

Dogs and Other Animals

Dogs and other animals (except those used to assist persons with disabilities) must not be brought onto Postal Service property for other than official purposes.

Vehicular and Pedestrian Traffic

Drivers of all vehicles in or on Postal Service property must be in possession of a current and valid driver's license and vehicle registration, and the vehicle must display all current and valid tags and licenses required by the jurisdiction in which it is registered. Drivers who have had their privilege or license to drive suspended or revoked shall not drive any vehicle in or on Postal Service property during such period of suspension or revocation.

Drivers of all vehicles in or on Postal Service premises shall drive in a careful and safe manner at all times and must comply with signals and directions of Security Force personnel, other authorized individuals, and all posted traffic signs.

Blocking of entrances, driveways, walks, loading platforms, or fire hydrants is prohibited.

Parking without authority, parking in unauthorized locations or in reserved locations, or parking continuously in excess of 18 hours without permission or contrary to the direction of posted signs is prohibited. Supplemental specific traffic directives may be issued by the postmaster or installation head. When issued and posted, such directives shall have the same force and effect as if made a part hereof.

Voter Registration

Voter registration may be conducted on Postal Service property only with the approval of the postmaster or installation head. See 39 CFR 232.1(h)(4) for the conditions that apply to voter registration activities on Postal Service property.

Weapons and Explosives

No person while on Postal Service property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on Postal Service property, except for official purposes.

Nondiscrimination

No person entering on postal property shall be subjected to discrimination on the basis of race, color, sex, religion, national origin, age (40 years of age or older), or disability (physical or mental) in using any of the services offered by the U.S. Postal Service.

Penalties and Other Law

Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a federal district court or by a federal magistrate in accordance with applicable court rules. Questions regarding such rules must be directed to the managing counsel for the office involved.

Individuals found guilty of violating these rules and regulations are subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both. Nothing contained in these rules and regulations shall be construed to abrogate any other federal laws or regulations or any state or local laws and regulations applicable to any area in which the property is situated.

Enforcement

Security Force personnel will exercise the powers of special police and are responsible for enforcing the regulations in this notice in a manner that will protect U.S. Postal Service property. Postal Inspectors, Office of Inspector General Special Agents, and anyone designated by the Chief Postal Inspector may also enforce these regulations.

Poster 7, August 2007
PSN 7690-03-00-9181

obstructs the ordinary use of entrances, foyers, corridors, offices, meeting rooms, elevators, stairways, or parking lots, or otherwise tends to impede or disturb the members of the Board in the performance of their duties, or members of the public while attempting to attend or observe a meeting of the Board or of any subdivision, or committee of the Board, is prohibited.

(3) Any person who violates paragraph (n) (1) or (2) of this section may, in addition to being subject to the penalties prescribed in paragraph (p) of this section, be removed from and barred from reentering postal property during the meeting with respect to which the violation occurred.

(4) A copy of the rules of this section governing conduct on postal property, including the rules of this paragraph appropriately highlighted, shall be posted in prominent locations at the public entrances to postal property and outside the meeting room at any meeting of the Board of Governors or of any subdivision or committee of the Board.

(o) *Depositing literature.* Depositing or posting handbills, flyers, pamphlets, signs, poster, placards, or other literature, except official postal and other Governmental notices and announcements, on the grounds, walks, driveways, parking and maneuvering areas, exteriors of buildings and other structures, or on the floors, walls, stairs, racks, counters, desks, writing tables, window-ledges, or furnishings in interior public areas on postal premises, is prohibited. This prohibition does not apply to:

(1) Posting notices on bulletin boards as authorized in §243.2(a) of this chapter;

(2) Interior space assigned to tenants for their exclusive use;

(3) Posting of notices by U.S. Government-related organizations, such as the Inaugural Committee as defined in 36 U.S.C. 501.

(p) *Penalties and other law.* (1) Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a Federal district court or by a Federal magistrate in accordance with applicable court rules. Questions regarding such rules should be directed to the regional counsel for the region involved.

(2) Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to a fine as provided in 18 U.S.C. 3571 or imprisonment of not more than 30 days, or both. Nothing contained in these rules and regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated.

(q) *Enforcement.* (1) Members of the U.S. Postal Service security force shall exercise the powers provided by 18 U.S.C. 3061(c)(2) and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property and persons thereon.

(2) Local postmasters and installation heads may, pursuant to 40 U.S.C. 1315(d)(3) and with the approval of the chief postal inspector or his designee, enter into agreements with State and local enforcement agencies to insure that these rules and regulations are enforced in a manner that will protect Postal Service property.

(3) Postal Inspectors, Office of Inspector General Criminal Investigators, and other persons designated by the Chief Postal Inspector may likewise enforce regulations in this section.

[37 FR 24346, Nov. 16, 1972]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §232.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

PART 233—INSPECTION SERVICE AUTHORITY

Sec.

233.1 Arrest and investigative powers of Postal Inspectors.
233.2 Circulars and rewards.
233.3 Mail covers.
233.4 Withdrawal of mail privileges.
233.5 Requesting financial records from a financial institution.
233.6 Test purchases under 39 U.S.C. 3005(e).
233.7 Forfeiture authority and procedures.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

(b) The Chief Postal Inspector is designated as the Security Officer for the U.S. Postal Service. That official is responsible for the issuance of instructions and regulations pertaining to security requirements within the Postal Service.

(39 U.S.C. 401)

[36 FR 4762, Mar. 12, 1971]

§ 231.2 Security Control Officer.

The postmaster or a supervisor designated by the postmaster shall act as Security Control Officer for each post office. The Security Control Officer shall be responsible for the general security of the post office, its stations and branches, in accordance with rules and regulations issued by the Chief Postal Inspector.

(39 U.S.C. 401)

[36 FR 4762, Mar. 12, 1971]

PART 232—CONDUCT ON POSTAL PROPERTY

AUTHORITY: 18 U.S.C. 13, 3061, 3571; 21 U.S.C. 802, 844; 39 U.S.C. 401, 403(b)(3), 404(a)(7), 1201(2).

§ 232.1 Conduct on postal property.

(a) *Applicability.* This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property. This section shall not apply to—

(i) Any portions of real property, owned or leased by the Postal Service, that are leased or subleased by the Postal Service to private tenants for their exclusive use;

(ii) With respect to sections 232.1(h)(1) and 232.1(o), sidewalks along the street frontage of postal property falling within the property lines of the Postal Service that are not physically distinguishable from adjacent municipal or other public sidewalks, and any paved areas adjacent to such sidewalks that are not physically distinguishable from such sidewalks.

(b) *Inspection, recording presence.* (1) Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. However, items brought directly to a postal facility's customer mailing acceptance area and deposited in the mail are not subject to inspection, except as provided by section 274 of the Administrative Support Manual. A person arrested for violation of this section may be searched incident to that arrest.

(2) Vehicles and their contents brought into, while on, or being removed from restricted nonpublic areas are subject to inspection. A prominently displayed sign shall advise in advance that vehicles and their contents are subject to inspection when entering the restricted nonpublic area, while in the confines of the area, or when leaving the area. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both, may be denied entry; after entering the area without objection, consent shall be implied. A full search of a person and any vehicle driven or occupied by the person may accompany an arrest.

(3) Except as otherwise ordered, properties must be closed to the public after normal business hours. Properties also may be closed to the public in emergency situations and at such other times as may be necessary for the orderly conduct of business. Admission to properties during periods when such properties are closed to the public may be limited to authorized individuals who may be required to sign the register and display identification documents when requested by security force personnel or other authorized individuals.

(c) *Preservation of property.* Improperly disposing of rubbish, spitting, creating any hazard to persons or things, throwing articles of any kind from a building, climbing upon the roof or any part of a building, or willfully destroying, damaging, or removing any property or any part thereof, is prohibited.

(d) *Conformity with signs and directions.* All persons in and on property shall comply with official signs of a prohibitory or directory nature, and with the directions of security force personnel or other authorized individuals.

(e) *Disturbances.* Disorderly conduct, or conduct which creates loud and unusual noise, or which impedes ingress to or egress from post offices, or otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

(f) *Gambling.* Participating in games for money or other personal property, the operation of gambling devices, the conduct of a lottery or pool, or the selling or purchasing of lottery tickets, is prohibited on postal premises. In accordance with 20 U.S.C. 107a(a)(5), this prohibition does not apply to the vending or exchange of State Lottery tickets at vending facilities operated by licensed blind persons where such lotteries are authorized by state law.

(g) *Alcoholic beverages, drugs, and smoking.* (1) A person under the influence of an alcoholic beverage or any drug that has been defined as a "controlled substance" may not enter postal property or operate a motor vehicle on postal property. The possession, sale, or use of any "controlled substance" (except when permitted by law) or the sale or use of any alcoholic beverage (except as authorized by the Postmaster General or designee) on postal premises is prohibited. The term "controlled substance" is defined in section 802 of title 21 U.S.C.

(2) Smoking (defined as having a lighted cigar, cigarette, pipe, or other smoking material) is prohibited in all postal buildings and office space, including public lobbies.

(h) *Soliciting, electioneering, collecting debts, vending, and advertising.* (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, soliciting and vending for commercial purposes (including, but not limited to, the vending of newspapers and other publications), displaying or distributing commercial advertising, collecting signatures on petitions, polls, or surveys (except as otherwise authorized by Postal Service regulations), are prohibited. These prohibitions do not apply to:

(i) Commercial or nonprofit activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized under Executive Order 12353, of March 23, 1982.

(2) Solicitations and other actions which are prohibited by paragraph (h)(1) of this section when conducted on Postal Service property should not be directed by mail or telephone to postal employees on Postal Service property. The Postal Service will not accept or distribute mail or accept telephone calls directed to its employees which are believed to be contrary to paragraph (h)(1) of this section.

(3) Leafleting, distributing literature, picketing, and demonstrating by members of the public are prohibited in lobbies and other interior areas of postal buildings open to the public. Public assembly and public address, except when conducted or sponsored by the Postal Service, are also prohibited in lobbies and other interior areas of postal building open to the public.

(4) *Voter registration.* Voter registration may be conducted on postal premises only with the approval of the postmaster or installation head provided that all of the following conditions are met:

(i) The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate or political party for any public office.

(ii) Absolutely no partisan or political literature may be available, displayed, or distributed. This includes photographs, cartoons, and other likenesses of elected officials and candidates for public office.

(iii) The registration is permitted only in those areas of the postal premises regularly open to the public.

(iv) The registration must not interfere with the conduct of postal business, postal customers, or postal operations.

(v) The organization conducting the voter registration must provide and be responsible for any equipment and supplies.

(vi) Contributions may not be solicited.

(vii) Access to the workroom floor is prohibited.

(viii) The registration activities are limited to an appropriate period before an election.

(5) Except as part of postal activities or activities associated with those permitted under paragraph (h)(4) of this section, no tables, chairs, freestanding signs or posters, structures, or furniture of any type may be placed in postal lobbies or on postal walkways, steps, plazas, lawns or landscaped areas, driveways, parking lots, or other exterior spaces.

(i) *Photographs for news, advertising, or commercial purposes.* Except as prohibited by official signs or the directions of security force personnel or other authorized personnel, or a Federal court order or rule, photographs for news purposes may be taken in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings. Other photographs may be taken only with the permission of the local postmaster or installation head.

(j) *Dogs and other animals.* Dogs and other animals, except those used to assist persons with disabilities, must not be brought upon postal property for other than official purposes.

(k) *Vehicular and pedestrian traffic.* (1) Drivers of all vehicles in or on property shall be in possession of a current and valid state or territory issued driver's license and vehicle registration, and the vehicle shall display all current and valid tags and licenses required by the jurisdiction in which it is registered.

(2) Drivers who have had their privilege or license to drive suspended or revoked by any state or territory shall not drive any vehicle in or on property during such period of suspension or revocation.

(3) Drivers of all vehicles in or on property shall drive in a careful and safe manner at all times and shall comply with the signals and directions of security force personnel, other authorized individuals, and all posted traffic signs.

(4) The blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on property is prohibited.

(5) Parking without authority, parking in unauthorized locations or in locations reserved for other persons, or continuously in excess of 18 hours without permission, or contrary to the direction of posted signs is prohibited. This section may be supplemented by the postmaster or installation head from time to time by the issuance and posting of specific traffic directives as may be required. When so issued and posted such directives shall have the same force and effect as if made a part hereof.

(l) *Weapons and explosives.* Notwithstanding the provisions of any other law, rule or regulation, no person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.

(m) *Nondiscrimination.* There must be no discrimination by segregation or otherwise against any person or persons because of race, color, religion, national origin, sex, or disability, in furnishing, or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on postal property.

(n) *Conduct with regard to meetings of the Board of Governors.* (1) Without the permission of the chairman no person may participate in, film, televise, or broadcast any portion of any meeting of the Board or any subdivision or committee of the Board. Any person may electronically record or photograph a meeting, as long as that action does not tend to impede or disturb the members of the Board in the performance of their duties, or members of the public while attempting to attend or observe a meeting.

(2) Disorderly conduct, or conduct which creates loud or unusual noise,

Melanie Lesh

From: Ernest Prax
Sent: Tuesday, January 31, 2012 11:09 AM
To: Melanie Lesh
Subject: Judiciary tomorrow

Carl -

Hi Melanie,

Rep. Keller will have to step out of Judiciary tomorrow around 1:30. There is a joint HSS meeting starting at that time. However, he can step out if need be. Please let me know if you need some form of written notice.

Thanks,

Ernest Prax
Office of Representative Wes Keller
State Capitol, Room 432
Juneau, AK 99801
Phone: 465-2186; Fax; 465-3818

House Judiciary ~ Wednesday, February 1, 2012

(GAVEL IN) Let's call this meeting of the House Judiciary Committee to order.

~~Let the record reflect~~ that it is ____ p.m. on Wednesday, February 1, 2012.

Present today are:

___ Representative Thompson

___ Representative Lynn

___ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

___ Representative Holmes

___ and Myself, Rep. Gatto

Housekeeping

Before we start, please turn off your cell phones. Just turning them to vibrate will interfere with the recording system. Thank you.

At today's meeting we will hear two new bills:

1) HB 291 – "An Act relating to the posting of notices at United States post offices; and providing for an effective date." Sponsored by the House Rules Committee at the Request of Legislative Council. AND

2) HB 296 – An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date." Sponsored by the House Judiciary Committee.

It is my intention today, to hear both of these bills and report them to the next committee of referral.

The first bill up is: HB 291 – "An Act relating to the posting of notices at United States post offices; and providing for an effective date."

Sponsored by the House Rules Committee at the Request of Legislative Council.

Here to present HB 291 is

- Pamela Finley, Revisor of Statutes, with Division of Legal and Research Services with the Legislative Affairs Agency.

Bill Presentation

Does the committee have any questions for the sponsor?

Seeing there are no further questions for the sponsor.

I would like to open up public testimony.

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Close public testimony.

That brings HB 291 back before the committee for discussion. Are there any further questions for Ms. Finley?

Is there any further discussion on HB 291?

Ask for a motion to move HB 291 from committee with the attached fiscal notes and individual recommendations.

Rep. Thompson: "I move that we move HB 291 from committee with the attached fiscal notes and individual recommendations."

Susan, call the roll.

Next up before the Committee is:

HB 296 –

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

Sponsored by the House Judiciary Committee.

Presenting HB 296 is Representative Max Gruenberg.

Available for questions via teleconference:

- Doug Gardner, Legislative Legal Services Division. We also have with us on teleconference today
- Leslie Houston is online, she is the Director of the Division of Administration, Dept. of Corrections.

((Carl ~ Nancy Mead, General Counsel with the Court System sent an email relaying that the Court has no position on the bill, a copy is on members' desks.... Nancy said: 'I wanted to let you know that the court has no position on the bill, but normally I would attend the hearing because it does say that I t indirectly amends a court rule. Unfortunately, I have a conflict tomorrow, and need to be in another hearing at the same time. Please feel free to call me or let me know if I can answer any questions about it. "))

Bill
Presentation

There is one amendment before us. Can I have a Motion to bring amendment D.2 before us.

Rep. ? Move to adopt amendment D.2 #1

Rep. ? Object for purposes of discussion.

Discussion of amendment 1(D.2)

[redacted]OUSE COMMITTEE REPOR[redacted]

(7)
Date Referred to Committee: January 20, 2012 **FURTHER REFERRAL**

Date of Committee Action: February 1, 2012

The JUDICIARY Committee considered: **HB 2**

HOUSE BILL NO. 291
"An Act relating to the posting of notices at United States post offices; and providing for an effective date."
HB 291 PUBLIC NOTICES POSTED AT POST OFFIC

Recommends it be replaced with [ ] HCS *or* [ ] CS for _____(_____
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LAW	0		X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AN
HOLMES	Holmes	X			
PRUITT	Pruitt	X			
KELLER	Keller	X			
LYNN	LYNN	X			
GRUENBERG	Gruenberg	✓			
THOMPSON	Thompson	✓			
Chair: Carl Gatto	GATTO	X			
Chair:					

HB 292

<TARGET><BILL>HB 292</BILL><SUBJECT>HB 292</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]HOUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: March 15, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 3/21/12

The JUDICIARY Committee considered: **HB 292**

HOUSE BILL NO. 292
"An Act relating to property exemptions for retirement plans; relating to pleadings, orders, liability, and notices under the Uniform Probate Code; relating to the Alaska Principal and Income Act; relating to the Alaska Uniform Transfers to Minors Act; relating to the disposition of human remains; relating to insurable interests for life insurance policies; relating to transfers of individual retirement plans; relating to the community property of married persons; and amending Rule 301(a), Alaska Rules of Evidence."

HB 292-PRINCIP.& INC/PROBATE/UTMA/RETIREMT/ETC.

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 292 (L&C)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
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***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	CED			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	✓			
	Kelled			X	
	Holmes	X			
	Pruitt	X			
Chair:	THOMPSON	X			
Chair:					

ALASKA STATE LEGISLATURE

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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

Sponsor Statement

HB292 Uniform Probate Code; Trusts, Wills; Disposition of Human Remains

Alaska first modernized its trust and estate legislation in 1997. Since then, the trust and estate planning community continuously makes recommendations to the legislature for updates and improvements to Alaska's trust and estate laws to ensure that Alaska can continue to provide the best possible planning solutions. Alaska's trust and estate laws have significant impact on our economy, bringing literally millions of dollars to the state and creating jobs within the trust, banking, insurance and legal fields.

House Bill 292 provides for amendments to statute in the following areas:

- Extends protection for retirement plan assets to the beneficiaries of retirement plans (often the surviving spouse).
- Provides means of representation for minors and incapacitated persons in dealing with settlements of accounts or settlement agreements.
- Amends the 2003 Alaska Principal and Income Act to conform to current IRS regulations.
- Provides rules concerning who may control the disposition of decedents' remains.
- Makes conforming amendments to Alaska's laws regarding insurable interests to align with changes to the Uniform Trust Code.
- Provides that IRA interests can be voluntarily transferred to a family member or trust.
- Makes amendments to Alaska's community property provisions to update and clarify the ownership of community property.
- Allows a beneficiary to extend the time funds will be held in a Uniform Transfer to Minors Account.

Passage of HB 292 will ensure that Alaska remains the premier state in which to establish trusts and estates. I urge your support for this important legislation.

E-mail Representative_Steve_Thompson@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 15, 2012

SUBJECT: CSHB 292(L&C) (Work Order No. 27-LS1232\I)

TO: Representative Kurt Olson
Chair of the House Labor and Commerce Committee
Attn: Konrad Jackson

FROM: Terry Bannister
Legislative Counsel

This memo accompanies the bill described above.

1. Single subject issue. It is my opinion that, by combining all of the subjects in the bill, the bill is not confined to one subject, and could be held by a court to violate the constitutional requirement that a bill be confined to one subject.[1]

The Alaska Supreme Court standard is that an "act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."[2]

Historically, the Alaska Supreme Court has interpreted Alaska's single subject rule to permit very broad subject matter in one bill without violating the single subject requirement. For example, the Court has held that bills relating to such broad themes as "development of water resources,"[3] "taxation,"[4] "land,"[5] "intoxicating liquor,"[6] and "criminal law"[7] are acceptable.[8] However, there was a strong dissent in one case against

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[1] Article 2, sec. 13, Alaska State Constitution.

[2] State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982).

[3] Gellert v. State, 522 P.2d 1120 (Alaska 1974).

[4] North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978).

[5] State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982).

[6] Van Brunt v. State, 646 P.2d 872 (Alaska App. 1982).

[7] Galbraith v. State, 693 P.2d 880 (Alaska App. 1985).

allowing broad subject matter in a single bill.[9] And, in 2010, the Alaska Supreme Court found that a proposed initiative violated the single subject requirement.[10] Please be aware that failure to comply with this requirement could jeopardize this bill if it were ever challenged.

2. Applicability (bill section 39). Applying the changes in AS 09.38.017 to retirement plans that pre-date the effective date of these changes, applying the changes and new provisions contained in AS 13.36.157 - 13.36.159 and AS 13.36.215(5) to trusts that pre-date the effective date of these changes, and applying the changes to AS 13.46 to transfers that pre-date the effective date of these changes may raise constitutional impairment of contracts issues if the changes or provisions operate as a substantial impairment of the retirement plans, trusts, or any contractual relationships involved in the transfers.

If I may be of further assistance, please advise.

TLB:plm
12-167.plm

Enclosure

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[8] Evans v. State, 56 P.3d 1046, 1070 (Alaska 2002).

[9] Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1985). In his dissent, at page 1182, Justice Moore stated: "This court has mistakenly continued to give the rule such an extremely liberal interpretation that the rule has become a farce."

[10] Croft v. Parnell, 236 P.3d 369 (Alaska 2010).

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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

MEMORANDUM

To: Representative Kurt Olson, Chair
House Labor & Commerce Committee

From: Representative Steve Thompson

Date: March 7, 2012

Re: Legal memo on HB292 re: Contract Clause

The question has been raised about whether the applicability of certain provisions of the bill to existing retirement accounts, IRAs, trusts, and Uniform Transfers to Minors Accounts might violate the Contracts Clause of the United States Constitution. Analysis indicates that these provisions do not violate that clause.

The Constitution prohibits the states from "impairing" contractual obligations. See U.S. Const. art. 1, § 10, cl. 1. Thus, unless a contractual obligation is impaired, there can be no violation of the Contracts Clause. The proposed legislation with respect to IRAs does not impair or restrict any contract right. To the contrary, it expands the rights of an IRA participant/owner in that it authorizes the assignment of an interest in the plan. Since the owner/participant could, prior to the proposed legislation, freely withdraw all of the money from the plan, enacting legislation that permits an assignment, as well as maintaining the right of withdrawal, cannot be viewed as an impairment. It is instead a permissible expansion of rights that does not constitute an impairment of rights within the meaning of the constitutional provision.

Similarly, the provision in the proposed legislation that would provide expanded creditor protection for an inherited IRA or retirement interest does not effect an impairment of contract rights. The only people whose rights are constrained by this provision are creditors. But a creditor has no contract right to enforce a claim against the IRA or retirement interest. Thus, the legislation does not effect an impairment of contract rights. So, for example, when Congress amended the Bankruptcy Code in 2005 to provide expanded creditor protection for existing IRAs, no concern was raised about its constitutional validity. See section 522 of the Bankruptcy

Code. So, too, here, the expansion of creditor protection does not implicate the Contracts Clause.

The ability of a trustee to modify a trust, pursuant to the amendments provided by sections 6 through 8 of the bill, does not raise Contract Clause issues. Many modifications are to administrative provisions. It is well established that changes that are administrative in nature do not implicate the Contract Clause. With respect to dispositive changes, if the existing trust provides for a limited standard, then the standard and beneficiaries cannot be changed. With respect to the ability of a trustee to "extend" the duration of a trust, it appears that the authority to invade trust principal by paying to another trust of longer duration is provided by common law. In the 1940 case of *Phipps*, the Supreme Court of Florida held the trustee had such power under common law. It relied on the RESTATEMENT OF PROPERTY. When New York, in 1991, enacted the country's first "decanting" statute (EPTL 10-6.6), the legislature stated it was declaratory of existing common law. Both Florida and New York have recently substantially amended their "decanting" statutes. Both of these states applied their amendments to existing trusts.

The changes to the Uniform Transfers to Minors Accounts provisions which allow for extension of the custodial period do not impair contract obligations of the minor. These changes allow the minor to compel distributions at the present statutory age (18 years or 21 years, depending on the existing provision), or at the beginning of an already extended period. Only if the minor consents, can the age be extended.

In summary, none of the provisions in the bill which apply to existing retirement accounts, IRAs, trusts, and Uniform Transfers to Minors Accounts violate the Contract Clause of the United States Constitution.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 292**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB292-DCCED-INS-02-24-12
Title: Princip & Inc/Probate/UTMA/Retiremt/Ect.
Sponsor: Representative Thompson
Requester: House Labor & Commerce

Dept. Affected: DCCED
Appropriation: Insurance Operations
Allocation: Insurance Operations
OMB Component Number: 354

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Linda Hall, Director — Phone: 907-465-2560
Division: Insurance — Date/Time: 2/23/12 2:00 PM
Approved by: JoEllen Hanrahan, Director Administrative Services — Date: 2/24/2012
Commerce, Community and Economic Development

(Revised 11/18/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 292

Analysis

Section 27 amends AS 21.42.020 and provides that a trustee or a trust may procure an insurance contract on the life or body of an individual and the proceeds may be payable to the trustee if the trustee or trust owns the insurance contract, a settler of the trust has an insurable interest in the individual insured, and the proceeds of the contract are primarily for the benefit of a trust beneficiary.

This provision has no anticipated fiscal impact on the Division of Insurance.

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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

SECTIONAL ANALYSIS FOR HOUSE BILL NO. 292 (27-LS1232\I)

Sec. 1. Asset Protection for Inherited Retirement Plans. Alaska Statute 09.38.017(a) protects an individual's interest in a retirement plan from the claims of the individual's creditors. The amendment extends this protection to claims of a beneficiary's creditors (e.g., creditors of an individual's spouse). Arizona, Florida, and Texas have enacted similar provisions.

Sec. 2. This is a conforming amendment for Sec. 28.

Sec. 3. These are definitional changes implementing Sec. 1.

Sec. 4. through Sec. 5. Representation for Settlement Agreements. Alaska Statute 13.06.120 provides that minors, incapacitated persons, and similar persons may be represented by another person who has the same interests in the matter. This type of representation is important in order to simplify and make more efficient proceedings that involve persons who are not legally competent to represent themselves. The existing statute clearly applies to judicial proceedings. However, often it is important to have representation of minors and incapacitated persons with respect to the settlement of accounts of trustees of trusts and with respect to settlement agreements. These amendments clarify that the statute not only applies to court proceedings but also to non-judicial settlement proceedings.

Section 6 through 8. Existing Alaska Statute 13.36.157 provides a trustee with a method to modify an existing trust, commonly referred to as "decanting". Alaska enacted its "decanting" statute in 1998. Alaska copied New York's statute. At the present time, the following states have enacted decanting statutes: Alaska, Arizona, Delaware, Florida, Indiana, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, South Dakota, and Tennessee. In addition, decanting statutes are pending before Illinois, Michigan, and Virginia.

New York recently did a thorough revision of its decanting statute and enacted this new revised statute in 2011. The proposed amendment to Alaska's decanting statute closely tracks the changes made by New York with modifications necessary to accommodate Alaska's procedural provisions.

The purposes of a decanting statute are to allow a trustee to modify a trust in order to correct errors and to adjust to changed circumstances and laws. The revised draft distinguishes between trustees who have unlimited discretion and those without unlimited discretion. A trustee without unlimited discretion must maintain the same beneficiaries in the new trust and apply the same standard for distributions. The trustee cannot be a settlor or beneficiary of the trust, and has a fiduciary duty to exercise the power of appointment in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under prevailing circumstances. A trustee must exercise the power in writing and must give written

notice to the settlor, any person having the right to remove or replace the trustee, and any qualified beneficiary. A beneficiary may object to the exercise if it is an abuse of discretion, or fails to comply with the trustee's duties stated above. Restrictions exist to protect mandatory distribution rights, tax benefits, and to prohibit the trustee from exercising the power to either increase the trustee's compensation or decrease the trustee's liability.

Implementation of irrevocable trusts is best accomplished if the law provides reasonable flexibility to adjust to changed circumstances and to correct errors. The reason why so many states have enacted decanting statutes is because of the need for this flexibility. Amendment to Alaska's decanting statute to include these revised provisions will benefit the residents of the state of Alaska, many of whom use lifetime or testamentary trusts to implement their estate planning purposes.

Sec. 9 through Sec. 25. Amendments to 2003 Alaska Principal and Income Act. This modern act allows a person creating a new trust, or a trustee of an existing trust, to adopt a "unitrust" approach for determining the income of the trust which may be required to be distributed annually. A unitrust distributes a certain percentage of its assets annually to the current beneficiary. The use of this percentage unitrust approach allows the trustee to invest in order to maximize total return for both income and remainder beneficiaries.

Since 2003, the Internal Revenue Service has issued final regulations with respect to unitrusts. The Alaska Principal and Income Act amendments contained in this bill are designed to update Alaska's provisions to take advantage of these new regulations.

In summary, the most important changes contained in the bill expressly allow a trustee to choose a unitrust rate of three to five percent rather than be limited to the four percent amount presently in the law. The changes provide an explicit definition of income for a trust drafted as a unitrust. Language is added to provide the ordering of distributions among types of income and principal. A smoothing period of up to five years is allowed for determining the assets to be used when applying the unitrust percentage. Also, the new provisions clarify how the unitrust rules will apply to retirement benefits. These new changes will facilitate the use of unitrusts under Alaska law and maximize flexibility to take advantage of federal income tax planning.

Sec. 26 through 28. Amendments to Alaska Uniform Transfers to Minors Act. The Alaska Uniform Transfers to Minors Act allows donors, personal representatives, trustees, and obligors, to transfer assets to an account for the benefit of a minor. A custodian is named who may make distributions for the benefit of the minor. Under the existing statutes, the minor is entitled to the property when the minor reaches age 18 years or 21 years, depending on the type of transfer. The statute allows this age of distribution to be extended in certain circumstances to age 25 years.

A number of situations have arisen both in Alaska and in other states where it is undesirable for assets to be distributed later than the ages 18, 21, or 25 years, due to problems the minor may have, including substance abuse problems, immaturity, and the inability to manage assets. Often, the minor himself or herself is willing to have the assets remain in a custodial setting, managed by a
competent person who will make distributions for the benefit of the minor. The amendments in this bill would allow for the extension to an age greater than that presently specified in the statute, as long as the minor consents to the extension during the six-month period when the minor attains
the age when otherwise the assets would be distributed under the statute.

Sec. 29. Decedents Remains. Alaska does not presently have adequate statutory authority with respect to who may control the disposition of a decedent's remains. This has resulted in arguments and disputes among relatives and friends. Businesses involved in this area need

protection concerning who is the person entitled to give them directions. This new act resolves the present uncertainty of the law. It provides authority for a person to provide directions and a form for a disposition document. If a person has not provided directions, then a priority list is provided of the persons who may control the disposition of the decedent's remains. Businesses who follow these directions or priority list are protected from liability.

Sec. 30. Insurable Interests. For many years, individuals have relied on life Insurance in helping to meet their financial, business, and estate planning needs. Often, their needs are best served by having one or more life insurance contracts held in an irrevocable trust, partnership, or limited liability company. In particular, irrevocable life insurance trusts have been widely used throughout the United States to own life insurance policies.

However, a relatively recent federal court case *(Chawla, ex rel Giesinger v. Transamerica Occidental Life Ins. Co.*, 2005 WL 405405 (E.D. Va. 2005)) had the effect of pointing out that while state insurance statutes typically require purchasers of insurance contracts to have an "insurable interest" in the life or body of the insured, the statutory provisions describing who may have an insurable interest did not specifically include trusts and business entities which are commonly used to purchase and own such policies. This case raised sufficient uncertainty about the status of life insurance trusts that in July, 2010, the Uniform Law Commission approved amendments to the Uniform Trust Code to clarify the situation.

Alaska has previously adopted substantial portions of the Uniform Trust Code. The proposed amendment to AS 21.42.020 is based in large part on the recommended amendments to the Uniform Trust Code, and also clarifies that persons with insurable interests may form business entities for the purposes of purchasing, holding, and administering life insurance contracts. Other states, for example Delaware, have already amended their statutes for these reasons, or are considering such amendments.

Sec. 31. Transfers of IRA Interests. Lifetime estate planning often occurs by a participant making gifts, sales or other transfers of property during lifetime to family members or trusts for their benefit. For many individuals, one of their most valuable assets is their individual retirement account (IRA). Alaska law (AS 09.38.017) protects IRAs from claims of creditors. This protection could be construed to even prohibit voluntary transfers of the participant's interest in an IRA, which would prevent lifetime transfers of IRAs for estate planning and other purposes. Although it is important to maintain that creditor protection for IRAs, it would be beneficial to permit voluntary transfers of IRAs. Therefore, this section clarifies that the participant of an IRA may voluntarily transfer his or her IRA during lifetime.

Sec. 32 through Sec. 36. Community Property. In 1998, Alaska enacted an optional community property system. Several amendments have been made to Alaska's act, and this bill proposes further amendments designed to improve the act. Specifically, the amendments accomplish the following:

a. Add references to a community property trust in appropriate provisions.

b. Eliminate language stating a confusing statute of limitations and incorporates by reference a new statute of limitations.

c. Provide clarification that property which spouses agree is community property is owned as community property regardless of the form of title to the property. If title to community property is in a form that provides for survivorship ownership between the spouses then the survivorship ownership is presumed to have been made with the consent of both spouses. If one spouse designates a beneficiary for an interest in property, the designation is only effective for that spouse's one half interest unless the other spouse consents in writing. Various family designations are presumed to have been made with the consent of the other spouse. The testimony of one spouse is sufficient to rebut a presumption.

d. Enact remedies for improper transfers and limitation periods within which those remedies must be pursued.

Sec. 37. Repealed sections.

Sec. 38. Indirect rule change.

Sec. 39. Applicability

Sec. 40. Requirement for two-thirds majority vote of each house.

ALASKA STATE LEGISLATURE

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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

HB292 Explanation of Changes from Version A to Version I

In Section 1. Language was changed to more clearly delineate the kinds of retirement accounts covered by the provisions of the section.

In Section 28. A definition of an individual retirement account is provided for the purposes of the section that governs voluntary transfers of accounts.

E-mail Representative_Steve_Thompson@legis.state.ak.us

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RELATED TOPICS

Statutes

Legislative Title of an Initiative Measure

General Rules of Construction

Meaning of the Language of Constitutional Provisions

Appeal and Error

De Novo Standard of Review Trial Court Grant of Summary Judgment

Croft v. Parnell
Supreme Court of Alaska. July 9, 2010 236 P.3d 369
Original Image of 236 P.3d 369 (PDF)

236 P.3d 369
Supreme Court of Alaska.

Eric **CROFT**, a private individual, and Alaskans for Clean Elections, an initiative group, and Tim June, Steve Cleary, and Joe McKinnon, initiative sponsors, Appellants,

v.

Sean **PARNELL**, Lieutenant Governor of the State of Alaska, and the State of Alaska, Appellees.

No. S-13200. July 9, 2010.

Synopsis

Background: Sponsors of an initiative brought action challenging lieutenant governor's refusal to certify the initiative for the ballot. The Superior Court, Third Judicial District, Anchorage, Mark Rindner, J., granted summary judgment in favor of lieutenant governor. Sponsors appealed.

Holding: On an issue of apparent first impression, the Supreme Court, Christen, J., held that initiative that created program and contained dedication of funds for program violated single-subject rule.

Affirmed.

West Headnotes (7)

Change View

1 **Appeal and Error** Extent of Review Dependent on Nature of Decision Appealed from
When reviewing a grant of summary judgment, the Supreme Court applies its independent judgment, affirming if the record presents no genuine issue of material fact and if the movant is entitled to judgment as a matter of law.

2 **Appeal and Error** Judgment
In determining whether the prevailing party was entitled to judgment as a matter of law when reviewing grant of summary judgment, the Supreme Court draws all factual inferences in favor of, and views the facts in the light most favorable to, the non-prevailing party.

3 **Constitutional Law** General Rules of Construction
The Supreme Court interprets the state constitution using its independent judgment, according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.

4 **Statutes** Constitutional Requirements and Restrictions
Statutes Acts Relating to One or More Subjects
The single-subject rule protects the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately; this approach allows voters to express their will through their votes more precisely, prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of "log-rolling," which consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure. Const. Art. 2, § 13.

5 **Statutes** Title and text of proposed act and other information
In ruling on single-subject challenges to initiatives, the Supreme Court must balance the rule's purpose against the need for efficiency in the legislative process. Const. Art. 2, § 13.

1 Case that cites this headnote

6 **Statutes** Title and text of proposed act and other information

In applying the test used to determine whether an initiative violates the single-subject rule, the Supreme Court disregards mere verbal inaccuracies, resolves doubts in favor of validity, and strikes down challenged proposals only when the violation is substantial and plain. Const. Art. 2, § 13.

7 **Statutes** Title and text of proposed act and other information
Initiative that created a program to provide public campaign funding to candidates for state office on a voluntary, opt-in basis and contained the "soft dedication" of oil tax revenue to fund that program violated the single-subject rule; there was no clear or established connection between the oil industry and a need for public financing of state electoral campaigns, coupling the approval of new oil production tax with approval of program deprived voters of opportunity to send message as to either one, and initiative contained non-binding directive that legislature transfer funds left over to a permanent fund dividend. Const. Art. 2, § 13.

Attorneys and Law Firms

***370** Eric **Croft**, Law Offices of Eric **Croft**, Joseph H. McKinnon, Law Offices of Joseph H. McKinnon, Anchorage, for Appellants.

Michael A. Barnhill, Senior Assistant Attorney General, Richard A. Svobodny, Acting Attorney General, Juneau, for Appellees.

Before: FABE, Chief Justice, EASTAUGH, CARPENETI, WINFREE, and CHRISTEN, Justices.

Opinion

OPINION

CHRISTEN, Justice.

I. INTRODUCTION

Sponsors of an initiative challenge the lieutenant governor's refusal to certify the initiative for the ballot. The lieutenant governor denied certification because he determined that the initiative violated the single-subject requirement of AS 15.45.040. The sponsors filed suit in the superior court seeking a declaration that the initiative did not violate the single-subject rule. The superior court granted summary judgment in favor of the lieutenant governor and the sponsors appeal. Because the "soft dedication" of funds connecting the two aspects of the initiative is an insufficient link, and because we find no other sufficient connection between the initiative's proposed new oil production tax and the initiative's proposed new "clean elections" program, we agree that the initiative violates the single-subject rule. Accordingly, we affirm the superior court's order entering summary judgment in favor of the lieutenant governor.

II. FACTS AND PROCEEDINGS

On May 29, 2007, Tim June, Steve Cleary, and Joe McKinnon submitted an application for a ballot initiative to Lieutenant Governor Sean **Parnell**.[1] The initiative proposed a program ***371** to provide public campaign funding to candidates for state office on a voluntary, opt-in basis. The initiative also proposed a three-cent tax on each barrel of oil produced in Alaska and stated that "[t]he legislature may appropriate ... the proceeds" of the tax to fund the program. The proposal included a non-binding directive that the legislature transfer excess funds to the Permanent Fund Dividend.

After submitting the initiative application, the sponsors engaged in "informal communications" with the Department of Law that led the sponsors to file a second initiative application. This second initiative application proposed the public campaign funding program but not the additional tax on oil production.

Lieutenant Governor **Parnell** reviewed the applications as required by AS 15.45.070. This statute directs the lieutenant governor to either certify an application for placement on the ballot or explain why certification is denied.[2] Lieutenant Governor **Parnell** denied certification of the first initiative proposal, explaining that the initiative "violates the single-subject rule" because "the initiative addresses two subjects that have no fair relation to each other: (1) it creates a voluntary system of public campaign financing, and (2) it imposes a tax on oil production."

Lieutenant Governor **Parnell** approved the second version of the initiative application. It appeared on the August 2008 ballot but did not pass.

The initiatives' sponsors, Eric **Croft** and a group called Alaskans for Clean Elections (collectively, "the Sponsors"), filed a complaint in the superior court against Lieutenant Governor **Parnell** and the State of Alaska (collectively, "Lieutenant Governor") seeking a declaration that the Lieutenant Governor erroneously rejected the first initiative.

The superior court granted summary judgment in favor of the Lieutenant Governor in June 2008. The Sponsors appeal.

III. STANDARD OF REVIEW

1 2 When reviewing a grant of summary judgment, we apply our independent judgment, "affirming if the record presents no genuine issue of material fact and if the movant is entitled to judgment as a matter of law."[3] In determining whether the prevailing party was entitled to judgment as a matter of law, we "draw [ ] all factual inferences in favor of, and view [ ] the facts in the light most favorable to, the non-prevailing party."[4]

3 We interpret the Alaska Constitution using our independent judgment, "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[5]

IV. DISCUSSION

The parties agree that the only issue in this case is whether the Sponsors' initiative violates the Alaska Constitution's single-subject rule.[6] ***372** Article II, section 13 of the Alaska Constitution provides, in part, that "[e]very bill shall be confined to one subject." Our court has ruled on challenges to bills and initiatives under this provision in only seven cases.[7] In each case, we identified a single subject that encompassed all the provisions of the challenged bill or initiative; that is, every provision of the bill or initiative, considered on its own, related to a broader, single subject.[8]

Despite their contrary outcomes, the superior court relied on these cases and ruled in favor of the Lieutenant Governor, explaining that "there is [no] connection between the type of revenue created ... [and] the type of program" proposed by the initiative. On appeal, the Sponsors argue that the trial court improperly interpreted the single-subject rule to require a nexus between a funding source and the funded program beyond the fact of the funding. The Sponsors argue that even when two provisions of a bill are not otherwise related by subject, if one provision creates a program and another imposes a tax calibrated to collect approximately the amount of revenue necessary to fund the program, a non-binding, "soft dedication" of funds from the revenue source is sufficient to unite what would otherwise be two subjects into one, at least for purposes of the single-subject test. The Sponsors also argue, in the alternative, that the initiative's oil tax *is* thematically related to the campaign finance program. We are not persuaded by either of these arguments.

4 The single-subject rule protects the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately. This approach allows voters to express their will through their votes more precisely, prevents the adoption of policies through stealth or fraud,[9] and prevents the passage of measures lacking popular support by means of log-rolling.[10]

5 6 In ruling on single-subject challenges, we must balance the rule's purpose against the need for efficiency in the legislative process. If the rule were applied too narrowly, "statutes might be restricted unduly in scope and permissible subject matter, thereby multiplying and complicating the number of necessary enactment[s] and their interrelationships."[11] Our solution has been to construe the single-subject "provision ... ***373** with considerable breadth."[12] We have consistently articulated the substance of the test to reflect this approach:

> All that is necessary is that [the] act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.[13]

In applying this test, we "disregard mere verbal inaccuracies, resolve doubts in favor of validity," and strike down challenged proposals only when the violation is "substantial and plain."[14]

7 In each of the seven cases in which this court has addressed a single-subject challenge, we upheld the challenged bill or initiative by determining that all provisions related to a single general subject, theme, or purpose.[15] But we have never addressed the question, raised by the Sponsors in this case, whether creating a revenue source that might fund an otherwise unrelated program suffices to unite the revenue source with the program as a "single subject."

The Sponsors argue that the creation of a program and the "soft dedication" of funds for that program are "inherently related" provisions "as a matter of both logic and popular understanding." They argue that the Washington Supreme Court's decision in *Wash. Ass'n of Neighborhood Stores v. Wash.* supports their position.[16] *Neighborhood Stores* involved an initiative that increased taxes on cigarettes and dedicated the new revenue to existing programs in the areas of "violence reduction and drug enforcement," "health services," and "water quality," with remaining funding allocated to "low-income health care programs and other programs."[17] The court held that the initiative did not violate that state's single-subject rule[18] because the new taxes provided revenue to programs that collectively constituted "a single and rationally unified proposal for improving the health of [Washington's] low-income citizens without imposing a net loss of tax revenue on other preexisting programs."[19]

In this case, the superior court observed that neither *Neighborhood Stores* nor any other example identified by appellants addressed a single initiative that proposed the creation of an entirely new government program and also proposed the creation of a new and thematically unrelated revenue source. The *Neighborhood Stores* initiative, which created and dedicated a revenue source, is fundamentally different from the Sponsors' initiative, which proposed the creation and "soft dedication" of a new revenue source, *and* proposed the creation of an entirely new government program. The latter runs afoul of the single-subject rule because it does not provide the voters with an opportunity to express their approval or disapproval of each distinct proposal.

Neighborhood Stores is also distinguishable because it was decided in the context of Washington's prohibition on the dedication of funds beyond a single biennium,[20] a framework different from the proscription of ***374** dedicated funds in Alaska. The Alaska Constitution expressly prohibits the binding dedication of state revenues for specific projects.[21] As the superior court correctly noted, "[t]he additional proceeds generated by the [proposed] oil production tax need not and indeed cannot be appropriate[d] to fund the Alaska Clean Elections Program" without running afoul of Article IX, section 7 of Alaska's Constitution. Because the dedication of funds is not permitted in Alaska, a "soft dedication" cannot be considered for purposes of a single-subject analysis and therefore cannot be used to make two independent provisions of an initiative address one subject. Without the "soft dedication," the Sponsors' proposed initiative will satisfy the requirements of the single-subject analysis only if its two provisions-campaign finance and taxation of the oil industry-otherwise relate to a single subject matter.

The Sponsors argue that even if the "soft dedication" of tax revenue cannot be considered, the proposed oil production tax is still related to the subject of "clean elections" because "the oil industry and the oil field services companies ... exert a tremendous and undue influence on Alaska politics and politicians," and contributions from these groups have been "fueling [electoral] campaigns in Alaska for years." But the oil industry is not the only source of contributions to political campaigns in Alaska, and the proposed tax is on oil production, not the political activities of the oil industry. The support for the Sponsors' argument-two newspaper articles and a listing of the top groups lobbying the Alaska Legislature-is insufficient to demonstrate a clear or established connection between the oil industry and a need for public financing of state electoral campaigns.

The proposed initiative directly implicates one of the main purposes of the single-subject rule-the prevention of log-rolling-in two ways. As noted earlier, the essence of log-rolling is appealing to different constituencies by including distinct provisions calculated to obtain sufficient votes to pass a measure.[22] The superior court observed that "record oil and gas prices, high oil company profits, the Exxon Valdez litigation, and controversy regarding a proposed gas pipeline" make the oil industry a target for some groups whose votes on this initiative could be driven entirely by such concerns. We agree that the events and issues cited by the superior court could influence some voters, but we note that other voters may be equally driven by strong feelings of support for the jobs and tax revenue generated by the oil industry in Alaska. Either way, coupling the approval of a new oil production tax with approval of a program to publicly fund elections deprives the voters of an opportunity to send a clear message on each subject encompassed by the Sponsors' initiative.

The second way the initiative violates the prohibition against log rolling is its inclusion of a non-binding directive that the legislature transfer funds left over from public elections to the Permanent Fund Dividend.[23] The Permanent Fund Dividend is entirely unrelated to the purpose of the clean elections program; offering the chance of increased Permanent Fund Dividend payments runs the risk of garnering support for the clean elections program from voters who are otherwise indifferent-or even unsupportive-of publicly funded campaigns.

V. CONCLUSION

For the reasons addressed above, we AFFIRM the decision of the superior court.

Footnotes

1 The initiative was titled "An Act establishing a program of public funding for campaigns for state elected offices, to be known as the Alaska Clean Elections Act, and amending the oil and gas production tax to levy and collect a surcharge on oil as a source of funding for that program."

2 AS 15.45.070 provides: "Within 60 calendar days after the date the application is received, the lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial."

3 *Beegan v. State, Dep't of Transp. & Pub. Facilities*, 195 P.3d 134, 138 (Alaska 2008) (citing *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n*, 152 P.3d 460, 465 (Alaska 2007)).

4 *State v. Jeffery*, 170 P.3d 226, 229 (Alaska 2007) (citing *Lewis v. State, Dep't of Corr.*, 139 P.3d 1266, 1268-69 (Alaska 2006)).

5 *Id.* at 230 (quoting *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999) (internal quotation marks omitted)).

6 The Sponsors' application was rejected for violating the single-subject provision of AS 15.45.040. Neither party argues that this rule differs from restrictions imposed by article II, section 13 of the Alaska Constitution, which requires that every bill may have only one subject. We have previously explained that, regardless of AS 15.45.040, "the [a]rticle II restriction ... applies to initiatives" under article XII, section 11, which provides that the people may exercise the legislature's law-making powers through the initiative. *Yute Air Alaska Inc. v. McAlpine*, 698 P.2d 1173, 1179 n. 2 (Alaska 1985).

7 *See Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Yute Air*, 698 P.2d at 1173; *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *Short v. State*, 600 P.2d 20 (Alaska 1979); *North Slope Borough v. SOHIO Petroleum Corp.*, 585 P.2d 534 (Alaska 1978); *Gellert v. State*, 522 P.2d 1120 (Alaska 1974); *Suber v. Alaska State Bond Comm.*, 414 P.2d 546 (Alaska 1966).

8 *See Evans*, 56 P.3d at 1049, 1070 (changes to damages recoverable for torts, changes to tort statutes of limitations, change to allocation of fault between parties in tort suits, change to offer of judgment rules, and grant of partial immunity to hospitals all "within the single subject of 'civil actions' "); *Yute Air*, 698 P.2d at 1175, 1181 (repeal of regulations of "motor and air carriers in Alaska," prohibition on further similar regulation, and requirement that governor seek repeal of federal statute that, among other things, regulates shipping by sea, all embraced by "[t]he subject 'transportation' "); *First Nat'l Bank of Anchorage*, 660 P.2d at 414-15 (provisions regulating sale of private land, and provisions on state's power to lease state-owned land and zone private lands all "in some respect concern[ ] land"); *Short*, 600 P.2d at 22-24 & n. 2 (purposes of new correctional facilities "sufficiently related to the purposes" of new buildings for "state troopers, fish and wildlife protection, a motor vehicles division, [and] a fire prevention division"); *SOHIO*, 585 P.2d at 545-46 (various provisions on municipal and state taxes all "relate directly to state taxation"); *Gellert*, 522 P.2d at 1123 (flood control projects and small boat harbors 'all part of a cooperative water resources development program"); *Suber*, 414 P.2d at 557 & n. 23 (criminal penalty for false statements in application for earthquake relief funds "fairly incidental to the general subject ... of grants to homeowners").

9 *See Suber*, 414 P.2d at 557.

10 *Gellert*, 522 P.2d at 1122 ("Log-rolling consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure.").

11 *Gellert*, 522 P.2d at 1122; *see also Evans*, 56 P.3d at 1069 (quoting *State v. First Nat'l Bank of Anchorage*, 660 P.2d at 415); *Yute Air*, 698 P.2d at 1183 (Moore, J., dissenting) (citing *Gellert*, 522 P.2d at 1122); *Short*, 600 P.2d at 23 (quoting *Gellert*, 522 P.2d at 1122).

12 *Gellert*, 522 P.2d at 1122.

13 *Gellert*, 522 P.2d at 1123 (quoting *Johnson v. Harrison*, 47 Minn. 575, 50 N.W. 923, 924 (1891)) (internal quotation marks omitted); *see also Evans*, 56 P.3d at 1069 (quoting *First Nat'l Bank of Anchorage*, 660 P.2d at 415); *Yute Air*, 698 P.2d at 1180-81 (quoting *Gellert*, 522 P.2d at 1123); *First Nat'l Bank of Anchorage*, 660 P.2d at 415 (quoting *Gellert*, 522 P.2d at 1123); *Short*, 600 P.2d at 24 (quoting *Gellert*, 522 P.2d at 1123); *SOHIO*, 585 P.2d at 545 (quoting *Gellert*, 522 P.2d at 1123).

14 *Gellert*, 522 P.2d at 1122 (quoting *Suber*, 414 P.2d at 557); *see also Evans*, 56 P.3d at 1069 (quoting *First Nat'l Bank of Anchorage*, 660 P.2d at 415), *First Nat'l Bank of Anchorage*, 660 P.2d at 415 (quoting *SOHIO*, 585 P.2d at 545); *Short*, 600 P.2d at 23 nn. 7 & 8 (citing *SOHIO*, 585 P.2d at 545, and quoting *Suber*, 414 P.2d at 557); *SOHIO*, 585 P.2d at 545 (citing *Suber*, 414 P.2d at 557).

15 *See supra* note 8.

16 149 Wash.2d 359, 70 P.3d 920 (2003).

17 *Id.* at 922.

18 WASH. CONST. art. II, § 19.

19 *Neighborhood Stores*, 70 P.3d at 926.

20 WASH. CONST. art. VIII, § 4.

21 Article IX, section 7 prohibits binding dedications of state revenues to specific projects. Article XI, section 7 independently prohibits initiatives from dedicating revenues.

22 *See supra* note 10.

23 This provision is part of proposed AS 15.14.010(e).

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ALASKA STATE LEGISLATURE

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REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

MEMORANDUM

To: Representative Carl Gatto, Chairman
House Judiciary Committee

From: Representative Steve Thompson

Date: March 16, 2012

Re: Hearing Request for HB292 **"An Act relating to property exemptions for retirement plans; relating to pleadings, orders, liability, and notices under the Uniform Probate Code; relating to the Alaska Principal and Income Act; relating to the Alaska Uniform Transfers to Minors Act; relating to the disposition of human remains; relating to insurable interests for life insurance policies; relating to transfers of individual retirement plans; relating to the community property of married persons; and amending Rule 301(a), Alaska Rules of Evidence."**

Please consider this memo as a request for the House Judiciary Committee to hear HB292.

The following documents are being sent via email:

- Sponsor Statement for HB292
- CSHB292(L&C) version I
- HB292 version A
- Sectional HB292 version I
- Explanation of Changes version A to version I
- DCCED 0 Fiscal Note
- Leg. Legal memo
- Memo re: Contracts Clause Issue
- Memo re: Single Subject Rule

E-Mail: Representative.Steve.Thompson@legis.state.ak.us
Website: www.akrepublicans.org/thompson/

HB 293

<TARGET><BILL>HB 293</BILL><SUBJECT>HB 293</SUBJECT><COMM>HJUD27</COMM></TARGET>

[redacted]OUSE COMMITTEE REPOR[redacted]

(7)

Date Referred to Committee: January 25, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 2/22/12

The JUDICIARY Committee considered: **HB 293**

HOUSE BILL NO. 293

"An Act relating to the rights of crime victims; relating to the duties of prosecuting attorneys; and amending Rule 45, Alaska Rules of Criminal Procedure."

HB 293 RIGHTS OF CRIME VICTIMS/CONTINUANCES

Recommends it be replaced with [ ] HCS *or* ~~[X]~~ CS *for* HB293 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **~~[X]~~ Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LAW		X	
	ADM		X	
	ADM		X	

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	—			
	Keller			X	
	Thompson	X			
	Holmes	X			
	Pruitt	X			
Chair:	GATTO	X			
Chair:					

27-LS1238\M.1
Gardner
2/15/12

AMENDMENT #1 OK 2-22-12

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 293( ), Draft Version "M"

Page 5, line 4, following "shall":

Insert "determine if the victim has been informed of the pending motion, as provided in AS 12.61.015(a), and"

requested
faxed 2-22-12
4:20 p.m.

O.K. 2-22-12
#2 Thompson
'Cumulative'

27-LS1238\M.2
Gardner
2/15/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE THOMPSON

TO: CSHB 293( ), Draft Version "M"

Page 4, line 13, following "**misdemeanor, a**":

Insert "**cumulative**"

Page 4, line 14, following "**felony, a**":

Insert "**cumulative**"

Page 4, line 15, following "**a**":

Insert "**cumulative**"

27-LS1238\M.1
Gardner
2/15/12

AMENDMENT # 1

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 293( ), Draft Version "M"

Page 5, line 4, following "shall":

Insert "determine if the victim has been informed of the pending motion, as provided in AS 12.61.015(a), and"

27-LS1238\M.2
Gardner
2/15/12

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE THOMPSON

TO: CSHB 293( ), Draft Version "M"

Page 4, line 13, following "**misdemeanor, a**":

Insert "**cumulative**"

Page 4, line 14, following "**felony, a**":

Insert "**cumulative**"

Page 4, line 15, following "**a**":

Insert "**cumulative**"

Representative Chris Tuck

Alaska State Legislature

District 29 - Representing Dimond Estates, Foxridge, Taku, Southwood Manor, Campbell, and Independence Park

SPONSOR STATEMENT

HB 293 – Continuances in Criminal Cases

Article I, section 24 of our constitution is entitled "Rights of Crime Victims." The amendment passed by an overwhelming majority when it was placed before Alaskan voters in 1994. Included in its eight specific provisions is the promise that crime victims will have "the right to timely disposition of the case following the arrest of the accused."

In the eighteen years since the amendment passed, the promise of a timely disposition of the case has often not been kept. Moreover, the breaches of that promise frequently occur in the most serious of cases. Delays in the trial of a case, known as continuances, can go on for years.

HB 293 requires prosecutors and judges to consider a victim's right to a timely disposition of their case when deciding whether to allow continuances. This legislation will also ensure that victims are notified of any requests or motions that could substantially delay speedy prosecution of their case.

Repeated delays prevent victims from reaching emotional, physical, and financial closure from the trauma that they suffered as a result of the crime perpetrated against them. Delays in prosecution can also affect the availability of witnesses, a victim's ability to recall important details, and it can create other impediments to a successful trial.

Currently, Alaska is one of 27 states with constitutional provisions to protect a victim's rights; however, there is no statute in place to implement it. With this important piece of legislation, Alaska will join 15 other states that have enacted a statutory provision recognizing this crucial right.

HB 293 will guarantee a victim's right to a timely resolution in the court system. I urge your support of this legislation.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 6, 2012

SUBJECT: Victims' rights
HB 293 (Work Order No. 27-LS1238\A)

TO: Representative Chris Tuck
Attn: George Ascott

FROM: Dan Wayne
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill; the bill itself is the best statement of its contents.

Section 1 adds to the rights of victims, under AS 12.61.100, the right to be notified if there is a request for a continuance that, if granted, may substantially delay a proceeding in either a criminal matter or the adjudication of a minor as provided under AS 47.12.110.

Section 2 requires a prosecuting attorney in a felony or domestic violence case to inform the victim when there is a motion pending that may substantially delay prosecution, and inform the court of the victim's position regarding the motion.

Section 3 would amend Alaska Rule of Criminal Procedure 45(d)(2) to require a court to consider the interests of a victim in a criminal case before granting a continuance or an adjournment requested or consented to by the defense.

Section 4 would amend Alaska Rule of Criminal Procedure 45 by adding a new subsection (h) to require a court to consider, before ruling on a motion for a continuance in a case involving a victim under AS 12.55.185, the victim's position on the motion for a continuance and how the victim might be affected if the continuance is granted.

DCW:plm
12-076.plm

Representative Chris Tuck

Alaska State Legislature

District 29 - Representing Dimond Estates, Foxridge, Taku Southwood Manor, Campbell, and Independence Park

MEMORANDUM

Summary of Changes HB 293, Version M

- Section 2, lines 12-15 – incorporates a definition of "substantially delay"
- Section 3, line 24 – removes the word "only"
- Section 3, line 25 – "if known" was added to provide for instances where the victim cannot be contacted or does not wish to participate
- Section 4, line 4 – "if known" was added again to account for the aforementioned circumstances

State Capitol Bldg. Rm 426
Juneau, AK 99801-1182
Representative_Chris_Tuck@legis.state.ak.us

Phone (907) 465-2095
Fax (907) 465-3810
Toll-free (866) 465-2095

27-LS1238\M
Gardner
2/13/12

CS FOR HOUSE BILL NO. 293( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES TUCK, Gardner, Kerttula, Gruenberg, Miller, Lynn, Dick, Petersen, Muñoz, Foster, Doogan

A BILL

FOR AN ACT ENTITLED

"An Act relating to the rights of crime victims; relating to the duties of prosecuting attorneys; and amending Rule 45, Alaska Rules of Criminal Procedure."

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

*** Section 1.** AS 12.61.010(a) is amended to read:

(a) Victims of crimes have the following rights:

(1) the right to be present during any proceeding in

(A) the prosecution and sentencing of a defendant if the defendant has the right to be present, including being present during testimony even if the victim is likely to be called as a witness;

(B) the adjudication of a minor as provided under AS 47.12.110;

(2) the right to be notified by the appropriate law enforcement agency or the prosecuting attorney of **any request for a continuance that may substantially delay the prosecution and of** the date of trial, sentencing, including a proceeding

before a three-judge panel under AS 12.55.175, an appeal, and any hearing in which the defendant's release from custody is considered;

(3) the right to be notified that a sentencing hearing or a court proceeding to which the victim has been subpoenaed will not occur as scheduled;

(4) the right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts and to be provided with information as to the protection available;

(5) the right to be notified of the procedure to be followed to apply for and receive any compensation under AS 18.67;

(6) at the request of the prosecution or a law enforcement agency, the right to cooperate with the criminal justice process without loss of pay and other employee benefits except as authorized by AS 12.61.017 and without interference in any form by the employer of the victim of crime;

(7) the right to obtain access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having medical assistance administered; however, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(8) the right to make a written or oral statement for use in preparation of the presentence report of a felony defendant;

(9) the right to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(10) the right to be informed by the prosecuting attorney, at any time after the defendant's conviction, about the complete record of the defendant's convictions;

(11) the right to notice under AS 12.47.095 concerning the status of the defendant found not guilty by reason of insanity;

(12) the right to notice under AS 33.16.087 of a hearing concerning special medical parole of the defendant;

(13) the right to notice under AS 33.16.120 of a hearing to consider or review discretionary parole of the defendant;

(14) the right to notice under AS 33.30.013 of the release or escape of the defendant; and

(15) the right to be notified orally and in writing of and receive information about the office of victims' rights from the law enforcement officer initially investigating the crime and from the prosecuting attorney assigned to the offense; at a minimum, the information provided must include the address, telephone number, and Internet address of the office of victims' rights; this paragraph

(A) applies only to victims of felonies and to victims of class A misdemeanors if the class A misdemeanor is a crime involving domestic violence or a crime against a person under AS 11.41; if the victim is an unemancipated minor, the law enforcement officer and the prosecuting attorney shall also provide the notice required by this paragraph to the parent or guardian of the minor;

(B) is satisfied if, at the time of initial contact with the crime victim, the investigating officer and prosecuting attorney each give each crime victim a brochure or other written material prepared by the office of victims' rights and provided to law enforcement agencies for that purpose.

*** Sec. 2.** AS 12.61.015(a) is amended to read:

(a) If a victim of a felony or a crime involving domestic violence requests, the prosecuting attorney shall make a reasonable effort to

(1) confer with the person against whom the offense has been perpetrated about that person's testimony before the defendant's trial;

(2) in a manner reasonably calculated to give prompt actual notice, notify the victim

(A) of the defendant's conviction and the crimes of which the defendant was convicted;

(B) of the victim's right in a case that is a felony to make a written or oral statement for use in preparation of the defendant's presentence report, and of the victim's right to appear personally at the defendant's

sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(C) of the address and telephone number of the office that will prepare the presentence report; and

(D) of the time and place of the sentencing proceeding;

(3) notify the victim in writing of the final disposition of the case within 30 days after final disposition of the case;

(4) confer with the victim of a crime involving domestic violence concerning a proposed plea agreement before entering into an agreement;

(5) inform the victim of a pending motion that may substantially delay the prosecution and inform the court of the victim's position on the motion; in this paragraph a "substantial delay" is

(A) for a misdemeanor, a delay of one month or longer;

(B) for a felony, a delay of two months or longer; and

(C) for an appeal, a delay of six months or longer.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(d)(2), Alaska Rules of Criminal Procedure, is amended to read:

(2) The period of delay resulting from an adjournment or continuance granted at the timely request or with the consent of the defendant and the defendant's counsel. The court shall grant such a continuance only if it is satisfied that the postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal offenses**, and after consideration of the interests of the crime victim, if known, as provided in (h) of this rule**. A defendant without counsel shall not be deemed to have consented to a continuance unless the defendant has been advised by the court of the right to a speedy trial under this rule and of the effect of consent.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45, Alaska Rules of Criminal

Procedure, is amended by adding a new subsection to read:

(h) **Victim's Interest in Ruling on Motion to Continue.** Before ruling on a motion for a continuance in a case involving a victim, as defined in AS 12.55.185, the court shall consider the victim's position, if known, on the motion to continue and the effect of a continuance on the victim.

Amdt, I OK.

HOUSE BILL NO. 293

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES TUCK, Gardner, Kerttula, Gruenberg, Miller, Lynn, Dick, Petersen, Muñoz, Foster, Doogan

Introduced: 1/25/12
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to the rights of crime victims; relating to the duties of prosecuting attorneys; and amending Rule 45, Alaska Rules of Criminal Procedure."

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

*** Section 1.** AS 12.61.010(a) is amended to read:

(a) Victims of crimes have the following rights:

(1) the right to be present during any proceeding in

(A) the prosecution and sentencing of a defendant if the defendant has the right to be present, including being present during testimony even if the victim is likely to be called as a witness;

(B) the adjudication of a minor as provided under AS 47.12.110;

(2) the right to be notified by the appropriate law enforcement agency or the prosecuting attorney of **any request for a continuance that may substantially delay the prosecution and of** the date of trial, sentencing, including a proceeding

before a three-judge panel under AS 12.55.175, an appeal, and any hearing in which the defendant's release from custody is considered;

(3) the right to be notified that a sentencing hearing or a court proceeding to which the victim has been subpoenaed will not occur as scheduled;

(4) the right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts and to be provided with information as to the protection available;

(5) the right to be notified of the procedure to be followed to apply for and receive any compensation under AS 18.67;

(6) at the request of the prosecution or a law enforcement agency, the right to cooperate with the criminal justice process without loss of pay and other employee benefits except as authorized by AS 12.61.017 and without interference in any form by the employer of the victim of crime;

(7) the right to obtain access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having medical assistance administered; however, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(8) the right to make a written or oral statement for use in preparation of the presentence report of a felony defendant;

(9) the right to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(10) the right to be informed by the prosecuting attorney, at any time after the defendant's conviction, about the complete record of the defendant's convictions;

(11) the right to notice under AS 12.47.095 concerning the status of the defendant found not guilty by reason of insanity;

(12) the right to notice under AS 33.16.087 of a hearing concerning special medical parole of the defendant;

(13) the right to notice under AS 33.16.120 of a hearing to consider or review discretionary parole of the defendant;

(14) the right to notice under AS 33.30.013 of the release or escape of the defendant; and

(15) the right to be notified orally and in writing of and receive information about the office of victims' rights from the law enforcement officer initially investigating the crime and from the prosecuting attorney assigned to the offense; at a minimum, the information provided must include the address, telephone number, and Internet address of the office of victims' rights; this paragraph

(A) applies only to victims of felonies and to victims of class A misdemeanors if the class A misdemeanor is a crime involving domestic violence or a crime against a person under AS 11.41; if the victim is an unemancipated minor, the law enforcement officer and the prosecuting attorney shall also provide the notice required by this paragraph to the parent or guardian of the minor;

(B) is satisfied if, at the time of initial contact with the crime victim, the investigating officer and prosecuting attorney each give each crime victim a brochure or other written material prepared by the office of victims' rights and provided to law enforcement agencies for that purpose.

*** Sec. 2.** AS 12.61.015(a) is amended to read:

(a) If a victim of a felony or a crime involving domestic violence requests, the prosecuting attorney shall make a reasonable effort to

(1) confer with the person against whom the offense has been perpetrated about that person's testimony before the defendant's trial;

(2) in a manner reasonably calculated to give prompt actual notice, notify the victim

(A) of the defendant's conviction and the crimes of which the defendant was convicted;

(B) of the victim's right in a case that is a felony to make a written or oral statement for use in preparation of the defendant's presentence report, and of the victim's right to appear personally at the defendant's

sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(C) of the address and telephone number of the office that will prepare the presentence report; and

(D) of the time and place of the sentencing proceeding;

(3) notify the victim in writing of the final disposition of the case within 30 days after final disposition of the case;

(4) confer with the victim of a crime involving domestic violence concerning a proposed plea agreement before entering into an agreement**;**

(5) inform the victim of a pending motion that may substantially delay the prosecution and inform the court of the victim's position on the motion.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45(d)(2), Alaska Rules of Criminal Procedure, is amended to read:

(2) The period of delay resulting from an adjournment or continuance granted at the timely request or with the consent of the defendant and the defendant's counsel. The court shall grant such a continuance only if it is satisfied that the postponement is in the interest of justice, taking ~~into account~~ the public interest in the prompt disposition of criminal offenses**, and only after consideration of the interests of the crime victim, as provided in (h) of this rule**. A defendant without counsel shall not be deemed to have consented to a continuance unless the defendant has been advised by the court of the right to a speedy trial under this rule and of the effect of consent.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 45, Alaska Rules of Criminal Procedure, is amended by adding a new subsection to read:

(h) **Victim's Interest in Ruling on Motion to Continue.** Before ruling on a motion for a continuance in a case involving a victim, as defined in AS 12.55.185, the court shall consider the victim's position on the motion to continue and the effect of a

continuance on the victim.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB293**
Fiscal Note Number
() Publish Date

Identifier (file name) HB293-DOA-OPA-1-27-12
Title Continuances in Criminal Trials; Victims
Sponsor Representative Tuck
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Richard Allen, Director — Phone 907-269-3504
Division Office of Public Advocacy — Date/Time 01/27/2012 9:15 a.m.
Approved by John Cramer, Deputy Commissioner — Date 1/27/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB293
2012 LEGISLATIVE SESSION

Analysis

This bill amends AS 12.61.010(a) by requiring that the victim of a crime be notified of any request for a continuance or pending motions that may substantially delay the prosecution, and inform the court of the victim's position on these motions. This bill amends Rule 45 (d)(2) of the Alaska Rules of Criminal Procedure by adding language that requires the court to grant continuances only after consideration of the crime victim as provided in a new subsection (h) that this bill would also add to Rule 45. The new subsection (h) requires the court to consider the victim's position on motions to continue.

Courts currently consider the impact of delay on a victim's rights under the state constitution. The Office of Public Advocacy believes that the victim's concerns are already considered by parties in trial cases as a result of constitutional requirements concerning crime victims. The compulsory language in the amendment to Rule 45 may have the collateral effect of causing additional hearings and delay if the victim cannot be located. This will be impacted by how the courts interpret "substantial delay."

Although this bill may increase hearings and delay, the Office of Public Advocacy (OPA) cannot reliably predict whether this will occur and have a fiscal impact on the Agency. Therefore OPA submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 293**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB293-LAW-CRIM-02-10-12
Title: An act relating to the rights of crime victims; relating to duties of prosecuting attorneys.
Sponsor: REPRESENTATIVE TUCK
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 2/10/12 7:30 PM
Approved by: Michael C. Geraghty, Attorney General — Date 2/10/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 293

Analysis

HB 293 provides that a victim has the right to be notified of a request for a continuance that may substantially delay the prosecution of a case, including the trial, sentencing, appeal, and any hearing addressing the defendant's release from custody. It requires the prosecution to inform the victim of any pending motion that may substantially delay the prosecution and to inform the court of the victim's position on the motion. The term "substantially" is not defined.

It could be argued that the prosecution and the courts are already considering the victim's position before granting a motion to continue a case and that the additional requirements in the bill are unnecessary. To the extent that the position of victims are not already being considered by the court, this bill could add to the cost of a prosecution.

For example **Section 1** requires notice of a request for a continuance and applies to both felonies and misdemeanors. In 2011 the state prosecuted 7,561 felonies and 22, 721 misdemeanors. Additional notification could require significant staff time.

Therefore the fiscal impact cannot be accurately determined.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB293**
Fiscal Note Number
() Publish Date

Identifier (file name) HB293-DOA-PDA-2-11-12
Title Continuances in Criminal Trials; Victims
Sponsor Representative Tuck
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907-269-3504
Date/Time 2/11/12 4:15 PM
Date 2/11/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB293
2012 LEGISLATIVE SESSION

Analysis

This bill amends AS 12.61.010(a) by requiring that the victim of a crime be notified of any request for a continuance or pending motions that may substantially delay the prosecution, and inform the court of the victim's position on these motions. This bill amends Rule 45 (d)(2) of the Alaska Rules of Criminal Procedure by adding language that requires the court to grant continuances only after consideration of the crime victim as provided in a new subsection (h) that this bill would also add to Rule 45. The new subsection (h) requires the court to consider the victim's position on motions to continue.

Courts currently consider the impact of delay on a victim's rights under the state constitution. The Public Defender Agency believes that the victim's concerns are already considered by parties in trial cases as a result of constitutional requirements concerning crime victims. The compulsory language in the amendment to Rule 45 may have the collateral effect of causing additional hearings and delay if the victim cannot be located. This will be impacted by how the courts interpret "substantial delay."

Although this bill may increase hearings and delay, the Public Defender Agency cannot reliably predict whether this will occur and have a fiscal impact on the Agency and therefore submits an indeterminate fiscal note.

Main Office
130 Seward St #214
Juneau, Alaska 99801
Phone: (907) 586-3650
Fax: (907) 463-4493
www.andvsa.org

ANDVSA
Alaska Network on Domestic Violence & Sexual Assault

Pro Bono Office
PO Box 6631
Sitka, Alaska 99835
Phone: (907) 747-7545
Fax: (907)747-7547

February 7, 2012

The Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 293 - Rights of Crime Victims/Continuances

Honorable Members of the Alaska Legislature:

The Alaska Network on Domestic Violence and Sexual Assault strongly supports House Bill 293. It is our understanding that this bill will provide a victim of crime, including domestic violence and sexual assault crime victims, a notice from law enforcement or prosecution when there will be a request for a continuance that would substantially delay a prosecution. All too often in Alaska victims have been disappointed in the process, procedure and outcome of their case. This bill will provide for consideration of the victim's wishes, the impact that continual delays will have on a victim of crime, and provide the victim with information of what to expect or what not to expect, in the nearer future.

Our eighteen member victim service agencies throughout the state witness daily the impact these delays have on the people they serve. Time and time again, our advocates appear in court with victims of both domestic violence and sexual assault, only to have their courage and hopes dashed by yet another delay. It has become a "tactic" which, when employed, disheartens the victim, decreases their sense of safety and decreases their faith in the criminal justice system and the State of Alaska. Hopefully, this bill will strike a balance between the Constitutional right to a speedy trial for both defendants and victims.

Sincerely,

Peggy Brown
Executive Director

Cc: Lisa Mariotti, Policy Director

Victims for Justice

January 24, 2012

Alaska State Legislature, State Capitol
Juneau, Alaska 99801

RE: House Bill 293, Continuances in Criminal Trials; Victims

Dear Members:

On behalf of the Board of Directors of Victims for Justice, I am writing to support House Bill 293.

Time and time again, we see continuances provided to defendants in criminal cases for reasons that seem insufficient and sometimes disingenuous, with absolutely no consideration given to the challenges this presents to victims in the case.

We have supported victims of violent crimes, and the surviving family members of homicide victims, in cases where so many continuances have been granted that they caused the trial to be delayed more than a decade. This length of delay can work to the benefit of the defendant, when witnesses die or leave the state, memories fade, prosecutors change over and over and it becomes difficult or impossible to win a conviction. And these delays work to the serious disadvantage of victims who only want to see justice done, and to society in general.

We have known victims to travel hundreds or thousands of miles, and incur great expense and inconvenience so that they may exercise their right to attend a trial or hearing, only to have the trial or hearing continued with absolutely no consideration given as to how this impacts the victim.

We recognize that courts want to extend the benefit of the doubt to defendants, who, after all, are the ones whose liberty is at stake. However, we feel the courts often fail to take into consideration the rights afforded by our state Constitution to victims in these situations. Senate Bill 135 puts the victim in the picture, and supports the judge who considers the victim when deciding whether to grant a continuance.

This bill is a very modest change to existing statutes and court rules. It simply describes a means to implement the requirements of our state Constitution and statutes with regard to victims. However, in a very important way, this bill brings balance to our justice system.

The Board of Directors of Victims for Justice strongly support HB 293.

Regards,

Susan Sullivan

Susan Sullivan
Executive Director

1057 West Fireweed Lane, Suite 101 • Anchorage, AK 99503 • 907-278-0977 • Toll Free 1-888-835-1213 • Fax 907-258-0740 • www.victimsforjustice.org

STATE OF ALASKA
OFFICE OF VICTIMS' RIGHTS

February 7, 2012

Honorable Members of the Alaska House of Representatives
Alaska State Legislature
Alaska State Capitol
Juneau, Alaska 99801

Re: House Bill 293, Continuances in Criminal Trials; Victims

Dear Honorable Members of the Alaska House of Representatives:

I write in support of House Bill 293, Continuances in Criminal Trials; Victims.

The proposed legislation strengthens notification standards for informing crime victims of any request for a continuance that may substantially delay the prosecution, the date of trial, sentencing, an appeal, and any hearing which the defendant's release from custody is considered.

The amendments to Alaska Criminal Rule 45 strengthen a crime victim's right to address the court, and for the court to consider the crime victim's perspective, before issuing an order based on a motion for continuance.

Both components of the proposed legislation fortify a crime victim's statutory rights and Alaska Constitutional rights to be "treated with dignity, respect, and fairness" and "to timely disposition of the case..." (Alaska Constitution, Article 1, Section 24). The proposed legislation also stands to amplify the crime victim's voice before the court and other criminal justice agencies regarding delay in the criminal justice process.

I believe strongly that the administration of justice is improved when a crime victim's voice is heard and considered within the Alaska criminal justice system.

1007 WEST 3RD AVENUE, SUITE 205 • ANCHORAGE, ALASKA 99501-1936
TELEPHONE: 1-907-272-2620 • FACSIMILE: 1-907-272-2640

In sum, the proposed legislation wisely aligns with the Alaska Constitutional rights of a crime victim - especially regarding the timely disposition of a criminal case.

I stand ready to testify in support of this legislation.

Respectfully submitted,

D. Victor Kester

D. Victor Kester
Executive Director

Dear Lawmakers,

I am writing to encourage your support for Senator Hollis French's SB 135 dealing with a victim's constitutional right to "timely disposition of their case."

As many of you may recall, my daughter, Bonnie Craig, was murdered in September 1994. Her killer, Kenneth Dion was finally sentenced October 31st, 2011. For 17 years our family, friends and the community waited for justice. Our constitutional right to "timely disposition of our case" was violated again and again. I vowed, when thrown into this horror story, that I would make sure the things that went wrong in our case would be changed for others.

Protecting a victim's right to "timely disposition" is the most important change that needs to come out of this incredible tragedy. It was the most egregious violation that our family had to endure, and that violation was at the hands of the State of Alaska, not the criminal. I need your help to ensure all future victims will have their constitutional rights protected in Alaska. Let's balance the scales of justice and honor the victim's right to "timely disposition."

Do not be mistaken. It is not okay to think "At least the criminal is behind bars and can't hurt anyone else." The pain inflicted on the victims is inexcusable and the prosecution of the case against the defendant weakens daily. Delays are a tactical advantage for defense attorneys to accommodate defense attorneys, rarely the defendant.

Kenneth Dion was identified November 2006. From the time he was identified our family was basically placed under a "gag order." Nothing could be said to the press, our friends, or the community. Our incredible grief - the wounds being ripped wide open, bringing us back to the day we were notified of Bonnie's death - were to be muzzled, and kept deep within us. We weren't allowed to share the news, our private trauma, our personal hell, for four months. As a family, we tried to continue our life as if nothing was happening, pretending this incredible burden and stress didn't exist. It was tearing us apart, eating at the very core of our existence, like a cancer. It destroyed relationships and financially ruined me. It affected our health and my parenting abilities. it could, and can, destroy a whole family.

Finally, May 1st, 2007 the news was released. Although we talked with the press and could finally share the information with friends, the gag was, once again, placed on our family members to avoid all contact with media. The threat of a "change of

venue" is not something a victim's family can take lightly. Until a jury is selected, avoiding any media coverage is critical. Our jury was selected more than 4 years later. During that time it became abundantly clear that the defense attorney and the defendant hold all the power and they call all the shots. Victims can only sit back and wait without complaining.

I know that you will never be able to even imagine the pain and suffering a parent, a sister and brothers goes through while awaiting a trial. Our pain and stress and fear was multiplied ten-fold with the memories of Joshua Wade being acquitted. We knew things could go wrong, evidence could get lost, a technicality could cause a mistrial, investigators and witnesses could die or be lost. We know memories fade. We know each day something could come up that could make it impossible to prosecute the man who brutally raped and murdered Bonnie. Our life is in a limbo, teetering on insanity. It is beyond comprehension. Yet, we try to continue our life with a new kind of normalcy.

Our first trial date was set for September, 2008. Please keep in mind that the killer was identified November, 2006. I wept when Judge Patrick MMcKay set the date. It was like having your guts ripped out of your body. He justified it by saying it would give both the prosecution and the defense plenty of time to prepare and that there would be absolutely no reason for any continuance. He vowed that he wanted to make sure both sides would be prepared, so we were going to have pretrial conferences to avoid any surprises or complications from arising. And we did. By the time we got to trial we had 45 pre-trial conferences, status and motion hearings. The judges, both Judge McKay and Judge Jack Smith were trying to make sure the defense was getting all they needed and getting ready for trial. They both failed. If the defense asks for anything, the judge, in fear of an appeal, will always grant the defense more time, even if it meant losing Pat Gullufson, our prosecutor of 3 years who had to retire for medical reasons. (July 15, 2010 a new prosecutor, Paul Miovas, took the case over. He successfully handled the case in less than 10 months.)

More than once, Lee De Grazia, the first public defender, misled the Judge. We all knew it and yet he never called her on it. One month before the trial was to start she claimed she fired her "DNA Expert" and would need more time. We all sat there amazed and wondering if she was lying. Had she even hired one yet? She doesn't need to answer to anyone. There was no accountability She made a mockery of the whole system. When the case was finally handed over to Office of Public Advocacy defense attorney Andrew Lambert (03/23/09) he told Judge McKay that De Grazia had done virtually nothing on the case and the judge

responded, "I was afraid of that." 18 months had been wasted on a totally incompetent defense attorney.
Make no mistake, the delays are not about affording the defendant a fair trial, nor protecting the defendant's rights. They are for the benefit of, more times than not, the defense attorney's schedule and needs. The litigation of a case is dictated by the personal life of the defense attorney. Timely disposition is about case management and having efficient and effective counsel. It is about prioritizing cases that have been lingering on for the benefit of the defense attorney's schedules. You can't imagine how disheartening it is to hear your case is going to be delayed, yet again, for 4-5 months because the defense attorney wants to go on their second, one month vacation of the year and he needs about a week to do a divorce case for a buddy of his and he is going to visit some schools for his daughter. Why can't co-counsel take over?

If a builder is building a home he can't tell the client he is going away for a month on vacation and will need 3-4 more months. In just about any profession a project must be completed before those involved can decide to take time off.
If you were diagnosed with cancer and the doctor goes for vacation for a month you have the opportunity to use another doctor. Victims have no choice, but to sit and wait. Prosecutors can't request that we use another defense attorney or that co-counsel handle the scheduled hearing, nor can the judge tell a defense attorney they will need to hold off on their vacation.

Below, I have listed each trial date that was set. I can never describe the sickening feeling a family feels when you are told, once again, that the trial date will be changed. You feel like you are going to vomit. Again, it's like your guts are being ripped out of you. In many cases I was on the verge of tears, knowing we would be given no consideration. And, it is always incredulous reasoning, something that you think may require an extra week or two, delays the trial by 4 months or more.

Preparing for each pretrial hearing is mentally exhausting. You have difficulty functioning and sleeping in fear of what the defense is going to do each time. The tension and anxiety are overwhelming. Getting to court is difficult. We had 45 pretrial hearings. Please consider what that does to families. As a victim, you can't plan life too far in advance; you can't start to rebuild your life.

Refusal to deal with "timely disposition" is a refusal to address the inefficiencies in our justice system. and allowing the "justice system" to re-victimize the victims. Please, support Senator French's SB 135 to honor victim's constitutional right to

"timely disposition of their case." Show the victims the respect they deserve and stop the re-victimization of the victims.

Sincerely yours,

Karen Foster

Karen Foster

November, 2006	Defendant Identified	
September 15, 2008	First Trial Date	4 month delay
January 5th, 2009	Second Trial Date	4 month delay
May 11, 2009	Third Trial Date	4 month delay
April 19, 2010	Fourth Trial Date	One year delay
August 30, 2010	Fifth Trial Date	4 month delay
February 7th, 2011	Sixth Trial Date	6 month delay
May 10th, 2011	Went to Trial, Jury finally selected.	

From: karen.dynamic@gci.net [mailto:karen.dynamic@gci.net]
Sent: Wednesday, February 15, 2012 11:07 AM
To: George Ascott
Subject: Dates for Hearing

It would be nice if the following dates could be handed out or displayed while I testify.

Thanks,

Karen Foster

State of Alaska v. Kenneth Dion

November, 2006	**Kenneth Dion Identified**	
September 15, 2008	**First Trial Date**	**4 month delay**
January 5th, 2009	**Second Trial Date**	**4 month delay**
May 11, 2009	**Third Trial Date**	**4 month delay**
March 23, 2009	**New Defense attorney assigned**	
April 19, 2010	**Fourth Trial Date**	**One year delay**
July 15, 2010	**New Prosecutor assigned**	
August 30, 2010	**Fifth Trial Date**	**4 month delay**
February 7th, 2011	**Sixth Trial Date**	**6 month delay**
May 10th, 2011	**Went to Trial, Jury finally selected.**	
June 15th, 2011	**Dion convicted**	
October 31st, 2011	**Dion sentenced to 124 years**	

Representative Chris Tuck

Alaska State Legislature

District 29 - Representing Dimond Estates, Foxridge, Taku
Southwood Manor, Campbell, and Independence Park

Date: February 13, 2012

To: Representative Carl Gatto, Chair
House Judiciary Committee

From : Representative Chris Tuck

RE: House Bill 293

Thank you for scheduling a hearing in the House Judiciary Committee for HB 293, "Rights of Crime Victims/Continuances."

Since my hearing request was granted the Senate companion bill, SB 135, underwent a few technical adjustments in the Senate Judiciary Committee. I have attached a draft Committee Substitute which mirrors those changes along with an explanation of what they are. It is my hope that the committee will adopt this version so that the language in the two bills will remain consistent.

Thank you for your consideration of this request. If you have any questions or need additional information, please call George Ascott at 465-2095.

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Juneau, AK 99801-1182
Representative_Chris_Tuck@legis.state.ak.us

Phone (907) 465-2095
Fax (907) 465-3810
Toll-free (866) 465-2095

Representative Chris Tuck

Alaska State Legislature

District 29 - Representing Dimond Estates, Foxridge, Taku
Southwood Manor, Campbell, and Independence Park

Date: February 8, 2012

To: Representative Carl Gatto, Chair
House Judiciary Committee

From : Representative Chris Tuck

RE: House Bill 293

I respectfully request that you schedule a hearing in the House Judiciary Committee for HB 293, "Rights of Crime Victims/Continuances."

A copy of the bill, a sponsor statement, sectional analysis, and additional support materials are attached.

Potential testimony can be expected from the Alaska Network on Domestic Violence & Sexual Assault, Victims for Justice, Standing Together Against Rape, the Alaska Office of Victims' Rights, and Karen Foster; mother of Bonnie Craig. I would also request that testimony be allowed statewide by electronic means.

If you have any questions or need additional information, please call George Ascott at 465-2095.

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Standing Together Against Rape
Crisis Intervention | Advocacy | Education | Prevention

February 7, 2012

Alaska Legislature
State Capitol
Juneau, Alaska 99801

Re: House Bill 293, Continuances in Criminal Cases

Dear Members of the Alaska State Legislature:

Standing Together Against Rape (STAR) strongly supports any bill that affords a victim of crime the opportunity to have their voice and concerns heard by the justice system. House Bill 293 appears to strengthen "the right to a timely disposition of the case following the arrest of the accused" as stated in the Alaska Constitution.

Crime victims, in particular, victims of sexual assault feel a tremendous amount of anxiety when contemplating facing the person who assaulted them in court. The anxiety builds, creating sleepless nights and increased reliance on coping skills. The day arrives, and the trail is continued. This pattern can be repeated over and over and over again. If the offender is incarcerated the victim is afraid they will be released. If the offender is not incarcerated the victim feels they must continue watching over their shoulder at the market, the department store, the movies, etc. The ability of the victim to move about freely may be inhibited.

While I believe it is not the intent of prosecution to re-victimize crime victims, repeated continuances often do. At the same time STAR recognizes the need for the prosecution to put forth a strong case, to increase the possibility of conviction, to hear defense requests and to lessen the likelihood of appeal. Hopefully this bill will allow for a balance to be struck between the two.

Respectfully submitted,

Standing Together Against Rape
Nancy A Haag, MSW
Executive Director

HB 296

<TARGET><BILL>HB 296</BILL><SUBJECT>HB 296</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
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HOUSE BILL 296 ~ Sponsor Statement
House Judiciary Committee

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

HB 296, addresses ambiguities that have risen from recent court cases involving prisoner issues. It clarifies the permissible method of personally serving process on incarcerated prisoners. It also clarifies the second and fourth degree escape statutes. The bill does three things;

1. For the purpose of service of process on state prisoners HB296 references the definition of "correctional facility" in AS 33.30.901 to clarify the manner in which incarcerated prisoners can be served civilly while incarcerated. The bill also makes it clear that the statute setting for the procedure for personally serving incarcerated persons, AS 09.05.030, is an indirect amendment to Alaska Civil 4. These changes will ensure there is a standardized legal process for serving process on prisoners. It will cure the problem in Hertz v. Carothers 225 P.3d 571 (Alaska 2010), that caused the Alaska Supreme Court to hold that prison officials were not peace officers who could serve legal summons and complaints on incarcerated prisoners.

2. This bill also defines what constitutes the crime of escape in the second degree. The result in Bridge v. State 258 P.3d 923 (Alaska 2011) was suggested for Legislative review from the Legal Services Annual Report (Dec. 2011). Bridge, was charged with driving with a suspended license, a class A misdemeanor. He could not post bail and was therefore held in jail. He was then transferred to a halfway house. He left the facility without permission and was caught. As a result of the escape he was charged with escape in the second degree, a class B felony. The Alaska Court of Appeals found that although Bridge was in the custody of the Department of Corrections, he was not "confined", because the halfway house did not have staff whose duty it was to prevent prisoners from leaving. This bill defines escape in the second degree as being from a "secure correctional facility" while under detention for a misdemeanor. Further, a "secure correctional facility" is defined as using construction or security fixtures or officers or other persons that are authorized to prevent persons under detention from departing such facilities without unlawful authorization. Other escapes by misdemeanants are fourth degree escapes, a class A misdemeanor. This bill will

codify the holding in Bridge and will avoid future questions as to what constitutes escape in the second degree.

3. This bill deletes the repeal of provisions passed by the legislature in 2007, AS 12.55.100(f) and AS 33.16.150(g), requiring electronic monitoring as a special condition of probation or parole for offenders whose offense was related to a criminal street gang. Repealing the December 31, 2012 sunset date will continue to provide the court system and the Department of Corrections an important tool to keep neighborhoods safe from gang related crime.

This bill provides clearer guidelines for civil service of process of persons under the custody of the Department of Corrections removing question raised in Hertz v. Carothers 225 P.3d 571 (Alaska 2010). The bill refines escape in the second degree answering questions from Bridge v. State 258 P.3d 923 (Alaska 2011). This bill is necessary to avoid future litigation that may arise involving these issues.

Please contact Rep. Gruenberg's legislative aides, Miles Brookes or Ted Madsen, at 465-4940 with any questions.

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HB 296 - Crime of Escape & Definition of Correctional Facility

Sectional Analysis for CS for HB296 (27-LS1199\E)

Section 1[1] adds a new subsection that defines a correctional facility for the purpose of AS 09.05.050 as a "prison, jail, camp farm, halfway house, group home, or other placement designated by the commissioner for the custody, care and discipline of prisoners (AS 33.30.901(4).

Section 2[2] defines that escape from a "secure correctional facility" while under official detention for a misdemeanor is escape in the second degree, a class B felony.

Section 3[3] adds a new subsection to AS 11.56.310 defining a secure correctional facility.

Section 4[4] repeals Section 3, ch.27, SLA 2007

Section 5[5]amends Rule 4, Alaska Rules of Civil Procedure to reflect changes indirectly made in section 1 of this act.

Section 6[6]states that changes to sections 2 and 3 apply to offenses on or after the effective date of this act.

Section 7[7]provides for an immediate effective date.

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[1] Page 1, Lines 5-7
[2] Page 1, Lines 8-14 through Page 2, Lines 1-9
[3] Page 2, Lines 10-18
[4] Page 2, Lines 19-23
[5] Page 2, Lines 24-29
[6] Page 2, Lines 30-31 through Page 3, Lines 1-5
[7] Page 3, Line 6

ALASKA STATE LEGISLATURE
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TO: Representative Bill Stoltze, Co-Chair
Representative Bill Thomas, Co-Chair
House Finance Committee

FROM: Representative Carl Gatto

DATE: February 24, 2012

RE: HB 296 Crime of Escape/Definition of Escape

****

Please consider this memorandum as a request for House Bill 296 to be heard in the House Finance Committee. Accompanying this memo are the following documents:

- HB 296 (27-LS1199\D)
- CSHB 296 (JUD) (27-LS1199\E)
- Sponsor Statement
- Sectional Analysis
- Changes from previous version memo
- Fiscal Notes
    - Department of Corrections (zero)
    - Department of Law (zero)
    - Department of Administration/Public Defender Agency (zero)
- Supporting Documents
    - *Hertz v. Carothers* 225 P.3d 571 (Alaska 2010)
    - *Bridge v. State* 258 P.3d 923 (Alaska 2011)

Thank you for considering the Judiciary Committee's request for a hearing on HB 296. Please contact my legislative aide, Melanie Lesh, at 465-4990 or legislative aide to Rep. Gruenberg, Miles Brookes, at 465-4940 with any questions.

ALASKA STATE LEGISLATURE
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HOUSE BILL 296 ~ Sponsor Statement
House Judiciary Committee

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

HB 296 addresses ambiguities that have risen from recent court cases involving prisoner issues. It clarifies the permissible method of personally serving process on incarcerated prisoners. It also clarifies the second and fourth degree escape statutes. The bill does two things;

1. For the purpose of service of process on state prisoners HB 296 references the definition of "correctional facility" in AS 33.30.901 to clarify the manner in which incarcerated prisoners can be served civilly while incarcerated. The bill also makes it clear that the statute relating to the procedure for personally serving incarcerated persons, AS 09.05.030, is an indirect amendment to Alaska Civil Rule 4. These changes will ensure there is a standardized legal process for serving process on prisoners. It will cure the problem in *Hertz v. Carothers* 225 P.3d 571 (Alaska 2010), where the Alaska Supreme Court held that prison officials were not peace officers who could serve legal summons and complaints on incarcerated prisoners.

2. This bill also defines what constitutes the crime of escape in the second degree. The result in *Bridge v. State* 258 P.3d 923 (Alaska 2011) was suggested for Legislative review from the Legal Services Annual Report (Dec. 2011). Bridge, was charged with driving with a suspended license, a class A misdemeanor. He could not post bail and was therefore held in jail. He was then transferred to a halfway house. He left the facility without permission and was caught. As a result of the escape he was charged with escape in the second degree, a class B felony. The Alaska Court of Appeals found that although Bridge was in the custody of the Department of Corrections, he was not "confined," because the halfway house did not have staff whose duty it was to prevent prisoners from leaving. This bill defines escape in the second degree as being from a "secure correctional facility" while under detention for a misdemeanor. Further, a "secure correctional facility" is defined as using physical restraints or fixtures to prevent movements or activities of persons under detention or officers or staff that are charged with preventing persons under detention from departing such facilities without unlawful authorization. Other escapes by misdemeanants are fourth degree escapes,

a class A misdemeanor. This bill will codify the holding in Bridge and will avoid future questions as to what constitutes escape in the second degree.

This bill provides clearer guidelines for civil service of process of persons under the custody of the Department of Corrections removing question raised in *Hertz v. Carothers* 225 P.3d 571 (Alaska 2010). The bill refines escape in the second degree answering questions from Bridge v. State 258 P.3d 923 (Alaska 2011). This bill is necessary to avoid future litigation that may arise involving these issues.

Please contact committee aide, Melanie Lesh, at 465-4990; or legislative aide Miles Brookes, at 465-4940 with any questions.

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To: Representative Bill Stoltze, Co-Chair
Representative Bill Thomas, Co-Chair
House Finance Committee

From: Representative Carl Gatto, Chair
House Judiciary Committee

Date: February 22, 2012

RE: Changes to HB 296 "Crime of Escape and Definition of Correctional Facility"

****

The House Judiciary Committee adopted two amendments that clarify language for the purposes of this bill. Below is an outline of changes made since the bill was introduced;

- A new subsection under AS 11.56.310 Escape in the second degree, defines "secure correctional facility" as one that can restrict the ability of a person from leaving without lawful authority or has correctional officers to do so.
- A repeal of Section 3, ch. 27, SLA 2007, which sets December 31, 2012 as the repeal date for requiring electronic monitoring as a condition of probation and parole for offenders whose offense was related to a criminal street gang.

If you have any questions about amendments adopted in the committee substitute, please contact the Judiciary committee aide, Melanie Lesh, at 465-3743.

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Crime of Escape & Definition of Correctional Facility

Sectional Analysis for HB296 (27-LS1199\D)

Section 1) adds a new subsection that defines a correctional facility for the purpose of AS 09.05.050 as a "prison, jail, camp farm, halfway house, group home, or other placement designated by the commissioner for the custody, care and discipline of prisoners (AS 33.30.901(4).

Section 2) defines that escape from a "secure correctional facility" while under official detention for a misdemeanor is escape in the second degree, a class B felony.

Section 3) adds a new subsection to AS 11.56.310 defining a secure correctional facility.

Section 4) amends 11.81.900(b)(9) to further define a correctional facility as a prison, jail, camp, farm, halfway house, group home, holding facility or other placement used for housing persons under official detention.

Section 5) amends Rule 4, Alaska Rules of Civil Procedure to reflect changes indirectly made in section 1 of this act.

Section 6) states that changes to sections 2,3 and 4 apply to offenses on or after the effective date of this act.

Section 7) provides for an immediate effective date.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 296(JUD)**
Fiscal Note Number: **1**
Publish Date: **2/17/12 (H)**

Identifier (file name): HB296-DOC-OC-01-30-12
Title: "An Act relating to service of process on prisoners; relating to crime of escape; relating to definition of..."
Sponsor: House Judiciary Committee
Requester: House Judiciary Committee

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director — Phone: 907-465-3339
Division: Department of Corrections - Administrative Services — Date/Time: 02/01/2012 7:00AM
Approved by: Joseph D. Schmidt, Commissioner, Department of Corrections — Date: 2/1/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA **BILL NO. CSHB 296(JUD)**
2012 LEGISLATIVE SESSION

Analysis

This legislation adds language to AS 11.56.301(a) inserting the word **secure** under (a)(1)(A) in the context of a **secure** correctional facility while under official detention; and, adds language to the end of (a)(1)(A) **for a misdemeanor**.

This legislation adds Section 3. AS 11.56.310 (c) "secure correctional facility" means (1) uses construction fixtures or other restraints designed to restrict physically the physical movements and activities of persons under official detention; or (2) employs correctional officers or other facility staff charged with preventing persons under official detention from departing the facility without lawful authorization.

The legislation also adds to the definition of "correctional facility" "a prison, jail, camp, farm, halfway house, group home, holding facility, or other placement [PREMISES, OR A PORTION OF PREMISES] used for housing [THE CONFINEMENT OF] persons under official detention;

If passed, the Department of Corrections does not anticipate a fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSHB 296(JUD)**
Fiscal Note Number	**2**
(H) Publish Date	**2/17/12**

Identifier (file name)	HB296-LAW-CRIM-01-27-12	Dept. Affected	Law
Title	An Act relating to service of process on prisoners; crime of escape; definition of 'correctional facility'.	Appropriation	Criminal
		Allocation	Criminal Justice Litigation
Sponsor	Judiciary		
Requester	(H) Judiciary	OMB Component Number	2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	Eileen Donahue, Division Operations Manager	Phone	465-5427
Division	Administrative Services	Date/Time	1/27/12 4:10PM
Approved by	Richard Svobodny, Acting Attorney General	Date	1/27/2012
	Department of Law		

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 296(JUD)

Analysis

Current law allows service of process to be made to a person in a correctional facility on the shift supervisor where the person is housed. HB 296 provides a definition of correctional facility for purpose of this law – the definition of correctional facility in AS 33.30.901. The bill also expands that definition by including camps, farms, halfway houses, and other placements for the housing of persons under official detention.

Under current law it is escape in the fourth degree (AS 11.56.330) for a person to remove oneself from official detention for a misdemeanor. Escape in the fourth degree is a class A misdemeanor.

Under current law it is escape in the second degree (AS 11.56.310) to remove oneself from a correctional facility while under official detention. Escape in the second degree is a class B felony. The Court of Appeals has recently held that a person in a correctional facility in connection with a misdemeanor could not be found guilty of escape in the second degree if the person were held in a facility that did not have locked doors or guards.

HB 296 would provide that a person in a correctional facility that is secure in connection with a misdemeanor commits escape in the second degree – a class B felony. The bill defines secure correctional facility as a correctional facility that has physical restraints or staff that is charged with preventing escape.

There is no anticipated fiscal impact to Department of Law.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 296(JUD)**
Fiscal Note Number: **3**
Publish Date: **2/17/12 (H)**

Identifier (file name): HB296-DOA-PDA-1-27-12
Title: Crime of Escape/Def. of Correct Facility
Sponsor: Judiciary
Requester: House Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 1/27/12 9:42 PM
Approved by: John Cramer, Deputy Commissioner, Department of Administration — Date: 1/27/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 296(JUD)

Analysis

This bill amends AS 11.56.310(a) by adding language that changes the definition of escape by including persons who remove themselves, without authority to do so, from a "secure" correctional facility while under official detention for a misdemeanor. Additionally, AS 11.81.900(b)(9) is amended by broadening the definition of a correctional facility. This new definition adds the descriptors prison, jail, camp, farm, halfway house, group home, holding facility or other placement as a correctional facility, when used for housing persons under official detention.

The expanded definition of correction facility and the inclusion of unauthorized exit from official detention in misdemeanor cases will increase the range of conduct that can be charged as escape and may increase the number of escapees charged. Additionally, the expanded definition will impact the number of cases that can be charged under the promoting contraband statutes. The Public Defender Agency has no reliable method for determining how many cases will be charged under the expanded definition, or how many of those charged would qualify for representation by the Public Defender. The Agency submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **CSHB296**
Fiscal Note Number
() Publish Date

Identifier (file name) HB296CS(JUD)-DOA-PDA-4-11-12
Title Escape/Service on Prisoners/Monitoring
Sponsor House Judiciary Committee
Requester Senate Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Language amending the statutory definiton of "correctional facililty" that would have created additional criminal cases was removed from the bill.

Prepared by Quinlan Steiner
Division Public Defender Agency
Phone 334-4414
Date/Time 4/11/12 10:42 AM

Approved by John Cramer, Deputy Commissioner
Department of Administration
Date 4/11/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB296

Analysis

This bill amends AS 11.56.310(a) by adding language that changes the definition of escape by including persons who remove themselves, without authority to do so, from a "secure" correctional facility while under official detention for a misdemeanor.

This change brings the escape statute into compliance with current case law from the Alaska Court of Appeals. The Agency does not anticipate a fiscal impact and submits a zero note.

[redacted]OUSE COMMITTEE REPOR[redacted]

(7)
Date Referred to Committee: January 25, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 2/15/12

The JUDICIARY Committee considered: **HB 296**

HOUSE BILL NO. 296
"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."
HB 296 CRIME OF ESCAPE/DEF. OF CORRECT. FACILITY

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 296 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES** *FN# is assigned by Chief Clerk's Office				
*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	ADM		X	
	COR			X
	LAW			X

***PREVIOUS* FISCAL NOTES**				
FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	✓			
	Keller			X	
	Thompson	X			
Chair:	GATTO	✓			
Chair:					

Alaska State Legislature

House of Representatives

Member
Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

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Anchorage, Alaska 99501-2133
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Alaska State Capitol, Rm 110
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Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

Draft

To: Doug Wooliver; Alaska Court System, Shalon Harrington; Dept. of Corrections, Anne Carpeneti ; Dept. of Law-Criminal, Kelly Howell; Dept. of Public Safety

From: Representative Max Gruenberg

Date: February 24, 2012

RE: Repeal effective dates; Requiring Electronic Monitoring as special condition of Probation and parole for offenders whose offense was related to criminal street gangs

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It has come to the attention of the House Judiciary Committee that the following Alaska Statutes (Ch. 27, SLA 2007) are repealed effective on December 31, 2012;

1. AS 12.55.100(f)

*** Section 1.** AS 12.55.100 is amended by adding a new subsection to read:
(f) While on probation and as a special condition of probation for an offense where the aggravating factor provided in AS 12.55.155(c)(29) has been proven or admitted, the court shall require that the defendant submit to electronic monitoring. Electronic monitoring under this section must provide for monitoring of the defendant's location and movements by Global Positioning System technology. The court shall require a defendant serving a period of probation with electronic monitoring as provided under this section to pay all or a portion of the costs of the electronic monitoring, but only if the defendant has sufficient financial resources to pay the costs or a portion of the costs. A defendant subject to electronic monitoring under this subsection is not entitled to a credit for time served in a correctional facility while the defendant is on probation. In this subsection, "correctional facility" has the meaning given in AS 33.30.901.

2. AS 33.16.150(g)

*** Sec. 2.** AS 33.16.150 is amended by adding a new subsection to read:
(g) In addition to other conditions of parole imposed under this section for a prisoner serving a sentence for an offense where the aggravating factor provided in AS 12.55.155(c)(29) has been proven or admitted, the board shall impose as a condition of special medical, discretionary, and mandatory parole a requirement that the prisoner submit to electronic monitoring. Electronic monitoring under this

subsection must provide for monitoring of the prisoner's location and movements by Global Positioning System technology. The board shall require a prisoner serving a period of probation with electronic monitoring as provided under this section to pay all or a portion of the costs of the electronic monitoring, but only if the prisoner has sufficient financial resources to pay the costs or a portion of the costs. A prisoner subject to electronic monitoring under this subsection is not entitled to a credit for time served in a correctional facility while the defendant is on parole. In this subsection, "correctional facility" has the meaning given in AS 33.30.901.

The simplest way to keep this law in action is to enact language repealing the effective repealing date of December 31, 2012. Such a repeal has been adopted in to CS HB 296 (JUD) which is currently in the House Finance Committee awaiting scheduling. Members of the House Judiciary Committee are interested in your comments, suggestions and concerns regarding the repeal effective date for AS 12.55.100(f) and 33.16.150(g). Please feel free to contact my legislative aide, Miles Brookes at (907) 465-4940 with any information regarding this matter.

HOUSE BILL NO. 296

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 1/25/12
Referred: JUD, FIN

A BILL

FOR AN ACT ENTITLED

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

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

*** Section 1.** AS 09.05.050 is amended by adding a new subsection to read:

(c) In this section, "correctional facility" has the meaning given in AS 33.30.901.

*** Sec. 2.** AS 11.56.310(a) is amended to read:

(a) One commits the crime of escape in the second degree if, without lawful authority, one

(1) removes oneself from

(A) a **secure** correctional facility while under official detention **for a misdemeanor**;

(B) official detention for a felony or for extradition; or

(C) official detention and, during the escape or at any time before being restored to official detention, one possesses on or about oneself a firearm;

(2) violates AS 11.56.335 or 11.56.340 and, during the time of the unlawful evasion or at any time before being restored to official detention, one possesses on or about oneself a firearm; or

(3) removes, tampers with, or disables the electronic monitoring equipment, or leaves one's residence or other place designated by the commissioner of corrections for the service by electronic monitoring of official detention for a felony.

*** Sec. 3.** AS 11.56.310 is amended by adding a new subsection to read:

(c) In this section, "secure correctional facility" means a correctional facility that

(1) uses construction fixtures or other restraints designed to restrict physically the physical movements and activities of persons under official detention; or

(2) employs correctional officers or other facility staff charged with preventing persons under official detention from departing the facility without lawful authorization.

*** Sec. 4.** AS 11.81.900(b)(9) is amended to read:

(9) "correctional facility" means **a prison, jail, camp, farm, halfway house, group home, holding facility, or other placement** [PREMISES, OR A PORTION OF PREMISES,] used for **housing** [THE CONFINEMENT OF] persons under official detention;

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 09.05.050, including the amendment made by sec. 1 of this Act, has the effect of amending Rule 4, Alaska Rules of Civil Procedure, relating to service of process on prisoners committed to the custody of the commissioner of corrections.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. The changes made to the crime of escape in the second degree under AS 11.56.310(a), as amended by sec. 2 of this Act, the definition of "secure correctional facility" in AS 11.56.310(c), added by sec. 3 of this Act, and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act, apply to offenses occurring on or after the effective date of this Act.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

27-LS1199\D.5
Gardner
2/14/12

AMENDMENT #3

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Page 1, line 2:

Delete "**relating to the definition of 'correctional facility'**"

Page 2, lines 13 - 18:

Delete all material and insert:

"(1) has construction fixtures or security features that are designed to restrict the ability of a person under official detention from leaving the facility without lawful authority; or

(2) has correctional officers or other persons authorized by the commissioner of corrections to prevent a person under official detention from leaving without lawful authority."

Page 2, lines 19 - 23:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 2, following "Act,":

Insert "and"

Page 3, lines 3 - 4:

Delete "and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act,"

by sec. 4 of this Act,"

27-LS1199\D.4
Gardner
2/10/12

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Page 1, line 2:

Delete "'**correctional facility**'"

Insert "'**secure correctional facility**'"

Page 2, lines 13 - 18:

Delete all material and insert:

"(1) has construction fixtures or security features that are designed to restrict the ability of a person under official detention from leaving the facility without lawful authority; or

(2) has correctional officers or other persons authorized to prevent a person under official detention from leaving without lawful authority."

Page 2, lines 19 - 23:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 2, following "Act,":

Insert "and"

Page 3, lines 3 - 4:

Delete "and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act,"

27-LS1199\D.2
Gardner
1/28/12

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Page 1, line 2, following "**'correctional facility';**"

Insert "**deleting the repeal of a provision relating to electronic monitoring as a special condition of probation and parole for offenders whose offense was related to a criminal street gang**;"

Page 2, following line 23:

Insert a new bill section to read:

"*** Sec. 5.** Section 3, ch. 27, SLA 2007, is repealed."

Renumber the following bill sections accordingly.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

(heard and held 2/1/12)

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
FAX: 907-465-2381
HOUSE_JUDICIARY@LEGIS.STATE.AK.US

HOUSE BILL 296

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

HB 296 addresses ambiguities that have risen from recent court cases involving prisoner issues. It clarifies the permissible method of personally serving process on incarcerated prisoners. It also clarifies the second and fourth degree escape statutes. The bill does two things;

1. For the purpose of service of process on state prisoners HB 296 references the definition of "correctional facility" in AS 33.30.901 to clarify the manner in which incarcerated prisoners can be served civilly while incarcerated. The bill also makes it clear that the statute relating to the procedure for personally serving incarcerated persons, AS 09.05.030, is an indirect amendment to Alaska Civil Rule 4. These changes will ensure there is a standardized legal process for serving process on prisoners. It will cure the problem in *Hertz v. Carothers* 225 P.3d 571 (Alaska 2010), where the Alaska Supreme Court held that prison officials were not peace officers who could serve legal summons and complaints on incarcerated prisoners.

2. This bill also defines what constitutes the crime of escape in the second degree. The result in *Bridge v. State* 258 P.3d 923 (Alaska 2011) was suggested for Legislative review from the Legal Services Annual Report (Dec. 2011). Bridge, was charged with driving with a suspended license, a class A misdemeanor. He could not post bail and was therefore held in jail. He was then transferred to a halfway house. He left the facility without permission and was caught. As a result of the escape he was charged with escape in the second degree, a class B felony. The Alaska Court of Appeals found that although Bridge was in the custody of the Department of Corrections, he was not "confined," because the halfway house did not have staff whose duty it was to prevent prisoners from leaving. This bill defines escape in the second degree as being from a "secure correctional facility" while under detention for a misdemeanor. Further, a "secure correctional facility" is defined as using physical restraints or fixtures to prevent movements or activities of persons under detention or officers or staff that are charged with preventing persons under detention from departing such facilities without unlawful authorization. Other escapes by misdemeanants are fourth degree escapes,

a class A misdemeanor. This bill will codify the holding in Bridge and will avoid future questions as to what constitutes escape in the second degree.

This bill provides clearer guidelines for civil service of process of persons under the custody of the Department of Corrections removing question raised in *Hertz v. Carothers* 225 P.3d 571 (Alaska 2010). The bill refines escape in the second degree answering questions from Bridge v. State 258 P.3d 923 (Alaska 2011). This bill is necessary to avoid future litigation that may arise involving these issues.

Please contact legislative aide, Miles Brookes, at 465-4940 with any questions.

Melanie Lesh

From: Nancy Meade <NMeade@courts.state.ak.us>
Sent: Tuesday, January 31, 2012 12:33 PM
To: Melanie Lesh
Subject: HB 296

Hi Melanie –

HB 296 is scheduled to be heard in the House Judiciary Committee meeting tomorrow. I wanted to let you know that the court has no position on the bill, but normally I would attend the hearing because it does say that it indirectly amends a court rule. Unfortunately, I have a conflict tomorrow, and need to be in another hearing at the same time. Please feel free to call me or let me know if I can answer any questions about it.

Nancy Meade
General Counsel
Alaska Court System
Anch: 907-264-8264
Juneau: 907-463-4736

258 P.3d 923
Court of Appeals of Alaska.

Wendell D. BRIDGE, Appellant,
v.
STATE of Alaska, Appellee.

No. A–10176. | Aug. 5, 2011.

Synopsis

Background: Defendant, who left halfway house without permission while awaiting trial on misdemeanor charge, was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Randy M. Olsen, JJ., of second-degree felony escape. He appealed.

Holdings: The Court of Appeals, Mannheimer, J., held that:
1 jury instruction defining term "correctional facility" was improper, and
2 retrial of defendant would not violate double jeopardy.

Reversed.

Bolger, J., filed dissenting opinion.

West Headnotes (2)

1 **Escape**
⇐Nature and elements of offenses in general

For purposes of interpreting the second-degree escape statute, the term "correctional facility," which is statutorily defined as "premises used for the confinement of persons under official detention," applies only to situations where staff at the facility have a duty to physically prevent inmates from leaving without permission, and not to situations where the facility simply houses defendants who were placed there by the Department of Corrections pending their trial or sentencing. AS 11.56.310, 11.81.900(b)(9).

2 **Double Jeopardy**
⇐Particular grounds for relief

Retrial of defendant on charge of second-degree escape would not violate double jeopardy based on trial court's failure to properly instruct jury on term "correctional facility," as required to properly convict defendant of second-degree escape; if on retrial, the State were to believe that it would be unable to establish that halfway house defendant left without permission qualified as a "correctional facility," then the State could ask the trial court to enter judgment against defendant on lesser offense of fourth-degree escape under statute which prohibited any act of "remov[ing] oneself from official detention for a misdemeanor." U.S.C.A. Const.Amend. 5; AS 11.56.310, 11.56.330(a)(1).

Attorneys and Law Firms

***924** Michael Schwaiger, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Anne D. Carpeneti, Assistant Attorney General, Criminal Division Central Office, Juneau (brief), Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage (oral argument), and Daniel S. Sullivan, Attorney General, Juneau, for the Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

Opinion

OPINION

MANNHEIMER, Judge.

This appeal requires us to clarify the meaning of the term "correctional facility" for purposes of the second-degree escape statute, AS 11.56.310. Under subsection (a)(1)(A) of this statute, a person commits the felony of second-degree escape if they unlawfully remove themselves "from a correctional facility" while they are under official detention for any crime, even a misdemeanor.

The term "correctional facility" is defined in AS 11.81.900(b)(9) as "premises ... used for the confinement of persons under official detention". The question posed in this appeal is whether the word "confinement" is equivalent to "residence" or "placement"—so that the term "correctional facility" would encompass *any* facility or residence where a prisoner has been ordered to remain by the Department of Corrections. Bridge argues that "confinement" has a narrower meaning—that it applies only when a prisoner's mandated residence at a particular facility is physically enforced by guards and restraints.

For the reasons explained in this opinion, we agree with Bridge that, at least for purposes of interpreting the second-degree escape statute, the phrase "premises used for the confinement of persons under official detention" must be given a narrower meaning than "residence" or "placement"—that it applies only to situations where a prisoner's residence is physically enforced.

Underlying facts

The defendant in this case, Wendell D. Bridge, was charged with a misdemeanor (driving with a suspended license). Because Bridge was unable to make bail, he was remanded to the custody of the Department of Corrections pending his trial.

***925** Bridge was initially confined at the Fairbanks Correctional Center. However, when the Department of Corrections conducted their prisoner classification of Bridge, they concluded that he was eligible for placement at the Northstar Center, a halfway house operated by a private corporation in Fairbanks. The Northstar Center has a contract with the Department of Corrections for housing low-security misdemeanor defendants who are awaiting trial or sentencing. Pursuant to this contract, and pursuant to the Department of Corrections' classification decision, Bridge was placed at the Northstar Center.
Because Bridge was charged with a crime, was unable to make bail, and was in the legal custody of the Department of Corrections, he was under "official detention"—and he remained under official detention even after he was transferred to the Northstar Center.[1]

On New Year's Day 2005, Bridge left the Northstar Center without permission. The Northstar staff notified the police, and the district court later issued a warrant for Bridge's arrest. He was arrested some fifteen months later and charged with second-degree escape.

In the superior court, Bridge argued that the Northstar Center was not a "correctional facility", and thus his act of walking away from the Center did not constitute second-degree escape. To help resolve this controversy, the superior court held a hearing at which the parties presented evidence concerning Bridge's status at the Northstar Center and the types of security measures employed at the Center. Based on the evidence presented at this hearing, the superior court concluded that the Northstar Center would qualify as a "correctional facility" for purposes of the escape statute (assuming the jury viewed the evidence in the light most favorable to the State).

Later, at Bridge's trial, in keeping with this pre-trial ruling, the superior court instructed the jury that "a halfway house under contract with the Department of Corrections ... is a correctional facility for ... individuals placed there by [the Department] for purposes of confinement [awaiting trial or sentencing]." Because it was undisputed that Bridge walked away from the Northstar Center without permission and without justification, the jury convicted Bridge of second-degree escape.

In this appeal, Bridge renews his argument that the Northstar Center did not qualify as a "correctional facility" for purposes of the escape statute. If Bridge is correct, then his act of leaving the Northstar Center without permission did not constitute second-degree escape; instead, his action constituted the lesser offense of fourth-degree escape under AS 11.56.330(a)(1). (This statute prohibits *any* act of "remov[ing] oneself from official detention for a misdemeanor".)

This Court's decision in State v. Crosby

This Court's decision in *State v. Crosby,* 770 P.2d 1154 (Alaska App.1989), is the primary appellate court decision construing the term "correctional facility" for purposes of Alaska's second-degree escape statute. Both Bridge and the State discuss *Crosby* at length in their briefs. Accordingly, to meaningfully address the arguments in the parties' briefs, we must examine the *Crosby* decision in some detail.
The defendant in *Crosby* was a sentenced prisoner who was released from prison on furlough to a residential drug treatment program, Akeela House.[2] Shortly after Crosby arrived at this residential facility, he walked away.[3] The State charged Crosby with second-degree escape, alleging (in the words of the statute) that he removed himself "from a correctional facility while under official detention."[4] The superior court ruled that Akeela House was *not* a "correctional facility" ***926** for purposes of the escape statute, and the State then appealed.[5]

The term "correctional facility" is defined in AS 11.81.900(b); it means "[any] premises ... used for the confinement of persons under official detention".[6] In *Crosby,* the State took the position that, under this

definition, the term "correctional facility" applied to *any* facility utilized by the Department of Corrections to house prisoners.[7] But this Court rejected the State's reading of the statutory definition.

This Court's explanation of why we rejected the State's interpretation of the statute is lengthy and somewhat difficult to follow, but the salient point of our analysis was that the statutory definition of "correctional facility" does not encompass any and all premises used for the *placement* or *custody* of persons under official detention. Rather, the statute defines "correctional facility" as premises used for the *confinement* of persons under official detention. *Crosby,* 770 P.2d at 1155.

Because our criminal code contained no definition of "confinement", we engaged in a lengthy analysis of the potential meanings of this word in the context of an escape statute. We concluded that the concept of "confinement" seemed to focus "not so much [on] the extent to which [a person's] freedom is restrained[, but rather on] *the specific manner* in which the restraints are imposed and enforced". *Id.* at 1157 (emphasis added).

We then offered two different explanations of why Crosby's placement at the Akeela House residential treatment center did not constitute "confinement"—and, thus, why Akeela House was not a "correctional facility" for purposes of the second-degree escape statute. Our decision to offer two different explanations appears to stem from the fact that the trial court record did not offer a clear answer as to whether Akeela House employed security guards or utilized physical restraints or barriers to keep residents from leaving the premises without permission.

This Court's first explanation of why Crosby was not in "confinement" at Akeela House was that, even though the conditions of Crosby's furlough from prison required him to remain at Akeela House, this restraint on his liberty was not "imposed or enforced in ways that amount to actual confinement". *Ibid.* We noted that "there [was] no indication" Akeela House had armed guards, physical restraints or barriers, or other security measures to physically prevent Crosby from leaving. *Ibid.*

This Court's second explanation of why Crosby was not in "confinement" at Akeela House appears to be based on the alternate possibility that Akeela House did, in fact, use guards or physical restraints to prevent residents from leaving without permission. We declared that "[any such] restrictions that Akeela House [placed] on its residents" were imposed for the purpose of furthering its treatment plan, and not because Akeela House was the agent of the Department of Corrections for the purpose of "maintaining security over its prisoners". *Ibid.* "Thus," we concluded, "to the extent that Akeela House relies on restrictive measures amounting to actual confinement, [this] confinement is clearly not confinement by the state." *Ibid.*

This second rationale appears to be squarely predicated on the fact that Crosby was a *furloughed* prisoner—*i.e.*, someone who had been granted "an authorized leave of absence from actual confinement for a designated purpose and period of time". AS 33.30.901(9) (the definition of "furlough"). In other words, the Department of Corrections had affirmatively decided to relinquish physical custody of Crosby for the purpose of allowing him to participate in the residential drug treatment program at Akeela House. Under the terms of Crosby's furlough, he was obligated to participate in this residential treatment program—but the Department apparently trusted Crosby to do just that, and the Department took no steps (either directly, or through agreement with Akeela ***927** House) to physically confine Crosby to the treatment facility. Rather, in the words of AS 33.30.091(9), Crosby was on a "leave of absence from actual confinement".

In sum, our decision in *Crosby* appears to have been ultimately based on the fact that the defendant was on furlough at the time he engaged in his unauthorized departure from Akeela House. But in our discussion of this issue, we suggested that even when a person is under official detention and living at a residential facility, the person is not "confined" there, for purposes of the escape statute, unless (1) the person is required to reside at the facility, (2) the person's required residency is enforced by guards or by physical restraints on the person's ability to leave, and (3) the guards or physical restraints are used at the behest of, or under the agency of, the Department of Corrections for the purpose of maintaining security over its prisoners, rather than for the private purposes of the corporation or group that runs the facility.

We note that the Alaska Legislature has not enacted a statutory definition of "confinement", nor has the legislature altered the statutory definition of "correctional facility", since we decided *Crosby* in 1989.

Bridge's argument on appeal

In his brief to this Court, Bridge focuses on the portion of *Crosby* where we suggested that "confinement" hinges "not so much [on] the extent to which [a person's] freedom is restrained[, but rather on] the specific manner in which the restraints are imposed and enforced".[8]

Bridge devotes the majority of his brief to a discussion of the lack of security measures at the Northstar Center. According to the testimony presented at the evidentiary hearing in this case, the Northstar Center is a "non-secure" facility, in that it does not have guards, or a security fence, or even surveillance cameras. Inmates

wear their own clothes, they have their own money, and they are not locked inside the facility. The members of the Northstar staff do not carry weapons, and they are instructed not to try to physically restrain inmates who leave the premises.

Relying on the absence of guards and physical restraints at the Northstar Center, Bridge argues that the Northstar Center is not a "correctional facility" because he was not subjected to "confinement" in the sense of physical restraints on his freedom. The problem with Bridge's argument is that it hinges on a portion of *Crosby* that appears to be dictum.

As we explained above, the *Crosby* decision offered two different explanations of why Crosby's residence at Akeela House did not constitute "confinement". The first explanation—*i.e.*, the portion of *Crosby* that Bridge relies on—dealt with the fact that Akeela House *apparently* did not utilize guards or physical restraints to keep residents from leaving without permission. But the record was unclear on this point, so this Court offered a second, alternative explanation for why Crosby's residence at Akeela House did not constitute "confinement". And under this second explanation, it was *irrelevant* whether Akeela House used guards or physical restraints to maintain control of its residents. This Court stated that even if Akeela House *did* utilize guards or physical restraints to keep residents from leaving, this would not constitute "confinement" for purposes of the escape statute—because these guards and physical restraints were not employed at the behest of the Department of Corrections, but rather were employed for the private purposes of Akeela House.[9]

Under this second rationale, the question of whether (or to what degree) the defendant in *Crosby* was subjected to physical restraints on his liberty during his residence at Akeela House was moot. The answer to this question made no difference to this Court's decision. Thus, our discussion of what type of restraint might constitute "confinement" for purposes of the escape statute became dictum.

928 *The question of "confinement" revisited

Bridge was not on furlough at the Northstar Center. That is, unlike the defendant in *Crosby*, no one had authorized Bridge to embark on a "leave of absence from actual confinement". Rather, Bridge was a misdemeanor defendant who was awaiting trial, and who had been remanded to the custody of the Department of Corrections because he was unable to make bail. Because of this, Bridge's case requires us to re-examine the question of what constitutes "confinement" for purposes of the escape statute.

The State's main argument in this appeal is that Bridge should be deemed to have escaped from "confinement" because the Department of Corrections placed Bridge at the Northstar Center in lieu of housing him at the Fairbanks Correctional Center. The State points out that Bridge knew that he was legally obligated to remain at the Northstar Center: Bridge was a prisoner who was being held in custody awaiting his trial, and he remained a prisoner even though he had been granted the benefit of waiting for his trial at a non-prison facility.

The State's description of Bridge's status is correct, but the State's argument is essentially the same one we rejected in *Crosby*. In *Crosby*, the State argued that the term "correctional facility" applied to *any* facility utilized by the Department of Corrections to house prisoners.[10] But as this Court noted in *Crosby*, the statutory definition of "correctional facility" does not encompass any and all premises used for the *placement* or *custody* of persons under official detention. Rather, the statute defines "correctional facility" as premises used for the *confinement* of persons under official detention. *Crosby*, 770 P.2d at 1155. Thus, we must decide whether the legislature intended the word "confinement" to mean something more specific or limited than "placement" or "custody".

One basic difficulty in answering this question is the fact that the word "confinement", like the word "convicted", can mean different things, depending on the context.[11]

For example, AS 33.30.065 authorizes the Department of Corrections to allow a prisoner to serve their term of imprisonment, or to serve their period of temporary commitment while awaiting trial, by living at home under electronic monitoring. One might speak of these prisoners as being "confined" to their residence, even though no one is guarding them, and even though they are permitted to leave their home for various authorized purposes.

But as we noted in *Crosby*, the commentary to the draft provisions of our current escape statutes suggests that the word "confinement" was being used in a more restrictive sense—the sense of actual physical restraints placed on a person's movement, enforced by officers whose duty is to keep the person from leaving without permission:

> [T]he tentative draft commentary to AS 11.56.310 ... suggests that escapes from "correctional facilities" were designated as [a higher degree of crime] because of the heightened danger posed by inmates who seek to remove themselves from secure facilities:
>
> > The Code classifies all escapes from correctional facilities ... as escape in the second degree, a class B felony. Existing law differentiates between an escapee who has committed a felony and one who has committed a misdemeanor; an escape by a

> misdemeanant is classified as a misdemeanor. The [Criminal Code Revision] Subcommission concluded that the danger to society resulting from correctional facility escapes is substantial, regardless of whether the escapee is a felon or misdemeanant. The classification of all correctional facility escapes as serious felonies is consistent with the Code provision on the justifiable use of force in preventing an escape from a correctional facility[.]

***929** *Crosby,* 770 P.2d at 1155, quoting Alaska Criminal Code Revision, Tentative Draft, Vol. 4 (1977), pp. 47–48.

This passage from the commentary to the Tentative Draft suggests that the drafters intended to draw a distinction between (1) all prisoners who unlawfully depart from the premises where they have been placed by the Department of Corrections, and (2) those prisoners who unlawfully depart from a facility where there are restraints or limitations on the prisoners' movement, and where corrections officers or other facility staff, acting as agents of the Department, are charged with the duty of preventing the prisoners from departing without permission. It is in these latter circumstances that an escape or attempted escape from the facility poses a heightened danger.

This was the context in which the *Crosby* court remarked that the word "confinement", as used in the statutory definition of "correctional facility", and as interpreted in the context of the second-degree escape statute, "seems to deal not so much with the extent to which [a person's] freedom is restrained as with the specific manner in which the restraints are imposed and enforced." *Crosby,* 770 P.2d at 1157.

In other words, there would be no "confinement" if a prisoner is subject only to *legal* restraints on their physical liberty, in the form of a Department of Corrections order directing them to reside at a particular facility. Rather, "confinement" would exist only when the prisoner's residence at the facility is forcibly maintained.

We note that the legislature appears to have used the word "confined" in this same narrow sense in AS 33.30.181(a), a statute that deals with prisoners whom the Department of Corrections has placed in a community restitution center. This statute declares that a prisoner who has been placed in one of these centers "shall be confined to the center at all times" *except* when the person is at work, or is traveling to and from work (or to attend a job interview), or is absent for another purpose specially approved by the commissioner. In this statute, the phrase "confined to the [community restitution] center" clearly means something more narrow than "placed in a community restitution center" or "classified to a community restitution center".

As we noted earlier in this opinion, this is not the only sense in which people use the words "confine" or "confinement". These words can mean different things in different contexts.

For example, when our supreme court declared in *Rust v. State* that the Commissioner of Corrections has the sole discretion to designate "the prison facility to which the prisoner is to be confined",[12] it is clear that the supreme court was using the word "confined" in the broader sense of "placed".

Similarly, it may make good sense to give the word "confinement" a broader meaning for purposes of interpreting AS 33.30.193, the statute that guarantees prisoners meaningful access to the courts for the purpose of challenging "the conditions of the prisoner's confinement". And it would seem that a broader interpretation of "confinement" might be justified when interpreting AS 33.30.211(b), the statute which provides that copies of a prisoner's pre-sentence report "and any other information ... that may affect the person's rehabilitation" shall be transmitted to the superintendent of the correctional facility in which the prisoner is "confined". For the same reasons, a broader interpretation of "confinement" might be warranted when interpreting AS 33.36.010, the statute which declares that it is the policy of the State of Alaska "not to transfer a resident inmate [to a facility] outside of [this] state" under the Interstate Corrections Compact "if [the] inmate's continued confinement in Alaska will better facilitate [their] rehabilitation or treatment".

In Judge Bolger's dissenting opinion, he asserts that the definition of "confinement" that we adopt in the present case will have manifold unfortunate consequences—because that same definition will apply in all of the contexts we have just mentioned, as well as several other contexts that Judge Bolger lists in his dissent. We disagree.

***930 1** The limited question before us is the proper interpretation of "confinement" for purposes of interpreting the scope of the second-degree escape statute. Our definition of "confinement" for this particular purpose does not necessarily govern the meaning of this term for other purposes—because it is possible for the same word or phrase to have different meanings in different contexts. For example, this Court has repeatedly recognized that the word "conviction" can mean different things, depending on the context of the statute or rule being construed. *See Larson v. State,* 688 P.2d 592, 597–98 (Alaska App.1984); *Kelly v. State,* 663 P.2d 967, 971–72 (Alaska App.1983).

In the present appeal, our task is to identify the conduct that constitutes an escape from confinement for purposes

of the second-degree escape statute. This statute declares that any escape from a "correctional facility" is a class B felony, even when the defendant's underlying criminal conduct (or charged conduct) is only a misdemeanor.

As we explained in *Crosby,* and as we explained earlier in this opinion, the commentary to the Tentative Draft of our criminal code suggests that the legislature's underlying justification for this decision was the perception that escapes from correctional facilities pose a significantly greater degree of danger than other escapes, even when the defendant's underlying crime or criminal charge is not itself particularly serious.

But this rationale—the greater potential danger posed by an escape from "confinement"—does not appear to apply to situations like the one presented in Bridge's case: situations where a prisoner simply walks away from a residence where they have been directed to stay. Rather, the legislature's rationale appears to apply only when the restrictions on a prisoner's physical liberty are enforced by officers whose duty is to keep the person from leaving without permission.

We agree with the State that a prisoner can be "confined" in a facility, for purposes of the second-degree escape statute, even though that facility does not have "gun tower[s] or a fence topped with barbed wire to keep [prisoners] in place". The paramount distinction between "placement" at a facility and "confinement" at a facility is the presence of corrections officers or other people whose duty is to prevent unauthorized departures from the facility—because the increased danger posed by escapes or attempted escapes from such facilities stems from the conflict or risk of conflict between the prisoner and these officers.

Thus, for instance, a work farm that has no towers and no restraining wall or fence could still be a place of "confinement" if it was staffed by corrections officers whose duty was to prevent prisoners from leaving without permission. But on the other hand, the fact that a halfway house has a wall or fence running around the perimeter of its lawn would not, of itself, convert the halfway house to a place of "confinement" if, as in Bridge's case, no officer or staff member had the duty to stop residents from leaving the halfway house without permission.

For these reasons, we agree with Bridge that the superior court was wrong to instruct Bridge's jury that the Northstar Center was a "correctional facility" simply because it housed defendants who were placed there by the Department of Corrections pending their trial or sentencing. The Northstar Center's status as a "correctional facility" hinged on an additional question of fact: whether prisoners' residence at the Center was forcibly maintained by corrections officers or by other guards or staff members acting as agents of the Department of Corrections (either formally or *de facto*).

The procedural posture of Bridge's case

During the pre-trial proceedings in Bridge's case, the superior court ruled that it was irrelevant what types of restraints or controls were placed on prisoners at the Northstar Center. Instead, the superior court ruled that *any* halfway house was a "correctional facility" if, under contract with the Department of Corrections, it housed defendants who were in custody awaiting trial or sentencing.

At Bridge's trial, the jurors were instructed in accordance with the superior court's ruling. That is, the jurors were told: "A ***931** halfway house under contract with [the] Department of Corrections ... is a correctional facility for pre-sentenced individuals placed there by [the Department] for purposes of confinement." In addition, the trial judge barred the defense attorney from arguing that the Northstar Center did not qualify as a "correctional facility" because the Center did not impose physical restraints on the freedom of its residents.

As we have explained, this jury instruction and this ruling were wrong. If the staff of the Northstar Center had no duty to physically prevent inmates from leaving without permission, then the Northstar Center was not a "correctional facility"-not a facility where prisoners were "confined".

For this reason, Bridge is entitled to a new trial on the charge of second-degree escape.
2 In a single sentence at the end of his opening brief, Bridge asserts that the double jeopardy clause bars the State from retrying him on this charge. This is incorrect. The flaw in Bridge's trial is that the jurors were misinstructed, in the government's favor, on an element of the offense. The constitution does not bar a retrial under these circumstances.13

If the State believes that it will be unable to establish that the Northstar Center qualifies as a "correctional facility" under the test we have announced here, then the State may ask the superior court to enter judgement against Bridge on the lesser offense of fourth-degree escape under AS 11.56.330(a)(1)—the statute which prohibits any act of "remov[ing] oneself from official detention for a misdemeanor".

The judgement of the superior court is REVERSED.

BOLGER, Judge, dissenting.

We recently held that a prisoner at a halfway house was "confined" in a "correctional facility" for purposes of the good-time credit statute.[1] I believe that the escape statute should be construed the same way. The requirement of armed guards is not mentioned in the text or history of this statute or in the numerous other criminal procedure statutes where these terms are used.

The central issue in this case is whether Northstar Center is a "correctional facility"—that is, a "premises ... used for the confinement of persons under official detention."[2] We considered the meaning of the term "confinement" when we addressed another section of the escape statute in *Beckman v. State*.[3] We concluded that Beckman was subject to "confinement" when he was allowed to attend residential treatment at Akeela House.[4] But Beckman was not confined "under an order of a court," as required by the definition of "official detention," because he was released to attend Akeela House as a condition of his probation.[5]

The legislature amended the definition of "official detention" in 1991.[6] The amendment was intended to overrule two of our cases that had construed this term narrowly.[7] I believe that the amendment corrected an ambiguity in the term "confinement" as it had been previously construed. The definition of "official detention" now includes "actual or constructive restraint" imposed by a court order.[8] When this definition is inserted into the definition of "correctional facility," that term now includes a facility designated for "confinement" under the constructive restraint of a court order. In other words, the statute now includes facilities where the prisoners are constructively restrained ***932** as well as facilities with barbed wire and armed guards.

The terms "confinement" and "correctional facility" are used in many criminal statutes. The definition of "correctional facility" that we construe in this case will also determine the scope of correctional facility litigation,[9] liability for sexual assault,[10] liability for promoting contraband,[11] the responsibility for victim notification in domestic violence cases,[12] the liability for correctional facility surcharges,[13] and the deadline for sex offender registration.[14] None of these applications suggest that this term should be limited to facilities with armed guards.

These terms are also used to define the requirements for criminal punishment. Various statutes require that a person sentenced to imprisonment must report to serve a term of "confinement" at a "correctional facility,"[15] that he will accrue good-time credit if he follows the rules of the "correctional facility" where he is "confined,"[16] that he will be returned to "confinement" in a "correctional facility" if he violates parole,[17] and that he will begin probation upon his release from "confinement in a correctional facility."[18]

My point is that these terms are used throughout the criminal statutes, and they should be construed consistently.[19] I would read the terms that apply to the escape statute in the same way that we have applied those terms to the good-time credit statute. In other words, I agree with the trial judge's instruction in this case—a halfway house is a "correctional facility" for those pretrial detainees who are placed there by the Department of Corrections.

Footnotes

1 The term "official detention" is defined as "custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release". AS 11.81.900(b)(40).

2 *Crosby,* 770 P.2d at 1154.

3 *Id.* at 1155.

4 *Ibid.*

5 *Ibid.*

6 At the time of the litigation in *Crosby,* this definition was found in AS 11.81.900(b)(7). Since then, the statute has been renumbered as section 900(b)(9), but the definition remains the same.

7 *Crosby,* 770 P.2d at 1155.

8 *Id.* at 1157.

9 *Ibid.*

10 *Crosby,* 770 P.2d at 1155.

11 *See State v. Otness,* 986 P.2d 890, 893 (Alaska App.1999): "This court has recognized that the term 'convicted' can have different

meanings, depending on the context. For some purposes, defendants are deemed 'convicted' when a jury or a judge finds them guilty. For other purposes, defendants are not 'convicted' until the court formally enters judgement against them following the sentencing hearing." (Footnotes omitted)

12 582 P.2d 134, 137 (Alaska 1978).

13 *See West v. State,* 223 P.3d 634, 639–640 (Alaska App.2010); *Burks v. United States,* 437 U.S. 1, 15–16, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978); *State v. Kalaola,* 124 Hawai'i 43, 237 P.3d 1109, 1141 (2010); *State v. Rosaire,* 123 N.M. 250, 939 P.2d 597, 601–02 (App.1996).

1 *State v. Shetters,* 246 P.3d 332, 333 (Alaska App.), *aff'd on reh'g,* 246 P.3d 338 (Alaska App.2010).

2 AS 11.81.900(b)(9).

3 689 P.2d 500 (Alaska App.1984).

4 *Id.* at 502.

5 *Id.*

6 *See* Ch. 91, § 3, SLA 1991.

7 *See id.* at § 1.

8 AS 11.81.900(b)(40).

9 *See* AS 09.19.200(g)(3).

10 *See* AS 11.41.425(a)(2).

11 *See* AS 11.56.375, .380.

12 *See* AS 12.30.027(d).

13 *See* AS 12.55.041(a).

14 *See* AS 12.63.010(a)(1).

15 *See* AS 12.55.025(c).

16 *See* AS 33.20.010(a).

17 *See* AS 33.16.250(a).

18 *See* AS 12.55.125(*o*).

19 *See State v. Strane,* 61 P.3d 1284, 1286 n. 4 (Alaska 2003) (stating that statutes relating to the same subject matter should be construed together as a scheme that maintains the integrity of each statute).

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225 P.3d 571
Supreme Court of Alaska.

Sidney HERTZ, Appellant,
v.
Dan CAROTHERS, Appellee.

No. S-13245. | Feb. 12, 2010. | Rehearing Denied March 10, 2010.

Synopsis

Background: Prisoner's civil rights action against State was dismissed and Superior Court awarded attorney's fees to the State. State attempted to execute judgment against prisoner trust account. Prisoner objected. The Superior Court, First Judicial District, Juneau, Patricia A. Collins, J., held that prisoner was properly served, trust account was subject to execution, and that State's attorney should not be sanctioned. Prisoner appealed.

Holdings: The Supreme Court, Christen, J., held that:
1 State did not comply with notice requirements, but prisoner was not prejudiced;
2 statutes governing prisoner trust accounts did not conflict with one another;
3 statute allowing disbursement of prisoner trust accounts in order to satisfy judgments was not an ex post facto law;
4 statute did not violate contract clause; and
5 attorney's failure to comply with notice requirements did not warrant sanctions.

Affirmed in part, reversed in part.

West Headnotes (13)

1 **Appeal and Error**
⇐Cases Triable in Appellate Court

Supreme Court reviews issues of statutory interpretation, as well as questions about the constitutionality of statutes, de novo.

2 **Appeal and Error**
⇐Costs and Allowances

Decisions whether to sanction attorneys are reviewed for abuse of discretion.

3 **Appeal and Error**
⇐Proceedings Preliminary to Trial

A judge's refusal to recuse him- or herself is reviewed under the abuse of discretion standard.

4 **Execution**
⇐Notice of levy

State did not comply with notice requirements in rule governing permissible methods for serving a summons in State's action seeking to execute judgment against prisoner trust account, but failure did not prejudice prisoner; prison guard who delivered documents to prisoner was not a peace officer or person specially appointed to serve process with the meaning of the rule, but prisoner had actual notice. Rules Civ.Proc., Rule 4.

5 **Execution**
⇐Property in custody of agent or depositary
Prisons
⇐Money and finances; inmate accounts
Prisons
⇐Wages or earnings
Statutes
⇐Nature and subject-matter of statute

Statute providing for prisoners to be compensated for their work in prison and wages to be placed in trust account did not conflict with statute allowing for disbursement of prisoner trust account to satisfy a judgment; statutes were not criminal statutes, as prisoner asserted, and therefore did not have to be strictly construed against the State. AS 09.38.030(f)(5), 33.30.201(d).

6 **Constitutional Law**
⇐Sentencing and Imprisonment
Execution
⇐Property in custody of agent or depositary

Statute allowing disbursement of prisoner trust accounts in order to satisfy judgments was not an ex post facto law, where statute did not criminalize behavior that was previously not criminal and it had no bearing on the defense of any crime. U.S.C.A. Const. Art. 1, § 10, cl. 1; AS 09.38.030(f)(5).

7 **Constitutional Law**
⇐Punishment in general
Constitutional Law
⇐Criminal Proceedings

Any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. U.S.C.A. Const. Art. 1, § 10, cl. 1.

8 **Constitutional Law**
⇐Contracts with states in general
Execution
⇐Property in custody of agent or depositary

Statute allowing disbursement of prisoner trust accounts in order to satisfy judgments did not violate contract clause; statute did not impair prisoners' ability to seek enforcement of the *Cleary* consent decree which set minimum standards for conditions of prisoner confinement and procedures for prisoners to file grievances for non-compliance with decree. U.S.C.A. Const. Art. 1, § 10, cl. 1; Const. Art. 1, § 15; AS 09.38.030(f)(5).

9 **Judgment**
⇐Construction and operation of judgment

The *Cleary* consent decree sets minimum standards for conditions of prisoner confinement including food, medical care, and dental care and provides procedures for prisoners to file grievances for non-compliance with the decree.

10 **Prisons**
⇐Access to Courts and Public Officials

An inmate's right to be free of state interference with his right of access to the court system is not absolute.

11 **Constitutional Law**
⇐Prisoners and pretrial detainees

A statute is constitutional if it does not impermissibly interfere with, or burden, an inmate's right of access to the court and is sufficiently related to a legitimate government interest.

12 **Attorney and Client**
⇐Liability for costs; sanctions

State's counsel's failure to comply with notice requirements in State's action to execute judgment against prisoner trust account did not warrant sanctions against counsel under civil rule of procedure or rules of professional conduct; there was no evidence that State's counsel intended to deprive prisoner of his right to notice. Rules Civ.Proc., Rules 4, 95(b).

13 **Appeal and Error**
⇐Disqualification of judge

Prisoner waived for appellate review his argument that trial judge should have recused

herself in State's action to execute a judgment against prisoner trust account, where prisoner failed to move for disqualification in the superior court.

Attorneys and Law Firms

***572** Sidney R. Hertz, pro se, Seward.
Marilyn J. Kamm, Assistant Attorney General, Richard A. Svobodny, Acting Attorney General, Juneau, for Appellee.

Before: EASTAUGH, WINFREE and CHRISTEN, Justices.

Opinion

OPINION

CHRISTEN, Justice.

I. INTRODUCTION

This is the second time we have addressed Sidney Hertz's objections to the State's attempt to execute a judgment against his prisoner trust account. In *Hertz v. Carothers*[1] (*Hertz I*), Hertz challenged the State's right to execute on his prisoner trust account to satisfy a judgment for Alaska Civil Rule 82 attorney's fees entered after Hertz lost a prisoner civil rights lawsuit against the State. There, we affirmed the validity of AS 09.38.030(f) which excludes prisoners from an exemption for low wage earners. Following *Hertz I*, the State again levied on Hertz's trust account to satisfy the remainder of its judgment. Hertz now challenges the levy on the grounds that (1) he was not served properly; (2) "ambiguities" between AS 09.38.030(f) and AS 33.30.201(d) should be resolved in his favor; (3) AS 09.38.030(f)(5) is an *ex post facto* law; and (4) AS 09.38.030(f)(5) violates the contract clauses of the Alaska and United States Constitutions. We reverse the court's ruling that Hertz was properly served but affirm the court's rulings that Hertz's prisoner trust account is subject to execution and that the State's attorney should not be sanctioned. We also hold that AS 09.38.030(f) is not an *ex post facto* law and that it does not violate the contract clause of the Alaska Constitution or the contract clause of the United States Constitution.

II. FACTS AND PROCEEDINGS

Hertz is an inmate at Spring Creek Correctional Center ("SCCC"). In July 2004 he sued the Alaska Department of Corrections ***573** and several of its employees for alleged civil rights violations.[2] The superior court dismissed Hertz's civil rights suit and awarded Rule 82 attorney's fees of $3,225 to the State.[3] The fee award was later reduced to a judgment.[4] When the State attempted to execute against Hertz's prisoner trust account to satisfy the judgment, Hertz claimed exemptions under AS 09.38.030(a) and (b).[5] Specifically, he argued that his wages were exempt from execution because they fell below the statutory minimum in AS 09.38.030.[6] Alternatively, he argued that the statute was invalid under several different theories.[7] In our January 2008 decision, *Hertz I*, we affirmed the superior court's order rejecting Hertz's claims of exemption.[8] We also affirmed the validity of AS 09.38.030(f).[9]

On March 14, 2008, the State again sought to execute against Hertz's prisoner account to satisfy the remaining portion of its judgment. The State's service instructions directed the Alaska State Troopers (Judicial Services) to serve the writ of execution and creditor's affidavit on Superintendent Turnbull at SCCC. The service instruction form contained a separate section entitled "Instructions for Serving Notices on the Debtor," which directed that a copy of the State's creditor's affidavit, notice of levy and sale of property, notice of right to exemptions, claim of exemptions form, and judgment debtor booklet be served on Hertz. On June 12, 2008, a trooper served the writ of execution on Superintendent Turnbull. The trooper did not serve any documents on Hertz.

It is undisputed that Hertz had actual knowledge of the State's attempt to execute against his prisoner trust account by June 17, 2008, when he sent a letter to the superior court challenging the State's "theft" of his money based in part on lack of notice. When the State's counsel realized that Hertz had not been served, she faxed the documents that should have been served on Hertz to SCCC. A prison guard personally delivered them to Hertz on June 19, 2008.

Hertz responded to the faxed documents by filing several claims of exemption in which he argued that (1) improper service voids the levy; (2) "ambiguities" between AS 33.30.201(d)-which provides that the "primary purpose" of the prisoner trust account is to make funds available for prisoners' use at the time of release-and AS 09.38.030(f)(5)-which allows the execution of judgments against prisoner accounts-must be construed against the government; and (3) $185 in his trust account was not subject to execution because he had received it in the

form of gifts from family and friends and the money should have been retained by the commissioner pursuant to AS 33.30.201(d).

On August 5, 2008, the superior court denied Hertz's claims of exemption, citing *Hertz I.* The superior court reasoned that our court "has ruled that a prisoner's trust account may be subject to execution," and noted that there is no exception in the statutory scheme for money acquired by gift. Finally, the court rejected Hertz's argument that the errors in the State's service should negate the writ because "there is no prejudice by [the] delayed service and no showing of a knowing violation of the statute." The superior court rejected Hertz's motion for reconsideration.

Hertz appeals.

III. STANDARDS OF REVIEW

1 2 3 We review issues of statutory interpretation, as well as questions about the constitutionality of statutes, de novo.[10] "Decisions whether to sanction attorneys are reviewed ***574** for abuse of discretion."[11] "A judge's refusal to recuse him- or herself is reviewed under the abuse of discretion standard."[12]

IV. DISCUSSION

A. The Execution on Hertz's Prisoner Trust Account Was Invalid Because the State Failed To Properly Serve Him.

4 The State argues that it was in technical compliance with AS 09.38.085(a)(1) because it served Hertz with a notice of levy, a claim of exemptions form, a creditor's affidavit, and a judgment debtor's handbook. But the State misses the crux of Hertz's argument. Hertz's challenge is not to the sufficiency of the documents served; he challenges the State's method of service.

Several statutes and rules describe the notice the State was required to provide Hertz before levying on his trust account. Alaska Statute 09.38.080(c) requires that "[b]efore, at the time of, or within three days after the levy, the creditor shall serve on the individual [debtor] a notice under AS 09.38.085." Alaska Statute 09.38.085 describes the content of the required notices, and AS 09.38.500, the definitions section of the Alaska Exemptions Act, specifies the method for serving the notices. The term "serve notice" in AS 09.38.080(c) means "to give the person to be served a written personal notice in the same manner a summons in a civil action is served, or to mail the notice to the person's last known address by first-class mail and by using a form of mail requiring a signed receipt."[13] Hertz was served personally, not by mail, so we turn to the civil rules.

Civil Rule 4 identifies the permissible methods for serving a summons in a civil action. It requires service to "be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail." The rule defines "peace officer" as "any officer of the state police, members of the police of any incorporated city, village or borough, United States Marshals and their deputies, other officers whose duty it is to enforce and preserve the public peace, and ... persons specially appointed." Special appointments "shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant."[14]

After the State's counsel learned that the trooper had failed to serve Hertz as instructed, she faxed the documents to SCCC. A prison guard delivered them to Hertz on June 19, 2008. But the State did not argue, and the record does not show, that the prison guard who served Hertz was a "peace officer" or a person "specially appointed to serve process" within the meaning of Civil Rule 4. We agree with the superior court that the delay in service was not prejudicial to Hertz, but the State was still required to use an authorized method of service. The record does not show that the State complied with Civil Rule 4.[15]

We are mindful that our ruling regarding service may appear to elevate form over substance because Hertz had actual knowledge of the levy by June 16, 2008. But we are loathe to carve out exceptions to the important rules for service of process. These rules enable courts to verify that service has actually been made; they are vital to ensuring that litigants receive the due process to which they are entitled, and they are broadly applicable. Creating an exception merely to avoid requiring the State to properly serve Hertz is fraught with precedential danger. Such an exception, though seemingly narrow, could be applied in future cases to relax the notice requirements for litigants ***575** who might not have received the actual notice Hertz enjoyed. This danger would be especially acute in cases involving requests for entry of default judgment. Given the serious consequences of execution, i.e., the involuntary confiscation of a debtor's property, we must insist on strict compliance with the legislature's statutory scheme and the service requirements of Civil Rule 4.[16]

B. Alaska Statutes 33.30.201(d) and 09.38.030(f)(5) Do Not Conflict and Are Not Ambiguous.

5 Alaska Statute 33.30.201(d) provides for prisoners to be compensated for their work in prison and for their wages to be placed in a trust account for the "primary purpose"

of being available to them at the time of release. But AS 09.38.030(f) provides that "[a]ll money in an incarcerated person's account at a correctional facility is available for disbursement under a notice of levy under this subsection ... (5) to satisfy other judgments entered against a prisoner in litigation against the state." Hertz argues that the "primary purpose" language of AS 33.30.201(d) conflicts with the disbursement scheme in AS 09.38.030(f). Citing this "ambiguity" Hertz argues that "[a]mbiguities in criminal statutes must be narrowly read and construe[d] strictly against the government."

In *Hertz I*, we upheld the state's ability to execute on prisoner accounts despite an exemption for low-wage earners and those who are paid semi-monthly.[17] We noted that AS 09.38.030(f)(5) specifically eliminates the low-wages exemption when low wages are paid to prisoners.[18]

Hertz's present challenge to AS 09.38.030(f)(5) is technically barred by the doctrine of res judicata;[19] he was required to raise all of his challenges to the statute in *Hertz I*.[20] But Hertz's argument is unavailing even on the merits. Alaska Statute 33.30.201 states that prisoner wages shall be disbursed pursuant to a specified order of priority and that remaining funds are to be given to the prisoner when he or she is released, subject to exceptions. After all disbursements are paid in the statutorily required order of priority, subsection .201(f) states that remaining funds are subject to lien, attachment, garnishment, execution, or similar procedures to encumber money or property. This provision does not conflict with AS 09.38.030(f)(5). Alaska Statutes 33.30.201(c) and (f) identify the priorities for which a prisoner's trust account can be invaded, and AS 09.38.030(f) explains that prisoners do not enjoy the benefit of the exemption for earnings and liquid assets enunciated in AS 09.38.030 generally. Both statutes contemplate and accommodate the execution and garnishment of prisoner trust accounts.

To the extent that Hertz argues that these statutes must be construed against the State because they are "criminal statutes," he is mistaken. The fact that these statutes govern the administration of prisoner trust accounts does not make them "criminal statutes." Hertz has cited no authority and we have found none supporting his assertion that statutes should be strictly construed against the State merely because they apply to convicted felons. Alaska Statutes 09.38.030 and 33.30.201 are civil statutes, they are not ambiguous, and they do not conflict. After all disbursements are made from a prisoner's trust account pursuant to the statute's order of priority, all remaining funds are subject to execution.

***576 C. Alaska Statute 09.38.030(f)(5) Is Not an *Ex Post Facto* Law.**

6 Hertz asserts that AS 09.38.030(f)(5) is an *ex post facto* law. The basis for this argument is that this statute was passed in 1995, after the State entered into a consent decree to resolve litigation challenging the conditions of confinement for Alaska prisoners.[21] Hertz argues that the adoption of AS 09.38.030(f)(5) in the wake of the *Cleary* consent decree creates the appearance that AS 09.38.030(f)(5) "was enacted solely for the purpose of circumventing the *Cleary* [Final Settlement Agreement and Order]."

7 We have adopted the United States Supreme Court's view that:

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.[22]

Alaska Statute 09.38.030(f)(5) does not criminalize behavior that was previously not criminal and it has no bearing on the defense of any crime; it is not an *ex post facto* law.

D. Alaska Statute 09.38.030(f)(5) Does Not Violate the Contract Clause.

8 Hertz argues that AS 09.38.030(f)(5) violates the contract clause of the United States Constitution and the contract clause of the Alaska Constitution by "substantial[ly] impair[ing]" his contractual right to allege noncompliance with the *Cleary* consent decree. He supports this argument by pointing out that "this Court has admitted that AS 09.38.030(f)(5) was to discourage prisoner litigation." Our court has explained:

> Article I, section 15 of the Alaska Constitution provides: "No law impairing the obligation of contracts ... shall be passed." Because the language of the contract clause of the Alaska Constitution is nearly identical to that of the federal Contract Clause, we apply the same two-part analysis to alleged violations of the Alaska and federal contract clauses. We first ask "whether the change in state law has operated as a substantial impairment of a contractual relationship." If there is a substantial impairment, we then examine "whether the impairment is reasonable and necessary to serve an important public purpose."
>
> ....
>
> Under the first prong of the contract clause test, we

consider: (1) whether there is a contractual relationship, (2) whether the law impairs the contractual relationship, and (3) whether the impairment is substantial.[23]

9 The *Cleary* consent decree sets minimum standards for conditions of prisoner confinement including food, medical care, and dental care. It also provides procedures for prisoners to file grievances for non-compliance with the decree.[24] After exhausting the "administrative grievance procedure," an inmate may file suit in superior court. In this case, the State does not challenge Hertz's assertion that the *Cleary* consent decree established a contractual relationship between the State and inmates in the custody of the State of Alaska,[25] arguing instead that even if such a contractual relationship exists, AS 09.38.030(f) does not impair it. We agree; AS 09.38.030(f) does not impair prisoners' ability to seek enforcement of the *Cleary* consent decree. We do not need to decide ***577** whether the *Cleary* consent decree constitutes a binding contract.

10 11 Civil Rule 82 provides for the award of attorney's fees to the prevailing party of a civil lawsuit. Civil Rule 82 was in effect when the *Cleary* consent decree was entered, November 1, 1990. The consent decree addresses certain conditions of confinement; it does not immunize prisoners from attorney's fee awards or exempt inmate trust accounts from execution to satisfy fee awards. Alaska Statute 09.38.030(f)(5) allocates some of the State's cost of defending lawsuits to the non-prevailing prisoner, thereby discouraging frivolous claims.[26] "An inmate's right to be free of state interference with his right of access to the court system is not absolute."[27] A statute is constitutional if it "does not impermissibly interfere with, or burden, an inmate's right of access to the court and is sufficiently related to a legitimate government interest."[28] Alaska Statute 09.38.030(f)(5) does not prevent or stifle a prisoner's ability to pursue legitimate claims against the government.

The specter of Rule 82 fees tempers the litigiousness of most civil litigants; we see no reason to make a special exception for inmates. Alaska Statute 09.38.030(f)(5) merely reflects the State's interest in discouraging frivolous prisoner litigation, a legitimate goal we have repeatedly upheld.[29] We are not convinced that permitting the State to collect judgments from prisoner trust accounts impairs the right of prisoners to seek enforcement of the *Cleary* consent decree,[30] and we hold that AS 09.38.030(f)(5) does not violate the Alaska or federal prohibition against impairment of contracts.

E. There Was No Misconduct by the State's Attorney.

12 Hertz asserts that the superior court erred by failing to sanction the State's counsel under Professional Conduct Rule 95(b) for (1) failing to have him served by a peace officer; and (2) for lying because she "never intended to serve Hertz with the Writ."

The superior court correctly decided that Hertz's claims of attorney misconduct are meritless. There is no evidence that the State's counsel acted inappropriately during the course of her efforts to collect the State's judgment. At most, there is evidence that a mistake was made at the time of service. Ironically, Hertz's allegation of misconduct arises from counsel's rush to arrange for personal delivery of the documents that would notify Hertz of his right to claim exemptions; the State's attorney likely faxed the documents to SCCC for immediate delivery in order to comply with AS 09.38.080(c), which requires the debtor to receive notice "[b]efore, at the time of, or within three days after the levy."

Even though the State failed to comply with Civil Rule 4, there is no evidence that the State's counsel intended to deprive Hertz of his right to notice. Hertz admits that he received the relevant documents by fax just days after he learned of the levy and apparently shortly after the State's attorney discovered the mistake. The superior court appropriately declined to sanction the State's attorney.

F. Hertz Waived His Argument that Judge Collins Should Have Recused Herself Because of Apparent Bias Against Prisoners.

13 Hertz argues that the superior court judge created an appearance of impropriety by ruling on his claim of exemptions before receiving his response to the State's objections. ***578** [31] We see no evidence of any bias in the record. And Hertz waived the issue in any event by failing to move for disqualification in the superior court.[32]

IV. CONCLUSION

We REVERSE the court's ruling that Hertz was adequately served, but hold that AS 33.30.201(d) and AS 09.38.030(f)(5) do not conflict and are not ambiguous, that AS 09.38.030(f)(5) is not an *ex post facto* law, and that AS 09.38.030(f)(5) does not violate the contract clause of the Alaska Constitution or United States Constitution. We AFFIRM the superior court's rulings that Hertz's trust account is subject to execution and that the State's attorney should not be sanctioned.

CARPENETI, Chief Justice and FABE, Justice, not

participating.

Footnotes

1 174 P.3d 243 (Alaska 2008).

2 *Id.* at 245.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Hertz v. Carothers,* 174 P.3d 243, 245 (Alaska 2008).

8 *Id.*

9 *Id.* at 244.

10 *C.J. v. State, Dep't of Corr.,* 151 P.3d 373, 377 (Alaska 2006) (citing *State v. Alaska Civil Liberties Union,* 978 P.2d 597, 603 (Alaska 1999); *Boone v. Gipson,* 920 P.2d 746, 748 (Alaska 1996)).

11 *Hertz,* 174 P.3d at 245 (citing *In re Schmidt,* 114 P.3d 816, 819 (Alaska 2005)).

12 *Mustafoski v. State,* 867 P.2d 824, 832 (Alaska App.1994) (citing *Blake v. Gilbert,* 702 P.2d 631, 640 (Alaska 1985); *Perotti v. State,* 806 P.2d 325, 327 (Alaska App.1991)).

13 AS 09.38.500(14).

14 Alaska R. Civ. P. 4(c)(3).

15 The State's reliance on the substantial compliance provision in AS 09.38.085(c) is misplaced. That provision excuses errors in the notices themselves, not errors in the physical delivery of the forms.

16 *See Beery v. Browning,* 717 P.2d 365, 367 n. 8 (Alaska 1986).

17 *Hertz v. Carothers,* 174 P.3d 243, 246 (Alaska 2008).

18 *Id.*

19 *See Plumber v. Univ. of Alaska Anchorage,* 936 P.2d 163, 166 (Alaska 1997) ("The doctrine of *res judicata* as adopted in Alaska provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, [and] (3) in a dispute between the same parties ... about the same cause of action.").

20 *Calhoun v. Greening,* 636 P.2d 69, 72 (Alaska 1981) ("[A] fundamental tenet of the res judicata doctrine is that it precludes relitigation between the same parties not only of claims that were raised in the initial proceeding, but also of those relevant claims that could have been raised then.").

21 *Cleary v. Smith,* No. 3AN-81-5274 Ci., Final Settlement Agreement and Order (Alaska Super., September 21, 1990).

22 *State v. Anthony,* 816 P.2d 1377, 1378 (Alaska 1991) (quoting *Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)).

23 *Hageland Aviation Serv., Inc. v. Harms,* 210 P.3d 444, 451-52 (Alaska 2009) (internal footnotes and citations omitted).

24 *Cleary v. Smith,* No. 3AN-81-5274 Ci., Final Settlement Agreement and Order (Alaska Super., September 21, 1990).

25 *See Hertz v. State, Dep't of Corr.,* --- P.3d ----, Op. No. 12842 at n. 33, 2010 WL 53112 (Alaska, January 8, 2010) (noting dicta in *Rathke v. Corr. Corp. of Am.,* 153 P.3d 303, 311 (Alaska 2007) that "the FSA 'is an enforceable contract between Alaska inmates and the state.' ")

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26 *Hertz v. Carothers,* 174 P.3d 243, 247 (Alaska 2008).

27 *Brandon v. Corr. Corp. of Am.,* 28 P.3d 269, 277 (Alaska 2001) (quoting *Mathis v. Sauser,* 942 P.2d 1117, 1121 (Alaska 1997)).

28 *Id.*

29 *See Hertz,* 174 P.3d at 248; *Brandon,* 28 P.3d at 277 (affirming the validity of a statute requiring prisoners to pay a portion of filing fees based on ability to pay).

30 *Cf. Hageland Aviation Serv., Inc. v. Harms,* 210 P.3d 444, 453 ("Chapter 19 substantially impaired the overtime compensation provision of the parties' employment agreement when Chapter 19 'totally eliminated' the pilots' claims for unpaid overtime wages.").

31 Judge Collins corrected herself by granting Hertz's motion for reconsideration and reviewing Hertz's response to the State's objections.

32 *See Brandon v. Corr. Corp. of Am.,* 28 P.3d 269, 280 (Alaska 2001) ("A party may not raise an issue for the first time on appeal."). Our court uses "independent judgment when determining whether an issue has been waived below due to inadequate briefing." *Lauth v. State,* 12 P.3d 181, 184 (Alaska 2000) (citing *Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.,* 993 P.2d 1018, 1021 (Alaska 1999)).

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2/15/12
Called in

27-LS1199\D.5
Gardner
2/14/12

approved

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Page 1, line 2:

Delete "**relating to the definition of 'correctional facility'**"

Page 2, lines 13 - 18:

Delete all material and insert:

"(1) has construction fixtures or security features that are designed to restrict the ability of a person under official detention from leaving the facility without lawful authority; or

(2) has correctional officers or other persons authorized by the commissioner of corrections to prevent a person under official detention from leaving without lawful authority."

Page 2, lines 19 - 23:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 2, following "Act,":

Insert "and"

Page 3, lines 3 - 4:

Delete "and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act,"

by sec. 4 of this Act,"

27-LS1199\D.2
Gardner
1/28/12

AMENDMENT 1 marG m

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Page 1, line 2, following "**'correctional facility';**"

Insert "**deleting the repeal of a provision relating to electronic monitoring as a special condition of probation and parole for offenders whose offense was related to a criminal street gang;**"

Page 2, following line 23:

Insert a new bill section to read:

"*** Sec. 5.** Section 3, ch. 27, SLA 2007, is repealed." (HB 133)

Sec. 3 repealed
AS 12.55.100(f) > on
AS 33.16.150(g) / 12/31/12

Renumber the following bill sections accordingly.

27-LS1199\D.2
Gardner
1/28/12

Passed

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Amd 0.5
Ok.

Page 1, line 2, following "**'correctional facility';**"

Insert "**deleting the repeal of a provision relating to electronic monitoring as a special condition of probation and parole for offenders whose offense was related to a criminal street gang;**"

Page 2, following line 23:

Insert a new bill section to read:

"*** Sec. 5.** Section 3, ch. 27, SLA 2007, is repealed."

Renumber the following bill sections accordingly.

27-LS1199\D.4
Gardner
2/10/12

w/d

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Doug Gardner on amdt.

Page 1, line 2:

Delete "'**correctional facility**'"

Insert "'**secure correctional facility**'"

Page 2, lines 13 - 18:

Delete all material and insert:

"(1) has construction fixtures or security features that are designed to restrict the ability of a person under official detention from leaving the facility without lawful authority; or

orig. may be better

(2) has correctional officers or other persons authorized to prevent a person under official detention from leaving without lawful authority."

Page 2, lines 19 - 23:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 2, following "Act,":

Insert "and"

Page 3, lines 3 - 4: DG. broader

Delete "and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act,"

✓

DG: may be other definit of correc. facil.

2/10/12

27-LS1199\D.4
Gardner
2/10/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

Page 1, line 2:

Delete "'**correctional facility**'"

Insert "'**secure correctional facility**'"

Page 2, lines 13 - 18:

Delete all material and insert:

"(1) has construction fixtures or security features that are designed to restrict the ability of a person under official detention from leaving the facility without lawful authority; or

(2) has correctional officers or other persons authorized to prevent a person under official detention from leaving without lawful authority."

Page 2, lines 19 - 23:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 2, following "Act,":

Insert "and"

Page 3, lines 3 - 4:

Delete "and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act,"

Amdt 2

Draft Amendment to HB296

Page 2, lines 11-18: delete all text

Insert: "(c) In this section, "secure correctional facility" means a correctional facility that

(1) has construction fixtures or security features that are designed to restrict the ability of a person under official detention from leaving the facility without lawful authority; or
(2) has correctional officers or other persons authorized to prevent a person under official detention from leaving the facility without lawful authority."

Page 2, lines 19-23: delete all text

Renumber sections accordingly

Page 3, lines 3-4: delete "and the definition of "correctional facility" in AS 11.81.900(b)(9) as amended by sec. 4 of this Act,"

27-LS1199\D.1
Gardner
1/28/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 296

NO.

Page 1, line 2, following "'**correctional facility**'":

Insert "**making arson in the first degree and arson in the second degree serious felonies for purposes of application of the crime of conspiracy;**"

Page 1, following line 7:

Insert a new bill section to read:

"*** Sec. 2.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**; or**

(E) that is arson in the first degree under AS 11.46.400 or arson in the second degree under AS 11.46.410."

Renumber the following bill sections accordingly.

Page 3, line 1, following "to":

Insert "the definition of "serious felony offense" in AS 11.31.120(h)(2), as amended

by sec. 2 of this Act,"

Page 3, line 2:

Delete "sec. 2"

Insert "sec. 3"

Page 3, line 3:

Delete "sec. 3"

Insert "sec. 4"

Page 3, line 4:

Delete "sec. 4"

Insert "sec. 5"

LAWS OF ALASKA

2007

Source
CSHB 133(FIN)

Chapter No.
_____

AN ACT

Relating to requiring electronic monitoring as a special condition of probation and parole for offenders whose offense was related to a criminal street gang.

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

THE ACT FOLLOWS ON PAGE 1

AN ACT

Relating to requiring electronic monitoring as a special condition of probation and parole for offenders whose offense was related to a criminal street gang.

*** Section 1.** AS 12.55.100 is amended by adding a new subsection to read:

(f) While on probation and as a special condition of probation for an offense where the aggravating factor provided in AS 12.55.155(c)(29) has been proven or admitted, the court shall require that the defendant submit to electronic monitoring. Electronic monitoring under this subsection must provide for monitoring of the defendant's location and movements by Global Positioning System technology. The court shall require a defendant serving a period of probation with electronic monitoring as provided under this subsection to pay all or a portion of the costs of the electronic monitoring, but only if the defendant has sufficient financial resources to pay the costs or a portion of the costs. A defendant subject to electronic monitoring under this subsection is not entitled to a credit for time served in a correctional facility

while the defendant is on probation. In this subsection, "correctional facility" has the meaning given in AS 33.30.901.

*** Sec. 2.** AS 33.16.150 is amended by adding a new subsection to read:

(g) In addition to other conditions of parole imposed under this section for a prisoner serving a sentence for an offense where the aggravating factor provided in AS 12.55.155(c)(29) has been proven or admitted, the board shall impose as a condition of special medical, discretionary, and mandatory parole a requirement that the prisoner submit to electronic monitoring. Electronic monitoring under this subsection must provide for monitoring of the prisoner's location and movements by Global Positioning System technology. The board shall require a prisoner serving a period of probation with electronic monitoring as provided under this subsection to pay all or a portion of the costs of the electronic monitoring, but only if the prisoner has sufficient financial resources to pay the costs or a portion of the costs. A prisoner subject to electronic monitoring under this subsection is not entitled to a credit for time served in a correctional facility while the defendant is on parole. In this subsection, "correctional facility" has the meaning given in AS 33.30.901.

*** Sec. 3.** AS 12.55.100(f) and AS 33.16.150(g) are repealed December 31, 2012.

27-LS1199\I
Gardner
1/19/12

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred: JUD

A BILL

FOR AN ACT ENTITLED

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

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

*** Section 1.** AS 09.05.050 is amended by adding a new subsection to read:

(c) In this section, "correctional facility" has the meaning given in AS 33.30.901.

*** Sec. 2.** AS 11.56.310(a) is amended to read:

(a) One commits the crime of escape in the second degree if, without lawful authority, one

(1) removes oneself from

(A) a **secure** correctional facility while under official detention **for a misdemeanor**;

(B) official detention for a felony or for extradition; or

(C) official detention and, during the escape or at any time before being restored to official detention, one possesses on or about oneself a firearm;

(2) violates AS 11.56.335 or 11.56.340 and, during the time of the unlawful evasion or at any time before being restored to official detention, one possesses on or about oneself a firearm; or

(3) removes, tampers with, or disables the electronic monitoring equipment, or leaves one's residence or other place designated by the commissioner of corrections for the service by electronic monitoring of official detention for a felony.

*** Sec. 3.** AS 11.56.310 is amended by adding a new subsection to read:

(c) In this section, "secure correctional facility" means a correctional facility that

(1) uses construction fixtures or other restraints designed to restrict physically the physical movements and activities of persons under official detention; or

(2) employs correctional officers or other facility staff charged with preventing persons under official detention from departing the facility without lawful authorization.

*** Sec. 4.** AS 11.81.900(b)(9) is amended to read:

(9) "correctional facility" means **a prison, jail, camp, farm, halfway house, group home, holding facility, or other placement** [PREMISES, OR A PORTION OF PREMISES,] used for **housing** [THE CONFINEMENT OF] persons under official detention;

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 09.05.050, including the amendment made by sec. 1 of this Act, has the effect of amending Rule 4, Alaska Rules of Civil Procedure, relating to service of process on prisoners committed to the custody of the commissioner of corrections.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. The changes made to the crime of escape in the second degree under AS 11.56.310(a), as amended by sec. 2 of this Act, the definition of "secure correctional facility" in AS 11.56.310(c), added by sec. 3 of this Act, and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act, apply to offenses occurring on or after the effective date of this Act.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

Melanie Lesh

From: Nancy Meade <NMeade@courts.state.ak.us>
Sent: Tuesday, January 31, 2012 12:33 PM
To: Melanie Lesh
Subject: HB 296

Hi Melanie –

HB 296 is scheduled to be heard in the House Judiciary Committee meeting tomorrow. I wanted to let you know that the court has no position on the bill, but normally I would attend the hearing because it does say that it indirectly amends a court rule. Unfortunately, I have a conflict tomorrow, and need to be in another hearing at the same time. Please feel free to call me or let me know if I can answer any questions about it.

Nancy Meade
General Counsel
Alaska Court System
Anch: 907-264-8264
Juneau: 907-463-4736

1/18/12

back pg →

Legal Services recommends legislative review of the following eight (8) court cases:

1. Hertz v. Carothers, 225 P. 3d 571 (Alaska 2010)
   Court decision: Service of process on the prisoner was invalid as the trooper delivered the process to the superintendent and the process was later faxed to the prison and delivered to the prisoner.

W.O. 999 2/3 vote to amend Civil Rule

Legal Services recommends legislative review of AS 09.38.080, AS 09.38.085, and Alaska Civil Rule 4 to determine a) if there needs to be specific guidance and procedures for the service of process to inmates in correctional facilities; and b) if prison guards should be included in the definition of "peace officers" for the purpose of service.

09.09.050
09.05.050

2. Planned Parenthood v. Campbell, 232 P. 3d 725 (Alaska 2010)
   Court Decision: The Parental Involvement Initiative summary may be corrected after the petition is signed and is allowed to remain on the ballot.

Legal Services recommends legislative review of AS 15.45.090(a) to revisit and clarify standards for ballot initiatives.

3. West v. State, __ P.3d __ (Alaska 2010)
   Court Decision: Predator control requires adherence to sustained yield principles.

Legal Services recommends legislative review of AS 16.05.255 and Article VIII, section 4 of the Constitution of the State of Alaska to determine whether the Supreme Court correctly applied the Predator Control statute in this case.

4. Mat-Su Valley Medical Center v. Advanced Pain Centers of Alaska, 218 P.3d 698 (Alaska 2010)
   Court Decision: Interpretation of Certificate of Need statute confers standing, even after administrative appeal period, because Mat-Su Valley Medical Center is a member of the public.

Legal Services recommends legislative review of AS 18.07.091(a) to determine whether the Supreme Court correctly applied the CON statute in this case.

5. Shehata v. Salvation Army, 225 P.3d 1106 (Alaska 2010)
   Court Decision: An injured employee has no affirmative duty to disclose information that would affect a right to workers compensation, unlike the affirmative duty required for unemployment benefits.

Legal Services recommends legislative review of AS 23.30.250 to determine if there needs to be disqualification standards for worker's compensation similar to existing standards for unemployment benefits.

6. Osterkamp v. Stiles, 235 P.3d 178 (Alaska 2010)
   Court Decision: Custody and visitation of a former foster child may not include consideration of foster parent status for the purposes of determining "psychological parent" status.

Legal Services recommends legislative review of AS 25.23.130 to determine whether the Supreme Court correctly interpreted the state policy on foster parent status as it relates to custody rights.

7. Bradshaw v. State, 224 P.3d 118 (Alaska 2010)
   Court Decision: The ten-year statute of limitations does not bar the DMV from charging a $100 fee upon reinstatement of a driver's license.

Legal Services recommends legislative review of AS 28.15.211 to determine whether a) the Supreme Court correctly interpreted the driver's license reinstatement fee statute; and b) the reinstatement fee should apply to the specific type of suspension applicable to this case.

8. Weimer v. Continental Care and Truck, LLC, 237 P.3d 610 (Alaska 2010)
   Court Decision: The Consumer Protection Act statute of limitations begins at the time of loss, not at the time of the discovery of the illegal act.

Legal Services recommended legislative review of AS 45.50.471(b) to determine if the Supreme Court correctly interpreted the statute of limitations in the Consumer Protection Act.

Legal Services *conditionally* recommends legislative review of the following four (4) court cases, *if* the legislature feels the current statues are not sufficient:

1. Hillstrand v. City of Homer, 218 P.3d 685 (Alaska 2009)
   Court Decision: When taking land by eminent domain for a public building or grounds, land may be taken for subsidiary features provided those features are necessary to accomplish the purpose of the taking.

Legal Services recommends legislative review of AS 09.55.250, *if* the legislature desires to restrict the Supreme Court's application of this statute through this case.

2. Alexie v. State, 229 P.3d 217 (Alaska App. 2010)

Court Decision: The Court must accept a legislative determination of imposing the same punishment for different crimes.

Legal Services recommends legislative review of AS 11.41.200 and AS 12.55.125(c), *if* the legislature desires to review the presumptive sentencing ranges for manslaughter and first degree assault.

3. Anderson v. Alyeska Pipeline Service Co., 234 P.3d 1282 (Alaska 2010)
   Court Decision: The Project Owner statute prevents an employee of a subcontractor from suing the owner of the project for injuries received while working on the project.

Legal Services recommends legislative review of AS 23.30.045 and AS 23.30.055, *if* the legislature desires to address the "difficult" hypothetical examples that came out of this case relating to small business owners as project owners.

4. Alvarez v. State, __ P.3d __ (Alaska 2010)
   Court Decision: Criminal law "speedy trial" requirements do not apply to driver's license suspension or revocation proceedings.

Legal Services recommends legislative review of AS 28.15.165, *if* the legislature wishes to impose a time limit on continuances in driver's license suspension hearings.

1/12

re: charging $.

Doug Gardner $ on books already (Rule 11) amt. $ recoverable from defend.
Rep. Grants.

AB 09.09 or 09.05

only indirect court rule Δ. and sec., defining 'correctional facility.' o/ retroactive in sec. 3. → Doug (?)

Court System will prefer 999 (the 2/3 vote Rule Δ)

27-LS0999\A
Luckhaupt
9/16/11

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

HJUD
Sponsor?
poll members

A BILL

FOR AN ACT ENTITLED

"An Act relating to service of process on prisoners; and amending Rule 4, Alaska Rules of Civil Procedure."

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

*** Section 1.** AS 09.05.050 is amended by adding a new subsection to read:

(c) In this section, "correctional facility" has the meaning given in AS 33.30.901.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 09.05.050, including the amendment made by sec. 1 of this Act, has the effect of amending Rule 4, Alaska Rules of Civil Procedure, relating to service of process on prisoners committed to the custody of the commissioner of corrections.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 24, 2012

SUBJECT: Requirement of a Conditional Effect Section for a Bill Indirectly Amending a Court Rule (Work Order No. 27-LS1199\I)

TO: Representative Max Gruenberg

FROM: Doug Gardner
Director

Your question is whether the above-referenced bill draft requires a conditional effect section. The answer is no. I note that there is no question that the proposed bill indirectly amends Civil Rule 4 regarding service of process on persons incarcerated at correctional facilities. I believe that you spoke with Legislative Counsel and Assistant Revisor Jerry Luckhaupt regarding this matter, and that his advice to you was that a conditional effect section is not necessary in this bill given the unique procedural circumstances of AS 09.05.050.

As you requested, this bill utilizes the process already in place in AS 09.05.050, and an indirect rule change to Civil Rule 4, to address the service of process problems that the State confronted in serving Mr. Hertz in *Hertz v. Carrothers*, 225 P.3d 571 (Alaska 2010). Indirect amendment of a court rule requires a two-thirds vote of each body for passage of the bill and amendment of the court rule at issue, as required by article IV section 15, Alaska Constitution. This issue is discussed in the *Manual of Legislative Drafting*, pp. 48 - 51 (2011 ed.). In this case, put simply, the cart is before the horse, and no conditional effect section is necessary. Here's why.

In most cases, the statutory provision in a bill that amends a court rule is being presented in the bill at the same time that the legislature desires to indirectly amend the court rule in question. In this case the circumstances are different. AS 09.05.05.050 is already on the books. While section 1 of the bill does amend AS 09.05.050 by adding a definition of "correctional facility," it is section 5 of the bill which expresses the Legislature's intent to indirectly amend the court rule. Section 5 of the bill is the operative section requiring two-thirds vote of each body to achieve the court rule amendment.

The situation confronted by this bill is that when AS 09.05.050 was originally passed it was not presented with a notice of indirect amendment of court rule, or with a conditional effect section. So, AS 09.05.050 passed without a specific two-thirds vote of both houses authorizing an indirect amendment of the court rule. But, without a conditional effect section, AS 09.05.050 became law despite the fact that it did not achieve the entire

objective intended of providing a process for serving incarcerated persons recognized as valid by Civil Rule 4. So, the service procedure in the Civil Rule 4 continued to trump the procedure set forth for serving prisoners in AS 09.05.050, and continues to do so.

In this bill, *if* the process in AS 09.05.050 were included in this bill, *then* it would be necessary to include a conditional effect section to make clear that unless the indirect court rule provision received a two-thirds vote, AS 09.50.050 would not take effect, and cause AS 09.05.050 to sit on the books having no utility as a means of achieving valid service of process on incarcerated persons. However, since the procedures in AS 09.05.050 are already on the books, there is no need to put a conditional effect section in this bill to prevent the dilemma that already exists: a statute that does not achieve the purpose of providing a service mechanism for incarcerated persons. So, now that the cart has been before the horse since 1989, we recommend that a conditional effect section not be included in this bill.

DDG:ljw
12-046.ljw

Mel

WORK DRAFT WORK DRAFT WORK DRAFT

27-LS1199\I
Gardner
1/19/12

Mel request Rep Gruenberg

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

Other 5 doesn't have the effect of amending Court Rule 4.

A BILL

FOR AN ACT ENTITLED

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

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

*** Section 1.** AS 09.05.050 is amended by adding a new subsection to read:

(c) In this section, "correctional facility" has the meaning given in AS 33.30.901.

*** Sec. 2.** AS 11.56.310(a) is amended to read:

(a) One commits the crime of escape in the second degree if, without lawful authority, one

(1) removes oneself from

(A) a **secure** correctional facility while under official detention **for a misdemeanor**;

(B) official detention for a felony or for extradition; or

(C) official detention and, during the escape or at any time before being restored to official detention, one possesses on or about oneself a firearm;

(2) violates AS 11.56.335 or 11.56.340 and, during the time of the unlawful evasion or at any time before being restored to official detention, one possesses on or about oneself a firearm; or

(3) removes, tampers with, or disables the electronic monitoring equipment, or leaves one's residence or other place designated by the commissioner of corrections for the service by electronic monitoring of official detention for a felony.

*** Sec. 3.** AS 11.56.310 is amended by adding a new subsection to read:

(c) In this section, "secure correctional facility" means a correctional facility that

(1) uses construction fixtures or other restraints designed to restrict physically the physical movements and activities of persons under official detention; or

(2) employs correctional officers or other facility staff charged with preventing persons under official detention from departing the facility without lawful authorization.

*** Sec. 4.** AS 11.81.900(b)(9) is amended to read:

(9) "correctional facility" means **a prison, jail, camp, farm, halfway house, group home, holding facility, or other placement** [PREMISES, OR A PORTION OF PREMISES,] used for **housing** [THE CONFINEMENT OF] persons under official detention;

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 09.05.050, including the amendment made by sec. 1 of this Act, has the effect of amending Rule 4, Alaska Rules of Civil Procedure, relating to service of process on prisoners committed to the custody of the commissioner of corrections.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

[+ Conditional effect section Pg. 51 of manual

new version 1/31

APPLICABILITY. The changes made to the crime of escape in the second degree under AS 11.56.310(a), as amended by sec. 2 of this Act, the definition of "secure correctional facility" in AS 11.56.310(c), added by sec. 3 of this Act, and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 4 of this Act, apply to offenses occurring on or after the effective date of this Act.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

Dept. Law had voiced concerns on the holding in the case. Rick Svobodny felt the

27-LS1199\B
Gardner
1/12/12

poll the members.

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to the crime of escape and to the definition of correctional facilities in the criminal code."

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

*** Section 1.** AS 11.56.310(a) is amended to read:

(a) One commits the crime of escape in the second degree if, without lawful authority, one

(1) removes oneself from

(A) a **secure** correctional facility while under official detention **for a misdemeanor**;

(B) official detention for a felony or for extradition; or

(C) official detention and, during the escape or at any time before being restored to official detention, one possesses on or about oneself a firearm;

(2) violates AS 11.56.335 or 11.56.340 and, during the time of the

unlawful evasion or at any time before being restored to official detention, one possesses on or about oneself a firearm; or

(3) removes, tampers with, or disables the electronic monitoring equipment, or leaves one's residence or other place designated by the commissioner of corrections for the service by electronic monitoring of official detention for a felony.

* **Sec. 2.** AS 11.56.310 is amended by adding a new subsection to read:

(c) In this section, "secure correctional facility" means a correctional facility that

(A) uses construction fixtures or other restraints designed to restrict physically the physical movements and activities of persons under official detention; or

(B) employs correctional officers or other facility staff charged with preventing persons under official detention from departing the facility without lawful authorization.

* **Sec. 3.** AS 11.81.900(b)(9) is amended to read:

(9) "correctional facility" means **a prison, jail, camp, farm, halfway house, group home, holding facility, or other placement** [PREMISES, OR A PORTION OF PREMISES,] used for **housing** [THE CONFINEMENT OF] persons under official detention;

* **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. The changes made to the crime of escape in the second degree under AS 11.56.310, as amended by sec. 1 of this Act, the definition of "secure correctional facility" in AS 11.56.310(c), added by sec. 2 of this Act, and the definition of "correctional facility" in AS 11.81.900(b)(9), as amended by sec. 3 of this Act, apply to offenses occurring on or after the effective date of this Act.

alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1969 (907) 279-2526 FAX (907) 276-5046
http://www.ajc.state.ak.us E-mail: postmaster@ajc.state.ak.us

Press Release

Alaska Judicial Council announces report on Pilot PACE Probation Program

September 16, 2011

The Alaska Judicial Council announced today that it has completed a preliminary evaluation of the Anchorage PACE pilot program that began operation in July 2010. Probation Accountability with Certain Enforcement (PACE) monitored at-risk probationers with drug or alcohol-testing conditions to assure their compliance, through random testing for substance abuse and tracking participants' appointments with their probation officers. An essential part of the program is collaboration among law enforcement, prosecutor, defense attorney, judges and the probation office to assure that probationers who violate the requirements of the program are quickly arrested and brought before a judge, who usually imposes an immediate sanction. The preliminary evaluation found that the data available showed that PACE appeared to be successful at reducing positive drug tests, with nearly two-thirds of the PACE probationers free of any positive drug tests during the three month followup period. In contrast, only one-fifth of those probationers were free of positive drug tests prior to their participation in PACE. Although some results were promising, definitive conclusions about the project's success will require more data and further evaluation.

Alaska's Criminal Justice Working Group, co-chaired by Chief Justice Walter Carpeneti and Attorney General John Burns, endorsed the pilot PACE program. The Criminal Justice Working Group collaborates on ways to improve Alaska criminal justice system. It includes the commissioners of administration, corrections, health and social services, and public safety, other top policymakers from the state, the chief of the Anchorage Police Department, the U.S. Marshall, and

the directors of the court system, the Mental Health Trust Authority, and the Judicial Council. The group is staffed by the Judicial Council with funding by the Alaska Legislature. Although the PACE program itself was carried out with the agencies' existing resources, the Mental Health Trust Authority provided some of the funding needed for start-up training.

The PACE project showed that innovations in the criminal justice process can be undertaken through collaboration. The Anchorage Police Department served most of the warrants for arrest when PACE probationers did not comply with the conditions of the program. The court, defense attorneys and prosecutors, and probation department used existing resources to provide additional drug testing, and the attorney, judge and staff time needed for the PACE hearings. The Institute for Social and Economic Research at UAA provided the expertise needed to compile and analyze the data.

In addition to its role on the Working Group, the Judicial Council has a constitutional mandate to conduct studies to improve the administration of justice in Alaska. For more information contact:

Larry Cohn, Executive Director
Alaska Judicial Council
lcohn@ajc.state.ak.us
www.ajc.state.ak.us
(907) 279-2526 x1

Anchorage PACE

Probation Accountability with Certain Enforcement

A Preliminary Evaluation of the Anchorage Pilot PACE Project

September 2011

alaska judicial council

Anchorage PACE
Probation Accountability with Certain Enforcement

A Preliminary Evaluation of the Anchorage Pilot PACE Project

September 2011

Teresa W. Carns (AJC) and Dr. Stephanie Martin (ISER)

Contact:

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Alaska Judicial Council
1029 West Third Avenue, Suite 201
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Acknowledgments

The impetus to create the PACE program as a pilot project in Anchorage came from the Department of Corrections. In October of 2009, then-Special Assistant to the Commissioner, Carmen Gutierrez, assembled stakeholders from the Division of Probation, the Alaska Court System, the Anchorage Police Department, the Anchorage offices of the district attorneys, public defense and Office of Public Advocacy, and other stakeholders to discuss the possibility of following the HOPE model to reduce the significant problems caused by increasing numbers of petitions to revoke probation. The team researched the HOPE model, considered the feasibility of carrying out a similar program in Anchorage, went to Hawaii for training, and in July of 2010 inducted the first PACE probationers. Since then, they have spent substantial time and effort to make PACE a workable program.

We would like to recognize the contributions of Keith Thayer and Jo Ann Wallace, supervisors in the Anchorage Probation office; Kim (Matt) Matthews and Rebecca Tuominen, the probation officers who have worked with all of the PACE participants; Judges William Morse and John Suddock who have heard the PACE cases; Tiffany Harkleroad and her criminal court clerk staff who have handled the paperwork; Clint Campion and Emma Haddix, Assistant District Attorneys; John Cashion, Assistant Public Defender; Brendan Kelly, Office of Public Advocacy; Sgt. Chris Jones and Lt. Richard Stouff of the Anchorage Police Department who assured the service of arrest warrants; and Judicial Services, the office that handled the PACE probationers when they were in custody. Research interns Leigh Coppola and Katherine Jackstadt invested many hours working with ISER to compile the data for the report.

Judge Steven Alm and the Hawaii HOPE stakeholders provided support, encouragement and training that made the project possible, and Dr. Angela Hawken's work was a model for this evaluation.

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Anchorage PACE Pilot Evaluation

Part 1: Background

A. Introduction

On July 12, 2010, Anchorage judges conducted the first warning hearings for the initial group of twenty-nine probationers assigned to the PACE – Probation Accountability with Certain Enforcement – pilot program. Modeled after Project HOPE in Hawaii,[1] Anchorage's PACE added another fifty-one probationers between November 2010 and February 2011.[2] This report describes the progress of the program, and the data on outcomes collected between July 2010 and June 2011.

B. Description of PACE

1. Background

In October 2009, the Department of Corrections, Anchorage judges, attorneys and others began to discuss the increasingly unmanageable number of probation violations filed monthly in the Anchorage superior court.[3] About 25 petitions each week to revoke probation because of technical violations were being filed in the Anchorage court. These required court, probation officer, and defense and prosecuting attorney time. Probation officers believed that the process was not as effective as it could have been.

---

[1] Hawaii Opportunity Probation with Enforcement, started by Judge Steven Alm in 2004. See A. Hawken and M. Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*, 2009, for description and evaluation of the Project HOPE.

[2] A total of seventy-nine probationers were assigned to PACE between July 2010 and February 2011 – 29 in July 2010; 18 in November 2010; 18 in January 2011; and 14 in February 2011. Of these, the fourteen in the February group were not included in the analysis because the data were not collected due to a miscommunication. Two of the November probationers moved out of Anchorage after assignment to PACE, and no information was available for them. A total of 63 PACE inductees were available for the analysis.

[3] Alaska has formal probation supervision only for offenders convicted of a felony. Although misdemeanor offenders spend time on probation, there is no formal supervision of their overall activities.

Members of the group decided to try a pilot probation monitoring and enforcement project modeled after Project HOPE in Hawaii.[4] They consulted extensively with Judge Alm,[5] who arranged for an Alaskan team to meet with their counterparts in the Honolulu law enforcement, court, prosecutors, probation and defense attorneys' offices.[6] During the week of July 12 - 16, 2010, Judges Morse and Suddock who had volunteered for the program gave warning hearings to the first twenty-nine offenders. Another 50 probationers were inducted in November 2010, and January and February 2011. The November, January, and February inductees were part of a group whose members were randomly assigned to PACE or probation as usual.[7]

The pilot program was carried out with the cooperation of all of the agencies involved, and without additional resources. The size of the initial group of probationers assigned was based on the capacity of the stakeholders to assume any extra work associated with the program using only existing staff and funds for drug testing. The Alaska Judicial Council (Council) funded the evaluation, monitored the PACE progress and wrote the report. The Institute for Social and Economic Research (ISER) at the University of Alaska Anchorage collected the data and conducted the analysis.

2. Program

Probationers assigned to PACE were required to comply with all probation conditions, including random drug testing and periodic meetings with their probation officers. A positive drug or alcohol test, failure to appear for a scheduled test, or failure to attend a meeting with the probation officer were the three conditions targeted in the PACE program. If offenders failed to comply with any one of these, they were immediately arrested or a warrant was issued for their arrest. A court hearing was scheduled, usually within 72 hours. At the hearing, the judge imposed a sanction of a short jail term, generally two to three days. If the offender violated again, the process was repeated, with another sanction. The essence of the program was that every single violation that was included in the PACE program was dealt with quickly, and a sanction was imposed each time.

---

[4] *Supra*, note 1.

[5] Judge Steven Alm of Honolulu, Hawaii, designed and developed the HOPE program. See *Managing Drug Involved Probationers*, *supra*, note 1.

[6] The Aalska Mental Health Trust Authority provided much of the funding for the training-related travel.

[7] See Methodology *infra* for discussion of the difficulties with the control group.

Probationers were not allowed to opt out of the program. If they completed two months without violation, the frequency of testing was usually reduced. One or more additional violations typically resulted in an increased emphasis on treatment, or in other actions by the court. Probationers did not return to court unless they were arrested; there were no scheduled status hearings as are used in the therapeutic courts.

3. Stakeholder roles

Each offender was required to attend a warning hearing set before one of the project judges. After that, the judge only saw the offender if a warrant was issued for the offender's arrest because of violation of a condition. If the offender was arrested for a new offense, the new charges were handled through regular court channels, generally without involving the PACE judges.[8]

Defense attorneys, prosecutors, and probation officers participated in any scheduled sanctioning hearings. The Anchorage Police Department made serving PACE warrants a top priority, and was responsible for most of the warrants served. The Alaska State Troopers and the federal marshals also assisted with the program, as needed. The Department of Corrections supervised all violators and incarcerated all offenders.[9] The Department made handling the pilot PACE program one of its top priorities, and expedited any actions associated with PACE probationers.

4. The PACE process

A stakeholder group that included courts, corrections, defense and prosecution, law enforcement, and the project evaluators met monthly starting in January of 2010 through May of 2011. The team continued to meet as needed to resolve issues of substance or procedure that arose during the project's operations. A wide range of issues – such as probationers moving out of town to avoid the program, court clerk workloads, criteria for assignment to the program – were dealt with by the PACE team. The PACE process was documented with public reports of the meetings. Stakeholders cooperated throughout the project to resolve problems and assure the program's effectiveness.

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[8] The judges assigned to PACE normally handled only civil cases.

[9] Alaska has both a unified corrections system with no local or county jails, and a unified court system, with no local or county courts.

C. Evaluation Methodology

1. Outcome measures

To assess the effectiveness of the PACE program, stakeholders agreed to measure change in several outcomes:

- Number of positive or refused drug tests;
- Number of missed drug tests;
- Number of missed appointments with probation officers;
- Number of probation revocations;
- Number of new arrests/charges;
- Number of incarceration days served; and
- Number of positive or failed alcohol tests.

Other purposes of the project were to a) determine the extent to which the Division of Probation electronic databases would be useful for subsequent evaluations of PACE and other evidence-based programs that the Department of Corrections was interested in using to achieve its goals of rehabilitation and protection of public safety;[10] and b) identify any obstacles to a large scale evaluation.

2. Study subjects and controls

a. Pace participants

The criteria for assignment to the program (or control group) were that the probationers be identified by the Anchorage probation office as at risk for a probation revocation for not complying with conditions of probation; that they have drug or alcohol testing as a specific condition of probation;[11] and that they not be on parole.[12] The final evaluation set of 63 PACE

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[10] Evaluators and the Department of Corrections knew that it would be necessary to use paper files for some aspects of the data collection for this project.

[11] The data showed that 94% of the final PACE evaluation group had a condition of no drug use, and 86% were required by the original probation conditions to subject to drug testing. Ninety-seven percent had a condition of no alcohol use or no use to excess, and 35% had a condition of alcohol testing.

[12] Additional criteria included that the probationers not be on the specialized probation supervision caseloads for sex offenders or offenders with mental health issues, and that they not have any active probation revocation petitions outstanding.

participants included 42 males and 21 females.[13] The mean (average) age was 33.7 years old. Sixty-six percent of the PACE participants were Caucasian, fifteen percent were Alaska Native/American Indian, and the others were Asian-American or Black.

b. Control probationers

The PACE team experimented with identifying and tracking a randomly assigned control group for the project. For each of the PACE groups inducted between November and February, the probation office identified twice as many people as were expected to be PACE participants. ISER randomly assigned one-half of each group to PACE and the other half to the control group. There were no statistically significant differences on the characteristics of age, gender, and ethnicity between the two groups.

One of the more important findings of the pilot project was that the control group was too difficult to track to provide useful data. While the PACE participants all were supervised by two experienced probation officers, the control group members continued with their ten previously assigned probation officers.[14] The PACE officers were meticulous record-keepers while the other officers had varying degrees of ability. Research technicians had greater access to PACE participant files than to control group files, which were in use most of the time, making data collection impractical and sometimes interfering with the work of probation officers.

3. Data

The primary data for the analysis were provided by the Division of Probation. Basic demographic and case-related data came from the Department of Corrections offender management system, ACOMS.[15] Data related to positive or refused drug tests were compiled from ACOMS. Most of the other evaluation-related data were collected from paper case files.

The biggest impediments to the evaluation were (1) lack of electronic data for many of the variables; (2) non-systematic reporting of appointments with probation officers, and of alcohol and drug test results for control group; and (3) omission of the February 2011 PACE participants from the analysis because of a miscommunication between the evaluators and data

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[13] Two of the probationers originally in the PACE evaluation set were not in the program long enough to compile data about their experience, because they moved to other communities in the state where PACE supervision and testing were not available.

[14] Starting in about February, the control probationers were reassigned to three experienced probation officers.

[15] Alaska Corrections Offender Management System.

sources. ISER research technicians spent almost 500 hours collecting data for the 63 participants included in the evaluation and the control group probationers in the November and January groups. Some data were electronically available in the ACOMS database but inconsistencies between what was reported in ACOMS and in written documents resulted in the study using paper files as the primary data source for most information. This evaluation did not include alcohol violations, missed appointments, or incarceration days because consistent data were missing for many or all of the participants during the three months prior to their induction into PACE, and for all of the controls. Lack of data and inconsistent reporting also made justification of selection into PACE difficult.

Data compiled about each participant and control group probationer included date of birth, ethnicity, gender, offense of conviction, and relevant probation conditions. To measure outcomes, data – when available – were entered about missed appointments, drug tests, alcohol tests, new charges, new arrests, and new probation violations, during the three months prior to entry into PACE or designation as a control, and during the first three months after entry into PACE.

4. Analysis and report

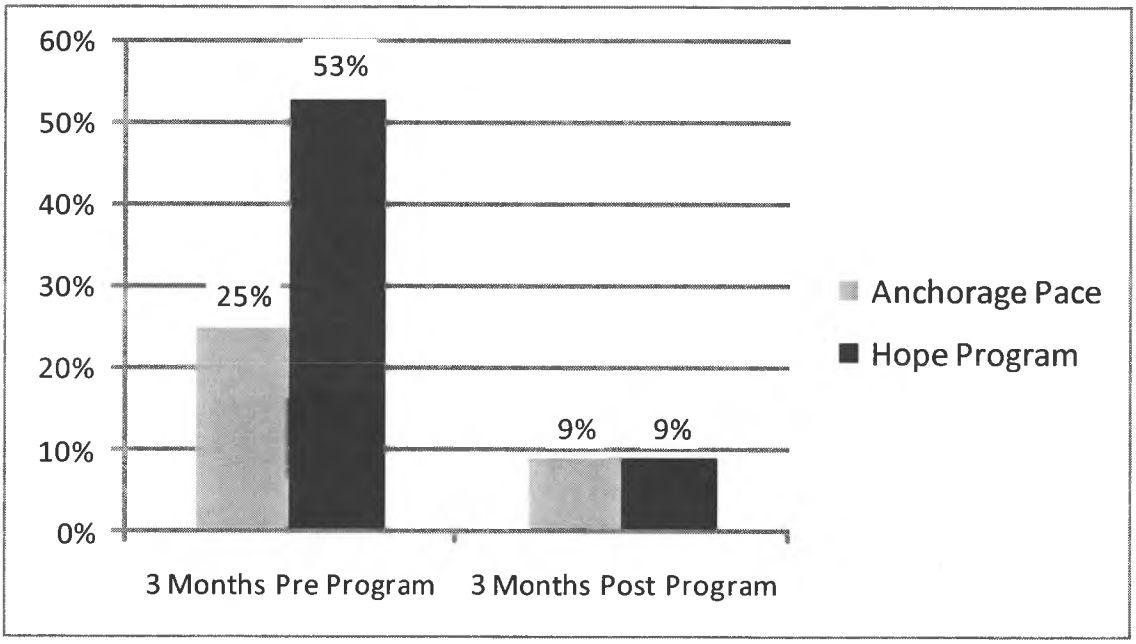
Data were analyzed by ISER, using SPSS programs. The analysis focused on the outcomes for the variables for the PACE participants during the first three months after entry into the program, as well as during the three months prior to their participation with PACE. The analysis also looked at how many violations were accumulated by each probationer. Because of the difficulties in accumulating any information about the control group, the data have been analyzed and reported without reference to controls.

Part 2: Findings

A. Drug use appeared to drop after beginning PACE

- Drug use by PACE participants, as measured by positive tests, appeared to decrease substantially during the three months following induction into PACE. PACE participants failed 25% of the 157 drug tests performed during the three months prior to starting the program. They failed 9% of the 587 tests conducted during the three months after the program.[16]

Figure 1
Anchorage PACE participants positive drug tests compared to HOPE[17] positive drug tests, first three months after starting the program



- The comparable data from the Hawaii HOPE program evaluation showed a similar pattern, with the percentage of the average number of positive drug tests dropping

[16] Paired t-test, t=2.833, p=0.006.

[17] Figure 1 compares HOPE and PACE data about drug tests for three months pre-and post starting the respective programs. For purposes of this report on PACE, we have reproduced only the HOPE results for HOPE probationers during the three months prior to beginning HOPE and the three months after beginning HOPE. The original Figure 1 in the Hawken report, supra note 1, has information about the HOPE control group, and information about drug test (urinalysis) results for six months after starting HOPE.

The following note was associated with Hawken, Figure 1, and is replicated here for completeness. "Note: Data are from PROBER. For comparison probationers, data reflect urinalysis results for regularly scheduled UAs. For HOPE probationers UAs include regularly scheduled tests, and random testing. Pre (3m) refers to the average number of positives UAs in the three months before the study state date (baseline). Follow-up (3m) refers to the average number of positive UAs in the three-month period following baseline and Follow-up (6m) refers to the average number of positive UAs in the six-month period following baseline."

substantially after the program started (in HOPE, the drop was from 53% of the probationers with positive tests before to 9% with positive tests after).[18]

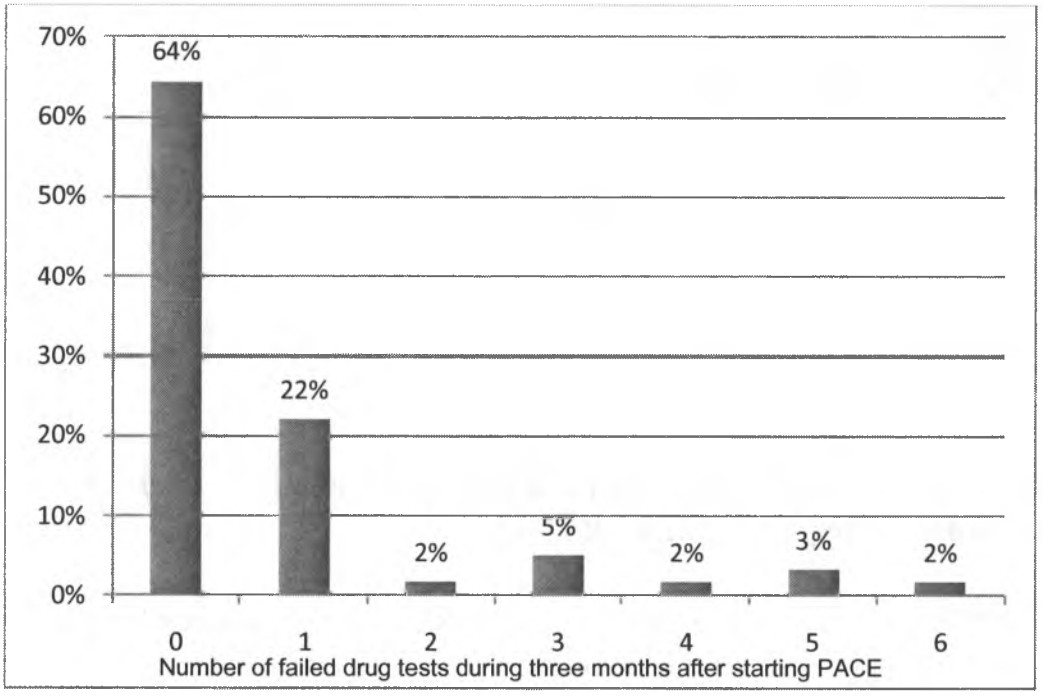
- There were insufficient data to evaluate missed drug test appointments for PACE participants. It is possible that probationers missed drug test appointments because they knew that they would have positive results. It is difficult to assess the overall finding of a reduced number of positive drug tests without also having the data about missed drug test appointments.

[18] Hawken and Kleiman, *supra* note 1, Figure 1, page 18.

B. The majority of PACE participants had no drug test failures during the first three months

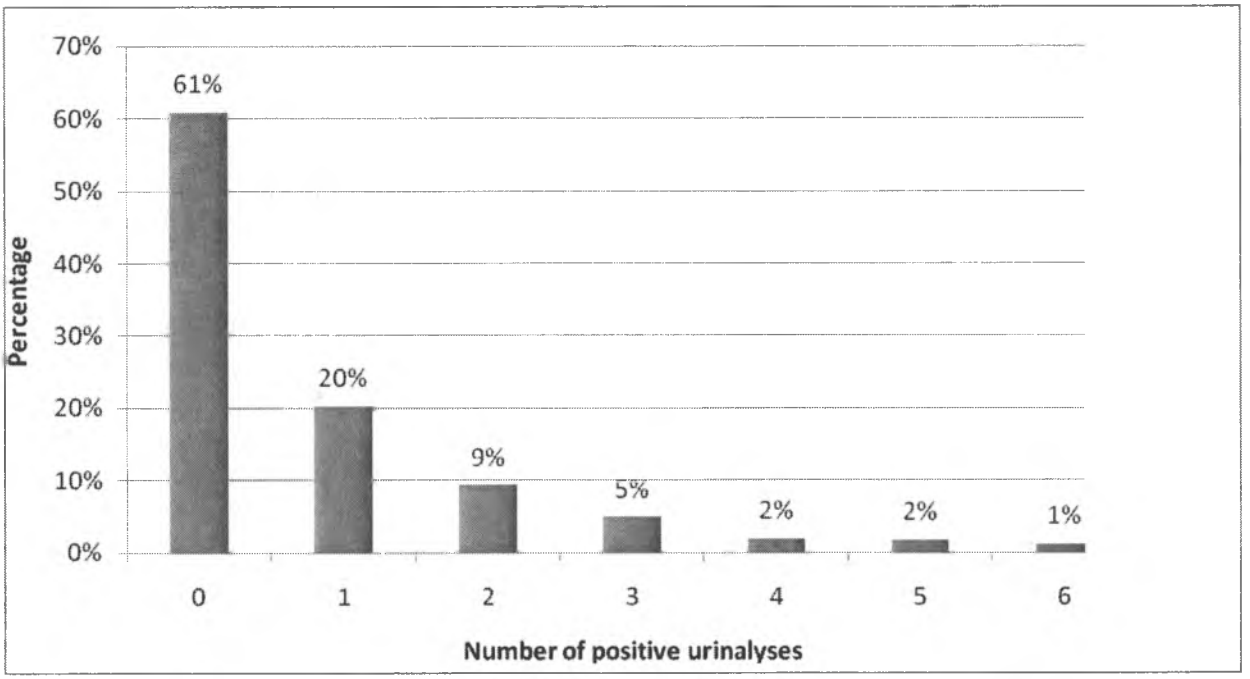
- Of the 59 probationers in PACE with drug use conditions, 64% (N=38) had no drug test failures at all during the three months after admission to PACE, compared to 20% of the same probationers during the three months prior to PACE with no drug test failures. Of the 36% (N=21) with failed drug tests, 62% (N=13) failed only once.

Figure 2
Number of failed drug tests for PACE participants with drug use conditions in three months after PACE



- The comparable data from the Hawaii HOPE program for a 12-month period (Figure 3) show a similar pattern, with the majority of HOPE participants having no failed drug tests, 20% having only one failed drug test, and small numbers having two or more failed drug tests. Although the pattern is similar, it is important to note that the data from PACE are for a three-month period while the HOPE data were recorded over a twelve-month period, four times as long.

Figure 3
HOPE:* Number of failed drug tests in 12 -months



** This chart replicates Figure 2 in the Hawken/Kleiman report, supra, note 1.*

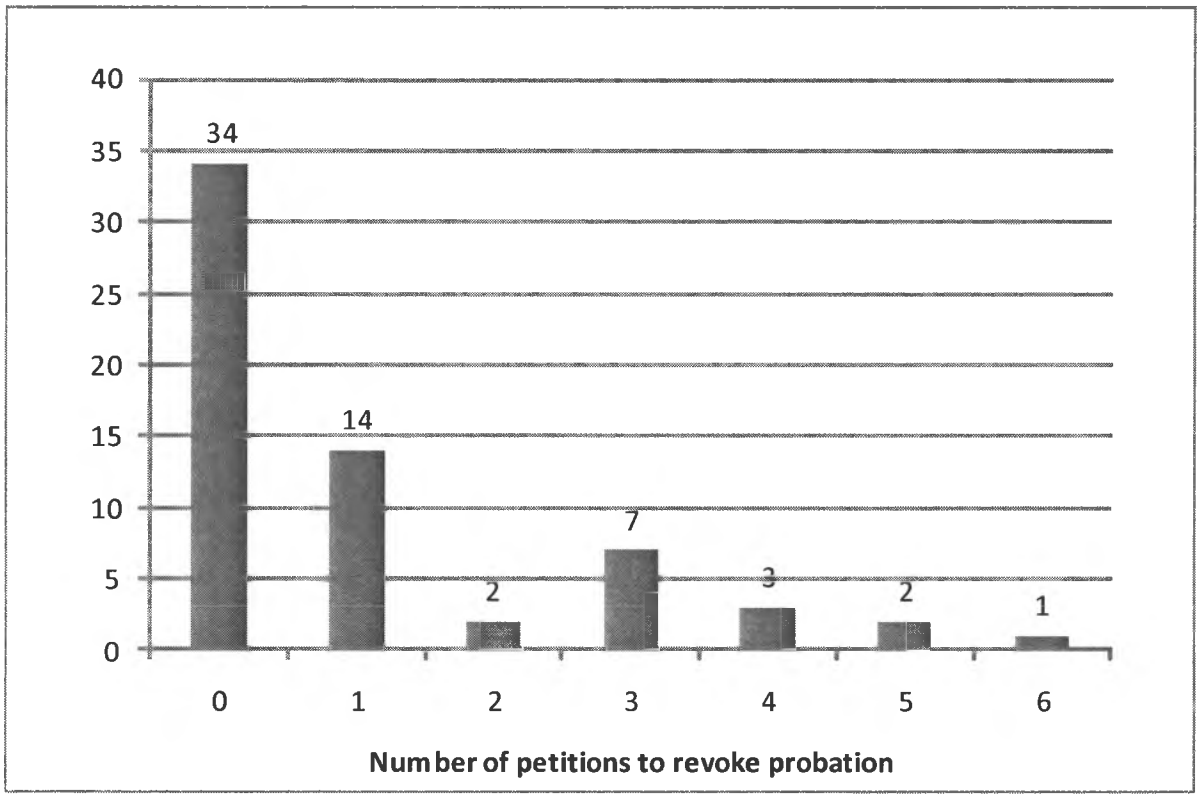
- The lack of sufficient data to measure missed drug test appointments could also have affected this finding.

C. PACE participants had more recorded probation violations after starting the program, an expected result of PACE

- The 63 PACE participants had a total of 40 petitions to revoke probation filed against them during the three months prior to starting PACE, and a total of 67 petitions to revoke probation filed against them during the three months following their induction into PACE.

- A slight majority of the PACE participants did not have any petitions to revoke probation filed during the three months after they started PACE compared to a slight majority who had at least one petition before they started PACE. Otherwise the patterns to revoke probation during the pre- and post- periods were similar, with a few probationers who had several petitions. That a slight majority had no petitions filed after starting PACE suggests that the program was effective, although that cannot be firmly concluded without a more rigorous evaluation. The following figure shows the distribution of petitions to revoke probation during the three months after starting PACE.

Figure 4
Petitions to revoke probation, during the three months after starting PACE



One of the most important features of PACE was the requirement that probationers be sanctioned for each violation of probation that was targeted in the PACE progam, in contrast to the usual procedure of filing a petition to revoke probation after several violations. The premise on which the program was built, therefore, led to an expectation of an increase in petitions to revoke probation.

D. Three PACE participants were arrested on new charges during the three months after starting the program

One person in the PACE evaluation group was arrested four times for new offenses during the three months following induction into PACE. Two PACE participants were arrested for new charges one time each. Other PACE participants were arrested on new charges after the three-month measurement period had elapsed. Data about arrests during the three-month period

prior to entering PACE were not available to determine whether this finding showed improvement.

E. Not enough data were available to measure other outcomes

Several outcomes – missed appointments for drug tests, missed appointments with the probation officers, positive alcohol tests, and incarceration days – could not be measured because of insufficient data. The discussion above, in the Methodology section, outlines some of the reasons for this.

Part 3: Conclusions and Suggestions

PACE appeared to be successful at reducing positive drug tests. Data showed that the PACE group did significantly better during the three months after starting PACE than they did during the three months prior. Data about missed drug test appointments would help verify this finding.

Sixty-four percent of the PACE participants had no drug test failures at all, compared to 20% of the same probationers who had no failed drug tests during the three months prior to starting PACE. About 36% of PACE participants had one failure. About one-quarter of them had only one failure. Only 14% had two or more failures. This pattern tracks closely that found in the study conducted of HOPE participants in Hawaii. Again, including missed drug test appointments in the data would help to assess the importance of this finding.

Fifty-four percent of the PACE participants did not have any petitions to revoke probation filed against them during the test period. Twenty-two percent had only one petition to revoke probation filed against them during the three months after starting PACE. The patterns for the number of petitions filed per probationer were similar during the pre and post periods, with only a few probationers having three or more petitions filed in each period. Although the PACE probationers (as a group) had more petitions filed after beginning PACE than before, this was an expected outcome of the program.

The positive drug tests, new petitions to revoke probation filed, and new arrests were concentrated among a few PACE participants. This followed the HOPE model. In the evaluation of HOPE, the authors stated, "HOPE identified a small minority of probationers who did not desist from drug use under sanctions pressure alone. This 'behavioral triage' function – identifying those in need of treatment by documenting their actual conduct rather than relying on assessment tools – is an independent benefit of HOPE processing."[19] The control group, to the extent that data were collected, also appeared to also have a few offenders who were responsible for most of the violations. However, because those violators were not monitored as closely as the PACE offenders, their violations were not dealt with as quickly.

The data available were insufficient to track many of the other outcome measures that were planned for the pilot evaluation. The data available for the evaluation were not enough, particularly for the randomly assigned control group, to analyze prior criminal history, probation violations that did not result in a revocation, new arrests, and days of incarceration. One of the purposes of the project was to determine what data were available for evaluation. The present

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[19] Hawken and Kleiman, *supra* note 1, Figure 1, pages 19-20.

evaluation of the pilot project showed that data were inadequate, despite considerable efforts on the part of some of the Division of Probation staff to assist in compiling data. Miscommunications did occur and the data collection process should be carefully monitored in future projects.

Future evaluations of the Anchorage PACE project and similar projects in the state should provide for more rigorous evaluations. Central to the state's ability to adequately evaluate the effectiveness of PACE are:

- Assignment of both participants and controls to a few probation officers with the ability to meticulously record all information needed for the evaluation.

- Limitation of the outcome variables to clearly defined, unambiguous measures.

- Provision of electronic means to record data rather than relying primarily on paper files. This could be done by providing a module in the Department of Corrections ACOMS management information system for entering data for all probationers, with the needed fields for this type of evaluation included.

- An opportunity for a longer-term evaluation that can assess the outcomes for PACE participants during a follow-up period after they have completed probation.

- Inclusion of a unique offender identification number that is common to other state justice information systems so that more data are available for each offender.[20]

[20] State agencies have agreed to use the APSIN ID number as the common identifying number for all defendants, and a project is underway to implement the conceptual agreement.

September 22, 2011

Judge William Morse
Anchorage Superior Court
State of Alaska
825 West 4th Avenue
Anchorage, Alaska 99501

Re: North Pacific Erectors, Inc. v. State of Alaska, Appeal No. 3AN-09-09085-CI

Subject: Decision

Dear Judge Morse,

If you have already issued your decision in this matter please disregard this correspondence.

This is my fifth request for you to make your decision in this case.

This case has been in your court for more than two years. The final briefing was submitted for your consideration on the 31st of May, 114 days ago. And, it has been 35 days since the final oral arguments were made. Please issue your decision in my case, so that I may move on with my life.

Sincerely,

David E. Olson
391 Sears Creek Road
Stites, Idaho 83552

Cc: Jeff Stark – Counsel - AKDOT&PF
Neil Slotnick – Counsel – DOA
Terry Martson – Counsel - NPE
Alaska Judicial Council
Rep. Carl Gatto, Chair, Judiciary Committee
Rep. Steve Thompson, Vice-Chair, Judiciary Committee
Rep. Wes Keller, Judiciary Committee
Rep. Bob Lynn, Judiciary Committee
Rep. Max Gruenberg, Judiciary Committee
Rep. Lindsey Holmes, Judiciary Committee
Rep. Mike Chenault, Judiciary Committee

HB

297

<TARGET><BILL>HB 297</BILL><SUBJECT>HB 297</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
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HOUSE BILL 297

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act."

Sponsor Statement

HB 297, the Uniform Real Property Transfer on Death Act (URPTODA), provides a simple, effective and affordable option for persons wishing to transfer real property upon their death. It will avoid the potentially lengthy and expensive process of probate. Currently, seventeen states have adopted the Act or other similar legislation allowing "Transfer on Death (TOD) deeds. Other non-probate transfers of personal property at death sometimes, known as "will substitutes" or TODs are now common practice.

Under HB 297, real property can pass at death by a transfer on death (TOD) deed. The deed is recorded before death with the district recorder. Upon death the deed automatically becomes effective. TOD deeds are not subject to the statute of wills. They do not operate and are revocable until the transferor's death. They are ineffective if the transferor disposes of the property during his or her lifetime. HB 297 allows the beneficiary to disclaim the transferred property. It does not affect the beneficiary's eligibility for public assistance or subject the property to the beneficiary's creditors. It allows a stepped up basis (favorable tax treatment) upon the transferor's death. HB 297 will provide a valuable option to Alaskans who may not need or cannot afford trusts, etc. and the probate process in passing property upon death. Yet it does not prohibit any other method of passing the property (e.g. gifts, wills, trusts, etc.); it simply provides another cheaper and efficient way of transferring real property upon death.

The bill was suggested by a retired constituent who believes it is an important alternative that should be permitted in Alaska. The legislation is necessary because currently joint tenancy with the right of survivorship in real property is statutorily prohibited, except for tenancy by the entirety allowing surviving spouses to take marital residences upon the other spouse's death. Thus this bill is necessary.

If you have any questions, please contact Representative Gruenberg's legislative aide, Miles Brookes, at 465-4940.

ALASKA STATE LEGISLATURE
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TO: Representative Kurt Olson, Chair
House Labor and Commerce Committee

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

DATE: January 30, 2012

RE: HB 297 – Uniform Real Property Transfer on Death Act (URPTODA)

****

Please consider this memorandum as a request for HB 297 to be heard by the House Labor and Commerce committee. Please find the following attached;

- HB 297 (27-LS1237\M)
- Sponsor Statement
- Sectional Analysis
- Uniform Real Property Transfer on Death Act (National Conference of Commissioners on Uniform State Laws)
- URPTODA Commentary from Uniform Law Commission
- List of States with URPTODA related enactments/active legislation

Thank you for considering my request for HB 297 to be scheduled in House Labor and Commerce Committee. Please contact my Judiciary Committee Aide, Melanie Lesh, at 465-4990 with any questions.

Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

Contact Us: **312.450.6600**

Why States Should Adopt URPTODA

The **Uniform Real Property Transfer on Death Act (URPTODA)** enables an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by operation of law by means of a recorded transfer on death (TOD) deed.During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed. On the owner's death, the property passes to the beneficiary, much like the survivorship feature of joint tenancy.

The TOD deed offers a number of advantages over joint tenancy. Because the TOD deed does not convey an immediate interest to the beneficiary, the property is not subject partition or to the beneficiary's creditors. The deed remains revocable, enabling the owner to make a different disposition of the property. It does not trigger an acceleration clause in a mortgage or a property tax reassessment during the transferor's life. Nor does it create adverse Medicaid consequences for either the owner or the beneficiary.

A decedent routinely passes personal property to a named beneficiary outside of probate. Common examples include a beneficiary designation in a life insurance policy or pension plan, registration of securities in TOD form, and a pay on death bank account. But a straightforward, inexpensive, and reliable means of passing real property (which may be the decedent's major asset) directly to a beneficiary is not generally available.

Thirteen states have previously enacted legislation authorizing a TOD deed: Missouri (1989), Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. The device is popular in those states and experience with it is favorable. The TOD deed has proved to be a useful addition to the tools available to an estate planner.

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HOUSE BILL NO. 297

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 1/25/12
Referred: L&C, JUD

A BILL

FOR AN ACT ENTITLED

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act."

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

*** Section 1.** AS 13 is amended by adding a new chapter to read:

Chapter 48. Uniform Real Property Transfer on Death Act.

Sec. 13.48.010. Transfer on death deed authorized. An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

Sec. 13.48.020. Transfer on death deed revocable. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Sec. 13.48.030. Transfer on death deed nontestamentary. A transfer on death deed is nontestamentary.

Sec. 13.48.040. Capacity of transferor. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

Sec. 13.48.050. Requirements. A transfer on death deed

(1) except as otherwise provided in (2) of this section, must contain the

essential elements and formalities of a properly recordable inter vivos deed;

(2) must state that the transfer to the designated beneficiary is to occur at the transferor's death; and

(3) must be recorded before the transferor's death in the public records in the office of the recorder in the recording district where the property is located.

Sec. 13.48.060. Notice, delivery, acceptance, consideration not required. A transfer on death deed is effective without

(1) notice or delivery to, or acceptance by, the designated beneficiary during the transferor's life; or

(2) consideration.

Sec. 13.48.070. Revocation by instrument authorized; revocation by act not permitted. (a) Subject to (b) of this section, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the recording district where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor,

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the

property.

Sec. 13.48.080. Effect of transfer on death deed during transferor's life. During a transferor's life, a transfer on death deed does not

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

Sec. 13.48.090. Effect of transfer on death deed at transferor's death. (a) Except as otherwise provided in the transfer on death deed, in this section, or in AS 13.12.203, 13.12.702, 13.12.706, 13.12.707, 13.12.803, or 13.12.804, on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) subject to (2) of this subsection, the interest in the property is transferred to the designated beneficiary under the deed;

(2) the interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor; the interest of a designated beneficiary that fails to survive the transferor lapses;

(3) subject to (4) of this subsection, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship;

(4) if the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one that lapses or fails for any reason is transferred to the other or to the others in proportion to the interest of

each in the remaining part of the property held concurrently.

(b) Subject to AS 40.17, a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and AS 40.17, the recording of the transfer on death deed is considered to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Sec. 13.48.100. Disclaimer. A beneficiary may disclaim all or part of the beneficiary's interest as provided by AS 13.70 (Uniform Disclaimer of Property Interests Act).

Sec. 13.48.110. Liability for creditor claims and statutory allowances. (a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under (a) of this section is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than 18 months after the transferor's death.

Sec. 13.48.120. Optional form of transfer on death deed. The following form may be used to create a transfer on death deed. The provisions of this chapter govern the effect of this or any other instrument used to create a transfer on death deed.

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. **You may want to consult a lawyer before using this form.**

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

PRIMARY BENEFICIARY/BENEFICIARIES

(Please list one or more primary beneficiaries. You may want to obtain legal advice before listing more than one primary beneficiary. There is more than one way to transfer property to several persons.)

I designate the following beneficiary if the beneficiary survives me:

_____ _____

Printed name Mailing address, if available

ALTERNATE BENEFICIARY/BENEFICIARIES - Optional

(You may list one or more alternate beneficiaries. You may want to obtain legal advice before listing more than one alternate beneficiary. There is more than one way to transfer property to several persons.)

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me:

_____ _____

Printed name Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the

property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each recording district where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the "legal description" of the property necessary? Yes.

How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the recorder in the recording district where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I "record" the TOD deed? Take the completed and acknowledged form to the office of the recorder in the recording district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the property is in more than one recording district, you should record the deed in each recording district.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each recording district where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each recording district where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that

expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.

Sec. 13.48.130. Optional form of revocation. The following form may be used to create an instrument of revocation under this chapter. The provisions of this chapter govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners Making This Revocation:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

REVOCATION

I revoke all my previous transfers of this property by transfer on

death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in the office of the recorder in each recording district where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the "legal description" of the property? This information may be on the TOD deed. It may also be available in the office of the recorder in the recording district where the property is

located. If you are not absolutely sure, consult a lawyer.

How do I "record" the form? Take the completed and acknowledged form to the office of the recorder in the recording district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the property is located in more than one recording district, you should record the form in each of those recording districts.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.

Sec. 13.48.140. Nonexclusivity. The provisions of this chapter do not affect any method of transferring property otherwise permitted under the law of this state.

Sec. 13.48.150. Uniformity of application and construction. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Sec. 13.48.160. Relationship to Electronic Signatures in Global and National Commerce Act. The provisions of this chapter modify, limit, and supersede 15 U.S.C. 7001 - 7031 (Electronic Signatures in Global and National Commerce Act), but do not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

Sec. 13.48.190. Definitions. In this chapter,

(1) "beneficiary" means a person who receives property under a transfer on death deed;

(2) "designated beneficiary" means a person designated to receive property in a transfer on death deed;

(3) "joint owner" means an individual who is a tenant by the entirety, who is an owner of community property with a right of survivorship, or who otherwise owns property concurrently with one or more other individuals with a right of

survivorship, but does not include an individual who is a tenant in common or other owner of community property without a right of survivorship or who is a joint tenant, other than an individual who is a tenant by the entirety;

(4) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity;

(5) "property" means an interest in real property located in this state which is transferable on the death of the owner;

(6) "transfer on death deed" means a deed authorized under this chapter;

(7) "transferor" means an individual who makes a transfer on death deed.

Sec. 13.48.195. Short title. This chapter may be cited as the Uniform Real Property Transfer on Death Act.

*** Sec. 2.** AS 13.70.100(e) is amended to read:

(e) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] before [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer shall be delivered to the person making the beneficiary designation.

*** Sec. 3.** AS 13.70.100(f) is amended to read:

(f) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] after [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer **of an interest in**

(1) personal property shall be delivered to the person obligated to distribute the interest**; and**

(2) real property shall be recorded in the office of the recorder in the recording district where the real property that is the subject of the disclaimer is located.

*** Sec. 4.** AS 13.70.130 is amended to read:

Sec. 13.70.130. Recording of disclaimer. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by

law to be filed, recorded, or registered, the disclaimer may be filed, recorded, or registered as required or permitted by law. **Except as otherwise provided in AS 13.70.100(f)(2), failure** [FAILURE] to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to a transfer on death deed made before, on, or after the effective date of this Act by a transferor dying on or after the effective date of this Act. In this section, "transfer on death deed" and "transferor" have the meanings given in AS 13.48.190, enacted by sec. 1 of this Act.

Carl-
Here's our first public comment on Max's bill

February 15, 2012

To: Representative Kurt Olson
Representative Carl Gatto

Re: HB 297: Uniform Real Property Transfer on Death Act

Dear Representatives Olson and Gatto:

On January 25, 2012, House Judiciary introduced HB 297, "An Act adopting and relating to the Uniform Real Property Transfer on Death Act." This bill has been referred to House Labor and Commerce and the House Judiciary Committee of which you are the respective chairpersons.

By way of background on January 12, 2010, a law professor who was one of the drafters of this Uniform Act was invited to speak before the Estate Planning and Probate section meeting of the Alaska Bar Association regarding this Act. In all my years as a section chair of the Estate Planning and Probate section of the Alaska Bar Association I have never seen a meeting so well attended, so deep were the concerns of attorneys who practice in this area. There were fully over a hundred attorneys in attendance. Not surprisingly some of the attorneys in attendance were real estate attorneys who represented title companies. It is my distinct memory that this bill was unfavorably received by most of the attendees because of the many issues surrounding the details of this bill. Some, but by no means all, the concerns that were raised included:

1. the payment of creditor claims, particularly because a decedent's real estate is typically the largest asset in the estate;

2. title problems for title insurance companies, who must pass on whether a title is insurable and thus marketable at the time of sale;

3. the defeat of a testator's intentions where the deed contravenes the testator's intentions as evidenced by the testator's will or trust, or the intestate succession laws if the decedent dies without a will;

4. limiting the options that might otherwise be available if the heirs need protection because of their own special needs or creditor issues.

Not surprisingly given the uproar this Uniform Act created back in 2010, this Act was not introduced as a bill at that time.

On Tuesday, February 14, 2012, before members of the Estate Planning and Probate Section, I mentioned the fact that this Act was recently introduced as a bill. There seemed to be a wide divergence of opinion regarding the bill's merits, with 1 or 2 members being in support of the bill but most of the members viewing it negatively and as potential breeding ground for ligation. Although the pros and cons were briefly discussed, I believe I can confidently say there was almost unanimous agreement that we as attorneys, whether initially for or against the Act,

needed more time to study the Act, particularly because "the devil is in the details" as is the case with most of the Uniform Acts that come before the legislature.

It would be hoped that this bill would stay in your respective committees to give us time as attorneys to form a study group time to study this bill, and perhaps recommend improvements to the bill instead of being stuck with a bad law where remedial legislation would be necessary to fix problems that could have been averted.

If you have any questions, please do not hesitate to call me.

Kindest regards,

Stephen E. Greer, Esq.
P.O. Box 242903
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(907) 561-5520 work
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Anchorage, AK 99503

Kieran -

Thanks for your report. I do not know the identity of the Alaska Bar speaker in 2010. Deborah O'Reagan, exec director of the Assoc, no doubt would. I will try to call her tomorrow and get back with you.

As for the concerns, it is relevant that all the jurisdictions having adopted the Act appear to have had no problems. At least their Acts have not been repealed. Attorneys, title companies, creditors and grantees seem to have had no problem with the Act. Naturally, the Act rightly and economically will eliminate unnecessary attorney and probate fees in those cases where the grantor desires to utilize the benefits it presents. Alaska already allows joint tenancy ownership of personal property, including massive bank accounts, vehicles and other valuable assets.

Why does Alaska restrict joint ownership of real property, with right of survivorship, solely to married couples? It makes no sense! It might even be in violation of the Constitution.

Thanks again for keeping me informed. I'll be back in touch with you tomorrow.

As an aside, attorneys generally need not require the Legislature to compel the public to employ their services. When needed, they are sought voluntarily by the public. It does not surprise me that the Bar's Estate and Probate section would prefer that this Bill not be enacted. However, the same body sees no objection to creating trusts that they maintain are wholly beyond the reach of the decedent's creditors.

Best regards,

Stan Ditus.

Miles,

The ULAs and supplements have not been updated yet to reflect the five enactments in 2011. Manual redlines of each enactment are attached here.

By way of history of the issue and the act, ULC promulgated URPTODA in 2009, and it was available to states for the first time in 2010. Prior to the act's promulgation, thirteen states had pre-existing TOD deed laws – the oldest in Missouri was enacted in 1989. Since URPTODA's availability, it has been considered by Hawaii, Illinois, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, and Utah. As discussed above, Hawaii, Illinois, Nevada, North Dakota, and Oregon have all adopted a version of the act and Nebraska appears poised to do so shortly. Of the five enactments so far, all of them have some local tailoring, and Illinois, Nevada, and Oregon are considered "substantially similar" to the uniform act, having some (in some cases significant) departure from form. Nevada was starting from pre-existing law, and trying to conform as much as possible to the uniform act without disrupting what they already do and know; Illinois and Oregon were slightly different cases, in that they started with our model prior to a Bar/Law Revision review and came out with a fair amount of local flavor over a year later. Upon passage, Nebraska would join this group. Oklahoma had a pre-existing statute, and we have no information about why conforming amendments were not completed. In South Dakota and Utah, the questions that were raised were essentially the same as those encountered in other states, and currently being raised in Alaska to some degree. Neither state has reintroduced the bill this session (many states are in short session or budget only session), but we will be working with our Commissioners in those states to see if any problems can be ironed out using lessons from states where it has been successfully enacted.

We look forward to our next discussion with you and Rep. Gruenberg this coming Friday, to discuss your questions and the general issues that we have seen raised around the country.

Thank you,

Kieran

Kieran Marion

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UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
IN SANTA FE, NEW MEXICO
JULY 9-16, 2009

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 30, 2009

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

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UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

Prefatory Note

One of the main innovations in the property law of the twentieth century has been the development of asset-specific will substitutes for the transfer of property at death. By these mechanisms, an owner may designate beneficiaries to receive the property at the owner's death without waiting for probate and without the beneficiary designation needing to comply with the witnessing requirements of wills. Examples of specific assets that today routinely pass outside of probate include the proceeds of life insurance policies and pension plans, securities registered in transfer on death (TOD) form, and funds held in pay on death (POD) bank accounts.

Today, nonprobate transfers are widely accepted. The trend has largely focused on assets that are personal property, such as the assets described in the preceding paragraph. However, long-standing uniform law speaks more broadly. Section 6-101 of the Uniform Probate Code (UPC) provides: "*A provision for a nonprobate transfer on death in* an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, *conveyance*, *deed of gift*, marital property agreement, *or other written instrument of a similar nature is nontestamentary*" (emphasis supplied).

A small but growing number of jurisdictions have implemented the principle of UPC §6-101 by enacting statutes providing an asset-specific mechanism for the nonprobate transfer of land. This is done by permitting owners of interests in real property to execute and record a transfer on death (TOD) deed. By this deed, the owner identifies the beneficiary or beneficiaries who will succeed to the property at the owner's death. During the owner's lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed.

Thirteen states have enacted statutes authorizing TOD deeds. In the chronological order of the statutes' enactment, the states are: Missouri (1989), Kansas (1997), Ohio (2000), New Mexico (2001), Arizona (2002), Nevada (2003), Colorado (2004), Arkansas (2005), Wisconsin (2006), Montana (2007), Oklahoma (2008), Minnesota (2008), and Indiana (2009).

The time is ripe for a Uniform Act to facilitate this emerging form of nonprobate transfer and to bring uniformity and clarity to its use and operation.

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Real Property Transfer on Death Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Beneficiary" means a person that receives property under a transfer on death deed.

(2) "Designated beneficiary" means a person designated to receive property in a transfer on death deed.

(3) "Joint owner" means an individual who owns property concurrently with one or more other individuals with a right of survivorship. The term includes a joint tenant[,][and] [owner of community property with a right of survivorship[,][and tenant by the entirety]. The term does not include a tenant in common [or owner of community property without a right of survivorship].

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) "Property" means an interest in real property located in this state which is transferable on the death of the owner.

(6) "Transfer on death deed" means a deed authorized under this [act].

(7) "Transferor" means an individual who makes a transfer on death deed.

Comment

Paragraph (1) defines a beneficiary as a person that receives property under a transfer on death deed. This links the definition of a "beneficiary" to the definition of a "person." A beneficiary can be any person, including the trustee of a revocable trust.

Paragraph (2) defines a designated beneficiary as a person designated to receive property in a transfer on death deed. This links the definition of a "designated beneficiary" to the

definition of a "person." A designated beneficiary can be any person, including a revocable trust.

The distinction between a "beneficiary" and a "designated beneficiary" is easily illustrated. Section 13 provides that, on the transferor's death, the property that is the subject of a transfer on death deed is transferred to the designated beneficiaries who survive the transferor. If *X* and *Y* are the designated beneficiaries but only *Y* survives the transferor, then *Y* is a beneficiary and *X* is not. A further illustration comes into play if Section 13 is made subject to the state's antilapse statute. If *X* fails to survive the transferor but has a descendant, *Z*, who survives the transferor, the antilapse statute may create a substitute gift in favor of *Z*. In such a case, the designated beneficiaries are *X* and *Y*, but the beneficiaries are *Y* and *Z*.

Paragraph (3) provides a definition of a "joint owner" as an individual who owns property with one or more other individuals with a right of survivorship. The term is used in Sections 11 and 13.

Paragraph (4) is the standard Uniform Law Commission definition of a "person."

The effect of paragraph (5) is that the act applies to all interests in real property located in this state that are transferable at the death of the owner.

Paragraph (6) provides that a "transfer on death deed" is a deed authorized under this act. In some states with existing transfer on death deed legislation, the legislation has instead used the term "beneficiary deed." The term "transfer on death deed" is preferred, to be consistent with the transfer on death registration of securities. See Article 6, Part 3, of the Uniform Probate Code, containing the Uniform TOD Security Registration Act.

Paragraph (7) limits the definition of a "transferor" to an individual. The term "transferor" does not include a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any legal or commercial entity other than an individual. The term also does not include an agent or other representative. If a transfer on death deed is made by an agent on behalf of a principal or by a conservator, guardian, or judge on behalf of a ward, the principal or ward is the transferor. By way of analogy, see Uniform Trust Code §103(15) (defining "settlor") and the accompanying Comment (excluding an individual "acting as the agent for the person who will be funding the trust"). The power of an agent to make or revoke a transfer on death deed on behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act, as indicated in the Comments to Sections 9 and 11.

SECTION 3. APPLICABILITY. This [act] applies to a transfer on death deed made before, on, or after [the effective date of this [act]] by a transferor dying on or after [the effective date of this [act]].

Comment

This section provides that the act applies to a transfer on death deed made before, on, or after the effective date of the act by a transferor dying on or after the effective date of the act. This section is consistent with the Uniform Probate Code's provisions governing transfer on death registration of securities. Those provisions "appl[y] to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date]." Uniform Probate Code §6-311.

SECTION 4. NONEXCLUSIVITY. This [act] does not affect any method of transferring property otherwise permitted under the law of this state.

Comment

This section provides that the act is nonexclusive. The act does not affect any method of transferring property otherwise permitted under state law.

One such method is a present transfer with a retained legal life estate. Consider the following examples:

Example 1. A conveys Blackacre to *B* while reserving *A*'s right to remain in possession until *A*'s death. By this conveyance, *A* has made a present transfer of a future interest to *B*. The transfer is irrevocable. The future interest will ripen into possession at *A*'s death, even if *B* fails to survive *A*.

Example 2. A executes, acknowledges, and records a transfer on death deed for Blackacre, naming *B* as the designated beneficiary. During *A*'s lifetime, no interest passes to *B*, and *A* may revoke the deed. If unrevoked, the deed will transfer possession to *B* at *A*'s death only if *B* survives *A*.

As illustrated in these examples, the two methods of transfer have different effects and are governed by different rules.

SECTION 5. TRANSFER ON DEATH DEED AUTHORIZED. An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

Comment

This section authorizes a transfer on death deed and makes it clear that the transfer is not an inter vivos transfer. The transfer occurs at the transferor's death.

The transferor is an individual, but the singular includes the plural. Multiple individuals can readily act together to transfer property by a transfer on death deed, as in the common case of a husband and wife who own the property as joint tenants or as tenants by the entirety. On the

effect of a transfer on death deed made by joint owners, see Section 13(c) and the accompanying Comment.

The transferor may select any form of ownership, concurrent or successive, absolute or conditional, contingent or vested, valid under state law. Among many other things, this permits the transferor to reserve interests for his estate (e.g., mineral interests); to specify the nature and extent of the beneficiary's interest; and to designate one or more primary beneficiaries and one or more alternate beneficiaries to take in the event the primary beneficiaries fail to survive the transferor. This freedom to specify the form and terms of the transferee's interest comports with the fundamental principle of American law recognized by the Restatement (Third) of Property (Wills and Other Donative Transfers) §10.1 that the donor's intention should be "given effect to the maximum extent allowed by law." As the Restatement explains in Comment c to §10.1, "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."

Notwithstanding this freedom of disposition, transferors are encouraged as a practical matter to avoid formulating dispositions that would complicate title. Dispositions containing conditions or class gifts, for example, may require a court proceeding to sort out the beneficiaries' interests. Other estate planning mechanisms, such as trusts, may be more appropriate in such cases.

SECTION 6. TRANSFER ON DEATH DEED REVOCABLE. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Comment

A fundamental feature of a transfer on death deed under this Act is that the transferor retains the power to revoke the deed. Section 6 is framed as a mandatory rule, for two reasons. First, the rule prevents an off-record instrument from affecting the revocability of a transfer on death deed. Second, the rule protects the transferor who may wish later to revoke the deed.

If the transferor promises to make the deed irrevocable or not to revoke the deed, the promisee may have a remedy under other law if the promise is broken. The deed remains revocable despite the promise.

SECTION 7. TRANSFER ON DEATH DEED NONTESTAMENTARY. A transfer on death deed is nontestamentary.

Comment

This section is consistent with Uniform Probate Code §6-101(a), which provides: "A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement

plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary."

As the Comment to Uniform Probate Code §6-101 explains, because the mode of transfer is declared to be nontestamentary, the instrument of transfer is not a will and does not have to be executed in compliance with the formalities for wills, nor does the instrument need to be probated.

Whether a document that is ineffective as a transfer on death deed (e.g., because it has not been recorded before the transferor's death) should be given effect as a testamentary instrument will depend on the applicable facts and on the wills law of the jurisdiction. Section 2-503 of the Uniform Probate Code provides in pertinent part: "Although a document ... was not executed in compliance with Section 2-502, the document ... is treated as if it had been executed in compliance with that section if the proponent of the document ... establishes by clear and convincing evidence that the decedent intended the document ... to constitute ... (iii) an addition to or alteration of the [decedent's] will ...."

SECTION 8. CAPACITY OF TRANSFEROR. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

Comment

This section provides that the capacity required to make or revoke a transfer on death deed, which is a revocable will substitute, is the same as the capacity required to make a will. It is appropriate that a will and a transfer on death deed require the same level of capacity, for both mechanisms are revocable and ambulatory, the latter term meaning that they do not operate before the grantor's death. This approach is consistent with the Restatement (Third) of Property (Wills and Other Donative Transfers) §8.1(b), which applies the standard of testamentary capacity, and not the standard of capacity for inter vivos gifts, to revocable will substitutes: "If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property." This section is also consistent with Uniform Trust Code §601: "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

A transfer on death deed is not affected if the transferor subsequently loses capacity. On the ability of an agent under a power of attorney to make or revoke a transfer on death deed, see the Comments to Sections 9 and 11.

SECTION 9. REQUIREMENTS. A transfer on death deed:

(1) except as otherwise provided in paragraph (2), must contain the essential elements and

formalities of a properly recordable inter vivos deed;

(2) must state that the transfer to the designated beneficiary is to occur at the transferor's death; and

(3) must be recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the property is located.

Legislative Note: *Because a transfer on death deed does not have present effect and is revocable, it may be useful to title searchers and insurers if the recording or indexing of the deed identifies it as a transfer on death deed. Information about how a recorder of deeds should record and index a transfer on death deed is available from the recorders of deeds in states having experience with such deeds. By way of example, the recorder of deeds of Clay County, Missouri, uses a grantor-grantee index that is fully searchable online, at http://recorder.claycogov.com/pages/online_access.asp.*

Comment

Paragraph (1) requires a transfer on death deed to contain the same essential elements and formalities, other than a present intention to convey, as are required for a properly recordable inter vivos deed under state law. "Essential elements" is a term with a long usage in the law of deeds of real property. The essential elements of a deed vary from one state to another but commonly include the names of the grantor and grantee, a clause transferring title, a description of the property transferred, and the grantor's signature. In all states, the essential elements of a properly recordable deed include the requirement that the deed be acknowledged by the grantor before a notary public or other individual authorized by law to take acknowledgments. See Thompson on Real Property §92.04(c) (observing that a "certificate of acknowledgment or attestation is universally required to qualify an instrument for recordation"). In the context of transfer on death deeds, the requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that he or she is performing an act with legal consequences. Such caution is important where, as here, the transferor does not experience the wrench of delivery because the transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment enables the rule in Section 11 that a later acknowledged deed prevails over an earlier acknowledged deed.

Paragraph (2) emphasizes an important distinction between an inter vivos transfer and a transfer on death. An inter vivos transfer reflects an intention to transfer, at the time of the conveyance, an interest in property, either a present interest or a future interest. In contrast, a transfer on death reflects an intention that the transfer occur at the transferor's death. Under no circumstances should a transfer on death be given effect inter vivos; to do so would violate the transferor's intention that the transfer occur at the transferor's death.

Paragraph (3) requires a transfer on death deed to be recorded before the transferor's death in the county (or other appropriate administrative division of a state, such as a parish)

where the land is located. If the property described in the deed is in more than one county, the deed is effective only with respect to the property in the county or counties where the deed is recorded. The requirement of recordation before death helps to prevent fraud by ensuring that all steps necessary to the effective transfer on death deed are completed during the transferor's lifetime. The requirement of recordation before death also enables all parties to rely on the recording system. For these reasons, all thirteen states that have already enacted transfer on death deed statutes require the deed to be recorded before the transferor's death.

An individual's agent may execute a transfer on death deed on the individual's behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act. This act does not define, but instead relies on other law to determine, the authority of an agent.

SECTION 10. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT REQUIRED. A transfer on death deed is effective without:

(1) notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or

(2) consideration.

Comment

This section makes it clear that a transfer on death deed is effective without notice or delivery to or acceptance by the beneficiary during the transferor's lifetime (paragraph (1)) and without consideration (paragraph (2)).

Paragraph (1) is consistent with the fundamental distinction under this Act between a transfer on death deed and an inter vivos deed. Under the former, but not under the latter, the transfer occurs at the transferor's death. Therefore, there is no requirement of notice, delivery, or acceptance during the transferor's life. This does not mean that the beneficiary is required to accept the property. The beneficiary may disclaim the property, as explained in Section 14 and the accompanying Comment.

Paragraph (2) is consistent with the law of donative transfers. A deed need not be supported by consideration.

SECTION 11. REVOCATION BY INSTRUMENT AUTHORIZED; REVOCATION BY ACT NOT PERMITTED.

(a) Subject to subsection (b), an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument:

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor:

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

Comment

This section concerns revocation by instrument and revocation by act. On revocation by change of circumstances, such as by divorce or homicide, see Section 13 and the accompanying Comment.

Subsection (a) provides the exclusive methods of revoking, in whole or in part, a recorded transfer on death deed by a subsequent instrument. Revocation by an instrument not specified, such as the transferor's will, is not permitted.

The rule that a transfer on death deed may not be revoked by the transferor's subsequent will is a departure from the Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 comment e (see also the corresponding Reporter's Note), which encourages the revocability of will substitutes by will. However, there is a sound reason for the departure in the specific case of a transfer on death deed. A transfer on death deed operates on real property, for which certainty of title is essential. This certainty would be difficult, and in many cases impossible, to achieve if an off-record instrument, such as the grantor's will, could revoke a recorded transfer on death deed. The rule in this Act against revocation by will is also consistent with the uniform acts governing multiple-party bank accounts. See Uniform Probate Code §6-213(b) ("A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.")

A recorded transfer on death deed may be revoked by instrument only by (1) a subsequently acknowledged transfer on death deed, (2) a subsequently acknowledged instrument of revocation, such as the form in Section 17, or (3) a subsequently acknowledged inter vivos deed containing an express revocation clause. Consider the following examples:

Example 1. *T* executes, acknowledges, and records a transfer on death deed for Blackacre. Later, *T* executes, acknowledges, and records a second transfer on death deed for Blackacre, containing an express revocation clause revoking "all my prior transfer on death deeds concerning this property." The second deed revokes the first deed. The revocation occurs when the second deed is recorded. (For the result if the second deed had not contained the express revocation clause, see Example 5.)

Example 2. *T* executes, acknowledges, and records two transfer on death deeds for Blackacre. Both deeds expressly revoke "all my prior transfer on death deeds concerning this property." The dates of acknowledgment determine which deed revoked the other. The first deed is acknowledged November 1; the second deed is acknowledged December 15. The second deed is the later acknowledged, so it revokes the first deed. The revocation occurs when the second deed is recorded.

Example 3. *T* executes and acknowledges a transfer on death deed for Blackacre. *T* later executes and acknowledges a revocation form. Both instruments are recorded. Because the revocation form is acknowledged later than the deed, the form revokes the deed. The revocation occurs when the form is recorded.

Example 4. *T* executes and acknowledges a transfer on death deed for Blackacre. *T* later executes and acknowledges an inter vivos deed conveying Blackacre and expressly revoking the transfer on death deed. Both instruments are recorded. Because the inter vivos deed contains an express revocation provision and is acknowledged later than the transfer on death deed, the inter vivos deed revokes the transfer on death deed. The revocation occurs when the inter vivos deed is recorded. (For the result if the inter vivos deed had not contained an express revocation clause, see the discussion below on "ademption by extinction.")

The same rules apply whether the revocation is total or partial. In the previous examples, suppose instead that the intial transfer on death deed provides for the transfer of two parcels,

Blackacre and Whiteacre, and that the subsequent instrument revokes the transfer on death deed as to Blackacre. The subsequent instrument revokes the transfer on death deed in part.

If the property described in the original deed is in more than one county, the revocation is effective only with respect to the property in the county or counties where the revoking deed or instrument is recorded.

Subsection (a)(1)(A) speaks of revocation "expressly or by inconsistency." This provision references the well-established law of revocation by inconsistency of wills. Consider the following examples:

Example 5. *T* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death deed for the same property, Blackacre, containing no express revocation of the earlier deed but naming *Y* as the designated beneficiary. Later, *T* dies. The recording of the deed in favor of *Y* revokes the deed in favor of *X* by inconsistency. At *T*'s death, *Y* is the owner of Blackacre.

Example 6. *T*, the owner of Blackacre in fee simple absolute, executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death deed containing no express revocation of the earlier deed but naming *Y* as the designated beneficiary of a life estate (or a mineral interest) in Blackacre. Later, *T* dies. The recording of the deed in favor of *Y* partially revokes the deed in favor of *X* by inconsistency. At *T*'s death, *Y* is the owner of a life estate (or a mineral interest) in Blackacre, and *X* is the owner of the remainder.

The question is sometimes raised whether a recorded inter vivos deed *without an express revocation clause* operates as a revocation of an earlier transfer on death deed. The answer highlights the important distinction between "revocation" and "ademption by extinction." See Atkinson on Wills §134. Revocation means that the instrument is rendered void. Ademption by extinction means that the transfer of the property cannot occur because the property is not owned by the transferor at death. The doctrines are different.

In some instances, revocation and ademption have the same practical effect: the designated beneficiary of the property receives nothing. Nothing in this section changes that fact, as indicated in subsection (d). However, there are other instances where the doctrines have differing effects. Consider the following illustration, drawn from the law of wills.

Example 7. *T* executes a will devising Blackacre to *A*. Later, *T* becomes legally incompetent, and *G* is appointed as *T*'s conservator. *G*, acting within the scope of his authority, sells Blackacre to *B* for $100,000. Later, *T* dies.

The law of wills provides that the devise to *A* is adeemed rather than revoked. This means that *A* is not entitled to Blackacre but is entitled to a pecuniary devise in the amount of $100,000. See Atkinson on Wills §134; *Wasserman v. Cohen*, 606 N.E.2d 901, 903 (Mass. 1993); Uniform Probate Code §2-606(b). The result is designed to effectuate *T*'s presumed intention.

The Joint Editorial Board for Uniform Trust and Estate Acts has begun a conversation on whether the Uniform Probate Code's provisions on ademption should be extended to nonprobate transfers, thus harmonizing the treatment of wills and will substitutes on this aspect of the law. This act accepts the well recognized distinction between revocation and ademption in order to leave the door open for such future harmonization, which would effectuate the presumed intention of nonprobate grantors.

Subsection (b) supplies rules governing revocation by instrument in the event of a transfer on death deed made by multiple owners. Subsection (b)(1) provides that revocation by a transferor does not affect a transfer on death deed as to the interest of another transferor. Subsection (b)(2) provides that a transfer on death deed of joint owners is revoked only if it is revoked by all of the living joint owners. This rule is consistent with Uniform Probate Code §6-306, which provides in pertinent part: "A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary." Subsection (b)(2) applies only to a deed of joint owners. A joint tenant who severs the joint tenancy, thereby destroying the right of survivorship, is no longer a joint owner.

Subsection (c) provides that a recorded transfer on death deed may not be revoked by a revocatory act performed on the deed. Such an act includes burning, tearing, canceling, obliterating, or destroying the deed or any part of it.

This statute does not define, but instead looks to other law to determine, the authority of an agent. An individual's agent may revoke a transfer on death deed on the individual's behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act.

SECTION 12. EFFECT OF TRANSFER ON DEATH DEED DURING TRANSFEROR'S LIFE. During a transferor's life, a transfer on death deed does not:

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

Comment

A fundamental feature of a transfer on death deed under this Act is that it does not operate until the transferor's death. The transfer occurs at the transferor's death, not before.

Paragraph (1): A transfer on death deed, during the transferor's lifetime, does not affect the interests or property rights of the transferor or any other owners. Therefore, the deed does not, among many other things: affect the transferor's right to transfer or encumber the property inter vivos; sever a joint tenancy or a joint tenant's right of survivorship; trigger a due-on-sale clause in the transferor's mortgage; trigger the imposition of real estate transfer tax; or affect the transferor's homestead or real estate tax exemptions, if any.

Paragraph (2): A transfer on death deed does not affect transferees, whether or not they have notice of the deed. Like a will, the transfer on death deed is ambulatory. It has no effect on inter vivos transfers.

Paragraph (3): A transfer on death deed, during the transferor's lifetime, does not affect pre-existing or future creditors, secured or unsecured, whether or not they have an interest in the property or notice of the deed.

Paragraph (4): A transfer on death deed, during the transferor's lifetime, does not affect the transferor's or designated beneficiary's eligibility for any form of public assistance, including Medicaid. On this point, the drafting committee specifically disapproves of the contrary approach of Colo. Rev. Stat. §15-15-403.

Paragraph (5): During the transferor's lifetime, a transfer on death deed does not create a legal or equitable interest in the designated beneficiary. The beneficiary does not have an interest that can be assigned or encumbered. Note, however, that this rule would not preclude the doctrine of after-acquired title. A warranty deed from a designated beneficiary to a third party would operate to pass the beneficiary's title to the third party after the transferor's death.

Paragraph (6): A transfer on death deed, during the transferor's lifetime, does not make the property subject to claims or process of the designated beneficiary's creditors. The deed has no more effect than a will.

If a transferor combines an inter vivos transfer of an interest in property (such as a mineral interest) with a transfer on death of the remainder interest, the inter vivos transfer may have present effect even though the transfer on death does not occur until the transferor's death.

SECTION 13. EFFECT OF TRANSFER ON DEATH DEED AT TRANSFEROR'S DEATH.

(a) Except as otherwise provided in the transfer on death deed[,][or] in this section[,][or in [cite state statutes on antilapse, revocation by divorce or homicide, survival and simultaneous death, and elective share, if applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) Subject to paragraph (2), the interest in the property is transferred to the designated beneficiary in accordance with the deed.

(2) The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive the transferor lapses.

(3) Subject to paragraph (4), concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

(4) If the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one which lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to [cite state recording act], a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and [cite state recording act], the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is:

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Legislative Note: *In light of the growing harmonization of the rules governing probate and nonprobate transfers, states enacting this act should consider extending to nonprobate mechanisms, such as transfer on death deeds, the probate rules governing antilapse, revocation by divorce, revocation by homicide, survival and simultaneous death, and the elective share of a surviving spouse.*

One of the significant trends in the law of property in the twentieth century has been the growing harmonization of the constructional and substantive rules governing deathtime transfers, whether the transfers occur in or outside of the probate process. Section 7.2 of the Restatement (Third) of Property (Wills and Other Donative Transfers) provides: "Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions."

The Uniform Probate Code contains statutory provisions treating wills and will substitutes alike for many purposes, including (1) antilapse; (2) revocation by divorce; (3) revocation by homicide (the "slayer rule"); (4) survival and simultaneous death; and (5) the elective share of a surviving spouse.

In some cases, the harmonization is achieved by applying the relevant rule to any "governing instrument," which is defined in Uniform Probate Code §1-201(18) as "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profitsharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type." The Uniform Probate Code's rules on revocation by divorce, revocation by homicide, and survival and simultaneous death apply to any governing instrument. See Uniform Probate Code §§2-702 (survival and simultaneous death), 2-803 (revocation by homicide), 2-804 (revocation by divorce).

For the elective share, the Uniform Probate Code treats wills and will substitutes alike by defining the decedent's "augmented estate" to include both probate and nonprobate transfers. See Uniform Probate Code §2-203(a).

For antilapse, the Uniform Probate Code has separate sections treating wills (§2-603) and will substitutes (§§2-706, 2-707), but the latter are modeled on the former.

See also the Legislative Note to Section 14 on disclaimers.

Comment

Subsection (a) states four default rules, except as otherwise provided by the transfer on death deed, by this section, or by other provisions of state law governing nonprobate transfers. On this last, and the desirability of extending the probate rules governing antilapse, revocation on divorce or homicide, survival and simultaneous death, and the elective share of the surviving spouse to nonprobate instruments such as transfer on death deeds, see the Legislative Note.

The four default rules established by subsection (a) are these. First, the property that is the subject of an effective transfer on death deed and owned by the transferor at death is transferred at the transferor's death to the designated beneficiaries as provided in the deed. The rule implements the transferor's intention as described in the deed. Consider the following example:

Example 1. A executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails to survive *A*. Both *X* and *Y* survive *A*. Blackacre is transferred to *X* at *A*'s death in accordance with the provisions of the deed.

This default rule implements the fundamental principle that the provisions of the deed control the disposition of the property, unless otherwise provided by state law.

The drafting committee approves of the result in *In re Estate of Roloff*, 143 P.3d 406 (Kan. Ct. App. 2006) (holding that crops should be transferred with the land under a transfer on death deed because this result would be reached on the same facts with any other deed).

The bracketed language at the beginning of subsection (a) enables a state to make the default rules subject to other statutes, such as an antilapse statute or a statute providing for revocation on divorce. Consider the following examples:

Example 2. A executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails to survive *A*. In fact, *X* and *Y* fail to survive *A*, who is survived only by *X*'s child, *Z*. Assume that the state's antilapse statute applies to transfer on death deeds and creates a substitute gift in *Z*. (For such a statute, see Uniform Probate Code §2-706.) Blackacre is transferred to *Z* at *A*'s death in accordance with the provisions of the deed as modified by the antilapse statute.

Example 3. A executes, acknowledges, and records a transfer on death deed for Blackacre naming her spouse, *X*, as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails to survive *A*. Later, *A* and *X* divorce. Assume that the state's statute on revocation by divorce applies to transfer on death deeds and revokes the designation in favor of *X*, with the effect that the provisions of the transfer on death deed are given effect as if *X* had disclaimed. (For such a

statute, see Uniform Probate Code §2-804.) Assume further that the effect of the putative disclaimer is that *X* is treated as having failed to survive *A*. (See the Uniform Disclaimer of Property Interests Act §6(a)(3)(B).) Blackacre is transferred to *Y* at *A*'s death in accordance with the provisions of the deed as modified by the revocation on divorce and disclaimer statutes.

Note that the property must be owned by the transferor at death. Property no longer owned by the transferor at death cannot be transferred by a transfer on death deed, just as it cannot be transferred by a will. This is the principle of ademption by extinction, discussed in the Comment to Section 11.

In almost every instance, the transferor will own the property not only at death but also when the transfer on death deed is executed, but the latter is not imperative. Consider the following example. *H* and *W*, a married couple, hold Blackacre as tenants by the entirety. *H* executes, acknowledges, and records a transfer on death deed for Blackacre in favor of *X*. *W* later dies, at which point *H* owns Blackacre in fee simple absolute. Later, *H* dies. Under the law of some states, there may be a question whether the transfer on death deed is effective, given that *H* executed it when Blackacre was owned, not by *H* and *W*, but by the marital entity. The correct answer is that the transfer on death deed is effective at *H*'s death because Blackacre is owned by *H* at *H*'s death. See, e.g., *Mitchell v. Wilmington Trust Co.*, 449 A.2d 1055 (Del. Ch. 1982) (mortgage granted by one tenant by the entirety is not void upon execution but remains inchoate during the lives of both spouses, and becomes a valid lien if the spouse who executed the mortgage survives the other spouse or if the spouses get divorced).

The second default rule established by subsection (a) is that the interest of a designated beneficiary is contingent on surviving the transferor. This default rule treats wills and will substitutes alike. The interest of a designated beneficiary who fails to survive the transferor lapses. On the desirability of extending statutory antilapse protection to will substitutes such as transfer on death deeds, see the Legislative Note.

The third default rule established by subsection (a) is that concurrent beneficiaries receive equal and undivided interests with no right of survivorship among them. This default rule is consistent with the general presumption in favor of tenancy in common. See Powell on Real Property §51.02. The rule is also consistent with Uniform Probate Code §6-212 governing multiple-party accounts and §6-307 governing the transfer on death registration of securities.

The fourth and last default rule established by subsection (a) is that, in the event of the lapse or failure of an interest to be held concurrently, the share that lapses or fails passes proportionately to the surviving concurrent beneficiaries. Consider the following example:

Example 4. *A* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X*, *Y*, and *Z* as the designated beneficiaries. *X* and *Y* survive *A*, but *Z* fails to survive *A*. The transfer on death deed is effective and, in the absence of an antilapse statute, transfers Blackacre to *X* and *Y*. This default rule is consistent with the transferor's probable intention in the absence of an antilapse statute and also with Uniform Probate Code §2-604(b) on the lapse of a residuary devise. On the desirability of extending statutory antilapse protection to will substitutes such as transfer on death deeds, see the Legislative Note.

Subsection (b) concerns the effect of transactions during the transferor's life. The subsection states an intermediate rule between two extremes. One extreme would provide that transactions during the transferor's life affect the beneficiary only if the transactions are recorded before the transferor's death. This would unfairly disadvantage the transferor's creditors and inter vivos transferees. The other extreme would provide that transactions during the transferor's life always supersede the beneficiary's interest, even if the recording act would provide otherwise. Between these two positions is the rule of subsection (b).

Subsection (b) provides that the beneficiary's interest is subject to *all* conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. "Liens" includes liens arising by operation of law, such as state Medicaid liens.

The only exception to this rule arises when the state recording act so provides. The state recording act will so provide only when two conditions are met: (1) the inter vivos conveyance or encumbrance is unrecorded throughout the transferor's life (the legal fiction in this subsection protects persons who transact with the transferor and record any time before the transferor's death); and (2) the beneficiary is protected by the recording act. These two conditions will be met only in rare instances. Most beneficiaries of transfer on death deeds are gratuitious, whereas state recording acts typically protect only purchasers for value. See Powell on Real Property §82.02.

Subsection (c) provides that the survivorship right of a joint owner takes precedence over the transfer on death deed. This rule is consistent with the law of joint tenancy and wills: the right of survivorship takes precedence over a provision in a joint tenant's will.

Subsection (d) states the mandatory rule that a transfer on death deed transfers the property without covenant or warranty of title. The rule is mandatory for two reasons: first, to prevent mishaps by uninformed grantors; and second, to recognize that a transfer on death deed is a will substitute. The rule of this section is consistent with the longstanding law of wills. As stated by Sir Edward Coke, "an express warranty cannot be created by will." Coke on Littleton 386a.

SECTION 14. DISCLAIMER. A beneficiary may disclaim all or part of the beneficiary's interest as provided by [cite state statute or the Uniform Disclaimer of Property Interests Act].

Legislative Note: *States should check their disclaimer statutes for any necessary amendments. The following are conforming amendments to the Uniform Disclaimer of Property Interests Act:*

SECTION 12. DELIVERY OR FILING.

(a) In this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:

(1) an annuity or insurance policy;

(2) an account with a designation for payment on death;

(3) a security registered in beneficiary form;

(4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or

(5) any other nonprobate transfer at death.

(b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt.

(c) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to appoint the personal representative.

(d) In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to enforce the trust.

(e) In the case of an interest in an inter vivos trust :

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, it must be filed with a court having jurisdiction to enforce the trust; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

(f) In the case of an interest created by a beneficiary designation which is disclaimed ~~made~~ before ~~the time~~ the designation becomes irrevocable, ~~a~~ the disclaimer must be delivered to the person making the beneficiary designation.

(g) In the case of an interest created by a beneficiary designation which is disclaimed ~~made~~ after ~~the time~~ the designation becomes irrevocable~~,~~:

(1) ~~a~~ the disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest~~.~~; and

(2) the disclaimer of an interest in real property must be recorded in [the office of the county recorder of deeds] of the [county] where the real property that is the subject of the disclaimer is located.

(h) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

(i) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power ; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

Comment

The rules set forth in Section 12 are designed ~~so that anyone who has the duty to distribute the disclaimed interest will be notified~~ to provide notice of the disclaimer. For example, a disclaimer of an interest in a decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only ~~when there is no one person or entity to whom delivery can be made~~ in very limited circumstances.

SECTION 15. RECORDING OF DISCLAIMER. *If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Except as otherwise provided in Section 12(g)(2), ~~F~~failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.*

Comment

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which ~~only~~ referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice. The reference to Section 12(g)(2) concerns the disclaimer of an interest in real property created by a "beneficiary designation" as that term is defined in Section 12(a). Such a disclaimer must be recorded.

Comment

A beneficiary of a transfer on death deed may disclaim the property interest the deed attempts to transfer. While this section relies on other law, such as the Uniform Disclaimer of

Property Interests Act, to govern the disclaimer, two general principles should be noted.

First, there is no need under the law of disclaimers to execute a disclaimer in advance. During the transferor's life, a designated beneficiary has no interest in the property. See Section 12. Nothing passes to the designated beneficiary while the transferor is alive, hence there is no need to execute a disclaimer during that time.

Second, an effective disclaimer executed after the testator's death "relates back" to the moment of the attempted transfer, here the death of the transferor. Because the disclaimer "relates back," the beneficiary is regarded as never having had an interest in the disclaimed property. The Uniform Disclaimer of Property Interests Act (UDPIA) reaches this result, without using the language of relation back, in UDPIA §6(b)(1): "The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable ...." As the Comment to UDPIA §6 explains, "This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean."

SECTION 15. LIABILITY FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES.

Alternative A

A beneficiary of a transfer on death deed is liable for an allowed claim against the transferor's probate estate and statutory allowances to a surviving spouse and children to the extent provided in [cite state statute or Section 6-102 of the Uniform Probate Code].

Alternative B

(a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under subsection (a) is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than [18 months] after the transferor's death.

End of Alternatives

Legislative Note: *Alternative A is for a state with an existing statute governing creditors' rights in nonprobate transfers, such as Uniform Probate Code §6-102. States are encouraged to enact such statutes, thereby treating nonprobate transfers comprehensively. Alternative B is a second-best approach, supplying creditor protection but governing only transfer on death deeds and not other nonprobate mechanisms.*

Comment

Alternative A defers to other law, such as Uniform Probate Code §6-102, to establish the liability of a beneficiary of a transfer on death deed for creditor claims and statutory allowances.

Uniform Probate Code (UPC) §6-102 was added in 1998 to establish the principle that recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is insufficient. The fundamental rule of liability is contained in UPC §6-102(b): "Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent's probate estate and stautory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee." The other provisions of UPC §6-102 implement this liability rule.

For states not favoring the comprehensive approach of UPC §6-102(b) or the equivalent, Alternative B provides an *in rem* liability rule applying to transfer on death deeds. The property transferred under a transfer on death deed is liable to the transferor's probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

One of the functions of probate is creditor protection. UPC §6-102, referenced in Alternative A, attempts to provide comprehensive creditor protection within the realm of nonprobate transfers. In addition, this Act in Alternative B provides more creditor protection than is typically available under current law. For many transferors, the transfer on death deed will be used in lieu of joint tenancy with right of survivorship. Under the usual law of joint tenancy, the unsecured creditors of a deceased joint tenant have no recourse against the property or against the other joint tenant. Instead, the property passes automatically to the survivor, free of the decedent's debts. See Comment 5 to UPC §6-102. If the debts cannot be paid from the probate estate, the creditor is out of luck. Under Alternative B, in contrast, the property transferred under a transfer on death deed is liable to the probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

[SECTION 16. OPTIONAL FORM OF TRANSFER ON DEATH DEED. The following form may be used to create a transfer on death deed. The other sections of this [act] govern the effect of this or any other instrument used to create a transfer on death deed:

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You May Want to Consult a Lawyer Before Using This Form.

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____	_____
Printed name	Mailing address
_____	_____
Printed name	Mailing address

Legal description of the property:

_____

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

_____	_____
Printed name	Mailing address, if available

ALTERNATE BENEFICIARY – Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

_____	_____
Printed name	Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ [(SEAL)]_____
Signature Date

_____ [(SEAL)]_____
Signature Date

ACKNOWLEDGMENT

(insert acknowledgment for deed here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each [county] where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the "legal description" of the property necessary? Yes.

How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in [the office of the county recorder of deeds] for the [county] where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I "record" the TOD deed? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is in more than one [county], you should record the deed in each [county].

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each [county] where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each [county] where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit

some but not all situations. If you have other questions, you are encouraged to consult a lawyer.]

Legislative Note: *This section and the next section are bracketed for states wishing to provide optional statutory forms. An enacting jurisdiction should review its statutory requirements for deeds and for acknowledgments and amend the statutory forms provided in Sections 16 and 17 where necessary for conformity with those requirements. If an enacting jurisdiction changes the act, the jurisdiction should review the answers to the common questions in Sections 16 and 17 to ensure the answers remain accurate.*

Comment

The form in this section is optional. The section is based on Section 4 of the Uniform Health-Care Decisions Act.

Ten of the thirteen states with transfer on death deed statutes provide a statutory form. See Ariz. Stat. §33-405(K); Ark. Stat. §18-12-608(h), Colo. Stat. §15-15-404; Kans. Stat. §59-3502; Minn. Stat. §507.071(24); Mont. Stat. §72-6-121(13); Nev. Stat. §111.109(6); N.M. Stat. §45-6-401(C); Ohio Code §5302.22(A); Okla. H.B. 2639 §3.

The transfer on death deed is likely to be used by consumers for whom the preparation of a tailored inter vivos revocable trust is too costly. The form in this section is designed to be understandable and consumer friendly.

For examples of statutory forms containing answers to questions likely to be asked by consumers, see the Illinois statutory forms for powers of attorney. 755 Ill. Comp. Stat. 45/3-3 (power of attorney for property); 755 Ill. Comp. Stat. 45/4-10 (power of attorney for health care).

[SECTION 17. OPTIONAL FORM OF REVOCATION. The following form may be used to create an instrument of revocation under this [act]. The other sections of this [act] govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation:

Printed name	Mailing address
Printed name	Mailing address

Legal description of the property:

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

Signature	[(SEAL)] Date
Signature	[(SEAL)] Date

ACKNOWLEDGMENT

(insert acknowledgment here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in [the office of the county recorder of deeds] of each [county] where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the "legal description" of the property? This information may be on the TOD deed. It may also be available in [the office of the county recorder of deeds] for the

[county] where the property is located. If you are not absolutely sure, consult a lawyer.

How do I "record" the form? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is located in more than one [county], you should record the form in each of those [counties].

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.]

Comment

The form in this section is optional. The section is based on Section 4 of the Uniform Health-Care Decisions Act.

Six of the thirteen states with transfer on death deed statutes provide a statutory form for revocation. See Ariz. Stat. §33-405(L); Ark. Stat. §18-12-608(i), Colo. Stat. §15-15-405; Minn. Stat. §507.071(25); Mont. Stat. §72-6-121(14); Nev. Stat. §111.109(7).

The aim of the form in this section is to be understandable and consumer friendly.

SECTION 18. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

SECTION 19. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

U.S.C. Section 7003(b).

SECTION 20. REPEALS. The following are repealed:

Legislative Note: *This section is for states wishing to replace their transfer on death deed statutes with this Act.*

SECTION 21. EFFECTIVE DATE. This [act] takes effect ....

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 19, 2012

SUBJECT: Bill adopting and relating to the Uniform Real Property Transfer on Death Act (Work Order No. 27-LS1237\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Terry Bannister
Legislative Counsel

This memo accompanies a draft of the bill described above. The bill is based on 27-LS1092\A.

1. Requested recorder changes. The term, "judicial district," is changed to "recording district" throughout the bill where applicable.

2. Sample form language. A line is added to each of the sections in the sample forms to inform the transferor that there can be more than one primary beneficiary and more than one alternate beneficiary. Although sec. 13.48.090(a) addresses the transfer to multiple beneficiaries, the inclusion of multiple alternate beneficiaries raises the question of how the multiple alternate beneficiaries will share the interests of nonsurviving beneficiaries. Sec. 13.48.090(a) does not seem to address alternate beneficiaries directly and the model form is designed for one alternate beneficiary. If there are multiple alternate beneficiaries, is there a priority among them? Will each replace one beneficiary? Perhaps multiple alternate beneficiaries could be prioritized on the form. It seems as if this matter should be clarified because it is dealing with the distribution of interests in real property. To avoid all problems, I suggest that the form not include a space for an alternate beneficiary, or, if you want to allow for one or more alternate beneficiaries, that the person be advised on the form to contact an attorney in that case.

3. Correction. In sec. 3, a correction has been made to AS 13.70.100(f) to replace "before" with "after."

If I may be of further assistance, please advise.

TLB:plm
12-032.plm

Enclosure

27-LS1237\A
Bannister
1/18/12

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act."

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

*** Section 1.** AS 13 is amended by adding a new chapter to read:

Chapter 48. Uniform Real Property Transfer on Death Act.

Sec. 13.48.010. Transfer on death deed authorized. An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

Sec. 13.48.020. Transfer on death deed revocable. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Sec. 13.48.030. Transfer on death deed nontestamentary. A transfer on death deed is nontestamentary.

Sec. 13.48.040. Capacity of transferor. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

Sec. 13.48.050. Requirements. A transfer on death deed

(1) except as otherwise provided in (2) of this section, must contain the

essential elements and formalities of a properly recordable inter vivos deed;

(2) must state that the transfer to the designated beneficiary is to occur at the transferor's death; and

(3) must be recorded before the transferor's death in the public records in the office of the recorder in the recording district where the property is located.

Sec. 13.48.060. Notice, delivery, acceptance, consideration not required. A transfer on death deed is effective without

(1) notice or delivery to, or acceptance by, the designated beneficiary during the transferor's life; or

(2) consideration.

Sec. 13.48.070. Revocation by instrument authorized; revocation by act not permitted. (a) Subject to (b) of this section, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the recording district where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor,

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the

property.

Sec. 13.48.080. Effect of transfer on death deed during transferor's life. During a transferor's life, a transfer on death deed does not

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

Sec. 13.48.090. Effect of transfer on death deed at transferor's death. (a) Except as otherwise provided in the transfer on death deed, in this section, or in AS 13.12.203, 13.12.702, 13.12.706, 13.12.707, 13.12.803, or 13.12.804, on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) subject to (2) of this subsection, the interest in the property is transferred to the designated beneficiary under the deed;

(2) the interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor; the interest of a designated beneficiary that fails to survive the transferor lapses;

(3) subject to (4) of this subsection, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship;

(4) if the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one that lapses or fails for any reason is transferred to the other or to the others in proportion to the interest of

each in the remaining part of the property held concurrently.

(b) Subject to AS 40.17, a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and AS 40.17, the recording of the transfer on death deed is considered to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Sec. 13.48.100. Disclaimer. A beneficiary may disclaim all or part of the beneficiary's interest as provided by AS 13.70 (Uniform Disclaimer of Property Interests Act).

Sec. 13.48.110. Liability for creditor claims and statutory allowances. (a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under (a) of this section is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than 18 months after the transferor's death.

Sec. 13.48.120. Optional form of transfer on death deed. The following form may be used to create a transfer on death deed. The provisions of this chapter govern the effect of this or any other instrument used to create a transfer on death deed.

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. **You may want to consult a lawyer before using this form.**

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

PRIMARY BENEFICIARY/BENEFICIARIES

(Please list one or more primary beneficiaries.)

I designate the following beneficiary if the beneficiary survives me:

_____ _____

Printed name Mailing address, if available

ALTERNATE BENEFICIARY/BENEFICIARIES - Optional

(You may list one or more alternate beneficiaries.)

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me:

_____ _____

Printed name Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each recording district where any part of the property is located. The form has no

effect unless it is acknowledged and recorded before your death.

Is the "legal description" of the property necessary? Yes.

How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the recorder in the recording district where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I "record" the TOD deed? Take the completed and acknowledged form to the office of the recorder in the recording district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the property is in more than one recording district, you should record the deed in each recording district.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each recording district where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each recording district where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.

Sec. 13.48.130. Optional form of revocation. The following form may be used to create an instrument of revocation under this chapter. The provisions of this chapter govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners Making This Revocation:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in the office of the recorder in each recording district where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the "legal description" of the property? This information may be on the TOD deed. It may also be available in the office of the recorder in the recording district where the property is located. If you are not absolutely sure, consult a lawyer.

How do I "record" the form? Take the completed and acknowledged form to the office of the recorder in the recording district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the

property is located in more than one recording district, you should record the form in each of those recording districts.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.

Sec. 13.48.140. Nonexclusivity. The provisions of this chapter do not affect any method of transferring property otherwise permitted under the law of this state.

Sec. 13.48.150. Uniformity of application and construction. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Sec. 13.48.160. Relationship to Electronic Signatures in Global and National Commerce Act. The provisions of this chapter modify, limit, and supersede 15 U.S.C. 7001 - 7031 (Electronic Signatures in Global and National Commerce Act), but do not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

Sec. 13.48.190. Definitions. In this chapter,

(1) "beneficiary" means a person who receives property under a transfer on death deed;

(2) "designated beneficiary" means a person designated to receive property in a transfer on death deed;

(3) "joint owner" means an individual who is a tenant by the entirety, who is an owner of community property with a right of survivorship, or who otherwise owns property concurrently with one or more other individuals with a right of survivorship, but does not include an individual who is a tenant in common or other owner of community property without a right of survivorship or who is a joint tenant, other than an individual who is a tenant by the entirety;

(4) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public

corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity;

(5) "property" means an interest in real property located in this state which is transferable on the death of the owner;

(6) "transfer on death deed" means a deed authorized under this chapter;

(7) "transferor" means an individual who makes a transfer on death deed.

Sec. 13.48.195. Short title. This chapter may be cited as the Uniform Real Property Transfer on Death Act.

* **Sec. 2.** AS 13.70.100(e) is amended to read:

(e) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] before [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer shall be delivered to the person making the beneficiary designation.

* **Sec. 3.** AS 13.70.100(f) is amended to read:

(f) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] after [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer **of an interest in**

(1) personal property shall be delivered to the person obligated to distribute the interest**; and**

(2) real property shall be recorded in the office of the recorder in the recording district where the real property that is the subject of the disclaimer is located.

* **Sec. 4.** AS 13.70.130 is amended to read:

Sec. 13.70.130. Recording of disclaimer. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be filed, recorded, or registered as required or permitted by law. **Except as otherwise provided in AS 13.70.100(f)(2), failure** [FAILURE] to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to a transfer on death deed made before, on, or after the effective date of this Act by a transferor dying on or after the effective date of this Act. In this section, "transfer on death deed" and "transferor" have the meanings given in AS 13.48.190, enacted by sec. 1 of this Act.

House Bill 297

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act"

Sponsor Statement

HB 297, the Uniform Real Property Transfer on Death Act (URPTODA), provides a simple, effective and affordable option for persons wishing to transfer real property upon their death. It will avoid the potentially lengthy and expensive process of probate.

Currently, seventeen states have adopted the Act or other similar legislation allowing "Transfer on Death (TOD) deeds. Other states are considering such bills. Other non-probate transfers of personal property at death sometimes, known as "will substitutes" or TODs are now common practice.

Under HB 297, real property can pass at death by a transfer on death (TOD) deed. The deed is recorded before death with the district recorder. Upon death the deed automatically becomes effective. TOD deeds are not subject to the statute of wills. They do not operate and are revocable until the transferor's death. They are ineffective if the transferor disposes of the property during his or her lifetime. HB 297 allows the beneficiary to disclaim the transferred property. It does not affect the beneficiary's eligibility for public assistance or subject the property to the beneficiary's creditors. It allows a stepped up basis (favorable tax treatment) upon the transferor's death. HB 297 will provide a valuable option to Alaskans who may not need or cannot afford trusts, etc. and the probate process in passing property upon death. Yet it does not prohibit any other method of passing the property (e.g. gifts, wills, trusts, etc.); it simply provides another cheaper and efficient way of transferring real property upon death.

The bill was suggested by a retired constituent who believes it is an important alternative that should be permitted in Alaska. The legislation is necessary because currently joint tenancy with the right of survivorship in real property is statutorily prohibited, except for tenancy by the entirety allowing surviving spouses to take marital residences upon the other spouse's death. Thus this bill is necessary.

If you have any questions, please contact Representative Gruenberg's legislative aide, Miles Brookes, at 465-4940.

HJUD ?

27-LS1092\A
Bannister
12/1/11

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE ~~GRUENBERG~~

Introduced:
Referred: HJUD

((to be introduced 1/-/12))

A BILL

FOR AN ACT ENTITLED

"An Act adopting and relating to the Uniform Real Property Transfer on Death Act."

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

*** Section 1.** AS 13 is amended by adding a new chapter to read:

Chapter 48. Uniform Real Property Transfer on Death Act.

Sec. 13.48.010. Transfer on death deed authorized. An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

Sec. 13.48.020. Transfer on death deed revocable. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Sec. 13.48.030. Transfer on death deed nontestamentary. A transfer on death deed is nontestamentary.

Sec. 13.48.040. Capacity of transferor. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

Sec. 13.48.050. Requirements. A transfer on death deed

(1) except as otherwise provided in (2) of this section, must contain the

essential elements and formalities of a properly recordable inter vivos deed;

(2) must state that the transfer to the designated beneficiary is to occur at the transferor's death; and

(3) must be recorded before the transferor's death in the public records in the office of the recorder located in the judicial district where the property is located.

Sec. 13.48.060. Notice, delivery, acceptance, consideration not required. A transfer on death deed is effective without

(1) notice or delivery to, or acceptance by, the designated beneficiary during the transferor's life; or

(2) consideration.

Sec. 13.48.070. Revocation by instrument authorized; revocation by act not permitted. (a) Subject to (b) of this section, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the office of the recorder for the recording district where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor,

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

Sec. 13.48.080. Effect of transfer on death deed during transferor's life. During a transferor's life, a transfer on death deed does not

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

Sec. 13.48.090. Effect of transfer on death deed at transferor's death. (a) Except as otherwise provided in the transfer on death deed, in this section, or in AS 13.12.203, 13.12.702, 13.12.706, 13.12.707, 13.12.803, or 13.12.804, on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) subject to (2) of this subsection, the interest in the property is transferred to the designated beneficiary under the deed;

(2) the interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor; the interest of a designated beneficiary that fails to survive the transferor lapses;

(3) subject to (4) of this subsection, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship;

(4) if the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one that lapses or fails for

any reason is transferred to the other or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to AS 40.17, a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and AS 40.17, the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Sec. 13.48.100. Disclaimer. A beneficiary may disclaim all or part of the beneficiary's interest as provided by AS 13.70 (Uniform Disclaimer of Property Interests Act).

Sec. 13.48.110. Liability for creditor claims and statutory allowances. (a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under (a) of this section is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than 18 months after the transferor's death.

Sec. 13.48.120. Optional form of transfer on death deed. The following form may be used to create a transfer on death deed. The provisions of this chapter govern the effect of this or any other instrument used to create a transfer on death

deed.

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. **You may want to consult a lawyer before using this form.**

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me:

_____ _____

Printed name Mailing address, if available

ALTERNATE BENEFICIARY - Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me:

_____ _____

Printed name Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each judicial district where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the "legal description" of the property necessary? Yes.

How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the recorder in the judicial district where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I "record" the TOD deed? Take the completed and acknowledged form to the office of recorder in the judicial district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the property is in more than one judicial district, you should record the deed in each judicial district.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each judicial district where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each judicial district where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and

might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.

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(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners Making This Revocation:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

State of _____ Judicial District (or County of _____ or Municipality of _____)

The foregoing instrument was acknowledged before me this (date) by (name of person who acknowledged).

_____

Signature of Person Taking Acknowledgment

_____

Title or Rank

_____

Serial Number, if any

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in the office of the recorder in each judicial district where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the "legal description" of the property? This information may be on the TOD deed. It may also be available in the office of the recorder in the judicial district where the property is located. If you are not absolutely sure, consult a lawyer.

How do I "record" the form? Take the completed and acknowledged form to the office of the recorder in the judicial district where the property is located. Follow the instructions given by the recorder to make the form part of the official property records. If the property is located in more than one judicial district, you should record the form in each of those judicial districts.

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I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.

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Sec. 13.48.150. Uniformity of application and construction. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Sec. 13.48.160. Relationship to Electronic Signatures in Global and National Commerce Act. The provisions of this chapter modify, limit, and supersede 15 U.S.C. 7001 - 7031 (Electronic Signatures in Global and National Commerce Act), but do not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

Sec. 13.48.190. Definitions. In this chapter,

(1) "beneficiary" means a person who receives property under a transfer on death deed;

(2) "designated beneficiary" means a person designated to receive property in a transfer on death deed;

(3) "joint owner" means an individual who is a tenant by the entirety, who is an owner of community property with a right of survivorship, or who otherwise owns property concurrently with one or more other individuals with a right of survivorship, but does not include an individual who is a tenant in common or other owner of community property without a right of survivorship or who is a joint tenant, other than an individual who is a tenant by the entirety;

(4) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity;

(5) "property" means an interest in real property located in this state which is transferable on the death of the owner;

(6) "transfer on death deed" means a deed authorized under this chapter;

(7) "transferor" means an individual who makes a transfer on death deed.

Sec. 13.48.195. Short title. This chapter may be cited as the Uniform Real Property Transfer on Death Act.

*** Sec. 2.** AS 13.70.100(e) is amended to read:

(e) In the case of an interest created by a beneficiary designation **that is disclaimed** [MADE] before [THE TIME] the designation becomes irrevocable, **the** [A] disclaimer shall be delivered to the person making the beneficiary designation.

*** Sec. 3.** AS 13.70.100(f) is amended to read:

(f) In the case of an interest created by a beneficiary designation **that is disclaimed before** [MADE AFTER THE TIME] the designation becomes irrevocable, **the** [A] disclaimer **of an interest in**

(1) personal property shall be delivered to the person obligated to distribute the interest**; and**

(2) real property shall be recorded in the office of the recorder of the judicial district where the real property that is the subject of the disclaimer is located.

*** Sec. 4.** AS 13.70.130 is amended to read:

Sec. 13.70.130. Recording of disclaimer. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be filed, recorded, or registered as required or permitted by law. **Except as otherwise provided in AS 13.70.100(f)(2), failure** [FAILURE] to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to a transfer on death deed made before, on, or after the effective date of this Act by a transferor dying on or after the effective date of this Act. In this section, "transfer on death deed" and "transferor" have the meanings given in AS 13.48.190, enacted by sec. 1 of this Act.

Real Property Transfer on Death Act Summary

Asset-specific mechanisms for the non-probate transfer of personal property and funds at death are now common. They are known informally as "will substitutes." The proceeds of life insurance policies and pension plans, securities registered in transfer on death form, and funds held in pay on death bank accounts, are examples of personal property that have benefitted from this trend in modern law to recognize and support the use of will substitutes. However there is no generally available straightforward, inexpensive, and reliable means of passing real property, which may be a decedent's major asset, directly to a beneficiary at death.

The Uniform Real Property Transfer on Death Act (URPTODA), promulgated by the Uniform Law Commission in 2009, enables an owner of real property to pass the property to a beneficiary on the owner's death simply, directly, and without probate.

Under URPTODA, real property passes by means of a recorded transfer on death (TOD) deed. URPTODA establishes the requirements for the creation and revocation of a TOD deed and clarifies the effect of the TOD deed on all parties while the transferor is living and after the transferor dies. URPTODA provides optional forms to create or revoke a TOD deed.

Key elements of URPTODA include:

- The TOD deed is not subject to the statute of wills and passes title directly to the named beneficiary without probate.

- The TOD deed must contain all of the essential elements and formalities of a properly recordable *inter vivos* deed. The TOD deed must state that the transfer to the beneficiary occurs on the transferor's death and must be

properly recorded during the transferor's lifetime in the office of the recorder of deeds where the property is located.

- The capacity required to create a TOD deed is the same as the capacity to make a will.

- A TOD deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a revocatory instrument such as a direct revocation of the TOD deed or a subsequent TOD deed that names a different beneficiary. If the transferor disposes of the property during lifetime, the TOD deed is ineffective.

- Until the transferor's death, a recorded TOD deed has no effect — it does not affect any right or interest of the transferor or any other person in the property. The TOD deed creates no legal or equitable interest in the designated beneficiary; it does not affect the designated beneficiary's eligibility for public assistance; it does not subject the property to the designated beneficiary's creditors.

- Assuming the transferor dies owning the property and has not revoked the TOD deed and assuming that the designated beneficiary survives the transferor, the TOD deed passes the property to the designated beneficiary on the transferor's death.

- Liability of the beneficiary and property for claims against the transferor's estate is limited to cases where the estate is insolvent.

- A designated beneficiary may disclaim all or part of the transferred interest.

Before promulgation of URPTODA some states enacted legislation to enable a TOD deed of real property. URPTODA

builds on these statutes. It provides an uncomplicated, effective, and affordable option to pass this important type of asset at death.

HB

299

<TARGET><BILL>HB 299</BILL><SUBJECT>HB 299</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

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Toll Free: (877) 465-3004

REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

SPONSORS STATEMENT for House Bill 299

"An Act allowing appropriations to the civil legal services fund from court filing fees."

This bill is designed to help fund civil legal services for low-income Alaskans. House Bill 299 will provide a mechanism for funding the Alaska Legal Services Corporation (ALSC), by allowing the legislature to appropriate up to 25 percent of filing fees paid to the Alaska Court System during the previous fiscal year into the Civil Legal Services Fund.
The Alaska Legal Services Corporation was established in 1966 to address the civil legal aid needs of low-income Alaskans. ALSC is not a state agency, but is instead a nonprofit charitable 501(c)(3) whose funding comes from a variety of state, federal, and private sources. Over the last several years ALSC funding has dwindled, from $4.2 million as of 1987 to less than $3.1 million as of 20 1 0, while it struggles to serve a growing number of poverty-level applicants. Appropriations from the State of Alaska that were once as high as $1.2 million in FY84 are currently at $350,000. House Bill 299 aims to correct this lack of funding and helps ensure civil legal representation for Alaska's most needy population.

E-mail Representative_Steve_Thompson@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 299**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB299-LAW-CIV-02-03-12
Title: An Act allowing appropriations to the civil legal services fund from court filing fees.
Sponsor: Representative Thompson
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Labor and State Affairs
OMB Component Number: 2718

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/3/12 3:30PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/3/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 299
2012 LEGISLATIVE SESSION

Analysis

This bill would provide an additional source for the civil legal services fund established in AS 37.05.590: an amount from the general fund that is up to 25 percent of the filing fees received by the Alaska Court System during the previous fiscal year.

There is no anticipated fiscal impact to Department of Law.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB299**
Fiscal Note Number
() Publish Date

Identifier (file name) HB299-DOA-OPA-02-07-2012
Title Civil Legal Services Fund
Sponsor Representative Thompson
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Office of Public Advocacy
OMB Component Number 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, Initial version

Prepared by Richard Allen, Director — Phone 907-269-3504
Division Office of Public Advocacy — Date/Time 02/07/2012 11:45 a.m.
Approved by John Cramer, Deputy Commissioner — Date 2/7/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB299
2012 LEGISLATIVE SESSION

Analysis

The Office of Public Advocacy's enabling statute includes a provision that requires OPA to provide legal representation "to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency." AS 44.21.410(a)(4). This portion of OPA's enabling statute was the result of a 1979 Alaska Supreme Court decision, *Flores v. Flores*, 589 P.2d 893 (Alaska 1979).

In *Flores*, the Alaska Supreme Court determined that a parent has a constitutional right to counsel in a child custody action where the indigent parent's opponent is represented by a "public agency." Mr. Flores, the indigent parent's opponent, was represented by Alaska Legal Services Corporation (ALSC) in the underlying child custody matter. The majority opinion in *Flores* identified ALSC as a public agency for purposes of triggering the state's obligation to provide counsel to the other parent.

The Flores court did not define "public agency" or set forth criteria for determining whether an organization is a public agency for these purposes. Likewise, OPA's enabling statute fails to define the term "public agency."

If the Alaska Legal Services Corporation or similar organizations receive additional public funding to represent parties in child custody matters, this will trigger additional obligations by the Office of Public Advocacy to provide representation to indigent parties in those matters. Since the agency cannot determine in how many additional cases it may be appointed, it cannot accurately predict the fiscal impact on the agency. Therefore, the Agency submits an indeterminate fiscal note.

Alaska Legal Services Corporation

Types of Cases

The types of problems ALSC handles fall into one of the following ten areas.

Consumer
Education
Employment
Family Law
Juvenile
Health Care
Housing
Public Benefits
Individual Rights
Miscellaneous

ALSC does not have enough staffing to accept all the applications that come in, and case acceptance decisions are based on priorities set by our governing board.

ALSC generally does not provide service in cases for personal injury, accidents, or wrongful death.

ALSC is prohibited from handling certain types of representation: (1) class actions; (2) criminal defense; (3) representation of prisoners in any type of case; (4) representation of undocumented non-citizens, with an exception if the case involves domestic violence or trafficking.

Consumer - bankruptcy/debtor relief, collections (repossessions, garnishments) contracts/warranties, collection practices/creditor harassment, predatory lending practices, loans/installment purchases, public utilities, unfair sales practices;

Education - discipline (including expulsion/suspension), special education/learning disabilities, access (including bilingual/residency/test), vocation education, student financial aid;

Employment - job discrimination, wage claims, earned income tax credit, taxes, employee rights, agricultural worker issues;

Family - adoption, custody/visitation, divorce/separation/annulment, guardianship/conservatorship, name change, parental rights termination, paternity, domestic abuse, support;

Juvenile - juvenile delinquent, neglected/abused/dependent, emancipation, minor guardian/conservatorship

Health - Medicaid, Medicare, Denali Kidcare, government children's health insurance programs, home and community based care, private health insurance, long term health care facilities, state and local health;

Housing - federally subsidized housing rights, homeownership/real property, landlord/tenant, other public housing, mobile homes, housing discrimination, mortgage foreclosures, mortgage predatory lending practices;

Public Benefits - Temporary Assistance for Needy Families, Social Security, food stamps, Supplementary Security Income, unemployment compensation, veterans benefits, state/local income maintenance;

Individual Rights - mental health, physically disabled rights, civil rights, human trafficking;

Miscellaneous - legal assistance to non-profit organizations/groups, Indian/tribal law, subsistence, Native allotments, license (auto and other), torts, advance directives, wills and estates, power of attorney, municipal legal needs.

Thomas Studler

From: Nancy Meade <NMeade@courts.state.ak.us>
Sent: Thursday, January 26, 2012 3:25 PM
To: Thomas Studler
Subject: SB 62 - House equivalent

Hi Tom –

Our CFO got me the number that you asked for right away: in FY11, the Court System collected and deposited into the general fund **$2,666,900** in filing fees. Your bill looks at calculating up to 25% of this, and my math says that would amount to $666,725.

I hope this helps. Thanks.

Nancy Meade
General Counsel
Alaska Court System
Anch: 907-264-8264
Juneau: 907-463-4736

Melanie Lesh

From: Pat and Dave Purcell <dppurcel@gci.net>
Sent: Tuesday, February 07, 2012 9:14 PM
To: Rep. Carl Gatto
Subject: Support HB299

Dear Representative Gatto,
I don't write to you very often, but I wanted to express my support of HB299. The Alaska Legal Services does an excellent job of service for our low income population with legal services. My youngest daughter was working on some issues with the father of her baby and I was able to see first hand how understanding and helpful the organization can be.
An estimated 88,000 Alaskans live below 125% of the poverty ceiling and this number increases yearly. For most of these people, access to the civil justice system is possible only with the help of a legal services attorney.
Thanks for considering my plea for your support of HB299.

Sincerely,
Patricia Purcell
5280 E Alder Dr
Wasilla, Ak 99645

907-373-1777

STATE OF ALASKA
DEPT. OF HEALTH & SOCIAL SERVICES

Alaska Commission on Aging

SEAN PARNELL, GOVERNOR

P.O. BOX 110693
JUNEAU, ALASKA 99811-0693
PHONE: (907) 465-3250
FAX: (907) 465-1398

February 6, 2012

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice Chair
House Judiciary Committee
Alaska State Capitol, Rooms 118 & 428
Juneau, AK 99801-1182

Subject: Support for HB 299, Civil Legal Services Fund

Dear Chair Gatto & Vice Chair Thompson:

The Alaska Commission on Aging (ACoA) is pleased to offer our support for HB 299, a bill to establish a mechanism to enhance funding for nonprofit organizations that provide free or reduced cost civil legal services for low-income individuals by allowing the Legislature to appropriate up to 25% of filing fees paid annually to the Alaska Court System. This bill is authored by Representative Thompson and co-sponsored by Representatives Gara, Costello, and Gruenberg.

Alaska Legal Services Corporation (ALSC) is a non-profit organization that addresses the civil legal needs of low-income Alaskans by providing no cost legal representation. Currently, there are approximately 88,000 Alaskans who live below 125% of the poverty level who are eligible for these services, including Alaskan seniors.

ALSC provides no-cost or subsidized legal assistance for seniors statewide to assure that seniors, especially those at greatest social and economic risk, have access to the civil justice system. ALSC received 611 new applications from Alaska seniors requesting legal assistance in 2011. Due to insufficient funding, ALSC was forced to turn away 186 seniors. This bill will provide a mechanism to increase funding to ALSC to provide legal assistance to help more seniors and other Alaskans of modest means. Examples of ways ALSC assists seniors with legal matters includes helping with consumer and family law by establishing Miller Trusts, guardianships, conservatorships, and wills; and assisting with housing issues such as resolving renter-landlord disputes, foreclosures, and reverse mortgages. Due to funding limitations, ALSC is able to accept about one in five individuals requesting their help.

The ACoA supports HB 299 to improve access to civil legal representation for Alaska's most needy population. Accessing legal information, advice, and assistance helps older Alaskans preserve financial and personal independence, maintain control of their finance and health care decisions, maintain appropriate family relationships, protect personal assets and enhance their well-being. Thank you for sponsoring this important legislation. Please feel free to contact Denise Daniello, ACoA's executive director, by phone (465-4879) or email (denise.daniello@alaska.gov) should you have questions or require additional information.

Sincerely,

Sharon Howerton-Clark
Chair, Alaska Commission on Aging

Sincerely,

Denise Daniello
ACoA Executive Director

Cc: Representative Keller
Representative Pruitt
Representative Holmes
Representative Lynn
Representative Gruenberg
Representative Chenault

AARP Alaska
3601 C Street
Suite 1420
Anchorage, AK 99503

T 1-866-227-7447
F 907-341-2270
TTY 1-877-434-7598
www.aarp.org/ak

February 7, 2012

The Honorable Carl Gatto, Chair
House Judiciary Committee
Alaska Capitol, Room 118
Juneau, AK 99801-1182

Dear Chair Gatto:

HB 299 (Thompson)—Support

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House Judiciary Committee to support HB 299, authored by your Committee Vice-Chair Steve Thompson and co-sponsored by your Committee colleague Representative Max Gruenberg as well as Representatives Les Gara, Mia Costello, and Beth Kerttula.

HB 299 would provide a mechanism to increase funding for legal services for lower income Alaskans.

Because of their unique health, income and social needs, and because they often depend on services provided by government agencies with complex requirements, older people must have access to competent legal assistance. As Alaska's population ages, the requests for landlord/tenant dispute resolution and other housing matters, quality health care and treatment, public benefits, fraud, and abuse and neglect will only increase for Alaska's seniors. HB 299 will provide additional funds to support the civil legal aid needs of low-income Alaskans, including many older clients.

We receive many calls, as I am sure you do, from older Alaskans with a legal problem or question who simply do not know where to go. There is great concern about the cost of seeking a private attorney and the ability to refer older callers to legal services assistance is of great importance to us as well as to them. AARP supports the good work done by our legal services programs and we hope you will too.

AARP recommends an "AYE" vote on HB 299.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Thank you for your consideration.

Sincerely,

Marie Darlin

Marie Darlin, Coordinator
AARP Capital City Task Force
415 Willoughby Avenue, Apt. 506
Juneau, AK 99801
586-3637 (voice)
463-3580 (fax)

CC: Vice-Chair Steve Thompson
Representative Bob Lynn
Representative Wes Keller
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

Alaska Legal Services Corporation

Serving Alaska Communities and Families for over 40 years

Who we are:

- Alaska Legal Services Corporation (ALSC) is a private, non-profit law firm that provides free civil legal services to seniors and low-income Alaskans.

Our Mission:

- To provide meaningful access to justice in resolving civil legal problems for low-income clients, thus promoting family stability and reducing the legal consequences of poverty.

Who We Serve:

- Alaskans below 125% of the Alaska poverty ceiling – 2541 last year alone
- Children --- nearly 1/2 of those assisted have children in their households
- Domestic Violence Victims --- over 550 cases per year
- Seniors --- over 600 per year
- Rural residents --- over 40% of all clients served resided in rural communities
- Veterans---preventing homelessness and assuring access to healthcare

Unmet Need For ALSC's services:

- An estimated 88,000 Alaskans live below the poverty ceiling. At present, there is only one ALSC attorney for every 4,000 Alaskans living in poverty.
- In FY11, ALSC received over 3,500 inquiries and 2,858 new applications for legal help.
- In FY11, we turned away nearly one family for each one that we helped due to lack of resources.
- Many more did not apply, knowing our resource limitations.

Providing Statewide Access To Justice With Offices In:

Anchorage Barrow Bethel Dillingham Fairbanks
Juneau Kenai Ketchikan Kotzebue Nome Palmer

Strong Local Support:

- All of our offices enjoy local financial support. Each office sets its own case acceptance priorities based on local needs.

Our Services:

Legal Advice and Counseling	Court Representation	Advocacy
Community Legal Clinics	On-line Self-Help	Pro Bono program

Types of Cases:

Domestic Violence Protection	Foreclosures	Family Law
Wills & Healthcare Directives	Public Benefits	Consumer Protection
Housing Protection	Debtor Relief	
Health care Advocacy	Employment	
Probates & Estates	Child Support	
Veteran's Benefits		

Alaska Legal Services Corporation

Access to Justice for Alaskans in Need

HB 299

Amending the Civil Legal Service Fund

What is the Fund?

- The Civil Legal Services Fund was created in 2007 with widespread bipartisan support to help ensure civil legal representation for Alaska's most needy population.
- At the discretion of the legislature, deposits to the fund come from Alaska's 50 percent share of civil damage awards. The Legislature is authorized to appropriate these funds to organizations providing civil legal services to low-income Alaskans.

Why the Fund is needed:

- An estimated 88,000 Alaskans live below 125% of the poverty ceiling – this number is increasing yearly. For most of these people, access to the civil justice system is possible only with the help of a legal services attorney.
- Alaska Legal Services (ALSC) is the only statewide comprehensive civil legal services provider. At present, there is only one ALSC attorney for every 4,000 Alaskans living in poverty.
- The May 2000 Alaska Supreme Court Access to Civil Justice Task Force Report recommended that ALSC be fully funded at a minimum of 1982 levels (adjusted for inflation $7.5 million as of 2005). ALSC's current budget is just over $3 million. The Fund was among the Task Force Recommendations to help bridge this gap.
- State appropriations to ALSC steadily declined from a high of $1.2 million in 1984 to nothing by 2004. Appropriations resumed in 2008, but are far below the level needed to meet the demand for services. At current funding levels, ALSC turns away hundreds of families seeking assistance each year due to resource limitations.

How has the Fund been used?

- To date the fund has generated only $110,000 over a 4 year period -- far less than needed to address the critical unmet need for civil legal assistance.

How can the Fund be more effective?

- Support HB 299. If passed House Bill 299 would amend AS 37.05.590 so that 25% of Court system filing fees would be placed into the Civil Legal Services Fund.

Access to Justice for Alaskans in Need

Alaska Legal Services Corporation

ACCESS TO CIVIL JUSTICE TASK FORCE:

REPORT AND RECOMMENDATIONS

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I. Executive Summary

The past five years has been marked by massive decreases in funding for social and legal services to low and moderate income Alaskans. This change corresponds to a decline in federal funding of programs assisting these individuals nationwide. The need for these services however has not declined. Indeed, it is greater than ever.

In Alaska, as in many states, the effect of these funding cuts created a crisis for groups charged with providing legal and social assistance to the poor and near-poor. The impact on Alaska Legal Services Corporation (Alaska Legal Services), the primary provider of civil legal services to the poor, was particularly profound. As various groups mobilized individually in response, it rapidly became apparent that a joint effort, examining the legal needs of Alaska's low- and moderate-income population and recommending new ways of meeting those needs, would ensure the most comprehensive and effective approach to the problem.

This movement spurred the creation of the Equal Access to Civil Justice Task Force in November 1997. Its mandate was to explore the unmet legal needs of Alaskans and to suggest ways of meeting those needs. The Task Force included representatives from as many parts of the community and state (urban and rural) as possible, including judges, business leaders, members of the private bar, court officials, and legal services providers. The recommendations formulated by the Task Force are directed to Alaska Legal Services, the private bar, the court system, other legal services providers and the state legislature.

This report presents the Task Force's recommendations. It is divided into three sections. First, a summary of the Task Force's prioritized recommendations is set out. Second, a narrative section provides an overview of the work and history of this Task Force, the legal needs of the poor and Alaska's poverty population, and outlines the history of Alaska Legal Services and it's funding. The third section contains the various subcommittee findings and Steering Committee/Task Force approved recommendations.

This report contains a request to the Alaska Supreme Court to authorize the formation of an Implementation Task Force to put into place the recommendations set forth here.

II. Summary of Recommendations

The Steering Committee approved and presented to the Task Force approximately 60 specific recommendations. Over the course of a two-day meeting, the Task Force reviewed and prioritized those recommendations. The following list represents only these 22 prioritized recommendations. More detailed explanations of these and all the other recommendations appear in the last section of this report with a list of the findings made by each subcommittee to support the recommendations. (The page cite after the prioritized recommendations refers to the page in the report where the more detailed explanation of the recommendation appears). There is no significance to the order of the prioritized recommendations, i.e. Recommendation A has no greater priority than Recommendation V.

A. The Alaska Supreme Court should establish an "Access to Civil Justice Implementation Task Force" to act upon and put into place the recommendations forwarded by this Task Force.

B. The Alaska Bar Association should develop an Alaska "Modest Means Program" to provide moderate-income Alaskans (those who do not qualify for Alaska Legal Services), access to representation by attorneys who have agreed to charge a reduced hourly rate for their services. [p. 20]

C. A "One-Stop Shopping" customer-oriented intake and referral service for low-income clients with potential legal problems should be established. The service would include the development of a mentoring program for volunteer lawyers and would provide information on alternative dispute resolution and other resources. All resources in this "One-Stop Shopping" service would be available in as many different languages and formats as possible in order to assist the greatest number of people. This service would be available on-line and by an 800 number. [p. 26, 35]

D. By the year 2001, secure significant increased funding for Alaska Legal Services, at a minimum to 1982 levels. Even in 1982, the funding level was only minimally adequate funding for Alaska Legal Services. Updated to 2001 dollars that figure would be $5,000,000 that should be raised from traditional and new sources. [p. 24-25]

E. Increase rural Alaska Legal Services staff and open an Alaska Legal Services office with attorneys on staff in every community that maintains an Alaska Superior Court. [p. 25]

F. Alaska Legal Services should increase coordination with other service providers, particularly in rural areas where there already may be a network of providers or staff willing and able to establish an affiliation with Alaska Legal Services. [p. 25]

G. Alaska Legal Services and the Alaska Bar Association should coordinate a request to the American Bar Association regarding law students' externships outside a school's geographical area, to permit law students to come to Alaska (a state with no law school), and work at Alaska Legal Services for the externship period. [p. 26]

H. The concept of an expanded and liberated (free of Congressional restrictions) Pro Bono Program should be explored.[1] [p. 29]

I. A Pro Bono Asylum Project should be created to assist immigrants seeking political asylum in the United States. (A free continuing legal education class was held in March 1999, and is scheduled for March 2000 in Anchorage for attorneys willing to take on a pro bono asylum case. In 1999, thirty attorneys out of 40 attending accepted cases. Follow-up meetings are being held bi-weekly to provide mentoring for these attorneys). [p. 22]

J. A Pro Bono Naturalization Program should be created to work with elderly and disabled immigrants. [p. 22]

K. The Alaska Pro Bono Program should adopt administrative procedures that would allow for attorneys to assist other pro bono attorneys by doing discrete tasks such as research or motion preparation. [p. 30]

L. The Alaska Pro Bono Program should develop a mentoring program. (This has already been implemented). [p. 29]

M. The Alaska Bar Foundation should continue to seek new ways of increasing "Interest On Lawyer Trust Accounts" funding. [p. 30]

N. The Alaska Bar Association should recommend that the Alaska Supreme Court adopt the American Bar Association's Model Rule 6.1 an aspirational guideline that all attorneys should perform 50 hours of pro bono work per year. [p. 29]

O. The Alaska Bar Association should especially encourage public sector attorneys to perform pro bono work. [p. 29]

P. The Alaska Bar Association should provide free continuing legal education classes to pro bono attorneys in poverty law areas, with the condition that the attorneys would then be obligated to take a pro bono case. (This was initiated in

[1] Currently, the Alaska Pro Bono Program operates under the same Congressional case restrictions as Alaska Legal Services. This might soon change as Alaska Legal Services has received oral and written confirmation from the national Legal Services Corporation approving a new plan for the Pro Bono Program which would in effect, sever it from Alaska Legal Services, and thus from the restrictions attached to the receipt of federal monies.

ALASKA FEDERATION OF NATIVES, INC.

2011 ANNUAL CONVENTION

RESOLUTION 11-25

TITLE: SUPPORT FOR ALASKA LEGAL SERVICES CORPORATION

WHEREAS: Alaska Legal Services Corporation's (ALSC's) twenty lawyers serve a poverty population exceeding 80,000 Alaskans, including over 20,000 Native Alaskans, in ten offices around the state; and,

WHEREAS: Although the May 2000, Alaska Supreme Court Access to Civil Justice Task Force Report recommended that ALSC be funded at $5 million annually, ALSC's actual funding has remained at approximately $3 million since that time; and

WHEREAS: That same report estimated that approximately ½ of this population would face a legal need at some point during any given 12-month period; and

WHEREAS: ALSC estimates that it is currently providing assistance to only 10%-20% of those needing such assistance, which figure appears to be consistent with estimate of 20% in the national Legal Services Corporation report from September 2005, "Documenting the Justice Gap in America"; and

WHEREAS: The vast majority of ALSC's cases involve the basic human necessities of shelter, food, access to medical care, income, maintenance, and safety and stability within the family; and,

WHEREAS: Several regional Native nonprofits, including Bristol Bay Native Association, Maniilaq Association, and Kawerak have made significant financial and in-kind contributions over the years for the re-establishment of small ALSC offices which had formerly had to be closed in the communities of Dillingham, Nome, and Kotzebue; and others, including the Central Council of Tlingit-Haida Indian Tribes of Alaska, the Tanana Chiefs Conference, the Inupiaq Community of the Arctic Slope, and the Nome Eskimo Community have otherwise provided support for ALSC; and,

WHEREAS: The State of Alaska, which had for several years been one of only five states making no appropriation for civil legal assistance to its citizens, did make an appropriation to ALSC for FY 2011, approved by Governor Parnell, in the amount of $350,000, but it is unclear whether this will be sustained in future fiscal years; and,

NOW THEREFORE BE IT RESOLVED by the Delegates to the 2011 Annual Convention of the Alaska Federation of Natives, Inc., that AFN urges Governor Parnell to retain and increase the appropriation for ALSC in his proposed FY 2012 budget, and urges the Alaska Legislature to appropriate that funding, and urges Congress to award sufficient funding to the federal Legal Services Corporation to support Alaska Legal Services Corporation's mission of providing free legal services on vital issues to low income Alaskans.

SUBMITTED BY: BRISTOL BAY NATIVE ASSOCIATION

COMMITTEE ACTION: DO PASS

CONVENTION ACTION: PASSED

[redacted]OUSE COMMITT EE REPOR[redacted]

(7)
Date Referred to Committee: January 27, 2012 **FURTHER REFERRALS: Fina**

Date of Committee Action: 2/10/12

The JUDICIARY Committee considered: **HB**

HOUSE BILL NO. 299
"An Act allowing appropriations to the civil legal services fund from court filing fees."
HB 299-CIVIL LEGAL SERVICES FU

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB299 (JUD
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LAW Civil			X
	LAW Crim			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zer

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**A**
	LYNN	X			
	Gruenberg	✓			
	Keller	X			
	Holmes	X			
	Pruitt	X			
Chair:	GATTO	X			
Chair:					

Mel - FYI

AARP Alaska
3601 C Street
Suite 1420
Anchorage, AK 99503

T 1-866-227-7447
F 907-341-2270
TTY 1-877-434-7598
www.aarp.org/ak

February 7, 2012

The Honorable Carl Gatto, Chair
House Judiciary Committee
Alaska Capitol, Room 118
Juneau, AK 99801-1182

Dear Chair Gatto:

HB 299 (Thompson)—Support

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House Judiciary Committee to support HB 299, authored by your Committee Vice-Chair Steve Thompson and co-sponsored by your Committee colleague Representative Max Gruenberg as well as Representatives Les Gara, Mia Costello, and Beth Kerttula.

HB 299 would provide a mechanism to increase funding for legal services for lower income Alaskans.

Because of their unique health, income and social needs, and because they often depend on services provided by government agencies with complex requirements, older people must have access to competent legal assistance. As Alaska's population ages, the requests for landlord/tenant dispute resolution and other housing matters, quality health care and treatment, public benefits, fraud, and abuse and neglect will only increase for Alaska's seniors. HB 299 will provide additional funds to support the civil legal aid needs of low-income Alaskans, including many older clients.

We receive many calls, as I am sure you do, from older Alaskans with a legal problem or question who simply do not know where to go. There is great concern about the cost of seeking a private attorney and the ability to refer older callers to legal services assistance is of great importance to us as well as to them. AARP supports the good work done by our legal services programs and we hope you will too.

AARP recommends an "AYE" vote on HB 299.

Should you have any questions about our position, please feel free to contact me (586-3637) or Patrick Luby, AARP Advocacy Director (907-762-3314).

Melanie Lesh

To: Thomas Studler
Subject: RE: HB 299, House Judiciary Committee

Thanks Tom,

From: Thomas Studler
Sent: Monday, February 06, 2012 9:55 AM
To: Melanie Lesh
Subject: FW: HB 299, House Judiciary Committee

Melanie ,

Another Letter in support for HB299 for the packet.

Also, here is a list of testifiers on HB299 as well.

Vance Sanders – Juneau
Michelle Sharp – Anchorage
Peggy Brockman – Anchorage
Fred Nielson – Dillingham
Frances Digman - Unakleet

Thanks,
Tom

Thomas Studler
Staff for Representative Steve Thompson
State Capitol, Room 428
Juneau, Alaska 99801
Ph: (907) 465-3004
Fax: (907) 465-2070
Toll free: (877) 465-3004

From: Rep. Steve Thompson
Sent: Monday, February 06, 2012 9:48 AM
To: Thomas Studler
Subject: FW: HB 299, House Judiciary Committee

From: Daniello, Denise L (HSS) [mailto:denise.daniello@alaska.gov]
Sent: Monday, February 06, 2012 9:43 AM
To: Rep. Carl Gatto; Rep. Steve Thompson; Rep. Wes Keller; Rep. Lance Pruitt; Rep. Lindsey Holmes; Rep. Bob Lynn; Rep. Max Gruenberg; Rep. Mike Chenault
Cc: Sharon Howerton
Subject: HB 299, House Judiciary Committee

Chair Gatto & Vice Chair Thompson:

The Alaska Commission on Aging supports HB 299 that is scheduled to be heard in the House Judiciary Committee. Thank you for your consideration of this legislation. Denise

---

Denise Daniello, Executive Director
Alaska Commission on Aging
P.O. Box 110693
Juneau, AK 99811-0693
907-465-4879 (phone) / 907-465-1398 (fax)
Denise.Daniello@alaska.gov
www.alaskaaging.org

Healthy Aging for Alaskans

ALASKA STATE LEGISLATURE

Session:
State Capitol Building,
Room 428
Juneau, Alaska 99801-2186
Phone (907) 465-3004
Fax: (907) 465-2070
Toll Free: (877) 465-3004

Interim:
1292 Sadler Way
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

received 1/30/12

REPRESENTATIVE STEVE THOMPSON
DISTRICT 10

MEMORANDUM

To: Representative Carl Gatto, Chair
House Judiciary Committee

From: Representative Steve Thompson

Date: January 27, 2012

Re: Hearing request for HB 299

"An Act allowing appropriations to the civil legal services fund from court filing fees."

Please consider this memo as a request for the House Judiciary Committee to hear HB 299.

The following documents are attached and will also be provided via email:

HB 299 Sponsor Statement version A
HB 299 version A
ALSC Overview
ALSC statement on HB299
Email from Alaska Court System on filing fees collected in FY11
Excerpt from Access to Civil Justice Task Force Report and Recommendations
AFN Resolution is support of HB299

Thank you,

E-Mail: Representative.Steve.Thompson@legis.state.ak.us
Website: www.akrepublicans.org/thompson/

HB 303

<TARGET><BILL>HB 303</BILL><SUBJECT>HB 303</SUBJECT><COMM>HJUD27</COMM></TARGET>

Reid
Rep. Johansen's

27-LS1385\A
Bailey
2/16/12

HB 203 ?

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE JOHANSEN

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act providing for purging records when a criminal charge is dismissed or a person is acquitted of a crime; and adding Rule 35.3 to the Alaska Rules of Criminal Procedure."

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

* **Section 1.** AS 12.62 is amended by adding a new section to read:

Sec. 12.62.195. Purging records after dismissal or acquittal. Notwithstanding AS 12.62.190, as soon as practicable following the dismissal of criminal charges against a defendant or arrestee, a judgment or order of acquittal, or other discharge of the proceedings in favor of the defendant or arrestee, the court in which charges were brought shall issue an order to purge, delete, or destroy from all official records in the state so that no trace of the information remains all records relating to the charges brought against the defendant or arrestee, including court records, information collected, stored, processed, or disseminated or records of arrest, complaint, indictment, information, trial, dismissal, or discharge. The effect of the

order shall be to restore the person, in the contemplation of the law and in the public record, to the status occupied by the person before charges, arrest, indictment, or information. Upon entry of the order, the arrest or other proceeding shall be considered not to have occurred, and the defendant or arrestee may answer accordingly any questions relating to its occurrence.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new rule to read:

Rule 35.3. Records purged on acquittal or dismissal. As soon as practicable following the dismissal of criminal charges against a defendant or arrestee, a judgment or order of acquittal, or other discharge of the proceedings in favor of the defendant or arrestee, the court in which charges were brought shall issue an order to purge, delete, or destroy from all official records in the state so that no trace of the information remains all records relating to the charges brought against the defendant or arrestee, including court records, information collected, stored, processed, or disseminated or records of arrest, complaint, indictment, information, trial, dismissal, or discharge. The effect of the order shall be to restore the person, in the contemplation of the law and in the public record, to the status occupied by the person before charges, arrest, indictment, or information. Upon entry of the order, the arrest or other proceeding shall be considered not to have occurred, and the defendant or arrestee may answer accordingly any questions relating to its occurrence.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 12.61.195, enacted by sec. 1 of this Act, applies to charges dismissed or judgments of acquittal ordered on or after the effective date of this Act.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 12.61.195, enacted by sec. 1 of this Act, takes effect only if sec. 2 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

Melanie Lesh

From: Reid Harris
Sent: Tuesday, February 21, 2012 3:06 PM
To: Melanie Lesh
Subject: Purge Public Records draft
Attachments: Public Records - Draft.pdf

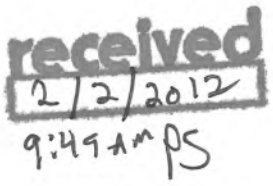
Hello Melanie,

Please see the attached bill draft. If you have any input of suggestions based on your expert background I'd appreciate them.

Best regards,

Reid Harris
Legislative Staff to
Rep. Kyle Johansen
907-465-3424

ALASKA STATE LEGISLATURE



REPRESENTATIVE LES GARA

MEMORANDUM

DATE: February 2, 2012

TO: Representative Carl Gatto

FROM: Representative Les Gara

RE: Hearing Request for HB 303: Suspended Imposition of Certain Criminal Offenses

I respectfully request that House Bill 303, relating to suspended imposition of sentence for certain criminal offences, be scheduled for a hearing in the Judiciary Committee. Please feel free to contact me, or my aide Toby Smith, with questions at 465-2647.

Attached you will find a background packet for HB 303. This includes the current version of the bill, a sponsor statement, and backup materials.

Thank you for your consideration.

Representative Les Gara

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BETH KERTTULA

Sponsor Statement

HB 303 Relating to Suspended Imposition of Certain Criminal Offences

Removing a Discharged Conviction: A Jobs and Fairness Issue

There is currently an anomaly under Alaska law. If you commit a lesser, non-violent, non-sexual crime; otherwise have a clean record; show good evidence that you won't commit another crime; and go through probation cleanly; in rare cases a judge will, under current law, remove your conviction. We don't change that law at all by this legislation.

However, it is unclear under Alaska law whether a person, such as a minor who had one Minor Consuming conviction, can state on a job application that they have never been convicted of a crime. If they say they have, of course, their job prospects are harmed.

HB 303 says that if your conviction is removed, you should be allowed to say you have not been convicted of a crime on things like job applications. This will give people who have done little wrong in life the chance to succeed in school and our economy, by not having to jeopardize employment, or admittance, based on a conviction that does not exist.

Feel free to call with any questions. Thank you.

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

HOUSE BILL NO. 303

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES GARA, Kerttula

Introduced: 1/27/12
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to suspended imposition of sentence for certain criminal offences."

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

Suspending imposition of sentence

*** Section 1.** AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. **As a matter of state law and policy, a person who receives a certificate under this subsection may truthfully answer questions relating to the offense that the person has not been convicted of the offense that was set aside.**

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 1, 2012

SUBJECT: Suspending Imposition of Sentence Under AS 12.55.085; Excluded Offenses and Exclusions (HB 303; Work Order No. 27-LS1192\M)

TO: Representative Les Gara
Attn: Toby Smith

FROM: Doug Gardner
Director

The question you asked is which crimes qualify for a suspended imposition of sentence (SIS) under AS 12.55.085, and which offenses are excluded.

The answer to your question may be found by reading AS 12.55.085(f), which provides:

> (f) The court may not suspend the imposition of sentence of a person who
>
> (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;
>
> (2) uses a firearm in the commission of the offense for which the person is convicted; or
>
> (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

As you can see from reviewing the statute, policy decisions have been made by the legislature to exclude the granting of an SIS to offenders convicted of all offenses in the range from murder (AS 11.41.100) through assault in the third degree (AS 11.41.220), which is a C felony. Note that assault in the fourth degree (AS 11.41.230) is an offense eligible for an SIS unless otherwise excluded by the statute because it involved a firearm, or the offender's record otherwise precluded the offender from being eligible for an SIS.

Continuing through the list of offenses not eligible for an SIS are stalking, assault on an unborn child, kidnapping and custodial interference in the first degree (AS 11.41.260 - 11.41.320) (note custodial interference in the second degree is an offense eligible for an SIS; AS 11.41.330), and human trafficking (AS 11.41.360 - 11.41.370). The statute continues to exempt all sexual offenses from sexual assault in the first degree (AS 11.41.410) through coercion (AS 11.41.530), arson in the first degree (AS 11.46.400), and distribution of child pornography (AS 11.61.125) through distribution of indecent materials to minors (AS 11.61.128).

You indicated in your request for advice that you intended that only "non-serious" crimes be eligible for an SIS. Previous legislatures have exercised judgment on what offenses should and should not be eligible for an SIS. Please review the offenses discussed above, and referred to in AS 12.55.085(f) the type of conduct the offense involved (using a firearm, etc.), to determine if an SIS only applies to your view of what constitutes a "non-serious" offense.

DDG:ljw
12-077.ljw

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 303**
Fiscal Note Number
() Publish Date

Identifier (file name) HB303-LAW-CRIM-02-03-12
Title An Act relating to suspended imposition of sentence for certain criminal offences.
Sponsor Representative Gara
Requester (H) Judiciary

Dept. Affected Law
Appropriation Criminal
Allocation Criminal Justice Litigation
OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager — Phone 465-5427
Division Administrative Services — Date/Time 2/3/12 5:10PM
Approved by Michael C. Geraghty, Attorney General — Date 2/3/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 303

Analysis

HB 303 provides that as a matter of state law a person who receives a certificate stating that his or her conviction has been set aside under the provisions of AS 12.55.085 (suspended imposition of sentence) may truthfully say that the person had not been convicted of the offense.

The fiscal impact to Department of Law is zero.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB303**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB303-DOA-OPA-1-30-12
Title: Suspended Imposition of Sentence
Sponsor: Representatives Gara and Kerttula
Requester: House Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)								
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 1/30/12 1:05 p.m.
Approved by: John Cramer, Deputy Commissioner — Date: 1/30/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB303

Analysis

This bill amends AS 12.55.085 by adding language that specifically allows a person who has a conviction set aside to say they have not been convicted of the offense in response to questions related to the offense. The Office of Public Advocacy does not anticipate any increased costs related to this legislation and therefore submits a zero impact fiscal note.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB303**
Fiscal Note Number
Publish Date

Identifier (file name) HB303-DOA-PDA-1-30-12
Title Suspended Imposition of Sentence
Sponsor Representatives Gara and Kerttula
Requester House Judiciary

Dept. Affected Administration
Appropriation Legal and Advocacy Services
Allocation Public Defender Agency
OMB Component Number 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner
Division Public Defender Agency
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 907 334-4414
Date/Time 1/30/12 9:45 AM
Date 1/30/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB303
2012 LEGISLATIVE SESSION

Analysis

This bill amends AS 12.55.085 by adding language that specifically allows a person who has a conviction set aside to say they have not been convicted of the offense in response to questions relating to the offense.
The Public Defender Agency does not anticipate any increased costs related to this legislation and submits a zero fiscal note.

27-LS1192\M.1
Gardner
2/8/12

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 303

Page 1, line 7, following "**subsection**":

Insert "**for a misdemeanor offense**"

Page 1, line 8, following "**the**":

Insert "**misdemeanor**"

Collateral references. — Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

Sec. 12.55.085. Suspending imposition of sentence. (a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 — 11.41.220, 11.41.260 — 11.41.320, 11.41.360 — 11.41.370, 11.41.410 — 11.41.530, AS 11.46.400, or AS 11.61.125 — 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 — 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction. (§ 1 ch 50 SLA 1965; am § 2 ch 32 SLA 1979; am §§ 1, 2 ch 36 SLA 1988; am § 2 ch 188 SLA 1990; am § 1 ch 196 SLA 1990; am § 7 ch 40 SLA 1993; am §§ 1, 2 ch 96 SLA 1994; am § 1 ch 55 SLA 1996; am § 13 ch 18 SLA 2010)

Cross references. — For restrictions on suspending imposition of sentence, see AS 04.16.200(d), AS 12.55.125(f), (g), and (*l*), 12.55.135(e) and (i), AS 16.30.010(c), AS 28.33.150(b), 28.35.030(b) and (n), and 28.35.032 (g) and (p).

Effect of amendments. — The 2010 amendment, effective July 1, 2010, in (f), in the introductory language, added "11.41.360 — 11.41.370" and "or AS 11.61.125 — 11.61.128", and in (f)(3) deleted "substantially" preceding "similar elements to an offense".

Editor's notes. — Section 2, ch. 55, SLA 1996 provides that the amendments to subsection (f) made by § 1, ch. 55, SLA 1996 apply "to offenses committed on or after September 4, 1996," except that references

"to prior convictions refer to convictions occurring before, on, or after September 4, 1996".

Section 21(a), ch. 18, SLA 2010, provides that the 2010 amendment of (f) of this section applies to offenses committed on or after July 1, 2010.

Legislative history reports. — For governor's transmittal letter for ch. 18, SLA 2010 (Senate Bill 222), relating to the amendment of (f) of this section, see 2010 Senate Journal 1237 — 1239.

NOTES TO DECISIONS

I. General Consideration.
II. Conditions of Probation.
III. Revocation of Probation.
IV. Setting Conviction Aside.

I. GENERAL CONSIDERATION.

AS 12.55.080 and subsection (a) now apply to Title 17. Stonefield v. State, 635 P.2d 494 (Alaska Ct. App. 1981).

Application of paragraph (f)(1). — Because the rule of lenity must prevail where legislative intent is ambiguous, and because it could not be said with certainty that the legislature intended to bar courts from imposing a suspended sentence for convictions of conspiracy, the appellate court ruled that this section did not preclude a court from granting a suspended sentence to persons convicted of conspiracy to commit one of the listed crimes. George v. State, 988 P.2d 1116 (Alaska Ct. App. 1999).

Application of paragraph (f)(2). — Defendant's claim that paragraph (f)(2) should be interpreted as applying only to crimes against people, not all crimes, was held not persuasive. Orr-Hickey v. State, 973 P.2d 612 (Alaska Ct. App. 1999).

Disposition should be limited. — A suspended imposition of sentence is primarily meant to be a one-time opportunity for particularly deserving first-offenders. It is a disposition ill-suited for repeated use with a persistent offender. State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992).

State law prohibits city from enacting ordinance providing for mandatory minimum sentence. City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978).

Mandatory minimum sentences created by city ordinances are invalid when in irreconcilable conflict with state law. Wright v. Municipality of Anchorage, 590 P.2d 425 (Alaska 1979).

Municipal enactments consistent with state laws. — Because municipalities are generally authorized to enact traffic laws consistent with state motor vehicle statutes, a municipality does not violate the sentencing provisions of AS 12.55.080 and this section if it follows the lead of the state legislature and enacts mandatory jail sentences and mandatory fines for the offenses of driving while under the influence and breath-test refusal. McCormick v. Municipality of Anchorage, 999 P.2d 155 (Alaska Ct. App. 2000).

Different limitations of probation period. — Under AS 12.55.080, a court may suspend the execution of all or a portion of a sentence and place the defendant on probation "for a period and upon the terms and conditions as the court considers best." That period of probation, however, is specifically limited by AS 12.55.090(c). This differs from probation granted after the court suspends the imposition of any sentence under subsection (a) of this section. Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

Where probation is granted after the court suspends the imposition of any sentence, the legislature has specifically limited the period of probation to a term not to exceed the maximum sentence which could be imposed for the particular offense. Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

Where the court actually imposed sentence and suspended the execution of a portion thereof, the only statutory limitation on the term of probation is that contained in AS 12.55.090(c). Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

Granting credit toward sentence. — This section merely defines the period in which sentencing may be imposed after it has been deferred; it in no sense precludes the granting of credit towards that sentence. Lock v. State, 609 P.2d 539 (Alaska 1980).

Upon revocation of probation, one is entitled to credit against his sentence on the original offense for time spent, as a condition of probation, in a rehabilitation program which imposes substantial restrictions on one's freedom of movement and behavior. Lock v. State, 609 P.2d 539 (Alaska 1980).

The limitation contained in AS 12.55.090(c) applies only to the period of probation to be served after the imposition of a sentence and suspension of all or a portion thereof pursuant to AS 12.55.080. Therefore, in calculating the period of probation allowable under AS 12.55.090(c), the court was not bound to consider the period of probation already served by defendant under its original order suspending the imposition of sentence pursuant to subsection (a). Elstad v. State, 599 P.2d 137 (Alaska 1979); Rice v. State, 603 P.2d 913 (Alaska 1979).

Period of suspension must begin when order entered. — The trial court was not clearly mistaken in imposing a sentence of six years' imprisonment for a forgery count, with three years suspended, and in suspending imposition of sentence for a count of uttering a check with insufficient funds for a stated period of five years the period of suspension to run consecutively to the sentence for forgery, except to the extent that the trial court appeared to have suspended the imposition of sentence for the uttering count for a period of time one year in excess of that permitted by this section. Cochran v. State, 586 P.2d 175 (Alaska 1978).

Since there was no logical way that the trial court could cause the period of suspension to begin several years in the future, i.e., at the end of the six-year term for forgery, and the period of suspension and probationary term had to begin when the trial court's order was entered, the supreme court held that what the judgment meant was that the imposition of sentence on the charge of uttering a check with insufficient funds was suspended, and defendant placed on probation, from the date of its entry until five years after the defendant's six-year term of imprisonment expired. Cochran v. State, 586 P.2d 175 (Alaska 1978).

Discretion of sentencing court. — Whether or not a sentencing court should impose a suspended

imposition of sentence in a given case is, by subsection (a), left to the discretion of the sentencing court. Nattrass v. State, 554 P.2d 399 (Alaska 1976).

Subsection (a) of this section reposes discretion in the trial court to suspend imposition of the sentence and place the defendant on probation. Mullins v. State, 573 P.2d 860 (Alaska 1978).

The state legislature has conferred broad discretionary powers on the sentencing court to establish conditions of probation when imposition of sentence is to be deferred. Sprague v. State, 590 P.2d 410 (Alaska 1979).

When sentencing alternative should be considered. — Generally, in the circumstances of youthful first offenders, who have committed nonviolent crimes, serious consideration should be given by Alaska's trial courts to the sentencing alternative offered by subsection (a) of this section. Nattrass v. State, 554 P.2d 399 (Alaska 1976); Wharton v. State, 590 P.2d 427 (Alaska 1979); Troyer v. State, 614 P.2d 313 (Alaska 1980); Burrell v. State, 626 P.2d 1087 (Alaska Ct. App. 1981).

When suspended sentence prohibited. — The prohibition against the granting of a suspended imposition of sentence applies to persons convicted of an attempt to commit one of the sexual offenses defined in the criminal code. Mack v. State, 900 P.2d 1202 (Alaska Ct. App. 1995).

Superior court did not abuse discretion in failing to impose suspended imposition of sentence. — See Nattrass v. State, 554 P.2d 399 (Alaska 1976).

Where at the time of sentencing for the crime of embezzlement by an employee of property worth more than $100, defendant was 22 years old, had been working several years and had spent two semesters in college, and, other than minor traffic violations, he had no previous criminal record, the trial court was not clearly mistaken in failing to order a suspended imposition of sentence, instead of actually imposing a sentence of three years and four months, with the entire period suspended upon the condition that he enter a twelve-month period of public service. Mullins v. State, 573 P.2d 860 (Alaska 1978).

Alaska's trial judges totally barred from engaging in either charge or sentencing bargaining. — See State v. Buckalew, 561 P.2d 289 (Alaska 1977).

Sentence modification. — Where the defendant detrimentally relied on the statement of an assistant district attorney that a plea agreement would not affect the renewal of his hunting license, he was to be provided with the opportunity to request that the sentencing court modify his sentencing conditions, notwithstanding any statute of limitations otherwise imposed on such modification. Boyd v. State, Dep't of Commerce & Economic Dev., 977 P.2d 113 (Alaska 1999).

Applied in Speas v. State, 511 P.2d 130 (Alaska 1973); Call v. State, 511 P.2d 135 (Alaska 1973); White v. State, 523 P.2d 428 (Alaska 1974); Andrews v. State, 552 P.2d 150 (Alaska 1976); Franzen v. State, 573 P.2d 55 (Alaska 1978); Wharton v. State, 590 P.2d 427 (Alaska 1979); Anderson v. State, 621 P.2d 1345 (Alaska 1981); Lowry v. State, 655 P.2d 780 (Alaska Ct. App. 1982); Davis v. State, 706 P.2d 1198 (Alaska Ct. App. 1985); Owings v. State, 771 P.2d 455 (Alaska Ct. App. 1989); Christensen v. State, 844 P.2d 557 (Alaska Ct. App. 1993); State v. Hernandez, 877 P.2d 1309 (Alaska Ct. App. 1994).

Quoted in Fresneda v. State, 458 P.2d 134 (Alaska 1969); Edinger v. State, 598 P.2d 943 (Alaska 1979); Mangold v. State, 613 P.2d 272 (Alaska 1980); Benboe v. State, 738 P.2d 356 (Alaska Ct. App. 1987); Gwalthney v. State, 964 P.2d 1285 (Alaska Ct. App. 1998).

Cited in Barrett v. State, 546 P.2d 161 (Alaska 1976); Thomas v. State, 566 P.2d 630 (Alaska 1977); Gilbert v. State, 598 P.2d 87 (Alaska 1979); Schmid v. State, 615 P.2d 565 (Alaska 1980); M.O.W. v. State, 645 P.2d 1229 (Alaska Ct. App. 1982); Baker v. State, 655 P.2d 1324 (Alaska Ct. App. 1983); Dodd v. State, 686 P.2d 737 (Alaska Ct. App. 1984); Luepke v. State, 765 P.2d 988 (Alaska Ct. App. 1988); State v. Staael, 807 P.2d 513 (Alaska Ct. App. 1991).

II. CONDITIONS OF PROBATION.

Authority to impose period of incarceration as condition of probation prior to enactment of AS 12.55.086. — See Boyne v. State, 586 P.2d 1250 (Alaska 1978); Sprague v. State, 590 P.2d 410 (Alaska 1979).

Imposition of jail time as condition of probation. — Imposition of jail time as a special condition of probation is not authorized under the Alaska statutes governing probation generally. Alaska law does, however, permit the imposition of jail time as a special condition of probation when the imposition of sentence is suspended under this section, as provided by AS 12.55.086(a). Whittlesey v. State, 626 P.2d 1066 (Alaska 1980).

When it was not imposed in accordance with AS 12.55.086(a), the requirement of jail time as a special condition of probation was illegal, and the sentence must, therefore, be vacated and the case remanded for resentencing. Whittlesey v. State, 626 P.2d 1066 (Alaska 1980).

III. REVOCATION OF PROBATION.

Subsection (b) provides for the revocation of probation for the violation of conditions imposed or engaging in criminal practices. Snyder v. State, 496 P.2d 62 (Alaska 1972).

In order to revoke probation, the state must prove a violation of a specific condition of probation. Holton v. State, 602 P.2d 1228 (Alaska 1979).

This section provides an independent basis for the court's terminating probation at any point during the period of the suspended imposition of sentence if the probationer engages in criminal practices. Burrell v. State, 626 P.2d 1087 (Alaska Ct. App. 1981).

Revocation of probation before the probationary term begins does not impermissibly extend the term in violation of AS 12.55.090(c). Enriquez v. State, 781 P.2d 578 (Alaska Ct. App. 1989).

When the accused has engaged in "criminal practices," the sentencing court has the authority to revoke probation, even when the probationary term has not yet commenced. Enriquez v. State, 781 P.2d 578 (Alaska Ct. App. 1989).

Probation can be revoked on the basis of a conviction which is on appeal and, therefore, not yet final. Alexander v. State, 578 P.2d 591 (Alaska 1978).

Prior notice of charges required. — Constitutional due process does require that a probationer accused of violating a condition of his probation receive prior notice of the charges against him and that he be given an opportunity to meet and refute the

charges. Burrell v. State, 626 P.2d 1087 (Alaska Ct. App. 1981).

As well as independent determination of good cause. — The requirement of an independent determination of good cause beyond mere proof of a probation violation for revocation of probation applies to cases involving suspended impositions of sentence under AS 12.55.080 and subsection (a) of this section, as well as to cases involving suspended executions of sentence under AS 12.55.080. Rich v. State, 640 P.2d 159 (Alaska Ct. App. 1982).

State's burden in seeking probation revocation is to establish a probation violation by a preponderance of the evidence. Burrell v. State, 626 P.2d 1087 (Alaska Ct. App. 1981).

Disposition on probation revocation. — The disposition when probation is revoked should be based on consideration of all relevant matters, including the probationer's original crime, his intervening conduct; and the violations of probation. Nix v. State, 624 P.2d 825 (Alaska Ct. App. 1981).

IV. SETTING CONVICTION ASIDE.

When set-aside orders may be entered. — Set-aside orders may be entered only in cases where a sentence has never formally been imposed against the defendant. Richey v. State, 717 P.2d 407 (Alaska Ct. App. 1986); Champion v. State, 908 P.2d 454 (Alaska Ct. App. 1995).

Where the judge had already rescinded defendant's suspended imposition of sentence and had formally imposed sentence and defendant was never discharged from probation under subsection (d), the judge had no authority to set aside his conviction under subsection (e). Richey v. State, 717 P.2d 407 (Alaska Ct. App. 1986).

Granting set-aside as matter of right. — No affirmative showing or finding of rehabilitation need be made before a set-aside is granted; rather, a set-aside should be granted as a matter of right unless some specific reason for denial is established. Wickham v. State, 770 P.2d 757 (Alaska Ct. App. 1989).

Notice of refusal to set aside conviction. — Before a sentencing court may refuse to set aside a conviction under subsection (e), the defendant must be given notice that there is reason to believe a set-aside should not be granted, with a precise statement of the reason or reasons, and must be afforded an opportunity for a hearing on the set-aside issue. Mekiana v. State, 707 P.2d 918 (Alaska Ct. App. 1985), rev'd on other grounds, 726 P.2d 189 (Alaska 1986).

Explanation by court. — By enacting the set-aside language of subsection (e), the legislature clearly intended to provide probationers who received a suspended imposition of sentence with the prospect of a clean slate and the promise of a new beginning upon successful completion of probation; a sentencing court cannot thwart this legislative goal — or, for that matter, hinder appellate review — by denying such relief without explanation. Mekiana v. State, 707 P.2d 918 (Alaska Ct. App. 1985), rev'd on other grounds, 726 P.2d 189 (Alaska 1986).

Correct remedy where defendant discharged from probation and denied set aside without prior notice and hearing was not an automatic set-aside but a delayed hearing on the set aside issue. State v. Mekiana, 726 P.2d 189 (Alaska 1986).

Effect of setting aside conviction on registration requirement. — Applying the Alaska Sex Offender Registration Act, AS 12.63.010 et seq., to a person whose conviction was set aside under this section, before the Act became specifically applicable to convictions that were set aside unconstitutionally interfered with the individual's liberty interests and was not justified by a compelling governmental interest. Doe v. Dep't of Public Safety, 92 P.3d 398 (Alaska 2004).

Effect on professional certification of setting aside conviction. — Nursing board, in denying an application for certification as a nurse aide, did not err in considering the applicant's previous felony forgery conviction, notwithstanding that the conviction had been set aside; setting aside an individual's conviction does not expunge the conviction from the individual's criminal record, and the applicant remained a person who was "convicted" of a criminal offense within the meaning of AS 08.68.334(2). State v. Platt, 169 P.3d 595 (Alaska 2007).

Belated set-aside hearing comporting with due process. — A belated set-aside hearing will not offend due process as long as the trial court (1) considers only those facts existing at the time the probationer was discharged and (2) explains on the record its reasons for denying a set aside. In other words, the court must decide the set-aside question based upon an evaluation of the defendant's conduct and situation as of the date of discharge from probation. State v. Mekiana, 726 P.2d 189 (Alaska 1986).

Belated set-aside hearing related back to date defendant was discharged from probation, where the defendant completed probation on a suspended imposition of sentence and had the conviction set aside in a belated set-aside hearing. Hansen v. State, 824 P.2d 1384 (Alaska Ct. App. 1992).

When expungement authorized. — The inherent authority of courts to expunge criminal records did not extend to a defendant who received a suspended sentence and had his conviction set aside after he completed probation, but who never established his factual innocence nor challenged the conviction or the underlying arrest; nor is there authority to expunge a charge which was dismissed because the state obtained evidence in violation of a warrant, since neither the validity of the substantive information nor fundamental fairness was implicated. Journey v. State, 850 P.2d 663 (Alaska Ct. App. 1993), aff'd, 895 P.2d 955 (Alaska 1995).

Expunction not part of set aside. — Expunction of a defendant's criminal record is not authorized under the set-aside provisions of subsection (e). The district court lacked statutory authority to order the criminal record expunged upon "discharge by the court without imposition of sentence" and the subsequent setting aside of his conviction. Journey v. State, 895 P.2d 955 (Alaska 1995).

Set-aside conviction not to be used for impeachment. — The set-aside provisions of this section "require a substantial showing of rehabilitation," within the meaning of Alaska Rule of Evidence 609 (d)(2). Accordingly, a prior conviction may not be relied on for impeachment purposes after it has been set aside pursuant to this section. Wickham v. State, 844 P.2d 1140 (Alaska Ct. App. 1993).

Set-aside order properly denied. — Trial court properly denied defendant's motion to set aside his prior convictions because, although defendant's three-year probationary term had passed, defendant had made no effort to contact the Department of Corrections or to fulfill his obligations; therefore, defendant

did not successfully complete his probation. Hanson v. State, 210 P.3d 1240 (Alaska Ct. App. 2009).

Collateral references. — Propriety of considering acts because of which probation was revoked in imposing sentence for original offense after revocation of probation. 65 ALR3d 1100.

Sec. 12.55.086. Imprisonment as a condition of suspended imposition of sentence. (a) When the imposition of sentence is suspended under AS 12.55.085, the court may require, as a special condition of probation, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed. The court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(b) A defendant imprisoned under this section is entitled to a deduction from the term of imprisonment for good conduct under AS 33.20.010. Unless otherwise specified in the order of suspension of imposition of sentence, a defendant imprisoned under this section is eligible for parole if the term of imprisonment exceeds one year and is eligible for any work furlough, rehabilitation furlough, or similar program available to other state prisoners.

(c) If probation is revoked and the defendant is sentenced to imprisonment, the defendant shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served." (§ 1 ch 32 SLA 1979; am § 4 ch 72 SLA 1985)

NOTES TO DECISIONS

For legislative history of this section, see Zurfluh v. State, 620 P.2d 690 (Alaska 1980).

Retroactive application. — This section may be applied retrospectively to the 153-day period between the decision in *State v. Boyne*, 586 P.2d 1250 (Alaska 1978) and the effective date of this section. Zurfluh v. State, 620 P.2d 690 (Alaska 1980).

Logic used by court in *Zurfluh v. State,* 620 P.2d 690 (Alaska 1980), to make this section retroactive applies with equal force to cases in which sentencings occurred prior to the decision in *Boyne v. State,* 586 P.2d 1250 (Alaska 1978), and cases in which sentencing took place after *Boyne* was decided, but before this section took effect. Whittemore v. State, 650 P.2d 411 (Alaska Ct. App. 1982).

This section has no application to a children's proceeding. M.O.W. v. State, 645 P.2d 1229 (Alaska Ct. App. 1982).

When jail time may be imposed as condition of probation. — Imposition of jail time as a special condition of probation is not authorized under the Alaska statutes governing probation generally. Alaska law does, however, permit the imposition of jail time as a special condition of probation when the imposition of sentence is suspended under AS 12.55.085, as provided by subsection (a) of this section. Whittlesey v. State, 626 P.2d 1066 (Alaska 1980).

When it was not imposed in accordance with subsection (a) of this section, the requirement of jail time as a special condition of probation was illegal, and the sentence must, therefore, be vacated and the case remanded for resentencing. Whittlesey v. State, 626 P.2d 1066 (Alaska 1980).

120-day incarceration requirement for possession of marijuana for sale. — Where the superior court suspended the imposition of sentence for possession of marijuana for purpose of sale and placed defendant on probation for a period of two years but required, as one of the conditions of his probation, that defendant serve 120 days of incarceration, the supreme court held that the incarceration requirement did not amount to an excessive sentence although recently developed sentencing guidelines suggested a sentence of no more than 30 days for a marijuana sale involving the same quantity of the drug, for a first-time felony offender, since the sale of drugs on school premises, as occurred in this case, is particularly objectionable. Anderson v. State, 621 P.2d 1345 (Alaska 1981).

Sentence of six months' incarceration as a condition of receiving a suspended imposition of sentence, upon conviction of one count of selling intoxicating beverages without a license in a local option area, was not clearly mistaken, where defendant had set up a commercial enterprise, although of short duration, and sold a pint of whiskey to a man who murdered a woman shortly after buying the whiskey. Wassillie v. State, 790 P.2d 1385 (Alaska Ct. App. 1990).

Credit against sentence. — Upon revocation of probation, one is entitled to credit against his sentence on the original offense for time spent, as a condition of probation, in a rehabilitation program which imposes substantial restrictions on one's freedom of movement and behavior. Lock v. State, 609 P.2d 539 (Alaska 1980).

Quoted in Mangold v. State, 613 P.2d 272 (Alaska 1980).

Stated in State v. Brueggeman, 24 P.3d 583 (Alaska Ct. App. 2001).

Cited in Schmid v. State, 615 P.2d 565 (Alaska 1980); State v. First Nat'l Bank, 660 P.2d 406 (Alaska 1982); State v. Hernandez, 877 P.2d 1309 (Alaska Ct. App. 1994).

HB 343

<TARGET><BILL>HB 343</BILL><SUBJECT>HB 343</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPO

(7)

Date Referred to Committee: March 16, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 3/28/12

The JUDICIARY Committee considered: **HB 343**

HOUSE BILL NO. 343

"An Act relating to disclosure of records of the Department of Health and Social Services pertaining to children in certain circumstances; and providing for an effective date."

HB 343-DISCLOSURE OF CHILDREN'S RECORDS

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 343 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**

*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	ADM			X
2	ADM			X
3	HES			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN			X	
	Gruenberg	✓			
	Keller	✓			
	Holmes				X
	Pruitt	✓			
Chair:	THOMPSON	✓			
Chair:					

CS FOR HOUSE BILL NO. 343(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MUÑOZ, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act relating to disclosure of records of the Department of Health and Social Services pertaining to children in certain circumstances; and providing for an effective date."

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

*** Section 1.** AS 47.10.093(b) is amended to read:

(b) A state or municipal agency or employee shall disclose appropriate confidential information regarding a case to

(1) a guardian ad litem appointed by the court;

(2) a person or an agency requested by the department or the child's legal custodian to provide consultation or services for a child who is subject to the jurisdiction of the court under AS 47.10.010 as necessary to enable the provision of the consultation or services;

(3) an out-of-home care provider as necessary to enable the out-of-home care provider to provide appropriate care to the child, to protect the safety of the

child, and to protect the safety and property of family members and visitors of the out-of-home care provider;

(4) a school official as necessary to enable the school to provide appropriate counseling and support services to a child who is the subject of the case, to protect the safety of the child, and to protect the safety of school students and staff;

(5) a governmental agency as necessary to obtain that agency's assistance for the department in its investigation or to obtain physical custody of a child;

(6) a law enforcement agency of this state or another jurisdiction as necessary for the protection of any child or for actions by that agency to protect the public safety;

(7) a member of a multidisciplinary child protection team created under AS 47.14.300 as necessary for the performance of the member's duties;

(8) the state medical examiner under AS 12.65 as necessary for the performance of the duties of the state medical examiner;

(9) a person who has made a report of harm as required by AS 47.17.020 to inform the person that the investigation was completed and of action taken to protect the child who was the subject of the report;

(10) the child support services agency established in AS 25.27.010 as necessary to establish and collect child support for a child who is a child in need of aid under this chapter;

(11) a parent, guardian, or caregiver of a child or an entity responsible for ensuring the safety of children as necessary to protect the safety of a child;

(12) a review panel established by the department for the purpose of reviewing the actions taken by the department in a specific case; [AND]

(13) the University of Alaska under the Alaska higher education savings program for children established under AS 47.14.400, but only to the extent that the information is necessary to support the program and only if the information released is maintained as a confidential record by the University of Alaska**;**

(14) a child placement agency licensed under AS 47.32 as necessary to provide services for a child who is the subject of the case; and

(15) a state or municipal agency of this state or another jurisdiction that is responsible for delinquent minors, as may be necessary for the administration of services, protection, rehabilitation, or supervision of a child or for actions by the agency to protect the public safety.

* **Sec. 2.** AS 47.12.310(b) is amended to read:

(b) A state or municipal agency or employee shall disclose

(1) information regarding a case to a federal, state, or municipal law enforcement agency for a specific investigation being conducted by that agency;

(2) appropriate information regarding a case to

(A) a guardian ad litem appointed by the court;

(B) a person or an agency requested by the department or the minor's legal custodian to provide consultation or services for a minor who is subject to the jurisdiction of the court under this chapter as necessary to enable the provision of the consultation or services;

(C) school officials as may be necessary to protect the safety of the minor who is the subject of the case and the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed;

(D) a governmental agency as may be necessary to obtain that agency's assistance for the department in its investigation or to obtain physical custody of a minor;

(E) a law enforcement agency of this state or another jurisdiction as may be necessary for the protection, rehabilitation, or supervision of any minor or for actions by that agency to protect the public safety;

(F) a victim or to the victim's insurance company as may be necessary to inform the victim or the insurance company about the arrest of the minor, including the minor's name and the names of the minor's parents, copies of reports, or the disposition or resolution of a case involving a minor;

(G) the state medical examiner under AS 12.65 as may be necessary to perform the duties of the state medical examiner;

(H) foster parents or relatives with whom the child is placed by the department as may be necessary to enable the foster parents or relatives to provide appropriate care for the child who is the subject of the case, to protect the safety of the child who is the subject of the case, and to protect the safety and property of family members and visitors of the foster parents or relatives;

(I) the Department of Law or its agent for use and subsequent release if necessary for collection of an order of restitution on behalf of the recipient;

(J) the Violent Crimes Compensation Board established in AS 18.67.020 for use in awarding compensation under AS 18.67.080; [AND]

(K) a state, municipal, or federal agency of this state or another jurisdiction that has the authority to license adult or children's facilities and services;

(L) a child placement agency licensed under AS 47.32 as necessary to provide services for a minor who is subject to the jurisdiction of the court under this chapter; and

(M) a state or municipal agency of this state or another jurisdiction that is responsible for child protection services, as may be necessary for the administration of services, protection, rehabilitation, or supervision of a minor or for actions by the agency to protect the public safety; and

(3) to the University of Alaska under the Alaska higher education savings program for children established under AS 47.14.400 information that is necessary to support the program, but only if the information released is maintained as a confidential record by the University of Alaska.

* **Sec. 3.** AS 47.12.310(f) is amended to read:

(f) The department may release to a person with a legitimate interest information relating to **a minor** [MINORS NOT] subject to the jurisdiction of the **department** [COURT] under this chapter. The department shall adopt **regulations under AS 44.62 to implement this subsection, including** regulations governing the release of information and **standards for** identifying a [SUFFICIENT] legitimate

interest **in the information**.

*** Sec. 4.** AS 47.12.315 is repealed and reenacted to read:

Sec. 47.12.315. Public disclosure of information in department records relating to certain minors. (a) Notwithstanding AS 47.12.310 and except as otherwise provided in this section, the department shall disclose information to the public, on request, concerning a minor subject to this chapter who was at least 13 years of age at the time of commission of

(1) a felony offense against a person under AS 11.41;

(2) arson in the first or second degree;

(3) burglary in the first degree;

(4) distribution of child pornography;

(5) promoting prostitution in the first degree;

(6) misconduct involving a controlled substance in the first, second, or third degrees involving distribution or possession with intent to deliver; or

(7) misconduct involving weapons in the first through fourth degrees.

(b) The department may dis aajnaged rmation authorized in (a) of this section only if the court has ~~entered a finding~~ g adjudicating ~~adjudicating~~ the minor as delinquent.

(c) When required by this section to disclose information, the department may disclose only the name of the minor, the name of each legal parent or guardian, the specific offense alleged to have been committed in the petition, and the final outcome of the court proceedings relating to the offense. Before the disclosure, the department shall delete the information that identifies the victim of the offense.

(d) The department may not disclose the name of an out-of-home care provider with whom the minor was living at the time the minor was alleged to have committed the offense.

(e) If the department or other state or municipal agency maintains the information to be disclosed by electronic means that can be recovered from a computer database, the department or agency may disclose the information in that medium.

(f) The department may not release information under this section after five years from the date the department or other agency is first required or authorized to

make the disclosure under this section.

(g) When disclosure is required under this section, the department may petition the court for an order prohibiting the disclosure. The court may grant the petition if, based on information presented in the petition or at an in camera hearing held on the petition, the court finds that

(1) the crime was an isolated incident and the minor does not present any further danger to the public; or

(2) the victim agrees that disclosure is inappropriate.

(h) In this section, unless the context otherwise requires, "out-of-home care provider" means a person, other than the child's legal parents, with whom a child who is in the custody of the state under AS 47.10, AS 47.12, or AS 47.14 is currently placed, including a foster parent, a relative other than a parent, and a person who has petitioned for adoption or guardianship of the child.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The Department of Health and Social Services may adopt regulations necessary to implement the changes made by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of secs. 1 - 4 of this Act.

*** Sec. 6.** Section 5 of this Act takes effect immediately under AS 01.10.070(c).

*** Sec. 7.** Except as provided in sec. 6 of this Act, this Act takes effect July 1, 2012.

27-LS1394\M.5
Mischel
3/28/12

CONCEPTUAL
AMENDMENT #4

OFFERED IN THE HOUSE
TO: CSHB 343(HSS)

BY REPRESENTATIVE ~~KELLER~~ Gruenberg
adopted w/o obj

Page 5, line 17, following "if":

Insert "a court has entered a finding adjudicating ~~judgment that~~ the minor was a ~~is~~ delinquent."

Page 5, lines 18 - 22:

Delete all material.

3/28/12 HJUD held for Lindsey Holmes to offer

27-LS1394\M.1
Mischel
3/26/12

#1 withdrawn

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE HOLMES

TO: CSHB 343(HSS)

m

w/d

Page 3, line 4, following "**safety**":

Insert "**, if notice and an opportunity to object is provided in writing to the child and the child's guardian ad litem not less than 10 business days before disclosure**"

info.

LH: requires OCS → DJJ
CM: concerned of the addit. 10 days.
TN: addit. constraints on ee's.
QS:

'Conceptual' Amdt. #5 ((that, who, . . .))

O.K. pg. 3 ln. 2 after 'jurisdiction' + who is

" pg 4. ln 18 "

JM: 'that' is

HJUD
3/28/12

27-LS1394\M.2
Mischel
3/27/12

#2

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 343(HSS)

M

other jurisdiction very broad - outside state w/d.

Page 2, line 9, following "jurisdiction":

Insert "**that operates under child protection standards similar to the standards for a law enforcement agency in this state,**"

Page 3, lines 1 - 2:

Delete "**or another jurisdiction**"

Page 3, line 2, following "**minors**":

Insert "**or another state or municipal agency of another jurisdiction that is responsible for delinquent minors and that operates under child protection standards similar to the standards for this state or a municipal agency in this state**"

Page 3, line 23, following "jurisdiction":

Insert "**that operates under child protection standards similar to the standards for a law enforcement agency in this state,**"

Page 4, lines 17 - 18:

Delete "**or another jurisdiction**"

Page 4, line 18, following "**services**":

Insert "**or another state or municipal agency of another jurisdiction that is responsible for child protection services and that operates under child protection standards similar to the standards for this state or a municipal agency in this state**"

27-LS1394\M.3
Mischel
3/27/12

AMENDMENT #3 withdrawn

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 343(HSS)

Page 5, lines 18 - 22:

Delete all material.

Insert "the minor has entered a guilty plea to a delinquent act contained in a petition seeking adjudication of the minor as a delinquent for the offense or has been adjudicated delinquent by a court for the offense."

HJUD 3/28/12

27-LS1394\M.4
Mischel
3/28/12

AMENDMENT #3 withdrawn

OFFERED IN THE HOUSE M BY REPRESENTATIVE GRUENBERG

TO: CSHB 343(HSS)

Page 5, line 17, following "if":

Insert "the court has adjudicated the minor as a delinquent for an offense contained in a petition seeking adjudication of the minor as a delinquent for the offense."

Page 5, lines 18 - 22:

Delete all material.

Conceptual

27-LS1394\M.5
Mischel
3/28/12

AMENDMENT #4

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 343(HSS)

Page 5, line 17, following "if":

Insert "a court has entered a ~~judgment that~~ finding adjudicating the minor ~~is~~ as a delinquent."

Page 5, lines 18 - 22:

Delete all material.

OK as amd.

m amdt. to #4 (OK)

not conceptual

party learns that the information disclosed or the response given is incomplete or incorrect in some material respect, and that the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. This duty to supplement or correct disclosures and responses extends to information provided in expert disclosures under subsection (d) of this rule.

(SCO 845 effective August 15, 1987; and rescinded and readopted by SCO 1561 effective April 15, 2006)

Annotations

Cases

That Alaska CINA R. 16(b) allows a court to order mental and physical examinations of a child's parents at the predisposition phase of a child-in-need-of-aid proceeding does not limit the court's authority under Alaska R. Civ. P. 35(a) to order a mental examination at the adjudication stage. **Alyssa B. v. Dep't of Health & Social Servs.,** Op. No. 5930, 123 P.3d 646 (Alaska 2005).

Rule 9. Evidence.

(a) **Applicability of Evidence Rules.** The Alaska Rules of Evidence apply to child in need of aid proceedings to the same extent as they govern civil proceedings, except as otherwise provided by these rules.

(b) **Privileges Inapplicable.**

(1) *Husband-Wife Privilege.* The husband-wife privilege, Evidence Rule 505, does not apply to the parent, child or custodian in Child in Need of Aid proceedings.

(2) *Physician-Patient Privilege.* The physician-patient privilege, Evidence Rule 504, does not apply to the parent, child or custodian in Child in Need of Aid proceedings.

(3) *Psychotherapist-Patient Privilege.*

(A) The psychotherapist-patient privilege, Evidence Rule 504, applies to the parent, child or custodian in Child in Need of Aid proceedings only to the extent described in this rule.

(B) The privilege applies to the child unless the child or the child's guardian ad litem waives the privilege, or the party seeking disclosure shows that the need for the requested disclosure outweighs the child's interest in confidentiality.

(C) The privilege does not apply to the parent unless the parent shows that the parent's interest in confidentiality outweighs the need for the requested disclosure. No disclosure may be made until the parent has an opportunity to make this showing.

(D) When considering a request to disclose or protect a communication, the court shall consider the following:

(i) the content and nature of the communication;

(ii) the purposes of AS 47.10, as expressed by AS 47.05.060, and of Evidence Rule 504;

(iii) whether there is any other effective way to obtain the information; and

(iv) whether the public interest and need for disclosure outweighs the potential injury to the patient and the patient's psychotherapist relationship.

Before ruling on such a request, the court may inspect records in camera. The court may allow, limit, or prohibit disclosure and use of the communication.

(E) If the court grants the request for disclosure of the child's privileged information, the court order must:

(i) limit disclosure to those parts of the child's records which are essential to fulfill the purpose of the disclosure;

(ii) limit disclosure to those persons whose need for the information is the basis for the order; and

(iii) include such other measures as are necessary to limit disclosure for the protection of the child and the psychotherapist-patient relationship.

(F) Evidence Rule 504(c) does not apply in child in need of aid proceedings. Unless otherwise ordered, the child's psychotherapist-patient privilege may only be claimed or waived as follows:

(i) If the child is twelve or older, the privilege may be claimed or waived by the child after consulting with an attorney, if an attorney has been appointed, or with the guardian ad litem.

(ii) If the child is younger than twelve, the privilege may be claimed or waived by the guardian ad litem.

(iii) The person who was the psychotherapist at the time of the communication is presumed to have authority to claim the privilege on behalf of the child.

(SCO 845 effective August 15, 1987; amended by SCO 1355 effective July 15, 1999; and by SCO 1442 effective October 15, 2001)

Cross References

CROSS REFERENCE: AS 47.17.060.

Annotations

Cases

This annotation construes former Children's Rule 17. This rule permits the consideration of social agency and police reports in the dispositive phase of a hearing. **In re S.D. Jr.,** Op. No. 1255, 549 P2d 1190 (Alaska 1976).

This annotation construes former Children's Rule 17. Before hearsay evidence is used in the dispositive phase, the child and his counsel should be clearly advised that it is being considered so that opposing evidence or explanation may be presented. **Matter of J.H.B.,** Op. No. 1626, 578 P2d 146 (Alaska 1978).

This annotation construes former Children's Rule 17. Finding by judge that juvenile was not amenable to treatment as a juvenile based solely upon prior determination of delinquency was not the searching inquiry necessary for such a finding. **A.D. v. State,** Op. No. 280, 668 P2d 840 (Alaska App. 1983).

This annotation construes former Children's Rule 17. Probable cause determination at juvenile jurisdiction waiver hearing may not be based on hearsay testimony. **A.D. v. State,** Op. No. 280, 668 P2d 840 (Alaska App.

1983).

This annotation construes former Children's Rule 17. The use of hearsay evidence in the disposition phase of a parental rights termination proceeding as allowed by state law did not conflict with the federal Indian Child Welfare Act. **Matter of J.R.B.,** Op. No. 3029, 715 P2d 1170 (Alaska 1986).

Statute providing that registration and other records of alcohol treatment facilities shall remain confidential and are privileged to the patient did not establish privilege precluding admission of alcohol treatment records in CINA proceedings. **In re D.D.S.,** Op. No. 4058, 869 P.2d 160 (Alaska 1994).

PART V. PRELIMINARY PROCEEDINGS

Rule 10. Temporary Custody Hearing.

(a) **Time of Hearing.**

(1) At the request of the petitioner, the court shall schedule a temporary custody hearing:

(A) within 48 hours, including weekends and holidays, of when the court is notified by the filing of a petition that emergency custody was taken pursuant to CINA Rule 6(a) or (b); or

(B) within a reasonable time following the filing of a petition when emergency custody has not been taken.

(2) The court may continue a temporary custody hearing at the request of a parent or guardian upon a showing of good cause for why the parent or guardian is not prepared to respond to the petition. A continuance must be requested before or at the outset of the hearing.

(b) **Conduct of Hearing.**

(1) *Opening Address.* The court shall first determine whether the persons specified in CINA Rule 7(b) have received notice of the hearing. The court shall then determine whether all parties have received copies of the petition and understand its contents and shall advise the parties of the nature of the proceedings and possible disposition. In addition, the court shall advise the parties of the possibility of a temporary custody or supervision order pending adjudication and final disposition, and that the parents may be liable for child support payments if the child is placed outside the home at any time during the proceeding.

(2) *Advice of Rights.* The court shall advise the parties of their right to counsel, including the right to court-appointed counsel if applicable; the child's right to a guardian ad litem; their right to a hearing at which the state is required to present evidence to prove the allegations in its petition; their right to confront and cross-examine witnesses at such a hearing, to present witnesses on their own behalf, and to compulsory process to compel these witnesses to attend; and their privilege against self-incrimination. In cases involving an Indian child, the court shall also advise the parties of an Indian custodian's or tribe's right to intervene. If the hearing is being held because emergency custody was taken pursuant to CINA Rule 6(a) or (b), the court shall also advise the child's parents or guardian, if they are present at the hearing, that they each have the right to request a continuance of the hearing if they are not prepared to respond to the allegation that the child is a child in need of aid.

(3) The court may admit hearsay evidence which would be otherwise inadmissible under the Evidence Rules if the hearsay is probative of a material fact, has circumstantial guarantees of trustworthiness, and the appearing parties are given a fair opportunity to meet it.

(c) **Findings of Fact and Order.**

(1) The court shall order the child returned to the home and dismiss the petition if the court does not find probable cause to believe that the child is a child in need of aid under AS 47.10.011.

(2) The court shall order the child placed in the temporary custody of the Department or order the child returned to the home with supervision by the Department if the court finds probable cause to believe that the child is a child in need of aid under AS 47.10.011.

(3) The court may approve the removal of the child from the child's home only if the court finds that continued placement in the home is contrary to the welfare of the child; and, in cases involving an Indian child, either: (A) that removal from the child's parent or Indian custodian is necessary to prevent imminent physical damage or harm to the child; or (B) that there is clear and convincing evidence, including testimony of qualified expert witnesses, that the child is likely to suffer serious emotional or physical damage if left in the custody of the parent or Indian custodian.

(4) In any case in which the court has approved the removal of the child pursuant to the preceding subparagraph, the court shall make the inquiry and findings required by CINA Rule 10.1.

(d) **Subsequent Proceedings.** If the court orders the child placed in the temporary custody of the Department or orders the child returned to the home with supervision by the Department, the court must set the time for the adjudication hearing and for the pretrial conference and meeting of parties required by CINA Rule 13. The court may also set the time to file motions, complete discovery, exchange witness and exhibit lists, and file pretrial briefs. The court may schedule a disposition hearing in conjunction with the adjudication hearing. In such cases, the order setting the time for adjudication and disposition must also set the time to submit reports in aid of disposition.

(e) **Review.**

(1) If circumstances relating to the child's placement change pending adjudication or disposition, any party may request that the court review the temporary custody or supervision order.

(2) When a party seeks the return of a child to the child's home pending adjudication or disposition, if the party makes a prima facie showing that removal is no longer necessary, the burden of proof shifts to the Department as described below:

#4

27-LS1394\M.5
Mischel
3/28/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSHB 343(HSS)

Page 5, line 17, following "if": a finding adjudicating

Insert "a court has entered ~~a judgment that~~ the minor is delinquent."

Page 5, lines 18 - 22:

Delete all material.

#5
add - "who is"
Page 3 Line 2 following jurisdiction
Page 4 Line 18
~~Line 2~~

3/26/12
HJUD

CONCEPTIONAL AMENDMENT

HB 343 27-LS1394\M.1

IN THE HOUSE

Judiciary Committee

By: Representative Keller

Page 2, Line 9

Insert:

Yes.
also sister agencies in other states.

(6) a law enforcement agency of this state or another jurisdiction **with similar rules** **for protection** as necessary for the protection of any child or for actions by that agency to protect the public safety;

Rep. M: will other agency jurisdiction have similar rules.

Stacie: also there's a overarching federal standard.

Public Comment.

Quinlan: sharing records eg. UCS cases incl. therapist records... currently disputed insta.
Q. Gruenberg - sharing c/ be limited

P/C Naomi Harris - OCS.

Max: response to Quinlan Steiner's testimony.

NH - would standardize the manner of sharing info. but would not supercede any HIPAA... creates an opportunity to work together

Social vs. Criminal

Max: the client y be very careful.

NH - OCS provides best; not her area laws of expertise.

Tony Newman collaborative effort../all (both) have access to records. Use of info. more inclined to use info for serving child.

Max secondary disclosure? A. 'B' Brisdem

CONCEPTIONAL AMENDMENT

HB 343 27-LS1394\M.1.a

IN THE HOUSE

Judiciary Committee

By: Representative Keller

Page 3, Line 2

(15) a state or municipal agency of this state or another jurisdiction **with similar rules and are** responsible for delinquent minors, as may be necessary for the administration of services, protection, rehabilitation, or supervision of a child or for actions by the agency to protect the public safety.

CONCEPTIONAL AMENDMENT

HB 343 27-LS1394\M.1.b

IN THE HOUSE

Judiciary Committee

By: Representative Keller

Page 4, Line 18

(M) a state or municipal agency of this state or another jurisdiction **with similar rules and** responsible for child protection services, as may be necessaryfor the administration of services, protection, rehabilitation, or supervision of a minor or for actions by the agency to protect the public safety; and

CONCEPTIONAL AMENDMENT

HB 343 27-LS1394\M.2

IN THE HOUSE

Judiciary Committee

By: Representative Keller

Page 5, Line 21

Delete all language and insert:

(3) the court has entered a notice of conviction or received a guilty plea from the defendant through legal counsel.

HJUD 3/26/12

2. Rep. Keller is prob. cause risky (for the child) if innocent.

Tony Newman adjudicate a youth as 'delinquent' aka: convicted'

cc

New Text Underlined [DELETED TEXT BRACKETED]

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

To: Rep. Carl Gatto, Chairman
House Judiciary Committee

Cc: Melanie Lesh, Aide
House Judiciary Committee

From: Rep. Cathy Muñoz

Date: March 19, 2012

Re: Hearing request for CSHB 343 (HSS), Disclosure of Children's Records

received 3/20/12

Please schedule CSHB 343 (HSS), relating to the disclosure of children's, for a hearing in the House Judiciary Committee at your earliest convenience.

Attached to this memo please find:

- HB 343 – the original and latest versions of the bill
- A sponsor statement
- A sectional analysis
- Letters of support from:
  - The Division of Juvenile Justice
  - The Office of Children's Services
- A flow chart explaining the current public disclosure law
- A flow chart explaining the proposed public disclosure law
- A side-by-side comparison between the current and proposed laws
- AS 47.12.315, the current public disclosure law
- Three zero fiscal notes

The contact for CSHB 343 (HSS) is Christopher Clark, 465-4712.

Thank you.

Alaska State Capitol, Room 403 Juneau, Alaska 99801 (907) 465-3744

REPRESENTATIVE CATHY MUÑOZ

SPONSOR STATEMENT
CSHB 343 (HSS)

"An Act relating to disclosure of records of the Department of Health and Social Services pertaining to children in certain circumstances; and providing for an effective date."

The original version of Committee Substitute for House Bill 343 (Health and Social Services) was introduced at the request of the Alaska Department of Health and Social Services to:

1) Assure that the Division of Juvenile Justice and the Office of Children's Services could exchange information to provide necessary services to children without undue delay.

2) Allow individuals with a legitimate interest – such as former clients who once were children in state custody, their parents, or guardians – to receive information about delinquency history and health records from the Division of Juvenile Justice to help them apply for jobs, obtain student loans, or get health care.

3) Clarify current law regarding public disclosure of juvenile information which state officials say is cumbersome and difficult to interpret. The legislation strives to preserve legislative intent of balancing public safety through disclosing appropriate information on serious offenders with protecting the confidentially of offenders who pose less risk to society.

The House Health and Social Services Committee made one change to the original bill on March 15, 2012. Under Section 4, the public disclosure provision, page 5, line 15, it amended the measure to exclude misconduct involving weapons in the fifth degree. The disclosure provisions of the bill now apply to misconduct involving weapons in the first through fourth degrees.

CSHB 343 (HSS) is supported by the Division of Juvenile Justice and the Office of Children's Services.

Alaska State Capitol, Room 403 Juneau, Alaska 99801 (907) 465-3744

REPRESENTATIVE CATHY MUÑOZ

MEMORANDUM

To: Rep. Carl Gatto, Chairman
House Judiciary Committee

From: Christopher Clark, Aide
Rep. Cathy Muñoz

Date: March 19, 2012

Re: Sectional analysis of CSHB 343 (HSS), relating to the disclosure of children's records

---

Kindly note that a sectional analysis of a bill or resolution should not be considered an authoritative interpretation of the measure itself. The legislation itself is the best statement of its contents.

Section 1. Amends AS 47.10.093(b), the state law on the disclosure of agency records that relates to children in need of aid, by adding two new subsections to allow the state Office of Children's Services to:

- Disclose confidential information regarding a child's case to a licensed child placement agency as needed to provide services for that child. See subsection (14), page 2, lines 30-31.
- Exchange current and historical case management records with the state Division of Juvenile Justice and agencies in other jurisdictions that are responsible for delinquent minors. See subsection (15), page 3, lines 1-4.

Section 2. Amends AS 47.12.310(b), the state law on agency records that relates to delinquent minors, by adding two new subsections to allow the state Division of Juvenile Justice to:

- Disclose confidential information regarding a case of a minor, who is subject to the jurisdiction of a court, to a licensed child placement agency as needed to provide services for that child. See subsection (L), page 4, lines 14-16.
- Exchange current and historical case management records with the state Office of Children's Services and agencies in other jurisdictions that are responsible for child protection services. See subsection (M), page 34, lines 17-21.

Section 3. Amends AS 47.12.310(f), the state law on agency records that relates to delinquent minors, by allowing the Division of Juvenile Justice to adopt regulations delineating what information it may release to someone who has a legitimate interest in a minor who is subject to the jurisdiction of the state Department of Health and Social Services. The provision also allows the division to set standards for identifying a legitimate interest in such records. See page 4, lines 26-31, and page 5, line 1.

Current law does not allow the division to release certain information about minors while they were under the jurisdiction of a court. A problem arises when former clients ask the agency for records about their contacts with the department while they were minors. The existing law would allow the agency to release information only if a minor's charges had been adjusted or if the minor had been placed on informal probation. Anything related to adjudications would not be available for release. This restriction can hurt those who need records for legitimate reasons such as applying for a job, obtaining student loans, or getting health care. This proposal is intended to help them as well as parents, guardians, or others who have a legitimate interest in this.

Section 4. Repeals and reenacts AS 47.12.315, the statute on public disclosure of information in agency records relating to certain minors. See page 5, lines 2-31, and page 6, lines 1-18.

This allows the Department of Health and Social Services to disclose information to the public, upon request, concerning a minor who is subject to the law on delinquent minors, AS 47.12. A child is someone who is at least 13 years of age at the time of committing a felony offense such as murder, manslaughter, assault, kidnapping, and other crimes as described under AS 11.41 as well as arson in the first or second degree, burglary in the first degree, distribution of child pornography, promoting prostitution in the first degree, misconduct involving a controlled substance in the first, second, or third degrees involving distribution or possession with intent to deliver, or misconduct involving weapons in the first through fifth degrees.

Current law allows public disclosure on informal adjustments for specified crimes or offenders who were previously adjudicated on any felony and are petitioned again for another felony.

This bill allows public disclosure if the Department of Health and Social Services has filed a petition seeking adjudication of a minor, a court has arraigned the minor on the petition, and the court has entered a finding that probable cause exists that the minor committed a delinquent act.

This new section will ensure that a juvenile's arrest on a charge that was determined by a judge to lack legal sufficiency will not be subject to public disclosure.

Other subsections describe what may be disclosed and prohibit releasing names of victims and out-of-home care providers. They allow the agency to disclose information electronically recovered from a computer database and prohibit the release of records after five years from the date the state is first required or authorized to make a disclosure. They would allow the department to petition a court for an order prohibiting disclosure if the court finds the crime was an isolated incident and the minor does not present any further danger to the public or if the victim agrees disclosure is inappropriate.

The final subsection defines out-of-home provider as someone who is other than a child's legal parents and with whom that minor is in state custody. This includes a foster parent, a child's relative, and a person who seeks to adopt or become a guardian of the minor.

Section 5. Amends uncodified law by adding a new section to allow the Department of Health and Social Services to adopt regulations as necessary to implement the changes made by this legislation.

Section 6. Provides for an immediate effective date for section 5.

Section 7. Provides an effective date for sections 1 through 4 of July 1, 2012.

Alaska Juvenile Justice Advisory Committee
Jasmin Smith, Chair 907-694-5530

House Bill 343: Disclosure of Children's Records

Sponsored by Cathy Munoz

HB 343 does :

1.) Allow the Division of Juvenile Justice and Office of Children Services to communicate about mutual cases
   - Providing holistic care for clients of both systems
   - Increasing cost effectiveness in youth's treatment plan

2.) Ease the process for getting access to records for the youth, and youth's guardian
   - Adult's to access **their own** juvenile records
   - Ensuring parental rights in advocating for their youth

3.) Clarify the language of the law
   - Make the law easier to navigate
   - Reduce confusion over interpretation of the law

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF JUVENILE JUSTICE

*Sean Parnell, **GOVERNOR***

P.O. BOX 110635
JUNEAU, ALASKA 99811-0635
PHONE: (907) 465-2212
FAX (907) 465-2333

February 24, 2012

Representative Cathy Muñoz
Alaska State Capitol Room 403
Juneau AK. 99801

Dear Representative Muñoz:

Thank you for your sponsorship of House Bill 343. The Division of Juvenile Justice fully supports this bill.

This bill makes several improvements to Alaska law regarding sharing and disclosure of juvenile information. Sections 1 and 2 clarify the authority of the Office of Children's Services (OCS) and the Division of Juvenile Justice (DJJ) to share records with each other to assist clients and to protect the public. Since 1999, when the Department of Health and Social Services split the Division of Family and Youth Services into two divisions (OCS and DJJ), there has been inconsistent understanding of the ability of these two agencies to share case information. The bill would amend AS 47.10.093 and AS 47.12.310 by stating clearly the legal authority for the sister divisions to provide necessary care and services without undue delay.

This bill will also provide clarification in AS 47.12.310 to allow individuals with a legitimate interest (e.g. former clients, parents, guardians) to receive information from the Division of Juvenile Justice to facilitate employment, health care, and other needs. The Division of Juvenile Justice routinely receives inquiries from former clients seeking information about their delinquency history, but statute has not been clear about our ability to provide this information to them. The change provided in the bill would allow the Division to develop regulations that provide this clarity. The changes proposed in Section 3 of the bill also will ensure that the state is in alignment with the federal HIPAA law. These changes are important to make because of the increasing frequency with which agencies and employers use barrier crimes and background checks to determine the fitness of candidates for employment and services, and the increased expectation that individuals have access to their own health care information.

Section 4 of the bill makes changes to AS 47.12.315, which allows public access to information regarding certain juvenile offenders. The original intention of this 1997 law was to increase the availability of some types of juvenile information to the general public. However, the practical application of this law has proved to be challenging. Division staff have found the law difficult to interpret and convey to juvenile offenders and the public. The changes proposed will expedite the ability of division staff to determine whether information on a particular juvenile or offense can be disclosed. The revision to the public disclosure law preserves the legislative intent of balancing public safety and confidentiality of juvenile records by disclosing appropriate information regarding more serious offenders while preserving confidentially of offenders posing less risk to the community.

Thank you for your leadership on these issues. The Division of Juvenile Justice looks forward to providing research and testimony in support of House Bill 343.

Respectfully,

Barbara Henjum
Director

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF CHILDREN'S SERVICES

SEAN PARNELL, GOVERNOR

P.O. BOX 110630
JUNEAU, ALASKA 99811-0630
PHONE: (907) 465-3170
FAX: (907) 465-3397

February 27, 2012

Representative Cathy Munoz
Alaska State Capitol
Room 403
Juneau, AK 99801

Dear Representative Munoz:

Thank you for sponsoring House Bill 343 Disclosure of Children's Records.

The Office of Children's Services supports this bill because it will allow improvements in our ability to exchange necessary, important information with our sister agency, the Division of Juvenile Justice. While throughout most of Alaska it is understood that our agencies can share information regarding our clients to ensure efficient use of resources and the best approaches to working with their families, occasional misunderstanding about this relationship among Departmental staff, attorneys, families, and judges can lead to confusion, withholding of information, and even court action to suppress sharing of information when actually the exchange can lead to better case management and more appropriate services for the child.

Many national organizations, including the Child Welfare League of America, have noted the benefits and importance of improved coordination between juvenile justice and child protection agencies.

The bill also includes provisions recommended by our Office that will facilitate better information sharing between child protection and juvenile justice agencies and Alaska's child placement agencies. These agencies license foster homes and place children in them. Both Juvenile Justice and Children's Services rely on child placement agencies to provide services for youth under our jurisdiction; better coordination with these agencies will only improve our ability to serve them.

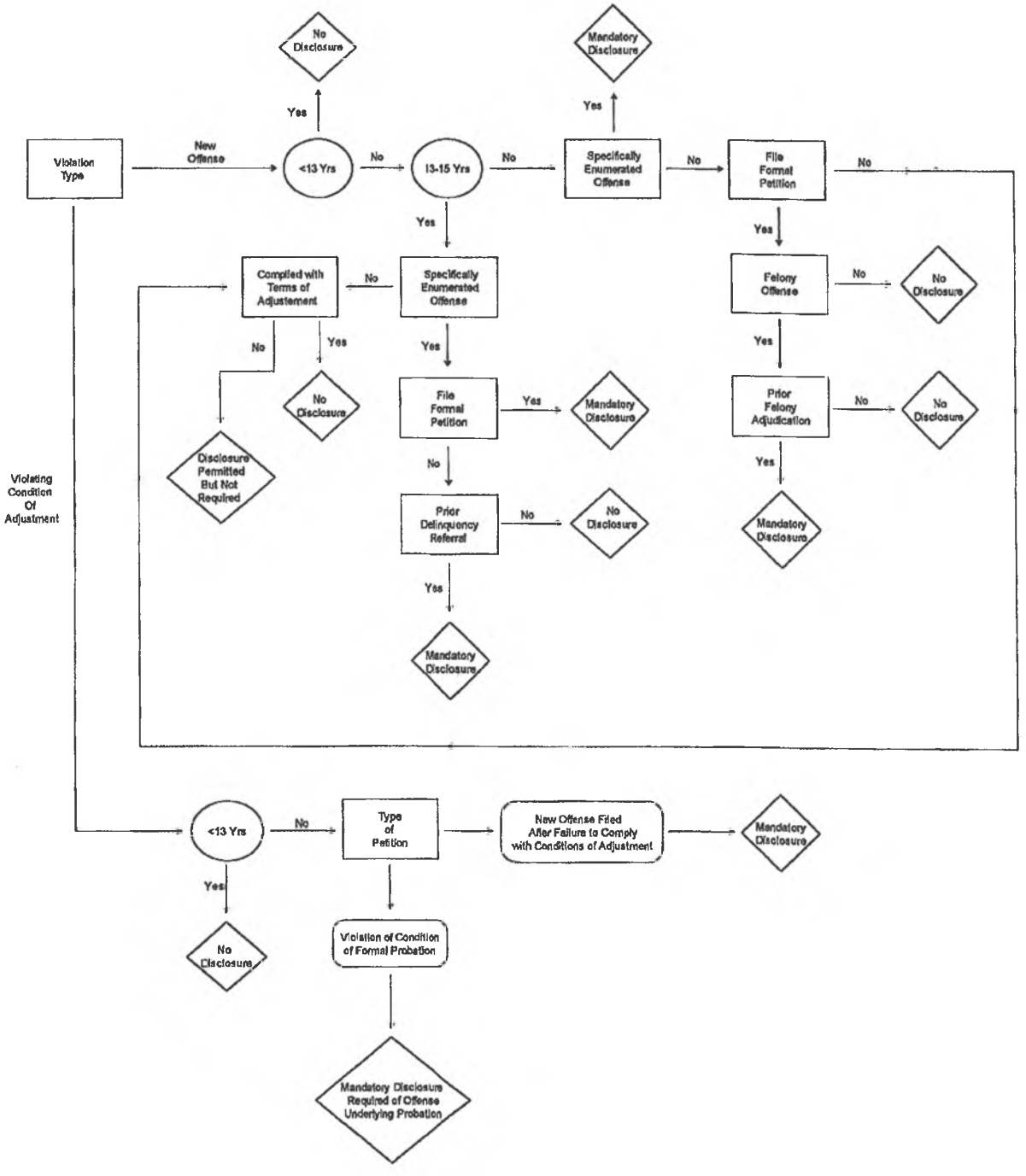
Please contact me if I can answer any questions or be of other assistance.

Sincerely,

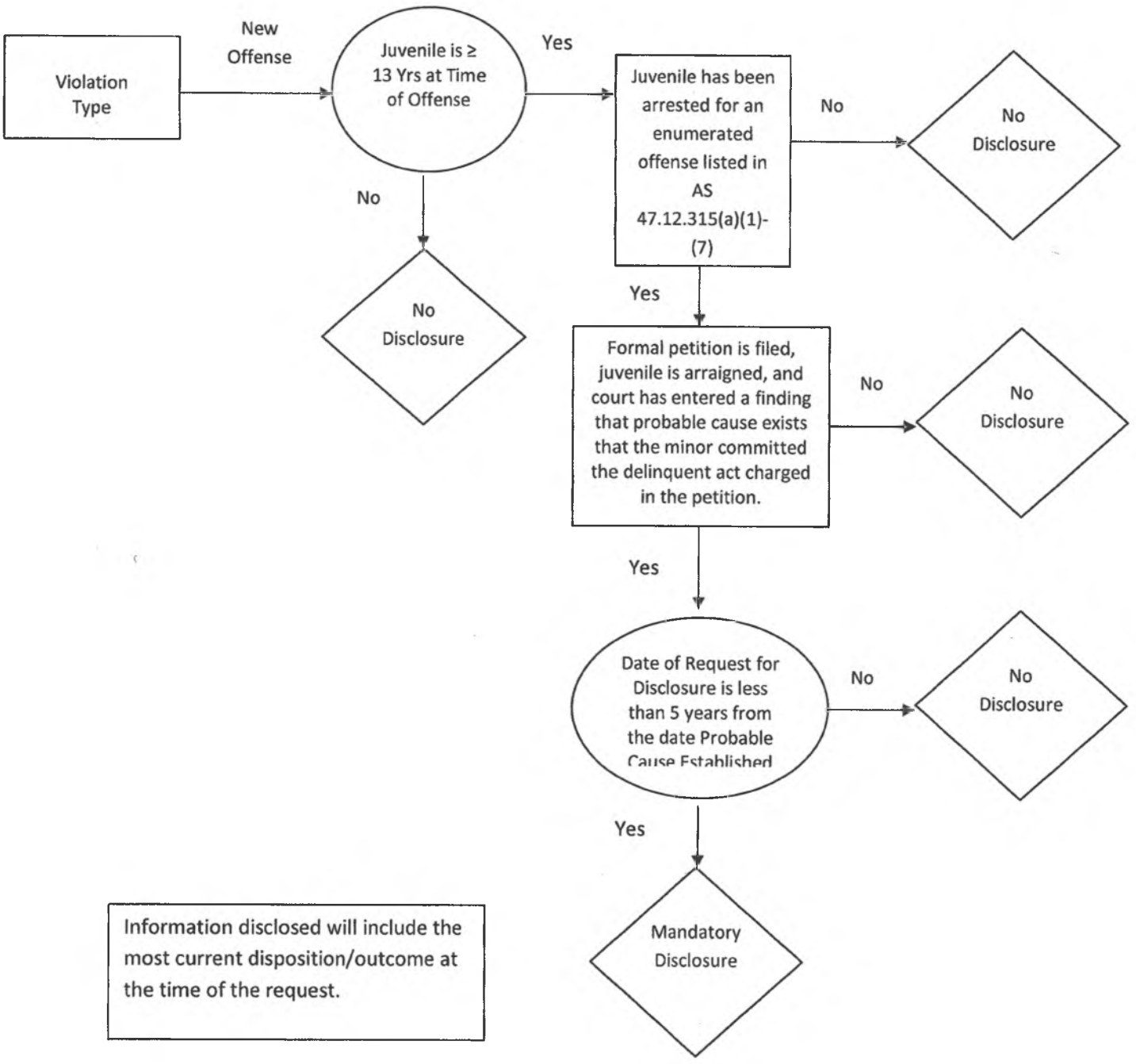
C. Lawton

Christy Lawton
Director

CURRENT DISCLOSURE LAW



PROPOSED JUVENILE DISCLOSURE LAW – 2/6/2012



CSHB 343 (HSS): Disclosure of Children's Information

Side-by-Side Comparison of AS 47.12.315

Public Disclosure of information in department records relating to certain minors

Current Law	How HB 343 Would Change It
Information shall be disclosed for a minor at least 13 years old, who has a history of an informal adjustment action for any offense referred after 9/2/92, and an adjustment plan is being implemented following a current referral for one of the following offenses: 1. A crime against a person punishable as a felony; 2. A crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime; 3. Arson under AS 11.46.400 – 11.46.410 4. Burglary under AS 11.46.300 5. Distribution of child pornography under AS 11.61.125; 6. Promoting prostitution in the first degree under AS 11.66.110; or 7. Misconduct Involving a Controlled Substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050.	The proposal requires that the minor alleged to have committed one of the listed offenses be petitioned to a court on the offense, and that the court find probable cause that the offense was committed, for information on the offense to be publicly disclosable. The proposal changes #2 of the enumerated offenses from "a crime in which the minor employed a deadly weapon," to "Misconduct Involving Weapons in the First through Fifth Degrees." NOTE: the H-HSS Committee amended the bill to exclude Misconduct Involving Weapons in the Fifth Degree.
Information MAY be disclosed for a minor at least 13 years of age who knowingly fails to comply with all the terms of an informal adjustment for any offense referred after 9/2/92.	The proposal does not allow for discretionary public disclosure of information when minors fail to comply with terms of an informal adjustment.
Information shall be disclosed for a minor when the Department has filed a petition for adjudication, the minor was at least 13 years old at the time of the offense, and the petition is filed for any offense as a result of the minor's failure to comply with terms of an informal adjustment plan.	The proposal requires that, for information on an offense to be disclosed publicly, a minor must be alleged to have committed one of the "enumerated offenses" above (1-7); the offense must be petitioned to a court; and the court must find probable cause. Previous noncompliance with an informal adjustment plan does not determine whether the information is disclosable.
Information shall be disclosed for a minor when the Department has filed a petition for adjudication, the minor was at least 13 years old at the time of the offense, the offense occurred after 1/1/98, the offense resulted in a court order, and the minor violated a condition of the court order.	The proposal requires that, for information on an offense to be disclosed publicly, a minor must be alleged to have committed one of the "enumerated offenses" above (1-7); the offense must be petitioned to a court; and the court must find probable cause. A violation of a court order connected to the petitioned offense does not determine whether the information is disclosable.

CSHB 343 (HSS): Disclosure of Children's Information

Side-by-Side Comparison of AS 47.12.315

Public Disclosure of information in department records relating to certain minors

Current Law	How HB 343 Would Change It
Information shall be disclosed for a minor at least 13 years old and a petition for adjudication is filed for commission of: 1. An offense against a person punishable as a felony 2. An offense in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime; 3. Arson under AS 11.46.400 – 11.46.410 4. Burglary under AS 11.46.300 5. Distribution of child pornography under AS 11.61.125; 6. Promoting prostitution in the first degree under AS 11.66.110; or 7. Misconduct Involving a Controlled Substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050.	The proposal requires that a court must find probable cause on a petition filed on one of these "enumerated offenses (1-7). The proposal also changes #2 of the enumerated offenses from "a crime in which the minor employed a deadly weapon," to "Misconduct Involving Weapons in the First through Fifth Degrees." NOTE: the H-HSS Committee amended the bill to exclude Misconduct Involving Weapons in the Fifth Degree from public disclosure.
Information shall be disclosed for a minor at least 16 years old and a petition is filed for commission of a felony and the minor has previously been adjudicated or convicted of a felony offense.	The proposal requires that, for information on an offense to be disclosed publicly, a minor must be alleged to have committed one of the "enumerated offenses" above (1-7); the offense must be petitioned to a court; and the court must find probable cause that the minor committed the offense. Previous adjudication on a felony offense does not determine whether or not information on one of these offenses is disclosable.
Information to be disclosed shall include the name of the minor, the name or names of the minor's parent or guardian, the alleged offense exclusive of information that identifies the victim, and, when available, the outcomes of the proceeding in the court when a petition is filed or the action required by the Dept.	No change.
If the agency or a court determines that the matter should be dismissed or minor is not delinquent and case dismissed, the minor may request that the department disclose the disposition of the matter.	The Department will release most current outcome information at the time of the request.

CSHB 343 (HSS): Disclosure of Children's Information

Side-by-Side Comparison of AS 47.12.315

Public Disclosure of information in department records relating to certain minors

Current Law	How HB 343 Would Change It
When disclosing information under this statute, the Dept. may not disclose the name of an out-of-home care provider with whom the minor was living at the time the minor was alleged to have committed the offense if the minor had been placed in out-of-home care with that provider on other than a permanent or long-term basis.	No change under the proposal except to move the final phrase: "if the minor had been placed in out-of-home care with that provider on other than a permanent or long-term basis." A new subsection (h) defines the out-of-home care providers who provide care on other than a permanent or long-term basis and their names are not to be disclosed.
If the Dept. maintains the information to be disclosed by electronic means that can be recovered from a computer data base, the Dept. may disclose the info in that medium.	No change under the proposal except to add the phrase "or other state or municipal agency" to this subsection.
The Dept. may not release information about a minor under this section if the offense allegedly committed by the minor occurred before 1/1/98. The authority to release information under this section is limited to 5 years from the date the Dept. is first authorized to make the disclosure. However, the limitation of this section does not apply if the Dept. determines that during the 5-year period the minor knowingly failed to make all restitution payments or committed a felony.	The Dept. may not release information under this section after 5 years from the date the department or other agency is first required or authorized to make the disclosure under this section.
When disclosure of information is dependent on the minor's previous conviction or adjudication as a delinquent, or on the minor's failure to comply with all terms required or imposed, the Dept. shall consider the minor's previous conviction or delinquency adjudication, or a term or condition required or imposed on the minor, that occurred before 9/2/97, but may not consider a conviction or adjudication that occurred, or a term or condition that was required or imposed, earlier than five years before 9/2/97.	Since the proposal does not require a previous adjudication or failure to comply with an adjustment for information to be disclosable, this subsection will not apply.

AS 47.12.315. Public disclosure of information in agency records relating to certain minors.

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when under AS 47.12.040(a)(2) the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) promoting prostitution in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

(b) The department shall publicly disclose the name of a minor, the name or names of the minor's parent, parents, or guardian, and the alleged offense exclusive of information that identifies the victim of the offense, and, when available, the outcome of proceedings before the court if, under AS 47.12.040(a)(1)(B) or AS 47.12.040(a)(2), the department files with the court a petition seeking adjudication of the minor as a delinquent based on

(1) the minor's alleged commission of an offense, the minor was at least 13 years of age at the time of commission of the offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(2) the minor's alleged commission of an offense set out in this paragraph and the minor was at least 13 years of age at the time of commission of the offense; the provisions of this paragraph apply to the minor's commission of

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) promoting prostitution in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(3) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony.

(c) If, under AS 47.12.060(a), the agency determines that a matter should be dismissed or if, under AS 47.12.120(c), the court finds that a minor is not delinquent and dismisses the case against the minor, the minor may request the department to disclose information about the matter or the case to the public. If the minor makes a request under this subsection, the department shall disclose to the public information about the disposition of the matter or case under AS 47.12.060(a) or 47.12.120(c), as appropriate, exclusive of information that identifies the victim of the alleged offense.

(d) When required by this section to disclose information,

(1) the department or other agency may not disclose the name of an out-of-home care provider with whom the minor was living at the time the minor was alleged to have committed the offense if the minor had been placed in out-of-home care with that provider on other than a permanent or long-term basis; in this paragraph, "out-of-home care provider" means an agency or person, other than the child's legal parents, with whom a child who is in the custody of the state under AS 47.10.080(c)(1) or (3), 47.10.142, or AS 47.14.100(c) is currently placed; "agency or person" includes a foster parent, a relative other than a parent, a person who has petitioned for adoption of the child, and a residential child care facility;

(2) if the department or other agency maintains the information to be disclosed by electronic means that can be recovered from a computer data base, the department or agency may disclose the information in that medium.

(e) The department or an agency may not release information about a minor under this section if the offense allegedly committed by the minor on which the information is based occurred before January 1, 1998. The authority to release information under this section is limited to five years from the date the department or other agency is first required or authorized to make the disclosure. However, the limitation of this section does not apply if the department or other agency determines that during the five-year period the minor

(1) has knowingly failed to make all restitution payments required of the minor by AS 47.12.060(b) or 47.12.120(b)(4); or

(2) has committed a crime punishable as a felony.

(f) When disclosure is required under this section, the department may petition the court for an order prohibiting the disclosure. The court may grant the petition if, on the basis of information presented in the petition or at an in camera hearing held on the petition, the court finds that

(1) the crime was an isolated incident and the minor does not present any further danger to the public; or

(2) the victim agrees that disclosure is inappropriate.

(g) In this section, when disclosure of information is dependent on the minor's previous conviction or adjudication as a delinquent, or on the minor's failure to comply with all terms and conditions required of or imposed on the minor, the department or other agency required to make the disclosure shall consider the minor's previous conviction or delinquency adjudication, or a term or condition required or imposed on the minor, that occurred before September 2, 1997, but may not consider a conviction or adjudication that occurred or a term or condition that was required or imposed earlier than five years before September 2, 1997.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 343(HSS)**
Fiscal Note Number: **1**
(H) Publish Date: **3/16/12**

Identifier (file name): HB343-DOA-OPA-3-12-12
Title: Disclosure of Children's Records
Sponsor: Representatives Munoz and P. Wilson
Requester: House Health & Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 3/12/12 12:45 PM
Approved by: John Cramer, Deputy Commissioner, Department of Administration — Date: 3/12/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 343(HSS)

Analysis

This bill makes changes to the statutes governing the disclosure of information and records of minors involved in Child in Need of Aid or Juvenile Delinquency proceedings. These changes allow for the disclosure of information needed to administer services, rehabilitation and supervision to and from state, municipal, and child placement agencies that are responsible for delinquent minors and child protection services. The Office of Public Advocacy does not anticipate a fiscal impact from these changes and therefore submits a zero impact fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 343(HSS)**
Fiscal Note Number: **2**
(H) Publish Date: **3/16/12**

Identifier (file name): HB343-DOA-PDA-3-6-12
Title: Disclosure of Children's Records
Sponsor: Representatives Munoz and P. Wilson
Requester: House Health & Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 3/6/12 10:10 AM
Approved by: John Cramer, Deputy Commissioner — Date: 3/6/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 343(HSS)

Analysis

This bill makes changes to the statutes governing the disclosure of information and records of minors involved in Child in Need of Aid or Juvenile Delinquency proceedings. These changes allow for disclosure of information needed to administer services, rehabilitation and supervision to and from state, municipal, and child placement agencies that are responsible for delinquent minors and child protection services. The Public Defender Agency does not anticipate the fiscal impact from these changes. Accordingly, the Agency submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 343(HSS)**
Fiscal Note Number: **3**
(H) Publish Date: **3/16/12**

Identifier (file name): HB343-DHSS-PS-3-12-12
Title: Disclosure of Children's Records
Sponsor: Representative Munoz
Requester: House Health & Social Services Committee

Dept. Affected: Health and Social Services
Appropriation: Juvenile Justice
Allocation: Probation Services
OMB Component Number: 2134

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version. Not applicable.

Prepared by: Barbara Henjum, Director — Phone: 907-465-4342
Division: Juvenile Justice — Date/Time: 2/23/12 8:10 AM
Approved by: Nancy Rolfzen, Assistant Commissioner — Date: 3/12/2012
DHSS Finance & Management Services

(Revised 1/17/2012 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 343(HSS)

Analysis

The proposed bill will:
1. Provide statutory clarification for information sharing between the Office of Children's Services and the Division of Juvenile Justice (DJJ) for the administration of services, protection, rehabilitation, or supervision of any child or for actions by that agency to protect the public safety;
2. Allow individuals with a legitimate interest (such as former clients of DJJ, parents, legal guardians, and others) access to information in agency records; and
3. Streamline the public disclosure law while ensuring appropriate disclosure of certain information to protect the public.

There will be no fiscal impact to DJJ with this bill.

HB 344

<TARGET><BILL>HB 344</BILL><SUBJECT>HB 344</SUBJECT><COMM>HJUD27</COMM></TARGET>

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB344-ACS-TRC-3-8-12**
Fiscal Note Number
Publish Date

Identifier (file name) HB344-ACS-TRC-3-8-2012
Title Child Support Awards
Sponsor Representative Munoz
Requester

Dept. Affected Alaska Court System
Appropriation Trial Courts
Allocation
OMB Component Number 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services			1,009.8	1,009.8			
Travel			63.0	63.0			
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**1,072.8**	**1,072.8**	**0.0**	**0.0**	**0.0**
FUND SOURCE			(Thousands of Dollars)				
1002 Federal Receipts							
1003 GF Match							
1004 GF			1,072.8	1,072.8			
1005 GF/Prgm (DGF)							
1037 GF/MH (UGF)							
1178 temp code (UGF)							
TOTAL	**0.0**	**0.0**	**1,072.8**	**1,072.8**	**0.0**	**0.0**	**0.0**
POSITIONS							
Full-time							
Part-time							
Temporary			10.0	10			
CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Nancy Meade, General Counsel
Division Alaska Court System
Approved by Nancy Meade for Christine Johnson, Administrative Director
Alaska Court System

Phone 907-463-4736
Date/Time 3/08/2012 11:00 A.M.
Date 3/8/2012

(Revised 11/17/2011 OMB)

Analysis

HB 344 will repeal Civil Rule 90.3, the court rule that contains the current child support guidelines, and replace it with a new chapter in the statutes setting out the method for calculating child support awards. The formula for calculating the amount to be awarded will change from the current "percentage of income" approach, in which a set percentage of the non-custodial parent's income is presumed to be the appropriate support amount, to an "income shares" approach, in which a set dollar amount that depends on the parents' incomes is the presumptive support obligation. The bill also makes other changes to the current method for establishing the appropriate support amounts.

Under AS 25.14.170(b), the adoption of child support award guidelines or a significant amendment to guidelines is a material change in circumstances such that a party to an existing order would have grounds to seek modification of that order. The Child Support Services Division (CSSD) has estimated that it is enforcing about 20,000 child support orders, and an additional unknown number of court orders are in existence in which the parties opted not to use the CSSD for enforcement. It is estimated that 10,000 modification requests could be made after the bill takes effect; about half of the requests (5,000) are likely to be handled by the CSSD directly without court involvement, and about half (5,000) could come to the court for consideration and resolution.

The Court System estimates that, on average, each of the predicted 5,000 requests for modification of child support orders would require three hours of a judge's time to consider and resolve. The motions are expected to be filed by parties over a two-year period following the effective date of the bill. To handle these motions, the court will hire 3.8 temporary (pro tem) judges (NPP FTE), as well as 3.8 (NPP FTE) court clerks to assist those judges with paperwork and case management during FY 13 and FY 14. The court allocated these positions to the different court locations based on the prior two fiscal years' statistics that show where similar motions have been filed statewide. The personal service costs for these pro tem judges who will be assigned to the courts with the highest predicted number of these motions amounts to $760,000 for each of the two years, as shown on page three.

In addition, the pro tem judges and clerks will be required to travel to other courts locations to handle the motions in the courts in which the parties file them; it is estimated that travel costs would amount to $63,000 for each of the two years.

Finally, the court's Family Law Self-Help Center, which is the court's free statewide service to help people represent themselves in family law cases, anticipates that the number of requests for assistance would rise significantly, requiring two additional full-time temporary facilitators for each year over the two-year period following the effective date of the bill.

Analysis Continued

Alaska Court System Fiscal Note Calculations for HB 344	
Personal Services:	Cost
Pro Tems Superior Court Judge - Anchorage (2.2 NPP FTE)	424,700
Pro Tems Superior Court Judge - Fairbanks (.6 NPP FTE)	120,000
Pro Tems Superior Court Judge - Palmer (.4 NPP FTE)	84,200
Pro Tems Superior Court Judge - Kenai (.2 NPP FTE)	46,900
Pro Tems Superior Court Judge - Remaining Court Locations (.4 NPP FTE)	84,200
Clerical Staffing In-Court Clerks for ProTem Judges (3.8 NPP FTE)	160,100
Facilitator for Family Law Self Help Center (2.0 NPP FTE)	89,700
Subtotal Personal Services Cost	1,009,800
Travel:	
Travel to Various Court Locations:	
Estimate 25 trips X $400 Airfare for Judge and Clerk	20,000
Estimate 25 trips X $60 Per Diem X 5 Days for Judge and Clerk	15,000
Estimate 25 trips X $125 Lodging X 4 Days for Judge and Clerk	25,000
Estimate 25 trips - Ground Transportation, Parking @ $60/Trip for Judge and Clerk	3,000
Subtotal Travel Cost	63,000
Total Estimated Cost	1,072,800

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 344**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB344-LAW-CIV-03-09-12
Title: An Act relating to child support awards; and repealing Rule 90.3, Alaska Rules of Civil Procedure.
Sponsor: Representative Munoz
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Collections and Support
OMB Component Number: 2210

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services			2,660.9				
Travel			13.4				
Services			429.0				
Commodities			61.7				
Capital Outlay			12.1				
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**3,177.1**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1007	I/A Rcpts (Other)			3,177.1				
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**3,177.1**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time			1				
Temporary			19				

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/9/12 12:30 PM
Approved by: Michael C. Geraghty, Attorney General — Date: 3/9/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 344
2012 LEGISLATIVE SESSION

Analysis

HB 344 will establish Alaska child support guidelines in statute and repeal the court Civil Rule 90.3 child support guidelines. The bill changes child support calculation formulas from the current percentage approach that only takes into account the non-custodial parent's income to an income shares model that considers the income of both parents. Additionally, the bill increases the minimum support amount required of the non-custodial parent and decreases the percentage of time required for a finding of shared custody.

AS 25.24.170(b) and AS 25.27.190(e) consider the adoption, enactment or significant modification to the guidelines a material change of circumstance for the purpose of a modification of the order. This would allow custodial and non-custodial parents to request a modification of their existing order(s). Federal law, 45 CFR 303.8(e), requires the Child Support Services Division (CSSD) to complete modification requests within 180 days from receipt of the request. CSSD could lose significant federal funds if it cannot meet this requirement. CSSD estimates it is enforcing approximately 20,000 child support orders that would be eligible for modification. CSSD conservatively anticipates 10,000 modification requests will be submitted in the first six months, with about ½ of the requests on court orders. The Attorney General's Office, Collections & Support Unit, represents CSSD in court when the agency requests modification of a court-issued child support order. The Collections & Support Section currently processes about 700 modification requests a year with 3.5 attorneys. The anticipated increase in modification requests from 700 to 5,000 in one year will require non-permanent positions of 12.5 attorneys, 2 paralegals, and 5 support positions to meet the anticipated initial demand.

HB 347

<TARGET><BILL>HB 347</BILL><SUBJECT>HB 347</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: March 23, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 4/2/12

The JUDICIARY Committee considered: **HB 347**

HOUSE BILL NO. 347
"An Act prohibiting the use of municipal funds to support or oppose an initiative proposal to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election."

HB 347-USE OF MUNICIPAL FUNDS FOR INITIATIVES

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 347 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	CED			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Greenberg			✓	
	Keller	X			
	Holmes			X	
	Knist	X			
Vice-Chair:					
Chair:	THOMPSON	X			

ALASKA STATE LEGISLATURE

REPRESENTATIVE KURT OLSON

- Chair: Labor and Commerce
- Vice Chair: Rules, Administrative Regulation Review
  Economic Development Trade & Tourism
- Member: Energy, Legislative Budget & Audit

Session: January - April
State Capitol, Room 24
Juneau, AK 99801-1182
Phone: 907-465-2693
Fax: 907-465-3835

Interim: May - December
145 Main Street Loop, Ste 221
Kenai, AK 99611
Phone: 907-283-2690
Fax: 907-283-2763

Official Business

House Bill 347
Sponsor Statement

"An Act prohibiting the use of municipal funds to support or oppose an initiative proposal to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election."

Currently municipalities can spend thousands of dollars on consultants and paid signature collectors to influence the outcome of a ballot initiative. Requiring voters to approve the use of funds for special interests keeps the agenda of the municipality aligned with its voters, and prohibits municipalities from spending copious amounts of money to advance their own agendas.

This legislation empowers all citizens of a municipality by giving them the chance to weigh in on important issues. Giving citizens the opportunity to approve or disapprove of spending for a ballot initiative makes them acutely aware of exactly how municipal funds are being spent.

The intent of HB 347 is to keep the ballot initiative process fair, and to ensure that the priorities of the municipality are the same as the priorities of its citizens.

Email: Representative_Kurt_Olson@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE KURT OLSON

- Chair: Labor and Commerce
- Vice Chair: Rules, Administrative Regulation Review
  Economic Development Trade & Tourism
- Member: Energy, Legislative Budget & Audit

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Official Business

Sectional Analysis
House Bill 347

"An Act prohibiting the use of municipal funds to support or oppose an initiative proposal to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election."

Section 1. Amends AS 15.13.145 (d) to include expenditures that have been authorized by municipal voters.

Section 2. Adds a new subsection to AS 15.13.145 to include funds that have been approved by municipal voters at an election.

Email: Representative_Kurt_Olson@legis.state.ak.us

HOUSE BILL NO. 347

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES OLSON, Millett, Stoltze, Feige, Thomas, Johansen, Keller, Pruitt, Saddler, Lynn, Fairclough, Tammie Wilson

Introduced: 2/22/12
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting the use of municipal funds to support or oppose an initiative proposal to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election."

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

*** Section 1.** AS 15.13.145(d) is amended to read:

(d) When expenditure of money is authorized by (b) or (c) of this section and is used to influence the outcome of an election, **or if an expenditure of money is authorized by municipal voters under (e) of this section,** the **expenditure** [EXPENDITURES] shall be reported to the commission in the same manner as an individual is required to report under AS 15.13.040.

*** Sec. 2.** AS 15.13.145 is amended by adding a new subsection to read:

(e) Money held by a municipality may be used to support or oppose an initiative proposal filed with the lieutenant governor under AS 15.45.020 or filed with

a municipal clerk under AS 29.26.110, to circulate a petition for an initiative, or, subject to (b) of this section, to influence the outcome of an election concerning a ballot initiative, but only if use of the funds for that purpose has been approved by municipal voters at an election.

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
(907) 465-3908 fax
research@legis.state.ak.us

Memorandum

TO: Representative Kurt Olson
FROM: Tim Spengler, Legislative Analyst
DATE: March 9, 2012
RE: State Prohibitions on Spending Municipal Funds on Initiatives without Voter Approval
LRS Report 12.215

You asked if any states prohibit the use of municipal funds to support or oppose an initiative proposal without voter approval.

Briefly, we identified no states with specific statutory provisions prohibiting the use of municipal funds to support or oppose an initiative (or other political or electoral matter) *without* voter approval.[1] Most of the states we reviewed, however, prohibit municipalities from expending funds for such purposes *regardless* of whether municipal voters approve of such actions or not.

Fourteen of the 20 states we reviewed prohibit the use of public funds to support or oppose an initiative.[2] Those states are Arizona; California; Georgia; Florida; Idaho; Massachusetts; Montana; Nevada; New Mexico; North Dakota; Oregon; Utah; Washington; and Wyoming.[3] It is interesting to note that none of the 11 Western States that we contacted (where initiatives are more commonly used) allow for the use of municipal funds to support or oppose an initiative. On the other hand, six of the nine states (excluding Florida, Georgia, and Massachusetts) that we contacted in the Northeast and South do not have such prohibitions.[4]

Below we provide an example of statutory language from the California Government Code 54964:

> a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters. . . "Ballot measure" means an initiative, referendum, or recall measure certified to appear on a regular or special election ballot of the local agency, or other measure submitted to the voters by the governing body at a regular or special election of the local agency.

As previously noted, such state laws do not allow for the use of municipal funds for *any* political advocacy, not just advocacy pertaining to initiatives. Also, it appears that most or all of these states *do* allow municipalities to expend funds to provide *informational or educational* background materials regarding an initiative.

A few years ago, a wide-ranging effort was made in Alaska to prohibit public spending on political advocacy. The "Alaska Anti-Corruption Act," Ballot Measure 1, was on the primary election ballot in August of 2010. The initiative would have banned the

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[1] For this report, we reviewed numerous state statutes and election websites, communicated with personnel from the National Conference of State Legislatures, the Initiative and Referendum Institute, the Council of State Governments, Ballot Access News, National League of Cities, and spoke with officials from many state municipal leagues.

[2] It is likely that a number of other states also have provisions prohibiting the use of municipal funds to advocate for or against a ballot initiative.

[3] In Idaho, Massachusetts and New Mexico, the prohibition is not codified in law but rather, pursuant to court rulings. (We were unable to identify the court case particulars in New Mexico.) Relevant statutory citations (or case law) are as follows: Arizona (ARS 9-500.14), California (CAL. Gov. Code 54964), Georgia (OCGA 21-5-30.2 and 21-5-3), Florida (FS 106.113), Idaho (pursuant to *Ameritel vs. Greater Boise Auditorium District*, 141 Idaho 849), Massachusetts (pursuant to *Anderson vs. City of Boston*, 367 Mass. 178), Montana (MCSA 2-2-121), Nevada (NRS 281A.520), New Mexico (pursuant to court decision), North Dakota (NDCC 16.1-10), Oregon (ORS 260.432), Utah (UCA 20A-11-1203), Washington (RCW 42.17A.555), and Wyoming (WSA 9-13-105(b) and 22-26-116).

[4] The states we identified that do not have laws prohibiting the spending of municipal funds for such purposes are Alabama, Connecticut, Maine, New Hampshire, Rhode Island, and Virginia. Again, there were numerous states that we did not contact and likely a number of those also do not prohibit municipalities from expending funds on initiatives.

use of public funds for political campaigns and lobbying by state and local government agencies and school districts to support or oppose ballot measures, lobby to pass a law, or request public funding. The measure failed as nearly 61 percent of voters cast their ballots against it.

While Ballot Measure 1 had the support of a number of groups such as Alaskans for Open Government and the Committee to Stop Corruption, it was opposed by such entities as the Alaska Chamber of Commerce, the Resource Development Council, the Alaska Municipal League, the Anchorage School Board and Assembly, and the Alaska Democratic Party.

The *Fairbanks Daily News-Miner,* which also opposed the measure, stated the following in their editorial published on August 20, 2010:

> Proponents of the measure say average voters should bring such troubles to the attention of legislators. The average voter might do so, but why cut out an authoritative source? We elect mayors, assembly members and school board members to represent us. And our local government officers shouldn't have to wait for a call from Juneau before they do that job. Alaskans should vote "no" on Ballot Measure 1.

We hope this is helpful. If you have questions or need additional information, please let us know.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB 347**
Fiscal Note Number
() Publish Date

Identifier (file name) HB347-DCCED-DCRA-02-24-12
Title USE OF MUNICIPAL FUNDS FOR INITIATIVES
Sponsor Representative Olson
Requester House State Affairs

Dept. Affected Commerce
Appropriation Community and Regional Affairs
Allocation Community and Regional Affairs
OMB Component Number 2879

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by Scott Ruby
Division Community and Regional Affairs
Approved by JoEllen Hanrahan, Director Administrative Services
Commerce, Community and Economic Development

Phone (907) 269-4569
Date/Time 2/23/2012 2:30pm
Date 2/24/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 347

Analysis

This bill authorizes municipalities to expend funds to influence the outcome of a statewide ballot initiative, if the expenditure is approved by voters. It also adds a requirement that if a municipality authorizes funds to be spent to influence the outcome of a ballot initiative election, the expenditures must be reported to the Alaska Public Offices Commission.

There is no anticipated fiscal impact to the Division of Community and Regional Affairs.

City of Homer

City Manager

491 East Pioneer Avenue
Homer, Alaska 99603
907-235-8121, X-2222

Fax (907) 235-3148 E-mail: wwrede@ci.homer.ak.us Web Site: www.ci.homer.ak.us

March 30, 2012

Chair Gatto
House Judiciary Committee
State Capitol
Juneau, AK 99801

RE: HB 347 "An Act prohibiting the use of municipal funds to support or oppose an initiative proposal to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election."

Dear Chair Gatto,

The City of Homer appreciates the opportunity to comment on HB 347 which is currently before your committee and scheduled to be heard on Monday.

A municipality has the duty to educate and inform constituents about ballot initiatives so the people can make an educated choice when voting on an initiative. I am concerned that HB 347 would restrict a municipality's ability to provide factual information to the voting public. AS.15.13.145(b) already requires that if a municipality is going to take a position or advocate for an initiative they must appropriate any funds spent on such advocacy through an ordinance. This provides for an accountable public process regarding the advocacy action. Requiring a special election before spending any funds on advocacy activity would be expensive and not allow enough time for the meaningful distribution of information.

HB 347 would have a negative impact on informed public discourse and I urge you not to support this legislation in its current form.

Thank you for your time and attention.

Sincerely,

Walt Wrede
City Manager, City of Homer

Cc:
Representative Thompson
Representative Keller
Representative Lynn
Representative Pruitt
Representative Gruenberg
Representative Holmes
Representative Hawker
Representative Seaton
Senator Stevens

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 2, 2012

4/2/12

Rep. Gruenberg: State cases?

SUBJECT: Questions relating to the constitutionality of HB 347 (Work Order No. 27-LS1396\A)

TO: Representative Kurt Olson
Attn: Anna Latham

FROM: Alpheus Bullard
Legislative Counsel

Anna asked two questions about HB 347. The questions, and my responses are below. Please note that I have paraphrased the questions for clarity.

Does HB 347 raise any issues under either the state or federal constitutions? Do municipalities have a right to "free speech" under the United States' Constitution?

It is my legal opinion that HB 347, which prohibits the use of municipal funds to support or oppose an initiative proposal, to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election, is constitutional under the free speech clauses of both the state and federal constitutions, and I do not see any other potential constitutional issues.

You asked whether municipalities have a right to "free speech." This is a broad question involving the complex "government speech doctrine" that itself, exists in a larger body of First Amendment jurisprudence which has been evolving rapidly in the last few years.[1] Accordingly, I've limited my response to the subject of HB 347, a state constraint on certain municipal expenditures.

Under our system of government in which voters' opinions are supposed to shape the policies of government, the expenditure of municipal funds to influence voter opinion

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[1] See *Citizens United v. Federal Election Commission*, 558 U.S.___, 130 S. Ct. 876 (January 21, 2010) (government cannot suppress political speech, in the form of independent election campaign expenditures, on the basis of the speaker's corporate identity), *Holder v. Humanitarian Law Project*, 561 U.S. ____, 130 S. Ct. 2705 (June 21, 2010) (upholding a federal law prohibiting material support to groups designated as terrorists, this is the first time a restriction on political speech has survived the strict scrutiny test) and *Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S. Ct. 2653, (June 23, 2011) (some government restrictions on commercial speech should be subjected to some sort of "heightened" scrutiny as opposed to "intermediate" scrutiny).

could easily be construed as a threat to democratic electoral processes. The distinctive role played by government as both a possible threat to, and participant in, our system of freedom of expression warrants caution in analyzing municipal speech as a subject of First Amendment protection. However, in application to HB 347, the issue is not complex, because it involves a state statutory limitation on municipal speech.

> Political subdivisions of States--counties, cities, or whatever--never were and never have been considered as sovereign entities." *Reynolds* v. *Sims*, 377 U.S. 533, 575, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). They are instead "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Ibid.*; see also *Louisiana ex rel. Folsom* v. *Mayor and Administrators of New Orleans*, 109 U.S. 285, 287, 3 S. Ct. 211, 27 L. Ed. 936 (1883) ("Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits"). State political subdivisions are "merely . . . department[s] of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit." *Trenton* v. *New Jersey*, 262 U.S. 182, 187, 43 S. Ct. 534, 67 L. Ed. 937 (1923) . . .

Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009).

A municipality, as a political subdivision of the state, is a subordinate unit of government created by the state to carry out delegated governmental functions. Such a political subdivision, "created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Id.* at 363 citing *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015 (1933). The state is the sovereign body from which any municipal power must flow. Consequently, if the legislature decides to limit the authority of a municipality to "speak" in relation to initiative campaigns, the municipality does not enjoy any First Amendment protection from the statutory limitation on municipal expenditures.

Would it be unconstitutional to prohibit the use of municipal funds to support or oppose an initiative proposal, to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative?

For the reasons articulated above, the legislature could constitutionally prohibit the use of municipal funds to support or oppose an initiative proposal, to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative with or without the approval of municipal voters.

If you have further questions, please do not hesitate to contact me.

TLAB:plm
12-197.plm

ALASKA STATE LEGISLATURE

REPRESENTATIVE KURT OLSON

- Chair: Labor and Commerce
- Vice Chair: Rules, Administrative Regulation Review
  Economic Development Trade & Tourism
- Member: Energy, Legislative Budget & Audit

Session: January - April
State Capitol, Room 24
Juneau, AK 99801-1182
Phone: 907-465-2693
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Interim: May - December
145 Main Street Loop, Ste 221
Kenai, AK 99611
Phone: 907-283-2690
Fax: 907-283-2763

Official Business

MEMORANDUM

TO: Representative Max Gruenberg

FROM: Anna Latham, Staff to Rep. Olson

DATE: March 27, 2012

RE: HB 347

At the State Affairs meeting on March 22, you asked for any legal research related to HB 347.

Originally our office requested that a bill was drafted prohibiting the payment of initiative petition circulators. This draft had constitutional conflicts, but I am enclosing the related memo from Legal Services because it touches on the issue of free speech and first amendment rights.

I have requested that Legal Services look into the constitutionality of HB 347, particularly regarding the free speech rights of municipalities.

Please feel free to contact our office with any additional questions regarding this bill.

Email: Representative_Kurt_Olson@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 19, 2012

SUBJECT: Prohibiting payment of initiative petition circulators
(Work Order No. 27-LS1218\A)

TO: Representative Kurt Olson
Attn: Konrad Jackson

FROM: Alpheus Bullard TLAB
Legislative Counsel

This memorandum accompanies the draft bill described above. The bill prohibits the payment of initiative petition circulators.[1] This memorandum is to alert you to constitutional issues raised by the bill.

While the legislature may statutorily regulate the initiative process in order to keep the process open, fair, and free of corruption, the United States Supreme Court has held that a state may not prohibit the payment of initiative petition circulators.

In Meyer v. Grant, 486 U.S. 414 (1988), the Supreme Court found a Colorado statute that prohibited payment for the circulation of initiative petitions unconstitutional because the state could not demonstrate that the statute, which burdened initiative sponsors' ability to communicate their message, was necessary in order to meet the state's concerns. The Court found that initiative petition circulation is "core political speech" entitled to substantial First Amendment protection and that states may not burden the exercise of the right to petition through use of the initiative by prohibiting the payment of petition circulators.

If you have questions, would like a bill drafted that provides limitations on how initiative petition circulators may be paid, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:plm:ljw
12-027.plm

Enclosure

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[1] The prohibition you requested applies only to circulators soliciting signatures for initiatives. It does not apply to persons soliciting signatures for a referendum (AS 15.45.340(b) and (c)) or recall of an elected state official (AS 15.45.580(b) and (c)).

STATE OF ALASKA

SEAN PARNELL
GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

LABOR & STATE AFFAIRS
1031 WEST 4th AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-6612
FAX: (907) 258-4978

March 27, 2012

Anna Latham, Legislative Aide
Office of Representative Olson
State Capitol, Room 24
Juneau, Alaska 99801

Re: House Bill No. 347

Dear Ms. Latham,

You have asked two questions about House Bill No. 347—a bill which will limit a municipality's ability to appropriate public money to support or oppose a ballot initiative or question. Your first question was whether this proposed law infringes on a municipality's free speech rights. The answer is no. Second, you asked whether the law would prohibit a municipal officer from flying to Juneau to testify on issues related to their district during session. The answer is also no. Allow me to elaborate.

First, House Bill No. 347 is constitutional.

Governmental entities—including municipalities—have no independent First Amendment rights.[1] Municipalities are not treated like individual citizens for purposes of constitutional inquiries, and the legislature is allowed to restrict municipal appropriations for speech related activities.[2] Recently, in *Associated Students of Univ. of Cal. at Santa Barbara v. Regents of the Univ. of Cal.*, a federal district court held that a public university's decision to prohibit using public funds for ballot initiative speech was not a violation of a student group's constitutional rights.[3]

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1 *See, e.g., Demery v. Arpaio*, 378 F.3d 1020, 1032-33 (9th Cir. 2004) (affirming that "the Bill of Rights protects the individual from the government, not the other way around").

2 *Buckley v. Valeo,* 424 U.S. 1, 93-108 (1976). *See also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546, 549 (1983) (affirming that First Amendment rights do not require state subsidization of First Amendment speech).

3 *Associated Students of Univ. of Cal. at Santa Barbara v. Regents of the Univ. of Cal.*, 2007 WL 196747, at 4 (N.D. Cal. 2007).

In House Bill No. 347, the legislature proposes to limit a municipality's ability to spend during the ballot initiative process. The new law would allow a municipality to appropriate ballot initiative funds only if, by popular vote, the citizens of the municipality agree to do so. The legislature is also considering whether to eliminate the municipality's ability to fund ballot initiative activities altogether. Either law would be constitutional. If challenged, there would be no genuine issue of fact regarding whether the money appropriated was public money. As such, the legislature's decision to restrict funding is simply a decision not to subsidize free speech; a choice which is always at the discretion of the legislature.[4] And because this law would not restrict an individual's freedom of speech, it is constitutional.

Second, House Bill No. 347 does not prevent a municipal member from representing the district's interests during the legislative session. Municipal officers acting within the scope of their duties are exempt from Alaska's comprehensive lobbying laws.[5] Appropriating funds for a municipal officer to travel to Juneau during session to "lobby" is not implicated by House Bill No. 347.[6]

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:
John M. Ptacin
Assistant Attorney General

JMP/ljt

cc: Deborah Behr, Section Chief, Department of Law, Legislation & Regulations Section (*via email*)
Cori Badgley, Legislative Liaison, Department of Law, Legislation & Regulations Section (*via email*)

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4 *Id.* at 8.

5 AS 24.45.161(a)(2) (2010).

6 Under House Bill No. 347, a municipal member could not go to Juneau during session solely for purposes of ballot initiative advocacy. But that is not likely ever the intention of sending a municipal member to Juneau during the session.

27-LS1396\A.5
Bullard
4/2/12

AMENDMENT #6

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 4, following "**election**":

Insert "**; and providing for an effective date**"

Page 2, following line 4:

Insert a new bill section to read:

"*** Sec. 3.** This Act takes effect August 29, 2012."

OK.
passed

Melanie Leon
465-2029

27-LS1396\A.8
Bullard
4/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1:

Delete "**municipal funds**"

Insert "**state funds held by a municipality**"

Page 1, line 2:

Delete "**an**"

Insert "**a state**"

Page 1, line 4, following "**election** ":

Insert "**; relating to the reporting of certain expenditures ~~to influence the outcome of an election~~**"

Page 1, line 8:

Delete "an"

Insert "**a state** [AN]"

Page 1, line 13:

Delete "Money"

Insert "State money"

Page 1, line 14, through page 2, line 1:

Delete "or filed with a municipal clerk under AS 29.26.110"

Page 2, line 2:

Delete "an"

Insert "a state"

4/2/12

27-LS1396\A.3
Bullard
4/2/12

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 2, line ~~2~~ 4, following "election":

Insert "paid for by the state"

M amdt. to amdt. Δ 4. OK.

Statewide elect.
Rep. Gruenberg - Cost of 1st elect. would have to be pd by state

Rep. Olson amdt. would mean State paid twice. Reimburse local govts...? for cost of

Call role:

failed

Y	N
11	111

27-LS1396\A.4
Bullard
4/2/12

#3

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

fails

Page 2, line 4, following "election.":

Insert "However, if the municipality fails to have the use of funds for that purpose approved by municipal voters, or if the result of the election to have the use of funds approved by municipal voters is not certified before the date of the election at which the initiative will be on the ballot, the results of the election on the initiative may not be invalidated on the basis of failure of the municipality to comply with this subsection."

Rep. Gruenb: munic. could just ignore if they fail to have pre-election.

RG: Spent $ & out first having pre-election - is the whole election potent. invalid?

RP: recess analogy.

RT:

Y 11

N 1111

Leg ✓

27-LS1396\A.5
Bullard
4/2/12

#6

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

w/d Obj. Keller

Page 1, line 4, following "**election**":

Insert "**; and providing for an effective date**"

O.K.

Page 2, following line 4:

Insert a new bill section to read:

"*** Sec. 3.** This Act takes effect August 29, 2012."

max. after primary.
Olson: OK.

4/2/12

27-LS1396\A.6
Bullard
4/2/12

AMENDMENT #4

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

withdrawn

Page 1, line 4, following "**election**":

Insert "**; and relating to the liability of municipal officials**"

Page 1, line 12:

Delete "a new subsection"

Insert "new subsections"

Page 2, following line 4:

Insert a new subsection to read:

"(f) A municipal official may not be held liable for the failure of a municipality to comply with (e) of this section."

Rep. Olson: no problem.

Rep. Lynn: ? immunity

AB: not sure.

Rep. Gruenb: violation § 'corrupt practice'

AS 15.56

penalty?

not sure

27-LS1396\A.7
Bullard
4/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1:

Delete "**prohibiting**"

Insert "**relating to**"

Page 1, lines 3 - 4:

Delete "**, without approval by municipal voters at an election**"

Page 1, line 8:

Delete "**or if an**"

Insert "**unless the**"

Page 1, line 9:

Delete "**authorized**"

Insert "**prohibited**"

Page 2, line 3:

Delete "but only if"

Insert "unless"

Delete "approved"

Insert "prohibited"

27-LS1396\A.8
Bullard
4/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1:

Delete "**municipal funds**"

Insert "**state funds held by a municipality**"

Page 1, line 2:

Delete "**an**"

Insert "**a state**"

Page 1, line 4, following "**election** ":

Insert "**; relating to the reporting of certain expenditures ~~to influence the outcome of an election~~**"

Page 1, line 8:

Delete "an"

Insert "**a state** [AN]"

Page 1, line 13:

Delete "Money"

Insert "State money"

Page 1, line 14, through page 2, line 1:

Delete "or filed with a municipal clerk under AS 29.26.110"

Page 2, line 2:

Delete "an"

Insert "a state"

27-LS1396\A.8
Bullard
4/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1:

Delete "**municipal funds**"

Insert "**state funds held by a municipality**"

Page 1, line 2:

Delete "**an**"

Insert "**a state**"

Page 1, line 4, following "**election** ":

Insert "**; relating to the reporting of certain expenditures to influence the outcome of an election**"

Page 1, line 8:

Delete "an"

Insert "**a state** [AN]"

Page 1, line 13:

Delete "Money"

Insert "State money"

Page 1, line 14, through page 2, line 1:

Delete "or filed with a municipal clerk under AS 29.26.110"

HJUD 4/2/12

27-LS1396\A.9
Bullard
4/2/12

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

obj. Keller

Page 1, line 1:

Delete "**prohibiting**"

Insert "**relating to**"

Rep. Gruenberg: Same Std. as other ballot measure. (AS 15.13.145)

Page 1, line 2, following "**proposal**":

Insert "**or**"

AB: This applies to petitions, etc.

Page 1, lines 2 - 4:

Delete ", **or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election**"

KO: late amdts.

Page 1, line 9:

Delete "**by municipal voters**"

Y 11 N 111

Page 2, line 1:

Delete "AS 29.26.110,"

Insert "AS 29.26.110 or"

Page 2, lines 1 - 3:

Delete ", or, subject to (b) of this section, to influence the outcome of an election concerning a ballot initiative"

Page 2, lines 3 - 4:

Delete "use of the funds for that purpose has been approved by municipal voters at an election"

Insert "funds for that purpose have been specifically appropriated for that purpose by a municipal ordinance"

27-LS1396\A.10
Bullard
4/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1:

Delete "**prohibiting**"

Insert "**relating to**"

Page 1, line 2, following "**proposal**":

Insert ","

Page 1, lines 3 - 4:

Delete "**, without approval by municipal voters at an election**"

Page 1, line 9:

Delete "**authorized by municipal voters**"

Insert "**made by a municipality**"

Page 2, lines 3 - 4:

Delete "only if use of the funds for that purpose has been approved by municipal voters at an election"

Insert "a municipality shall identify

(1) each source of funding used for that purpose; and

(2) for each source of funding over $1,000, the amount of funds provided"

27-LS1396\A.11
Bullard
4/2/12

A M E N D M E N T

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1, following "**of**":

Insert "**certain**"

Page 2, line 3, following "if":

Insert

"(1)"

Page 2, line 4, following "election":

Insert "; or

(2) the funds were contributed to the municipality by a private person for the purpose of supporting or opposing the initiative"

27-LS1396\A.12
Bullard
4/2/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: HB 347

Page 1, line 1, following "**of**":

Insert "**certain**"

Page 1, line 2, following "**proposal**":

Insert ","

Page 2, line 3, following "if":

Insert

"(1)"

Page 2, line 4, following "election":

Insert "; or

(2) the amount of funds used by the municipality for that purpose would be less than the estimated cost of holding the election at which municipal voters would approve or disapprove the use of funds for that purpose"

House Judiciary ~ Monday, April 2nd, 2012

(GAVEL IN) Let's call this meeting of the House Judiciary Committee to order.

It is ____ p.m. Monday, April 2nd, 2012.

Present are:

___ Representative Thompson

___ Representative Lynn

___ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

___ Representative Holmes

___ and Myself, Representative Gatto

First – I would like to Thank Rep. Steve Thompson for stepping up to Chair the House Judiciary Committee in my absence. From all reports, and as I personally witnessed, thanks to Gavel to Gavel, he has done an admirable job. Thank you.

Secondly – Let's move on to Housekeeping: Please disable your electronic devices, if they're left on - even on vibrate - they may interfere with the recording system. Thank you.

We have new bill today:

HB 347 **USE OF MUNICIPAL FUNDS FOR INITIATIVES**

"An Act prohibiting the use of municipal funds to support or oppose an initiative proposal to circulate a petition for a ballot initiative, or to influence the outcome of an election concerning a ballot initiative, without approval by municipal voters at an election."

Here to continue discussing the bill is Rep. Kurt Olson and/Anna Latham, Staff to Rep. Olson

Rep. Olson, please come to the table, put your name on the record and let us take up where we left off on HB 347.

BILL PRESENTATION

Thank you Representative Olson.

Is there anyone online or in the room who would like to provide public testimony?

KO - Paid signature gatherers.
- Kathy Wasserman AML

Public testimony:

- Walt Wrede , City Manager, City of Homer (I *believe* he will be on the offnet)

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Is there anyone else who would like to provide public testimony on HB 347?

Public comment is now closed.

That brings the bill, HB 347 back before the committee for discussion. Are there any further questions for the sponsor?

Can I have a motion to move HB 347, (27-LS1396/A), with individual recommendations, and with attached fiscal note from committee?

Rep. Thompson: I move to report HB 347, (27-LS1396/A), *with* committee recommendations, and with attached fiscal note from committee.

Any objection, have Susan call the roll. If not, HB 347 moves from committee.

On Wednesday we will hear:

(H)JUDICIARY

Apr 04 Wednesday 1:00 CAPITOL 120

+ **SB 82**	**FOSTER CARE LICENSING/STATE CUSTODY**
+ **HB 269**	**COMMON INTEREST COMMUNITIES**
+	Bills Previously Heard/Scheduled

Having concluded our scheduled business for today... At _____ p.m., I adjourn today's meeting of the House Judiciary Committee (GAVEL OUT).

HB 355

<TARGET><BILL>HB 355</BILL><SUBJECT>HB 355</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: April 10, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 4/12/12

The JUDICIARY Committee considered: **HB 355**

HOUSE BILL NO. 355
"An Act relating to the membership of, and member qualifications for, the Alaska Public Offices Commission; prohibiting certain uses of names and addresses contained in certain reports to the commission; and providing for an effective date."

HB 355-APOC: MEMBERSHIP; USE OF REPORT INFO

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 355 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	ADM	X		

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	✓			
	Keller			X	
	Holmes	X			
	Pruitt	X			
Chair: Steve M Thompson	THOMPSON	X			
Chair:					

CS FOR HOUSE BILL NO. 355(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GUTTENBERG, Miller

A BILL

FOR AN ACT ENTITLED

"An Act relating to the membership of, and member qualifications for, the Alaska Public Offices Commission; relating to candidate forums and contributions in state election campaigns; and providing for an effective date."

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

*** Section 1.** AS 15.13.020(a) is amended to read:

(a) There is created in the Department of Administration the Alaska Public Offices Commission consisting of five **voting** members **and two nonvoting advisory members**. The governor shall appoint all members of the commission in the manner prescribed in (b) and (c) of this section, subject to confirmation by a majority of the legislature meeting in joint session.

*** Sec. 2.** AS 15.13.020(a), as amended by sec. 1 of this Act, is amended to read:

(a) There is created in the Department of Administration the Alaska Public Offices Commission consisting of five [VOTING] members [AND TWO NONVOTING ADVISORY MEMBERS]. The governor shall appoint all members of

the commission in the manner prescribed in (b) and (c) of this section, subject to confirmation by a majority of the legislature meeting in joint session.

* **Sec. 3.** AS 15.13.020(b) is amended to read:

(b) The governor shall appoint **three** [TWO] members of each of the two political parties whose candidate for governor received the highest number of votes in the most recent preceding general election at which a governor was elected. **Two appointed members of each political party shall be voting members of the commission, and one appointed member from each political party shall be a nonvoting advisory member with extensive experience in the financing of political campaigns and compliance with disclosure and reporting requirements.** The two **voting member** appointees from each of these two parties shall be chosen from a list of four names to be submitted by the central committee of each party. **The nonvoting advisory member appointee from each party shall be chosen from a list of three names submitted by the central committee of each party. All names submitted by the central committee of each party, whether for voting or nonvoting positions, shall be of persons with experience working on political campaigns and the reporting requirements of this chapter.**

* **Sec. 4.** AS 15.13.020(b), as amended by sec. 3 of this Act, is amended to read:

(b) The governor shall appoint **two** [THREE] members of each of the two political parties whose candidate for governor received the highest number of votes in the most recent preceding general election at which a governor was elected. [TWO APPOINTED MEMBERS OF EACH POLITICAL PARTY SHALL BE VOTING MEMBERS OF THE COMMISSION, AND ONE APPOINTED MEMBER FROM EACH POLITICAL PARTY SHALL BE A NONVOTING ADVISORY MEMBER WITH EXTENSIVE EXPERIENCE IN THE FINANCING OF POLITICAL CAMPAIGNS AND COMPLIANCE WITH DISCLOSURE AND REPORTING REQUIREMENTS.] The two [VOTING MEMBER] appointees from each of these two parties shall be chosen from a list of four names to be submitted by the central committee of each party. [THE NONVOTING ADVISORY MEMBER APPOINTEE FROM EACH PARTY SHALL BE CHOSEN FROM A LIST OF THREE NAMES SUBMITTED BY THE CENTRAL COMMITTEE OF EACH PARTY.] All names

submitted by the central committee of each party [, WHETHER FOR VOTING OR NONVOTING POSITIONS,] shall be of persons with experience working on political campaigns and the reporting requirements of this chapter.

* **Sec. 5.** AS 15.13.020(c) is amended to read:

(c) The four **voting** members selected under (b) of this section shall, by a majority vote, nominate to the governor an individual to serve as the **seventh** [FIFTH] member of the commission**, who shall be a voting member**. The governor shall either appoint the nominee to the commission, or shall reject the nominee and request those four members to nominate another individual to serve as the **seventh** [FIFTH] member of the commission.

* **Sec. 6.** AS 15.13.020(c), as amended by sec. 5 of this Act, is amended to read:

(c) The four [VOTING] members selected under (b) of this section shall, by a majority vote, nominate to the governor an individual to serve as the **fifth** [SEVENTH] member of the commission [, WHO SHALL BE A VOTING MEMBER]. The governor shall either appoint the nominee to the commission, or shall reject the nominee and request those four members to nominate another individual to serve as the **fifth** [SEVENTH] member of the commission.

* **Sec. 7.** AS 15.13.020(d) is amended to read:

(d) Members of the commission serve staggered terms of five years, or until a successor is appointed and qualifies. The terms of no two **voting** members who are members of the same political party may expire in consecutive years. A member may not serve more than one term. However, a person appointed to fill the unexpired term of a predecessor may be appointed to a successive full five-year term.

* **Sec. 8.** AS 15.13.020(d), as amended by sec. 7 of this Act, is amended to read:

(d) Members of the commission serve staggered terms of five years, or until a successor is appointed and qualifies. The terms of no two [VOTING] members who are members of the same political party may expire in consecutive years. A member may not serve more than one term. However, a person appointed to fill the unexpired term of a predecessor may be appointed to a successive full five-year term.

* **Sec. 9.** AS 15.13.020(g) is amended to read:

(g) The **voting** members **of the commission** shall elect a chairperson. Three

voting members of the commission constitute a quorum. A vacancy does not impair the powers of the remaining members to exercise all of the powers of the commission.

* **Sec. 10.** AS 15.13.020(g), as amended by sec. 9 of this Act, is amended to read:

(g) The [VOTING] members [OF THE COMMISSION] shall elect a chairperson. Three [VOTING] members of the commission constitute a quorum. A vacancy does not impair the powers of the remaining members to exercise all of the powers of the commission.

* **Sec. 11.** AS 15.13.150 is amended to read:

Sec. 15.13.150. Election educational activities not prohibited. This chapter does not prohibit a person from engaging in educational election-related communications and activities, including

(1) the publication of the date and location of an election;

(2) the education of students about voting and elections;

(3) the sponsorship of [OPEN] candidate debate forums **open to the public**;

(4) participation in get-out-the-vote or voter registration drives that do not favor a particular candidate, political party, or political position;

(5) the dissemination of the views of all candidates running for a particular office.

* **Sec. 12.** AS 15.13.400(4) is amended to read:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal

application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; [OR]

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; **or**

(vii) an opportunity to participate in a candidate forum provided to a candidate without compensation to the candidate by another person and for which a candidate is not ordinarily charged;

*** Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

MEMBERS OF THE ALASKA PUBLIC OFFICES COMMISSION; TRANSITION; STAGGERED TERMS. Notwithstanding AS 15.13.020, as amended by secs. 1, 3, 5, 7, and 9 of this Act, a member of the commission serving on the effective date of sec. 1 of this Act remains in office for the duration of the term to which appointed and confirmed. Within 90 days after the effective date of sec. 1 of this Act, the central committee of each of the two

political parties whose candidates for governor received the highest number of votes in the most recent preceding election at which a governor was elected shall submit to the governor a list of three nominees for the two additional nonvoting seats on the commission. The governor shall appoint one nonvoting member to a three-year term and one nonvoting member to a five-year term. The governor shall specify the term of each of the nonvoting members appointed subject to this section.

* **Sec. 14.** Sections 2, 4, 6, 8, and 10 of this Act take effect five years from the effective date of sec. 1 of this Act.

27-LS1388\D.2a
Bullard
4/12/12

AMENDMENT

#1 O.K

OFFERED IN THE HOUSE
TO: CSHB 355(STA)

M By: Rep. Gruenberg

nem. obj.

Page 1, line 2, following "**Commission;**":

Insert "**relating to candidate forums and contributions in state election campaigns;**"

Page 4, following line 6:

Insert new bill sections to read:

"* **Sec. 11.** AS 15.13.150 is amended to read:

Sec. 15.13.150. Election educational activities not prohibited. This chapter does not prohibit a person from engaging in educational election-related communications and activities, including

(1) the publication of the date and location of an election;

(2) the education of students about voting and elections;

(3) the sponsorship of [OPEN] candidate debate forums **open to the public**;

(4) participation in get-out-the-vote or voter registration drives that do not favor a particular candidate, political party, or political position;

(5) the dissemination of the views of all candidates running for a particular office.

* **Sec. 12.** AS 15.13.400(4) is amended to read:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a

candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; [OR]

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; **or**

O.K. amdt. to amt. **(vii) an opportunity to participate in a candidate ~~debate~~ forum provided to a candidate without compensation by another person and for which a candidate is not ordinarily charged;**" to the candidate

Renumber the following bill sections accordingly.

(newer)

ALASKA STATE LEGISLATURE

SESSION:
Alaska State Capitol, Room 418
Juneau, AK 99801
(907) 465-4457 Office
(907) 465-3519 Fax
(800) 928-4457 Toll Free

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1292 Sadler Way, Suite 304
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Representative David Guttenberg

Sponsor Statement

HB 355

The primary purpose of the Alaska Public Offices Commission (APOC) is to ensure compliance with campaign donation restrictions, disclose how campaigns are funded, and report how those funds are spent. HB 355 "APOC: Membership," is intended to ensure APOC members have the requisite experience filing disclosures and other reports, to promote compliance, understand the day-to-day idiosyncrasies of modern campaigns, and recognize their real-life consequences. Today, virtually all boards and commissions require at least some members to possess background experience with the issues they govern. Hairdressers, tattoo artists, doctors, and lawyers in Alaska are governed by people who understand their occupations. APOC should be no different.

HB 355 would change the membership of APOC by requiring all the governor's appointees to have extensive campaign experience with APOC filing. Members experienced in maintaining pertinent records, filing campaign disclosures, and managing bank accounts will help APOC better serve its constituency.

The level of campaign experience required of qualified appointees is open to interpretation at three separate points in the appointment process. First, when the party selects the three names it forwards to the governor; second, when the governor makes his or her selection(s); and third, when the legislature confirms the nominee(s).

To facilitate these new requirements, HB 355 recognizes the need for a transition period and allows for a staggered transition period until the new requirements can be met.

I urge your support of HB 355.

Representative.David.Guttenberg@legis.state.ak.us
http://guttenberg.akdemocrats.org

ALASKA STATE LEGISLATURE

SESSION:
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INTERIM:
1292 Sadler Way, Suite 304
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Representative David Guttenberg

Sponsor Statement

HB 355

The primary purpose of the Alaska Public Offices Commission (APOC) is to ensure compliance with campaign donation restrictions, disclose how campaigns are funded, and report how those funds are spent. HB 355 "APOC: Membership," is intended to ensure APOC members have the requisite experience filing disclosures and other reports, to promote compliance, understand the day-to-day idiosyncrasies of modern campaigns, and recognize their real-life consequences. Today, virtually all boards and commissions require at least some members to possess background experience with the issues they govern. Hairdressers, tattoo artists, doctors, and lawyers in Alaska are governed by people who understand their occupations. APOC should be no different.

HB 355 would change the membership of APOC by requiring all the governor's appointees to have extensive campaign experience with APOC filing. Members experienced in maintaining pertinent records, filing campaign disclosures, and managing bank accounts will help APOC better serve its constituency.

To facilitate these new requirements, HB 355 recognizes the need for a transition period and allows for a staggered transition period until the new requirements can be met.

I urge your support of HB 355.

Representative.David.Guttenberg@legis.state.ak.us
http://guttenberg.akdemocrats.org

ALASKA STATE LEGISLATURE

SESSION:
Alaska State Capitol, Room 418
Juneau, AK 99801
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Representative David Guttenberg

Sectional Analysis
HB 355

Section 1. Amends AS 15.13.020(a) to add two nonvoting advisory members to the Alaska Public Office s Commission ("commission").

Section 2. Amends AS 15.13.020(a) to undo the changes made in section 1 of the bill.

Section 3. Amends AS 15.13.020(b) to require that each nonvoting advisory member of the commission must be chosen from a list of three names submitted by the central committees of the two political parties whose candidate for governor received the highest numbers of votes in the most recent preceding general election at which a governor was elected and have extensive experience in the financing of political campaigns and compliance with disclosure and reporting requirements. Requires all members of the commission, voting and nonvoting, to have experience working on political campaigns and with the reporting requirements of AS 15.13.

Section 4. Amends AS 15.13.020(b) to undo the changes made in section 3 of the bill.

Section 5. Amends AS 15.13.020(c) to conform the addition of two nonvoting members of the commission.

Section 6. Amends AS 15.13.020(c) to undo the changes made in section 5 of the bill.

Section 7. Amends AS 15.13.020(d) to conform to the existence of voting and nonvoting members of the commission.

Section 8. Amends AS 15.13.020(d) to undo the changes made in section 7 of the bill.

Section 9. Amends AS 15.13.020(g) to conform to the existence of voting and nonvoting members of the commission.

Section 10. Amends AS 15.13.020(g) to undo the changes made in section 9 of the bill.

Section 11. Adds a provision to uncodified law, relating to the manner in which sections 1, 3, 5, 7, and 9 should be implemented.

Section 12. Provides that sections 2, 4, 6, 8, and 10 of the Act take effect five years from the effective date of Section 1 of the Act.

Representative.David.Guttenberg@legis.state.ak.us
http://guttenberg.akdemocrats.org

ALASKA STATE LEGISLATURE

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Representative David Guttenberg

Summary of Changes from HB 355 to CSHB 355 (STA)

Section 11: Deleted, this removes the prohibited uses of names and information contained in reports and statement filed with the commission.

Title change: Removal of prohibited uses of names and information contained in reports and statement filed with the commission, changes the title.

Representative.David.Guttenberg@legis.state.ak.us
http://guttenberg.akdemocrats.org

27-LS1388\D.1
Bullard
4/11/12

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 355(STA)

Page 1, line 2, following "**Commission;**":

Insert "**relating to candidate forums and contributions in state election campaigns;**"

Page 4, following line 6:

Insert a new bill section to read:

"*** Sec. 11.** AS 15.13.400(4) is amended to read:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; [OR]

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; **or**

(vii) an opportunity to participate in a candidate forum provided to a candidate without compensation by another person and for which a candidate is not ordinarily charged;"

Renumber the following bill sections accordingly.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 10, 2012

SUBJECT: "Contributions" under AS 15.13.400 (Work Order No. 27-LS1493)

TO: Representative Max Gruenberg
Attn: Ted Madsen

FROM: Alpheus Bullard
Legislative Counsel

In response to an April 2, 2012, letter from the Alaska Public Offices Commission ("commission"), you asked about certain candidate forums and the definition of "contribution" under AS 15.13. "Contribution" is defined at AS 15.13.400(4).[1]

---

[1] AS 15.13.400(4) provides:

> "contribution"
>
> (A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of
>
> (i) influencing the nomination or election of a candidate;
>
> (ii) influencing a ballot proposition or question; or
>
> (iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;
>
> (B) does not include
>
> (i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;
>
> (ii) ordinary hospitality in a home;
>
> (iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;
>
> (iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

The letter from the commission states that an organization's provision of a "candidate forum" could be a contribution. You asked whether an organization's provision of a candidate forum for which candidates and candidate campaigns are not ordinarily charged could be interpreted as a contribution. While every situation is different, and each will be evaluated by the commission on its facts, a "candidate forum" such as you describe should not be interpreted as a contribution. The definition of "contribution" provides that "*contribution . . . means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services* ***for which charge is ordinarily made****, and includes . . . .*" (Emphasis added)

Accordingly, while not addressed in the commission's letter, if you as a candidate are invited to a candidate forum, even if not all candidates for the office for which you are running have been invited (i.e. fringe party candidates), if the organization's provision of that forum is a service for which a candidate, or a candidate's campaign, is not ordinarily charged, it may not be a "contribution" under AS 15.13.400(4). Again, please note both that each situation will be evaluated on the basis of its own facts and that a court will likely defer to the commission's interpretation of AS 15.13.400(4).

If you have further questions, or a specific scenario in mind, please do not hesitate to contact me.

TLAB:ljw
12-272.ljw

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party[.]

STATE OF ALASKA

Department of Administration

Alaska Public Offices Commission

SEAN PARNELL, GOVERNOR

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April 2, 2012

Dear Legislators,

As time becomes a more precious commodity during the final days of the regular session, you clearly have more important things to do than read a note from APOC. As a result this will be the last letter during this session. The question addressed below is particularly germane to the upcoming campaign season.

Question—Are there any issues regarding candidate forums that a candidate or organization needs to be aware of during the campaign season?

Answer—The biggest issue is that most forums are seen as non-monetary contributions, unless all candidates are invited.

a) **A political forum could be a contribution.** If an organization provides a forum for all candidates to discuss issues there is no problem. 2AAC 50.990(7)(C)(vii) notes that if the service or facility is made available to all candidates there is no contribution. However, if only some of the candidates are invited then the organization providing the forum is making a contribution to the candidates which must be reported and may be prohibited. AS 15.13.400(4) defines a contribution as "a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods or services for which charge is ordinarily made, and includes, payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of influencing the nomination or election of a candidate...". Clearly, a political forum does influence the election of a candidate. 2AAC 50.990(7) (B) also notes that "anything of value provided to a candidate" is considered a contribution.

How to avoid this issue. In this case an organization such as a Kiwanas club should invite all of the candidates to a forum to avoid any issues. All of the candidates need not attend, but they need to be invited. The organization should save any documentation that it did invite all candidates to avoid any potential complaints later. It would then be considered an election educational activity under AS 15.13.150 and would not be a contribution.

b) **The media.** If the media is covering a news story, or providing an editorial or commentary, the news story, editorial or commentary is not considered a contribution and is not covered by APOC regulations (2AAC50.990(7)(C)(i). However, if a forum, such as a debate, is sponsored by a media entity and hosted as an event, all candidates must be invited.

c) **What can you do to ensure no one lodges a complaint against you for participating in a forum?** The easiest thing to do is ask if all candidates have been invited. If all candidates have not been invited, you can request that the organizer do so. If that doesn't happen, check to see if the potential contribution would be prohibited by calling APOC. Regardless, the venue should be paid for at a commercially reasonable rate.

Yours truly,

Paul Dauphinais

Distributed by Gruenberg
email add

CS FOR HOUSE BILL NO. 355(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered: 4/10/12
Referred: Judiciary

Sponsor(s): REPRESENTATIVES GUTTENBERG, Miller

A BILL

FOR AN ACT ENTITLED

"An Act relating to the membership of, and member qualifications for, the Alaska Public Offices Commission; and providing for an effective date."

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

*** Section 1.** AS 15.13.020(a) is amended to read:

(a) There is created in the Department of Administration the Alaska Public Offices Commission consisting of five **voting** members **and two nonvoting advisory members**. The governor shall appoint all members of the commission in the manner prescribed in (b) and (c) of this section, subject to confirmation by a majority of the legislature meeting in joint session.

*** Sec. 2.** AS 15.13.020(a), as amended by sec. 1 of this Act, is amended to read:

(a) There is created in the Department of Administration the Alaska Public Offices Commission consisting of five [VOTING] members [AND TWO NONVOTING ADVISORY MEMBERS]. The governor shall appoint all members of the commission in the manner prescribed in (b) and (c) of this section, subject to

confirmation by a majority of the legislature meeting in joint session.

*** Sec. 3.** AS 15.13.020(b) is amended to read:

(b) The governor shall appoint **three** [TWO] members of each of the two political parties whose candidate for governor received the highest number of votes in the most recent preceding general election at which a governor was elected. **Two appointed members of each political party shall be voting members of the commission, and one appointed member from each political party shall be a nonvoting advisory member with extensive experience in the financing of political campaigns and compliance with disclosure and reporting requirements.** The two **voting member** appointees from each of these two parties shall be chosen from a list of four names to be submitted by the central committee of each party. **The nonvoting advisory member appointee from each party shall be chosen from a list of three names submitted by the central committee of each party. All names submitted by the central committee of each party, whether for voting or nonvoting positions, shall be of persons with experience working on political campaigns and the reporting requirements of this chapter.**

*** Sec. 4.** AS 15.13.020(b), as amended by sec. 3 of this Act, is amended to read:

(b) The governor shall appoint **two** [THREE] members of each of the two political parties whose candidate for governor received the highest number of votes in the most recent preceding general election at which a governor was elected. [TWO APPOINTED MEMBERS OF EACH POLITICAL PARTY SHALL BE VOTING MEMBERS OF THE COMMISSION, AND ONE APPOINTED MEMBER FROM EACH POLITICAL PARTY SHALL BE A NONVOTING ADVISORY MEMBER WITH EXTENSIVE EXPERIENCE IN THE FINANCING OF POLITICAL CAMPAIGNS AND COMPLIANCE WITH DISCLOSURE AND REPORTING REQUIREMENTS.] The two [VOTING MEMBER] appointees from each of these two parties shall be chosen from a list of four names to be submitted by the central committee of each party. [THE NONVOTING ADVISORY MEMBER APPOINTEE FROM EACH PARTY SHALL BE CHOSEN FROM A LIST OF THREE NAMES SUBMITTED BY THE CENTRAL COMMITTEE OF EACH PARTY.] All names submitted by the central committee of each party [, WHETHER FOR VOTING OR

NONVOTING POSITIONS,] shall be of persons with experience working on political campaigns and the reporting requirements of this chapter.

*** Sec. 5.** AS 15.13.020(c) is amended to read:

(c) The four **voting** members selected under (b) of this section shall, by a majority vote, nominate to the governor an individual to serve as the **seventh** [FIFTH] member of the commission**, who shall be a voting member**. The governor shall either appoint the nominee to the commission, or shall reject the nominee and request those four members to nominate another individual to serve as the **seventh** [FIFTH] member of the commission.

*** Sec. 6.** AS 15.13.020(c), as amended by sec. 5 of this Act, is amended to read:

(c) The four [VOTING] members selected under (b) of this section shall, by a majority vote, nominate to the governor an individual to serve as the **fifth** [SEVENTH] member of the commission [, WHO SHALL BE A VOTING MEMBER]. The governor shall either appoint the nominee to the commission, or shall reject the nominee and request those four members to nominate another individual to serve as the **fifth** [SEVENTH] member of the commission.

*** Sec. 7.** AS 15.13.020(d) is amended to read:

(d) Members of the commission serve staggered terms of five years, or until a successor is appointed and qualifies. The terms of no two **voting** members who are members of the same political party may expire in consecutive years. A member may not serve more than one term. However, a person appointed to fill the unexpired term of a predecessor may be appointed to a successive full five-year term.

*** Sec. 8.** AS 15.13.020(d), as amended by sec. 7 of this Act, is amended to read:

(d) Members of the commission serve staggered terms of five years, or until a successor is appointed and qualifies. The terms of no two [VOTING] members who are members of the same political party may expire in consecutive years. A member may not serve more than one term. However, a person appointed to fill the unexpired term of a predecessor may be appointed to a successive full five-year term.

*** Sec. 9.** AS 15.13.020(g) is amended to read:

(g) The **voting** members **of the commission** shall elect a chairperson. Three **voting** members of the commission constitute a quorum. A vacancy does not impair

the powers of the remaining members to exercise all of the powers of the commission.

*** Sec. 10.** AS 15.13.020(g), as amended by sec. 9 of this Act, is amended to read:

(g) The [VOTING] members [OF THE COMMISSION] shall elect a chairperson. Three [VOTING] members of the commission constitute a quorum. A vacancy does not impair the powers of the remaining members to exercise all of the powers of the commission.

*** Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

MEMBERS OF THE ALASKA PUBLIC OFFICES COMMISSION; TRANSITION; STAGGERED TERMS. Notwithstanding AS 15.13.020, as amended by secs. 1, 3, 5, 7, and 9 of this Act, a member of the commission serving on the effective date of sec. 1 of this Act remains in office for the duration of the term to which appointed and confirmed. Within 90 days after the effective date of sec. 1 of this Act, the central committee of each of the two political parties whose candidates for governor received the highest number of votes in the most recent preceding election at which a governor was elected shall submit to the governor a list of three nominees for the two additional nonvoting seats on the commission. The governor shall appoint one nonvoting member to a three-year term and one nonvoting member to a five-year term. The governor shall specify the term of each of the nonvoting members appointed subject to this section.

*** Sec. 12.** Sections 2, 4, 6, 8, and 10 of this Act take effect five years from the effective date of sec. 1 of this Act.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **HB355**
Fiscal Note Number
() Publish Date

Identifier (file name) HB355-DOA-APOC-4-9-12
Title APOC: Membership; Use of Report Info
Sponsor Representatives Guttenberg and Miller
Requester House State Affairs

Dept. Affected Administration
Appropriation Alaska Public Offices Commission
Allocation Alaska Public Offices Commission
OMB Component Number 70

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	1.4		1.4	1.4	1.4	1.4	1.4
Travel	14.0		14.0	14.0	14.0	14.0	14.0
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**15.4**	**0.0**	**15.4**	**15.4**	**15.4**	**15.4**	**15.4**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	15.4		15.4	15.4	15.4	15.4	15.4
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**15.4**	**0.0**	**15.4**	**15.4**	**15.4**	**15.4**	**15.4**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Paul Dauphinais
Division Alaska Public Offices Commission
Phone 907-276-4176
Date/Time 2/23/12 1:23 PM

Approved by John Cramer, Deputy Commissioner
Department of Administration
Date 2/24/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB355

Analysis

Analysis
HB 355 adds two new member positions to the current number of APOC commissioners.

Assumptions
One must assume that any new members to the commission may come from any place in Alaska.

Program Summary
Each new commissioner will receive a stipend at the current level of $50 per day. Each meeting will now cost an additional $50 for each new commissioner attending. Those funds are expended from personnel services.

Assuming that each new commissioner comes from a place other than Anchorage it is anticipated that each new commissioner will require travel, per diem, and other costs required for them to attend meetings. In Fiscal Year 2013 the current schedule is set for 14 meeting days. At $1,000 per trip the increased costs of travel for these two new commissioners is anticipated to be $14,000 per year.

(2) the commission's costs of investigation and adjudication; and

(3) reasonable attorney fees.

(c) The commission's determination under (b) of this section may be appealed to the superior court under AS 44.62 (Administrative Procedure Act).

(d) When an action has been filed in the superior court under AS 15.13.380, upon proof of the violation, the court shall enter a judgment in the amount of the civil penalty authorized to be collected by (a) of this section.

(e) If the commission or superior court finds that the violation was not a repeat violation or was not part of a series or pattern of violations, was inadvertent, was quickly corrected, and had no adverse effect on the campaign of another, the commission or the court may

(1) suspend imposition of the penalties; and

(2) order the penalties set aside if the person does not engage in a similar violation for a period of one year.

(f) A party who has filed a civil action under AS 15.13.380

(1) is not entitled to trial by jury on the civil action;

(2) is not entitled to be represented by legal counsel at public expense. (§ 6 ch 167 SLA 1976; am § 5 ch 126 SLA 1994; am § 3 ch 59 SLA 1995; am §§ 22, 23 ch 48 SLA 1996; am § 7 ch 1 TSSLA 2002)

Revisor's notes. — Formerly AS 15.13.125. Renumbered in 2000, at which time "AS 15.13.380" was substituted for "AS 15.13.120" in subsections (a), (b), (d), and (f) in order to reflect the 2000 renumbering of AS 15.13.120.

Cross references. — For criminal penalties for violations of this chapter, see AS 15.56.012 — 15.56.019.

NOTES TO DECISIONS

Penalty cannot be obviously unreasonable. — The penalty cannot be so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. The standard is one of obvious unreasonableness. VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n, 753 P.2d 703 (Alaska 1988), appeal dismissed, 488 U.S. 919, 109 S. Ct. 298, 102 L. Ed. 2d 317 (1988).

Statement of reasons for maximum penalties. — A statement of reasons should be given by the commission when it imposes the maximum civil penalties under this section. VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n, 753 P.2d 703 (Alaska 1988), appeal dismissed, 488 U.S. 919, 109 S. Ct. 298, 102 L. Ed. 2d 317 (1988).

Stated in State, Alaska Pub. Offices Comm'n v. Marshall, 633 P.2d 227 (Alaska 1981).

Sec. 15.13.400. Definitions. In this chapter,

(1) "candidate"

(A) means an individual who files for election to the state legislature, for governor, for lieutenant governor, for municipal office, for retention in judicial office, or for constitutional convention delegate, or who campaigns as a write-in candidate for any of these offices; and

(B) when used in a provision of this chapter that limits or prohibits the donation, solicitation, or acceptance of campaign contributions, or limits or prohibits an expenditure, includes

(i) a candidate's campaign treasurer and a deputy campaign treasurer;

(ii) a member of the candidate's immediate family;

(iii) a person acting as agent for the candidate;

(iv) the candidate's campaign committee; and

(v) a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of the candidate;

(2) "commission" means the Alaska Public Offices Commission;

(3) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and

costing $500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c);

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party;

(5) "electioneering communication" means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and

(C) occurs within the 30 days preceding a general or municipal election;

(6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party;

(iv) influencing the outcome of a ballot proposition or question; or

(v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

(7) "express communication" means a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;

(8) "group" means

(A) every state and regional executive committee of a political party;

(B) any combination of two or more individuals acting jointly who organize for t principal purpose of influencing the outcome of one or more elections and who take act the major purpose of which is to influence the outcome of an election; a group that ma expenditures or receives contributions with the authorization or consent, express implied, or under the control, direct or indirect, of a candidate shall be considered to l controlled by that candidate; a group whose major purpose is to further the nominatic election, or candidacy of only one individual, or intends to expend more than 50 perce of its money on a single candidate, shall be considered to be controlled by that candida and its actions done with the candidate's knowledge and consent unless, within 10 da from the date the candidate learns of the existence of the group the candidate files w the commission, on a form provided by the commission, an affidavit that the group operating without the candidate's control; a group organized for more than one yea preceding an election and endorsing candidates for more than one office or more than on political party is presumed not to be controlled by a candidate; however, a group tha contributes more than 50 percent of its money to or on behalf of one candidate shall b considered to support only one candidate for purposes of AS 15.13.070, whether or no control of the group has been disclaimed by the candidate; and

(C) any combination of two or more individuals acting jointly who organize for th principal purpose of filing an initiative proposal application under AS 15.45.020 or wh file an initiative proposal application under AS 15.45.020;

(9) "immediate family" means the spouse, parents, children, including a stepchild an an adoptive child, and siblings of an individual;

(10) "independent expenditure" means an expenditure that is made without the direc or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaig treasurer, or another person acting as a principal or agent of the candidate;

(11) "individual" means a natural person;

(12) "issues communication" means a communication that

(A) directly or indirectly identifies a candidate; and

(B) addresses an issue of national, state, or local political importance and does no support or oppose a candidate for election to public office.

(13) "nongroup entity" means a person, other than an individual, that takes action the major purpose of which is to influence the outcome of an election, and that

(A) cannot participate in business activities;

(B) does not have shareholders who have a claim on corporate earnings; and

(C) is independent from the influence of business corporations.

(14) "person" has the meaning given in AS 01.10.060, and includes a labor union nongroup entity, and a group;

(15) "political party" means any group that is a political party under AS 15.80.010 an any subordinate unit of that group if, consistent with the rules or bylaws of the politica party, the unit conducts or supports campaign operations in a municipality, neighbor hood, house district, or precinct;

(16) "publicly funded entity" means a person, other than an individual, that receive half or more of the money on which it operates during a calendar year from government including a public corporation. (§ 24 ch 48 SLA 1996; am § 39 ch 21 SLA 2000; am §§ 25 26 ch 1 SLA 2002; am § 7 ch 3 SLA 2002; am §§ 8, 9 ch 1 TSSLA 2002; am §§ 18, 19 cl 108 SLA 2003; am § 2 ch 90 SLA 2006; am §§ 7 — 9 ch 73 SLA 2010)

Revisor's notes. — Paragraph (13) was enacted as (12) and paragraphs (3), (5), (7), and (12) were enacted as (13)-(16). Renumbered in 2002 to retain alphabetical order. In 2010, in paragraph (15), "AS 15.80.010 was substituted for "AS 15.60.010" to reflect the 201 renumbering of AS 15.60.010.

Effect of amendments. — The 2006 amendment, effective October 11, 2006, added subparagraph (4)(B)(iv) and made related stylistic changes.

The 2010 amendment, effective September 9, 2010, rewrote (4)(A); added (6)(A)(v), and made related changes; added (8)(C), and made related changes.

Editor's notes. — Under § 16, ch. 73, SLA 2010, the 2010 amendments of the provisions of paragraphs (4), (6), and (8) of this section that relate to initiative proposals apply "to an initiative, the application for which is filed with the lieutenant governor under AS 15.45.020 on or after September 9, 2010."

Opinions of attorney general. — The statutory limit under AS 15.13.070(a) is applicable to "control groups" under former AS 15.13.130. Exempting such groups from the contribution limit would seriously undermine the statute's primary purpose of deterring the buying of elections and the undue influence of large contributors. June 15, 1987, Op. Att'y Gen.

NOTES TO DECISIONS

Constitutionality. — Under the First Amendment, former AS 15.13.400(3)(B)(i) was unconstitutional to the extent that it limited the volunteering of professional services by individuals, but the statute was constitutional as to the ban on the provision of volunteer services by corporations. Jacobus v. Alaska, 338 F.3d 1095 (9th Cir. 2003).

Alaska's campaign finance law, AS 15.13.030 et seq., does not violate pro-life association's First Amendment rights because this section's definition of "electioneering communication" is not unconstitutionally vague or overbroad either facially or as applied, and the reporting and disclosure provisions are reasonable and serve a significant state interest. Alaska Right to Life Comm. v. Miles, 441 F.3d 773 (9th Cir. 2006).

Applied in Jacobus v. Alaska, 182 F. Supp. 2d 893 (D. Alaska 2001).

Quoted in State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000).

Cited in Libertarian Party of Alaska, Inc. v. State, 101 P.3d 616 (Alaska 2004).

Chapter 15. Elections and Ballots.

Section

10. General administrative supervision by director
20. Date of general election
30. Preparation of official ballot
32. Use of electronically generated ballots
35. Printing of ballots and other material
40. Preparation of other election materials
50. Distribution of election materials
60. Polling places, voting booths, and supplies
70. Public notice of election required
80. Time for opening and closing polls
90. Designation of precinct polling place
100. Time off for voting
110. General duties and oath of election board
120. Filling vacancies in election board
130. Majority decision of election board
140. Permitted use of unofficial ballots
150. Official opening of polls
160. Prohibition of political discussion by election board
170. Prohibition of political persuasion near election polls
180. Keeping of register
195. Voters on official registration list
198. Voters not on official registration list
210. Questioning of voters of suspect qualification
215. Disposition of questioned votes
220. Administration of oaths
225. Voter identification at polls
230. Providing ballot to voter
240. Voter assistance
250. Disposition of spoiled ballot
260. Placing ballot in ballot box by voter
270. Prohibiting the leaving of the polling place with ballot
280. Prohibiting the exhibition of marked ballots
290. Prohibiting the identification of ballots
300. Prohibiting the count of exhibited ballots
310. Official closing of polls
320. Voters in line when polls close
330. Commencement of ballot count
340. Duties, oath, and vacancies of additional election officials
350. General procedure for ballot count
360. Rules for counting ballots
361. Stickers
370. Completion of ballot count; certificate
380. Payment of election board members
390. Election expenses
400. Preparation of voter list
410. Plural voting
420. Duty to review the ballot counting
430. Scope of the review of ballot counting
440. State ballot counting review
450. Certification of state ballot counting review
460. Tie votes
470. Preservation of election ballots, papers, and materials
480. Security of ballots

Collateral references. 26 Am. Jur. 2d, Elections, § 1 et seq.

29 C.J.S., Elections, §§ 190-220.

Admissibility of election ballots in quo warranto proceedings, 71 ALR2d 353.

Sec. 15.15.010. General administrative supervision by director. The director shall provide general administrative supervision over the conduct of state elections, and may adopt regulations under AS 44.62 (Administrative Procedure Act) necessary for the

2 AAC 50.990. Definitions

In this chapter, unless the context requires otherwise:

(1) "agent"

(A) means a representative or one who is authorized to act for another;

(B) includes a contractor or subcontractor;

(2) "anything of value"

(A) except as provided in (B) of this paragraph, means any item, property, or services, tangible or intangible, that could reasonably be considered to be a material advantage, or of material worth, use, or service to a person receiving the item, property, or services;

(B) for a legislative branch filer, has the meaning given in AS 24.60.990 ;

(C) includes any facility, equipment, polling information, supplies, advertising service, membership list, mailing list, and the service of distributing information by means of electronic mail, unless the cost of doing so is minimal

(3) except as provided in 2 AAC 50.405, "candidate"

(A) means a candidate for state or municipal elective office;

(B) includes an individual who

(i) submits a letter of intent to the commission under 2 AAC 50.274; or

(ii) has publicly announced an intent to run as a write-in candidate;

(4) "child" has the meaning given in AS 39.50.200 ;

(5) "commission" means the Alaska Public Offices Commission;

(6) "complainant" means a person who files a complaint with the commission under 2 AAC 50.870;

(7) "contribution"

(A) has the meaning given in AS 15.13.400 ;

(B) includes (means "includes, but is not limited to")

(i) a subscription, advance, transfer, forgiveness of all or part of a debt, relaxation of credit, or anything of value made for or provided to a candidate or campaign by a person, group, or nongroup entity for the purpose set out in AS 15.13.400 (4)(A); and

← so it includes the requirement that it must be something "for which charge is ordinarily made"

← In context this does not mean a form (otherwise it would unreasonably expand "for which charge is ordinarily made")

(ii) a personal contribution as provided in 2 AAC 50.254;

(C) does not include

(i) costs that a media organization, including a broadcasting station, newspaper, or periodical of regular publication, incurs in covering or carrying a news story, editorial, or commentary; however, if the media organization is owned or controlled by a political party, group, or candidate, the cost of the news story, editorial, or commentary is a contribution, unless the media organization carries a bona fide news account as part of a general pattern of campaign-related news accounts that gives reasonably equal coverage to all opposing candidates in the circulation or listening area;

(ii) a non-monetary contribution or in-kind donation of a single item with a normal cost of $50 or less;

(iii) a payment by an individual for the individual's own travel expenses, if the payment is voluntary and is made without an understanding that the payment will be directly or indirectly repaid;

(iv) costs that a business, corporation, trade association, labor union, or other organization not organized primarily to influence elections incurs to communicate directly with the organization's members, employees, or the families of members or employees, on any subject, if the communication is in the same format the organization has used in the past for communications on nonpolitical subjects, and does not solicit contributions or any action other than voting for or against a candidate or ballot proposition or question;

(v) a gift, loan, advance, or deposit of money or anything of value made with respect to a recount of a state or municipal election;

(vi) costs incurred to provide necessary administrative services associated with a payroll withholding plan, if the costs do not include expenses associated with soliciting contributions;

(vii) provision of a service or facility to a candidate, group, or nongroup entity if the entity providing the service or facility is paid at a commercially reasonable rate within a commercially reasonable time or makes the service or facility available to all candidates for a particular office;

(viii) provision of an organization's membership or mailing list to the group or nongroup entity affiliated with the organization;

(ix) the use of personal money or credit by a campaign treasurer or deputy treasurer for an expenditure allowable under AS 15.13.112 , if the amount does not exceed $500 and is repaid before the end of the report cycle in which the expenditure was made; or

(x) the use of personal money or credit by a candidate for an authorized campaign expenditure, if the amount is repaid no later than three days after the date of the expenditure;

(8) "creditor" includes a government authority that has a right by law to demand and recover money from a person or a person's family member;

(9) "deferred income" means money or anything of value that is earned in a reporting period, but is to be paid after the end of that reporting period;

(10) "disclosure statement" or "statement" means a disclosure statement required under AS 24.60.200 or AS 39.50.020 ;

(11) "domestic partner" has the meaning given in AS 39.50.200 ;

(12) "family member" means

(A) a spouse;

(B) a domestic partner;

(C) a dependent child; in this subparagraph, "dependent child" means an unmarried child of a person subject to this chapter who is dependent upon that person and who is either

(i) under 19 years of age; or

(ii) under 23 years of age and registered at and attending on a full-time basis an accredited educational or technical institution recognized by the Department of Education and Early Development; age restrictions set out in this subparagraph do not apply to a child who is totally and permanently disabled;

(13) "gift"

(A) means a payment or item received without consideration of equal or greater value;

(B) for a person subject to AS 25.45, has the meaning given in AS 24.45.171 ;

(C) includes

(i) satisfaction of a loan or debt by forgiveness or payment by a third party, or a third party's enforceable promise to pay the loan or satisfy the debt obligation if the person obligated does not give full and adequate consideration;

(ii) accommodations, including housing, a hotel room, and a vacation rental;

(iii) a ticket for travel or an entertainment event;

(iv) food or beverages not intended for immediate consumption;

(v) a discount or rebate for goods and services if the discount or rebate is not available to the public generally;

(vi) goods or services provided or loaned for personal or professional use, including office expenses connected with holding public office;

(vii) a scholarship to pay costs of an educational or recreational program;

(D) does not include

(i) a political contribution;

(ii) a commercially reasonable loan made in the ordinary course of business in exchange for consideration of equal or greater value;

(iii) an inheritance;

(iv) an item of value received without consideration from a family member or a parent, nondependent child, sibling, grandparent, aunt, uncle, niece, or nephew;

(14) "income"

(A) has the meaning given in AS 24.60.990 ;

(B) includes money or anything of value, including deferred income, earned or received

(i) in exchange for labor or services;

(ii) from the sale of goods or property;

(iii) as profit from a financial investment;

(iv) as alimony;

(v) as child support;

(vi) as a government entitlement; or

(vii) as an honorarium;

(15) "individual" means a natural person;

(16) "judicial officer" has the meaning given in AS 39.50.200 ;

(17) "labor union" means a local, national, or international union, a labor council, or any other labor organization recognized under state or federal law;

(18) "legislative branch filer" means

(A) a legislator;

(B) a legislative director;

(C) a member of the Select Committee on Legislative Ethics;

(19) "loan or loan guarantee" means a business or personal

(A) loan signed or co-signed by the legislative branch filer, public official, or candidate, or a family member of the legislative branch filer, public official or candidate; or

(B) loan guarantee made on behalf of the legislative branch filer, public official, or candidate, or a family member of the legislative branch filer, public official, or candidate;

(20) "lobbyist" has the meaning given in AS 24.45.171 ;

(21) "minor" means an individual who is under 18 years of age;

(22) "money" means currency of the United States or of a foreign nation, checks, money orders, or negotiable instruments payable on demand;

(23) "municipality" has the meaning given in AS 01.10.060 ;

(24) "municipal officer" has the meaning given in AS 39.50.200 ;

(25) "nondependent child" is a child that is not a dependent for purposes of the definition of "family member" in this section;

(26) "person"

(A) has the meaning given in AS 15.13.400 ;

(B) includes an initiative committee that is designated as provided in AS 15.45.030 ;

(27) "political action" has the meaning given in AS 24.60.990 ;

(28) "public official" or "public officer" has the meaning given in AS 39.50.200 ;

(29) "resident of the state" or "resident of this state"

(A) means an individual who meets the requirements of AS 01.10.055 ; and

(B) includes each individual who is registered to vote in the state;

(30) "respondent" means a person against whom a complaint has been made or an investigation has been initiated under 2 AAC 50.870 - 2 AAC 50.875;

(31) "sibling" means a brother or sister, including a stepbrother, stepsister, and adopted brother or sister;

(32) "source of income" has the meaning given in AS 39.50.200 ;

(33) "staff"

(A) means the staff of the Alaska Public Offices Commission, employed under AS 15.13.020 (i);

(B) includes any individual hired as a contractor to provide specific services to the commission;

(C) does not include a member of the commission;

(34) "taking office" means the earlier of

(A) the day on which the public official first earns compensation for work: or

(B) the day on which the public official takes the oath of office;

(35) "working day" means a day other than Saturday, Sunday, or a state holiday;

(36) "zero report" means a report filed under AS 15.13, AS 24.45, AS 24.60.200 - 24.60.260, or AS 39.50 that shows the person filing the report had no reportable activity during the period of time covered by the report.

- **History: Eff. 12/22/2011, Register 200**

- **Authority:** AS 15.13.030

AS 24.45.021

AS 24.60.220

AS 39.50.050

27-LS1388\D.1
Bullard
4/11/12

AMENDMENT

(not offered)

OFFERED IN THE HOUSE

TO: CSHB 355(STA)

Page 1, line 2, following "**Commission;**":

Insert "**relating to candidate forums and contributions in state election campaigns;**"

Page 4, following line 6:

Insert a new bill section to read:

"*** Sec. 11.** AS 15.13.400(4) is amended to read:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; [OR]

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; **or**

(vii) an opportunity to participate in a candidate forum provided to a candidate without compensation by another person and for which a candidate is not ordinarily charged;"

Renumber the following bill sections accordingly.

HB 359

<TARGET><BILL>HB 359</BILL><SUBJECT>HB 359</SUBJECT><COMM>HJUD27</COMM></TARGET>

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

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JUNEAU, ALASKA 99811-0300
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February 22, 2012

The Honorable Carl Gatto, Chair
House Judiciary Committee
State Capitol Room 118
Juneau, AK 99801

Re: House Bill 359 – relating to sex crimes and video conferencing

Dear Representative Gatto:

House Bill 359 has been assigned to the House Judiciary Committee for your consideration. The Department of Law respectfully requests a hearing in the Judiciary Committee on the bill at your earliest convenience. HB 359 builds on and refines legislation enacted over the past several years to address serious problems of sexual exploitation of children and other victims.

A sectional analysis that describes each section of the bill is attached. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and representatives from the Department of Public Safety will testify regarding this legislation. Experienced law enforcement officers will also be available if needed. No teleconference sites are expected.

Thank you for your consideration of this request.

Sincerely

Michael C. Geraghty
Attorney General

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL, GOVERNOR

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HOUSE BILL 359
SEX TRAFFICKING AND HUMAN TRAFFICKING
SECTIONAL ANALYSIS

The increased scrutiny of crimes related to promoting prostitution of children in Alaska has prompted the proposed change in terminology from promoting prostitution to sex trafficking. There are good reasons for this change. First, a child who is put into prostitution by an adult should be considered and described as a victim, not a prostitute. The change in terminology will encourage this change. Second, a majority of law enforcement officers now refer to the crime of promoting prostitution of children as sex trafficking. Changing Alaska law will facilitate better communication and understanding.

Sections 1, 2, 7 -- 11, 14, 17 – 19, and 21 -- 24 change the statutes prohibiting promoting prostitution to prohibiting sex trafficking. The elements of the offenses remain the same. These sections also make conforming amendments to other laws that currently refer to the crime of promoting prostitution so that they cross-reference sex trafficking.

Section 3 adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the felonies described as "serious felony offenses" in the state's conspiracy law, AS 11.21.120. This change would enable the state to investigate and potentially prosecute offenders who work with other people to plan and engage in human trafficking or sex trafficking.

Section 4 amends the crime of distribution of indecent materials to minors, AS 11.61.128. This proposed amendment is in response to the recent decision by a federal district court judge holding the current version of the statute to be unconstitutional in violation of the first amendment, because it applies to conduct that is constitutionally protected. In response to the decision that the current law is overbroad, the bill would require that the state prove the defendant intentionally distributed, or possessed with intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

Sections 5 and 6 raise the penalty for being a patron of a prostitute, if the prostitute is a minor under 18 years of age, from a class B misdemeanor to a class C felony. It also specifies the legislative intent that the age of the prostitute is a circumstance that does not require proof of a culpable mental state.

Section 12: Under current law, no corroboration is required of the testimony of an alleged victim in a prosecution for promoting prostitution (sex trafficking) in the first, second, and third

degrees. The bill adds the crime of promoting prostitution (sex trafficking) in the fourth degree to those crimes that do not require corroboration of the testimony of an alleged victim.

Section 13: Under current law property used to facilitate or derived from a crime of promoting prostitution (sex trafficking) is subject to forfeiture. The bill adds the crime of prostitution to these crimes. Under the bill property used to facilitate or derived from the crime of prostitution would be subject to forfeiture.

Section 15 corrects an error in AS 11.81.250(b). Under current law the crime of promoting prostitution (sex trafficking) in the first degree under AS 11.66.110(a)(2) – where the person promoted is a child – is an unclassified felony. The bill adds this offense to the other offenses described as unclassified felonies in Alaska law.

Section 16 allows the testimony of a witness in a hearing addressing the competency of a defendant for being tried for a crime by way of contemporaneous two-way video conference. It allows this testimony if the witness would be required to travel more that 50 miles to attend the hearing in person or if the witness lives in a place where people customarily travel by air to the court site.

Section 19, in addition to conforming the definition of most serious felony to the changes in the sex trafficking provisions, also corrects an omission in the definition of most serious felony by including online enticement of a minor in the definition.

Section 20 adds a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would be required to register for 15 years if convicted of one offense, and for life if convicted for two or more offenses.

Section 25 adopts Rule 38.3, Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow this testimony if the parties agree to its use. If the parties do not agree, it would allow contemporaneous two-way video conference testimony if the court finds that its use is necessary to further an important public policy, the witness is unavailable, and the testimony is given under oath and is subject to cross-examination.

Section 26 addresses the applicability of the changes described above.

Section 27 is an instruction to the revisor of statutes regarding the heading of AS 11.66.110.

Section 28 provides for an effective date of July 1, 2012.

HOUSE BILL NO. 359

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/22/12
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally

punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

*** Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, or **sex**

traffickers [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

*** Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.360; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

*** Sec. 4.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors

if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection** to **either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [ANOTHER PERSON ANY] material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 5.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

*** Sec. 6.** AS 11.66.100 is amended by adding a new subsection to read:

(c) Prostitution is a class C felony if

(1) the person described in (a)(1) of this section is under 18 years of age; the age of the person is a circumstance that does not require proof of a culpable

mental state; and

(2) the person described in (a)(2) of this section is 18 years of age or older and at least three years older than the person described in (a)(1) of this section.

*** Sec. 7.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

*** Sec. 8.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

*** Sec. 9.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

*** Sec. 10.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree. (a) A person commits the crime of **sex trafficking** [PROMOTING

PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 11.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 12.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 13.** AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of **AS 11.66.100 - 11.66.135** [AS 11.66.110 -

11.66.135] shall be forfeited.

* **Sec. 14.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* **Sec. 15.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

* **Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may allow the testimony of a witness, including the psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness would be required to travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court. In this subsection, "contemporaneous two-way video conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

* **Sec. 17.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the

offense, a fine of no more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

* **Sec. 18.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant

has two prior convictions for sexual felonies, 99 years.

*** Sec. 19.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor,** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

*** Sec. 20.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; [OR]

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction

for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; [OR]

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense; **or**

(D) a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction;

*** Sec. 21.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 22.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of

application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460.

* **Sec. 23.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the

crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or AS 11.71.050; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

* **Sec. 24.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when under AS 47.12.040(a)(2) the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of

another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony.

(a) **In General.** In every trial the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may authorize the

amend #12 at its discretion

contemporaneous two-way video conference testimony of a witness if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The persons who are present with the witness must be identified. The parties may move to exclude any person other than the video conference technician from the witness's presence; the court, in its discretion, may exclude a person other than the video conference technician from the presence of the witness.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

*** Sec 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 7 - 11, 14, 17 - 19, 21 - 24, and 27 of this Act

apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 6, 12, 13, 16, 20, and 25 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree".

*** Sec. 28.** This Act takes effect July 1, 2012.

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT #3

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

TO: HB 359

BY Gruenberg

Page 4, line 29 through page 5, line 3:

Delete all material and insert: (amdt. to amdt. #3)

"(c) Prostitution is a class C felony if

(1) the defendant ~~is a patron of~~ patronizes a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT #4

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

27G-2-B
3/15/2012
(2:24 pm)
Carpeneti

AMENDMENT #5

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 17, line 1, following "testimony":

Insert "at trial"

Page 17, line 11, following "stand.", through line 15:

Delete all material.

Insert "The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified."

full packet fn. (7)

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **1**
Publish Date: **2/22/12 (H)**

Identifier (file name): 0627-LAW-CRIM-02-17-12
Dept. Affected: Law
Title: An Act relating to sex trafficking and distribution of indecent materials.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/17/12 3:40PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/17/2012
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

The bill changes the description of the crime of promoting prostitution under AS 11.66.110 – 11.66.135 from promoting prostitution in the first, second, third, and fourth degrees to sex trafficking in the first, second, third, and fourth degrees.

It adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the definition of "serious felony offense" under the conspiracy law.

The bill amends the crime of distribution of indecent materials to minors under AS 11.61.128 in response to the judicial decision that the current law is unconstitutional due to over breadth by requiring the prosecution to prove that the offender intentionally distributed, or possessed with the intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

It adopts a procedure for contemporaneous two-way videoconference in criminal trials where the court finds that it is necessary to further an important public policy, that the witness is unavailable, and the testimony is given under oath and subject to cross-examination. The bill would also allow contemporaneous two-way videoconference testimony in hearings addressing the competency of a defendant to be tried for criminal charges if the witness resides 50 or more miles away from the place of the hearing or the customary travel to the site of the hearing is by air.

The bill would require a person present in Alaska to register as a sex offender if the person is required to register as a sex offender in another jurisdiction.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **2**
(H) Publish Date: **2/22/12**

Identifier (file name)	0627-DPS-DET-02-17-12	Dept. Affected	Public Safety
Title	SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS	Appropriation	Alaska State Troopers
		Allocation	AST Detachments
Sponsor	Rules by Request of the Governor		
Requester	Governor Parnell	OMB Component Number	2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Lt. Rodney Dial — Phone: (907) 247-4480
Division: Alaska State Troopers — Date/Time: 2/17/12 5:25 PM
Approved by: Joseph A. Masters, Commissioner — Date: 2/17/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill changes the name of the crime of "promoting prostitution" to "sex trafficking" in numerous sections in Alaska Statutes; makes changes to Alaska Statute to address recent court decisions regarding the distribution of indecent material to minors; adds AS 11.61.100 (Prostitution) to AS 11.66.145 (Forfeiture) relating to the forfeiture of property used in prostitution offenses; would define human trafficking and sex trafficking in the first degrees as serious felony offenses for purposes of the state conspiracy law; and requires a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska.

This bill will have no fiscal impact on the Division of Alaska State Troopers.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **3**
(H) Publish Date: **2/22/12**

Identifier (file name): 0627-DOA-PDA-2-17-12
Title: Sex trafficking and distribution of indecent materials
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 465-4414
Division: Public Defender Agency — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner, Department of Administration — Date: 2/17/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Public Defender Agency does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Public Defender. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **4**
(H) Publish Date: **2/22/12**

Identifier (file name): LL0627-DOA-OPA-2-17-12
Title: Sex trafficking and distribution of indecent material
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal & Advocay Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/17/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase, "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Office of Public Advocacy does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Office of Public Advocacy. Therefore, the Office of Public Advocacy submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **5**
Publish Date: **2/22/12 (H)**

Identifier (file name): JU2011200627
Title: "An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degr
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director
Division: Department of Corrections - Administrative Services
Approved by: Joseph D. Schmidt, Commissioner
Department of Corrections

Phone: 907-465-3339
Date/Time: 2/17/12 8:30 PM
Date: 2/17/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE #5

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill adds human trafficking in the first degree and sex trafficking in the first degree to the conspiracy statues (AS 11.31.120). A person convicted of this new crime would be subject to punishment for a Class B felony. The average sentence for a Class B felony is five years. The average daily cost of care in a DOC facility is $134.90. Therefore, one individual convicted of conspiring to commit sex trafficking in the first degree could cost the Department of Corrections $246,192.50 based on a five year *average* sentence.

In the past five years, DOC has seen an average of 2.4 convictions for promoting prostitution (sex trafficking). However, DOC does not have any historical data on conspiracy to commit sex or human trafficking, as this would be a new crime if this legislation were to pass. Therefore, DOC is currently unable to quanitfy the fiscal impacts of the passage of this legislation.

The Department will closely monitor the potential future fiscal impacts should this legislation pass.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**HB 359**
Fiscal Note Number	**6**
(H) Publish Date	**2/22/12**

Identifier (file name)	0627-DPS-R&I-02-21-12	Dept. Affected	Public Safety
Title	SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS	Appropriation	Statewide Support
		Allocation	Records & Identification
Sponsor	Rules by Request of the Governor		
Requester	Governor Parnell	OMB Component Number	1190

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	109.5		109.5	109.5	109.5	109.5	109.5
Travel	5.0		5.0	5.0	5.0	5.0	5.0
Services	5.8		5.8	5.8	5.8	5.8	5.8
Commodities	1.0		1.0	1.0	1.0	1.0	1.0
Capital Outlay	2.9		2.9	2.9	2.9	2.9	2.9
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	124.2		124.2	124.2	124.2	124.2	124.2
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

POSITIONS							
Full-time	**1**		1	1	1	1	1
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	David Schade, Director	Phone	(907) 269-0202
Division	Division of Statewide Services	Date/Time	2/21/12 11:07 AM
Approved by	Joe Masters, Commissioner	Date	2/21/2012
	Department of Public Safety		

(Revised 1/17/2012 OMB)

FISCAL NOTE #6

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This proposed legislation would require a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska even if there is no substantive law in Alaska that is similar to the offense the person was convicted of.

For the department's Records & Identification bureau to continue to accomplish a core service of providing public access to current information regarding sex offenders in Alaska, the determination that a person must register as a sex offender or child kidnapper in Alaska because of their requirement to register in another jurisdiction must be made timely and must be based on information that has been validated.

Considerable research and analysis of the criminal history background of persons with sex offense convictions outside of Alaska would be required to determine whether the offense of conviction is a registerable offense under the current laws of that jurisdiction and whether or not the person is subject to that jurisdiction's registration requirements. Coordination with the jurisdiction's sex offender central registry office would need to occur to obtain source documents and other relevant information on the person.

Additionally, it is anticipated that the department would need to continually monitor the status of registration laws and legal cases affecting sex offender registration in all jurisdictions to ensure a person required to register in Alaska under proposed AS 12.63.100(6)(D) continued to be subject to the registration requirements of the jurisdiction that their offense was committed in.

The department anticipates that these additional efforts will require one new full-time Criminal Justice Planner position. This position would be responsible to review and evaluate offender records with out-of-state sex offense convictions to determine the requirement to register under proposed AS 12.63.100(6)(D), to coordinate with other jurisdictions' sex offender central registry offices, and to monitor sex offender registration laws in other jurisdictions and any changes for possible impact to currently registered offenders.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CS HB 359 (JUD)**
Fiscal Note Number: (new 6) 7
() Publish Date:

Identifier (file name)	CS HB 359 (JUD)	Dept. Affected	Public Safety
Title	Sex Crimes; Testimony by Video Conference	Appropriation	Statewide Support
		Allocation	Records & Identification
Sponsor	Rules by Request of the Governor		
Requester	House Judiciary Committee	OMB Component Number	1190

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

CS HB 369 (JUD) deletes Sec. 20 of the original bill.

Prepared by	Melanie Lesh, Legislative Aide	Phone	907-465-4990
Division	House Judiciary Committee	Date/Time	3/14/12 12:00 AM
Approved by	Representative Carl Gatto, Chair	Date	3/14/2012
	House Judiciary Committee		

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CS HB 359 (JUD)

Analysis

There is no additional cost resulting from the passage of House Bill 359.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: HB359-ACS-TRC-2-28-12
Fiscal Note Number:
Publish Date:

Identifier (file name): HB359-ACS-TRC-2-28-2012
Dept. Affected: Alaska Court System
Title: Human trafficking; furnishing indecent material to minors; video conferencing
Appropriation: Trial Courts
Allocation:
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Nancy Meade, General Counsel — Phone: 907-463-4736
Division: Alaska Court System — Date/Time: 2/28/2012 1:00 p.m.
Approved by: Nancy Meade for Christine Johnson, Administrative Director — Date: 2/28/2012
Alaska Court System

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB359-ACS-TRC-2-28-12
2012 LEGISLATIVE SESSION

Analysis

House Bill 359 changes the crimes of prostitution in the first, second, third and fourth degrees to sex trafficking, and adds the crimes of human trafficking and sex trafficking in the first degree to the definition of "serious felony offense" under the conspiracy law. These changes have no fiscal impact on the court system.

The bill also amends the crime of distribution of indecent materials to minors (AS 11.61.128(a)) by requiring intent and knowledge as elements of the crime, it creates new crimes, and it requires persons with a sex offense in another jurisdiction to register as a sex offender in Alaska. These changes could have the effect of changing the number and types of criminal cases that are filed with and handled by the court system. However, the number of cases filed under AS 11.61.128(a) in FY 2011 was low, and the court expects that it would handle any additional cases under this bill in the normal course, without any fiscal impact. The court will monitor the cases filed under the revised statutes to determine whether the bill does cause a significant change, but a fiscal impact from those revisions is not expected.

In addition, Section 25 of House Bill 359 adds a Rule of Criminal Procedure that allows for two-way videoconferencing for witness testimony in criminal trials when the parties agree or when the court authorizes it because it is found to be necessary to further an important public policy, the witness is not available, and the testimony is given under oath and subject to cross-examination. Similarly, Section 16 adds a new subsection to AS 12.47.100 allowing the testimony of witnesses in competency hearings to be presented by two-way videoconferencing in certain circumstances.

The court does not view this bill as requiring installation of high-quality, high-definition videoconferencing cameras, televisions, and speakers in courtrooms, and therefore is not basing its fiscal note on the high cost of that undertaking. Still, the bill may result in the increased costs associated with the increased use of "webcams" for the video testimony of witnesses, such as the costs of software and, possibly, access to increased bandwidth. The court cannot accurately determine how many trials and competency hearings might include testimony by videoconferencing under this bill, and therefore submits an indeterminate fiscal note.

March 4, 2012

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STUDENT ADVISORS

The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

Re: HB 359: Video Testimony and Sex Offender Registration
ACLU Review of Legal Issues

Dear Chair Gatto and Vice-Chair Thompson:

Thank you for the opportunity to provide written testimony with respect to House Bill 359, which – amongst other provisions – permits judicial testimony by video conference and modifies the registration of sex offenders.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we wish to advise you of constitutional and policy issues with sections 16, 20, and 25 of this proposed legislation.

Section 16 Unconstitutionally Violates the Confrontation Clauses

If enacted, Section 16 of HB 359 would permit, in the context of determining if a criminal defendant is mentally competent to stand trial, a witness, "including the psychiatrist or psychologist who examined the defendant," who would have to "travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court," to "testify concerning the competency of the defendant by contemporaneous two-way

video conference[.]" A court would likely rule that this provision violates the Confrontation Clauses of the federal and Alaska Constitutions. U.S. Const., Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); Alaska Const., Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him").

The federal Confrontation Clause's "right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). It is a "bedrock procedural guarantee" that "applies to both federal and state prosecutions." *Id.* at 42; *see Lemon v. State*, 514 P.2d 1151 (Alaska 1973).

This essential right serves four purposes: first, it "insures that the witness will give his statements under oath [by] impressing him with the seriousness of the matter," *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (internal quotation omitted); second, it "ensur[es] that evidence admitted against an accused is reliable" by "forc[ing] the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth," *id.* (internal quotation omitted); third, it "permits the jury . . . to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility," *id.* (internal quotation omitted); and fourth, it has a "strong symbolic purpose" of assuring everyone that the prosecution is fair, *id.* at 847. Confrontation "may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 846–47 (internal quotation omitted).

Face-to-face confrontation is "the core of the values furthered by the Confrontation Clause," *id.* at 847 (internal quotation omitted) and "[t]he prosecution *must* produce . . . witnesses . . . against the defendant," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2534 (2009) (emphasis in original). The face-to-face confrontation may be denied only if, after a fact-based, "case-specific" inquiry, *Craig*, 497 U.S. at 855, a court determines that "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," *id.* at 850.

The "necessary to further an important public policy" prong is not easily satisfied. While juvenile victims of sexual violence may be exempted from personally confronting the accused, the denial of face-to-face confrontation is only justified if "it is the presence of the defendant that causes the trauma." *Id.* at 856. But, the desire to have the child witness avoid "courtroom trauma generally" is insufficient to deny face-to-face confrontation "because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present." *Id.* And, the court must determine that "the emotional distress . . . is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify." *Id.* (internal quotation omitted); *Blume v. State*, 797 P.2d 664, 674 (Alaska Ct. App. 1990). Simple need for a witness's testimony,[1] expediency,[2] efficiency,[3] security,[4] "convenience and cost-saving,"[5] and a desire not

[1] *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).

to leave a severely ill, elderly spouse's side[6] do not satisfy *Craig*'s important public policy test nor justify avoiding face-to-face in-person confrontation.[7]

While no court has squarely addressed if "the [federal] Confrontation Clause applies to pretrial competency hearings," *United States v. Hamilton*, 107 F.3d 499, 504 (7th Cir. 1997), such as those in Alaska Stat. § 12.47.100, an Alaska court might hold that the federal and state Confrontation Clauses do. West Virginia holds that a defendant is entitled to face-to-face confrontation in pretrial hearings to determine whether to transfer his case from juvenile to criminal court, *State v. Gary F.*, 432 S.E.2d 793, 800 (W. Va. 1993), and Pennsylvania applies the Confrontation Clauses to pretrial suppression hearings, *Commonwealth v. Atkinson*, 987 A.2d 743, 746 (Pa. Super. Ct. 2009).

The touchstone of a court's inquiry would be the Confrontation Clauses' purpose in a competency hearing. A competency hearing is "critically important," *see Gary F.*, 432 S.E.2d at 801, and "an adversarial proceeding and a critical stage in a criminal proceeding . . . . at which substantive rights may be preserved or lost," *Atkinson*, 987 A.2d at 747 (internal quotation omitted). Indeed, the competency hearing is how the court determines if a "defendant is unable to understand the proceedings against [him] or to assist in [his] own defense," and if not, the defendant "may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists." Alaska Stat. § 12.47.100(a). The court decides this issue through an adversarial process and "[t]he party raising the issue of competency bears the burden of proving the defendant is incompetent by a preponderance of the evidence." *Id.* at § 12.47.100(c).

The court bases its decision on the testimony of "at least one qualified psychiatrist or psychologist," *id.* at § 12.47.100(b), but the scientific expertise of the witness does not affect the Confrontation Clause analysis. "The prosecution *must* produce . . . witnesses . . . against the defendant," *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original), even if the witnesses are scientists offering forensic analysis. "Confrontation is one means of assuring accurate forensic

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[2] *Id.*

[3] *Commonwealth v. Atkinson*, 987 A.2d 743, 750 (Pa. Super. Ct. 2009).

[4] *Id.*

[5] *Id.* at 751.

[6] *Bush v. State*, 193 P.3d 203, 216 (Wyo. 2008).

[7] In *Melendez-Diaz*, the U.S. Supreme Court directly faced a request to "relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.'" *Melendez-Diaz*, 129 S. Ct. at 2540. The Court rejected this proposal because "[i]t is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience." *Id.* "It is a truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

analysis. . . . Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 2536–37. "[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534. The importance of a pretrial competency hearing, with an adversarial process to determine critical rights, likely requires the full protections of the Confrontation Clauses.

In conducting its inquiry of Section 16, an Alaska court will rely on the *Craig* test. *Blume*, 797 P.2d at 674; *Reutter v. State*, 886 P.2d 1298, 1307 (Alaska Ct. App. 1994) (using *Craig* to evaluate Alaska Stat. § 12.45.046, which allows child victims to testify via closed-circuit television).[8] Using the *Craig* test, the Eight and Eleventh federal circuits determined "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. . . . the two are not constitutionally equivalent." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (en banc). The Confrontation Clause "is most certainly compromised when the confrontation occurs though an electronic medium. Indeed, no court that has considered the question has found otherwise[.]" *Id.* "The virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect." *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

Given (1) the criticism of two-way video testimony and (2) that the supposed benefits of Section 16, such as cost-savings, convenience, and efficiency, do not rise to an "important public policy," a court would likely conclude that Section 16 violates the federal and Alaska Confrontation Clauses. This is especially true because the Alaska Supreme Court has expressly reserved its ability to interpret the Alaska Confrontation Clause more broadly than the federal one, *Lemon*, 514 P.2d at 1154 n.5,[9] and because it has "the authority and, when necessary, duty to construe the provisions of the Alaska Constitution to provide greater protections than those arising out of the identical federal clauses," *Doe v. State*, 189 P.3d 999, 1005 (Alaska 2008).

This conclusion is even more inexorable given the Alaska Supreme Court's long-standing recognition that one of the "vital interests" of the Confrontation Clauses is to "enable[] the defendant to demonstrate to the jury the witnesses' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom," *Lemon*, 514 P.2d at 1153, and that testimony via video may alter "impressions of the witness' demeanor and credibility," *Stores v. State*, 625 P.2d 820, 828 (Alaska 1980).[10]

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[8] The Sixth, Eighth, Ninth, Tenth, and Eleventh federal circuits apply the *Craig* test to evaluate two-way video conference testimony. *Yates*, 438 F.3d at 1313 (listing cases).

[9] The supreme courts of Illinois and Pennsylvania each interpreted their state Confrontation Clause more broadly than the federal one and each concluded that their state Clauses prohibit testimony by closed-circuit television. *People v. Fitzpatrick*, 633 N.E.2d 685, 688 (Ill. 1994); *Commonwealth v. Ludwig*, 594 A.2d 281, 281–82 (Pa. 1991).

[10] Video testimony causes the "most serious . . . [e]vidence distortion . . . because the picture conveyed may influence a juror's feelings about guilt or believability. . . . Variations in lens or angle, may result in failure to

Even if a court did not completely overturn Section 16, that Section "must be construed to incorporate the requirements of *Craig*." *Reutter*, 886 P.2d at 1307. *Craig* would require that a court permit video testimony only if it "is necessary to further an important public policy," *Craig*, 497 U.S. at 850, which, as noted above, does not include efficiency, speed, convenience, or cost-savings. At best, Section 16 would be functionally overturned because it would be the rare situation when the need for video testimony in a competency hearing satisfied *Craig*.[11]

Section 25 Should Be Improved to Enhance Witnesses' Reliability and to Strengthen Its Constitutionality

Section 25's proposed addition to the Alaska Rules of Criminal Procedure tracks *Craig* and so it is likely secure from federal constitutional challenge.[12] It should, however, be altered to enhance witnesses' reliability and to further buttress its presumed constitutionality.

Craig and other courts note that the Confrontation Clause increases witnesses' reliability by exposing witness coaching. *E.g. Craig*, 497 U.S. at 847 (face-to-face confrontation may "reveal the child coached by a malevolent adult") (internal quotations omitted). Subpart (c) of Section 25 puts the onus on the parties to "move to exclude any person other than the video conference technician from the witness's presence[.]"

Given that witnesses who testify via video are more able to be coached (because someone in the video room, rather than in the courtroom, with the witness, may more easily coach him) and any coaching is harder to detect, the Committee should amend the Rule and establish a default of having just the video technician in the room with the witness, but permitting the parties to move to allow others to be present with him. To further caution against coaching, the Committee should also add a provision that a second camera should transmit to the courtroom a live feed of what the witness sees.[13]

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convey subtle nuances, including changes in witness demeanor such as a nervous twitch or paling and blushing in response to an important question . . . Furthermore, the camera itself is selective of what it relates to the viewer. Transmission of valuable first impressions may be impossible, and off-camera evidence is necessarily excluded while the focus is on another part of the body or another witness." *Stores*, 625 P.2d at 828 n.25.

[11] This analysis focused on Section 16's unconstitutionality, but the Committee should also consider practical problems with video testimony, such as the difficulties of having the witness physically use and interact with exhibits, counsel, and the court.

[12] Alaska courts could conclude, however, that the Rule violates the Alaska Confrontation Clause. *Lemon*, 514 P.2d at 1154 n.5

[13] Not all coaching is intentional or malicious. Spectators may innocently influence testimony through their facial expressions and body language. Permitting the court, counsel, and the defendant to see what the witness sees enables them to notice and check that behavior.

Section 20 Is Unwise; It Shackles Alaska's Policy to Every Other Jurisdiction

Section 20 adds a requirement that anyone who has been convicted of "a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction" must register with the Alaska sex offender registry. Alaska Stat. § 12.63.100(6) currently ensures that out-of-state offenders register in Alaska if they "committed or attempted to commit" one of Alaska Stat. § 12.63.100(6)'s offenses or "a similar offense [or] law of another jurisdiction." Section 20, then, serves only to unpin the Alaska registry from Alaska crimes and Alaska public policy.

This concern is not academic. Other states require registration for offenses that, if committed in Alaska, would not require the offender to register. In Alaska, for example, while most forms of indecent exposure require offenders to register, not all do: streaking (perhaps done as a prank),[14] is a misdemeanor in Alaska[15] and does not require registration.[16] Other states are more draconian; to continue to use the indecent exposure example, some states require registration for all forms, even those variants that Alaska has omitted from registration.[17] If Section 20 is enacted, it would commit these individuals to register annually for at least 15 years[18] and suffer the ignominy and consequences of registration.

Registration is life-changing. The Department of Public Safety publishes, on an easily accessible website, each registrant's "name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located." Alaska Stat. § 18.65.087(b). This "'impose[s] significant affirmative obligations and a severe stigma on every [registrant],'" *Doe*, 189 P.3d at 1009 (quoting *Smith v. Doe*, 538 U.S. 84, 111 (Stevens, J., dissenting)) (first alteration in original), and "through aggressive public notification of their crimes," *id.* (internal quotation omitted), causes registrants to risk "public

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[14] Associated Press, *Juneau High School Boys Disciplined for Streaking*, Oct. 28, 2009; Julia O'Malley, *Hey, Nude Hikers, What About the Bugs?*, Anchorage Daily News, May 19, 2010 (discussing nude hiking on Anchorage's trails).

[15] Alaska Stat. § 11.41.460.

[16] Alaska Stat. § 12.63.100(6)(C)(iv) (not requiring registration for indecent exposure so long as it was not "before a person under 16 years of age and the offender [does not have] a previous conviction for that offense").

[17] Including California (Cal. Penal Code § 290(c) for violating California's indecent exposure statute, Cal. Penal Code. § 314); Colorado (Colo. Rev. Stat. § 16-22-103 for violating Colorado's indecent exposure statute, Colo. Rev. Stat. § 18-7-302); and Oklahoma (Okla. Stat. tit. 57, § 582(A) for violating Oklahoma's indecent exposure statute, Okla. Stat. tit. 21, § 1021).

[18] 15 years is the briefest registration period in Alaska. Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson," *id.* at 1010 n.80.

If obligated to register, one must register each year for at least 15 years.[19] Once on the registry, there is "no mechanism" through which one "can petition the state or a court for relief from the obligations of continued registration and disclosure." *Id.* at 1017.

No matter one's feelings about registration as a policy matter, everyone should be able to agree that placement on the registry, because of its significant, irrevocable consequences, should not be done lightly. If Section 20 is enacted, individuals will be forced to register and bear the heavy costs even though they have not committed an offense that Alaska, in its sound policy judgment, has decided warrants registration.

Alaska should not abdicate its sovereignty and wisdom nor should it cede its policymaking to other jurisdictions. The Legislature should continue to exercise its considered judgment in determining what offenses justify registration. Section 20 would make Alaska's registry an appendage to all other jurisdictions and it would carelessly ensnare otherwise anodyne individuals into its life-changing scheme.

Conclusion

We hope that the Judiciary Committee will recognize that these are just some of the problems with House Bill 359, in that it impermissibly deprives Alaskans of their constitutional rights and it outsources the Legislature's policy judgments about the sex offender registry to every other jurisdiction.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

[19] Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

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In promoting prostitution, no due process violation for statute dispensing with reasonable mistake of age defense

668 P.2d 829
(Cite as: 668 P.2d 829)

C

Court of Appeals of Alaska.
Willie B. BELL, Appellant,
v.
STATE of Alaska, Appellee.

No. 5821.
Sept. 9, 1983.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., of promoting prostitution in the first degree and managing a prostitution enterprise, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) statute which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree does not violate due process of law; (2) trial court did not abuse its discretion in admitting tape recording of phone conversation between defendant and person he was alleged to have induced to engage in prostitution even though part of tape was inaudible; (3) evidence was sufficient to support finding of existence of probable cause to support issuance of search warrant to record conversations between defendant and women who had worked for him; (4) defendant failed to show prejudice stemming from untimely notification of execution of the warrant; (5) trial court's supplemental instruction, issued in response to inquiry by jury whether inability to agree on one count of indictment constituted a hung jury, was not coercive and did not constitute an abuse of discretion; (6) conviction of the two offenses did not violate double jeopardy; and (7) increase of defendant's sentence by one year was justified by fact that defendant attempted to arrange a romantic involvement with a 14-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of 16.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚿4509(23)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(23) k. Sex offenses, incest, and prostitution. Most Cited Cases
(Formerly 92k258(5))

Prostitution 315H ⚿14

315H Prostitution
315Hk11 Constitutional, Statutory, and Regulatory Provisions
315Hk14 k. Validity. Most Cited Cases
(Formerly 92k258(5))

The Legislature may, consistent with the requirements of constitutional due process, preclude mistake of age from constituting a defense to the crime of promoting prostitution in the first degree. AS 11.66.110; Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

[2] Criminal Law 110 ⚿20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In general. Most Cited Cases

Criminal intent is a necessary ingredient of criminal liability, and one charged with criminal conduct must have an awareness or consciousness of wrongdoing.

[3] Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)

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As an element of the offense of promoting prostitution in the first degree, defendant was required to be aware that he was procuring women to engage in acts of prostitution. AS 11.66.110(a)(2), (b).

[4] Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)
In prosecution for promoting prostitution in the first degree, while defendant was not required to know the age of those whom he procured, this is not to say that the offense did not require mens rea or a culpable mental state. AS 11.66.110(a)(2), (b).

[5] Criminal Law 110 ⚿33

110 Criminal Law
110II Defenses in General
110k33 k. Ignorance or mistake of fact. Most Cited Cases
(Formerly 316k1)

Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)
Even if defendant, who was convicted of promoting prostitution in the first degree on a basis that he induced a person under the age of 16 to engage in prostitution, had made a reasonable mistake of age of the person induced, defendant would still have been guilty of promoting prostitution in the third degree. AS 11.66.110(a)(2), (b), 11.66.130(a)(2).

[6] Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)

The act of procuring another for purposes of prostitution is malum in se, without regard to the age of the person procured, and thus, in a prosecution for procuring a person under the age of 16 years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. AS 11.66.110(a)(2), (b); Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 ⚿4509(23)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(23) k. Sex offenses, incest, and prostitution. Most Cited Cases
(Formerly 92k258(5))

Prostitution 315H ⚿14

315H Prostitution
315Hk11 Constitutional, Statutory, and Regulatory Provisions
315Hk14 k. Validity. Most Cited Cases
(Formerly 316k1)
Statute which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree does not violate due process of law. AS 11.66.110(b); Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

[8] Criminal Law 110 ⚿1169.1(10)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(10) k. Documentary and demonstrative evidence. Most Cited Cases
In prosecution for promotion of prostitution in

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first degree, trial court's decision to admit recording of a telephone conversation between defendant and a person defendant was alleged to have induced to engage in prostitution would be reversible error only if it constituted an abuse of discretion. AS 11.66.110.

[9] Criminal Law 110 ⚿438.1

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publica- tions
110k438.1 k. Sound recordings. Most Cited Cases

In prosecution for promotion of prostitution in the first degree, trial judge did not abuse his discretion in admitting tape recording of a telephone conversation between defendant and a person whom he was alleged to have induced to engage in prostitution, a portion of which was inaudible, in that most of the tape was audible, the judge gave cautionary instruction, and probative value of the tape outweighed the possibility of prejudice. AS 11.66.110.

[10] Telecommunications 372 ⚿1460

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1460 k. In general. Most Cited Cases
(Formerly 372k510)

Procedures outlined in federal electronic surveillance act need not supplement the requirements that must be met before electronic monitoring of conversations is permitted.

[11] Searches and Seizures 349 ⚿191

349 Searches and Seizures
349VI Judicial Review or Determination
349k191 k. In general; conclusiveness of warrant in general. Most Cited Cases
(Formerly 110k1158(2))

Trial judge's determination that probable cause existed for issuance of search warrant was entitled to great deference by the Court of Appeals.

[12] Telecommunications 372 ⚿1467(5)

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1464 Application or Affidavit
372k1467 Competency of Information; Hearsay
372k1467(5) k. Citizens, victims or officers. Most Cited Cases
(Formerly 372k515)

In prosecution for promotion of prostitution in the first degree, evidence was sufficient to support finding that probable cause existed for issuance of *Glass* search warrant to record conversations between defendant and two women who had worked for him, and who were the informants. AS 11.66.110.

[13] Searches and Seizures 349 ⚿115.1

349 Searches and Seizures
349II Warrants
349k115 Competency of Information; Hearsay
349k115.1 k. In general. Most Cited Cases
(Formerly 349k115, 349k3.6(3))

Aguilar-Spinelli standards for ascertaining the reliability and credibility of informants who have provided hearsay information in support of issuance of a search warrant did not apply where neither informant in support of search warrant was a confidential informant in that both testified personally and were under oath at the time, and the magistrate had ample opportunity to assess their credibility.

[14] Criminal Law 110 ⚿392.49(9)

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110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(3) Weight and Sufficiency
110k392.49(9) k. Wiretaps; electronic surveillance. Most Cited Cases
(Formerly 110k394.3)

Defendant failed to show prejudice stemming from untimely notification of execution of search warrant authorizing his telephone conversation to be monitored and recorded, and, as it did not appear that the late notification was the result of bad faith on the part of investigating officers, the untimely notice to defendant did not justify suppression of the recording made pursuant to the warrant. Rules Crim.Proc., Rules 37, 37(b)(1, 2).

[15] Criminal Law 110 ⚿863(2)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) k. Requisites and sufficiency. Most Cited Cases

Trial court's supplemental instruction, issued in response to note from jury inquiring if inability to agree on one count of the indictment constituted a hung jury, stating in part that the jury had not deliberated long enough to validly reach conclusion that it could not agree, was not coercive and did not constitute an abuse of discretion, in that the jury had not deliberated for an extended time, the communication did not unequivocally indicate a deadlock, and the court's instruction did not imply that the jury would be required to deliberate until unanimity was reached.

[16] Double Jeopardy 135H ⚿148

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk148 k. Sex offenses; obscenity. Most Cited Cases
(Formerly 110k163)

Finding that defendant managed a prostitution business with at least two women working for him involved the element of management and required proof of an enterprise, neither of which were involved in separate charge of inducing a person under 16 years of age to engage in prostitution, and thus, defendant's intent and conduct differed on the two charges, and sentences on the two charges did not violate double jeopardy. AS 11.66.110(a)(2), 11.66.120(a)(1), 11.66.150(2); U.S.C.A. Const.Amend. 5.

[17] Double Jeopardy 135H ⚿112.1

135H Double Jeopardy
135HIV Effect of Proceedings After Attachment of Jeopardy
135Hk112 Resentencing; Increase of Punishment
135Hk112.1 k. In general. Most Cited
(Formerly 135Hk112, 110k163)

Trial court's failure to reduce defendant's sentence after finding that at least part of basis for increased sentence previously imposed may not have been true was not an abuse of discretion, and as there was no increase in the original sentence, no violation of double jeopardy was involved. U.S.C.A. Const.Amend. 5.

[18] Sentencing and Punishment 350H ⚿95

350H Sentencing and Punishment
350HI Punishment in General
350HI(E) Factors Related to Offender
350Hk93 Other Offenses, Charges, Misconduct
350Hk95 k. Nature, degree, or seriousness of other misconduct. Most Cited Cases
(Formerly 110k986.2(4.1), 110k986.2(4))

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Fact that defendant attempted to arrange a romantic involvement with a 14-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of 16 indicated a lack of remorse on defendant's part and a greater need for deterrence of defendant himself, and thus justified imposition of a more severe sentence. AS 11.66.110.

***831** Christine Schleuss, Asst. Public Defender, Dana Fabe, Public Defender, Anchorage, for appellant.

W.H. Hawley, Jr., Asst. Atty. Gen., Anchorage, Wilson L. Condon, Atty. Gen., Juneau, for ap- pellee.

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

OPINION

BRYNER, Chief Judge.

Willie B. Bell appeals his convictions for promoting prostitution in the first degree in violation of AS 11.66.110(a)(2) and managing a prostitution enterprise in violation of AS 11.66.120(a)(1). He also appeals the sentence imposed. We affirm.

Bell was a twenty-nine-year-old army sergeant when he procured two sixteen-year-old girls, C.R. and M.J., and one fourteen-year-old girl, D.W., for prostitution. C.R. began living with Bell and engaging in prostitution after Bell promised to marry her and to buy her a new car and new clothing. At Bell's direction, D.W. and M.J. worked as prostitutes in May, 1980. On May 22, 1980, Bell assaulted M.J., claiming that she had been drinking instead of "working." Fearing that Bell would harm them, C.R. and M.J. left him and contacted police, who obtained a search warrant to record conversations between M.J., C.R. and Bell. A telephone conversation between Bell and C.R. and a conversation involving Bell, M.J. and C.R. were recorded pursuant ***832** to the warrant and used as evidence against Bell.

The indictment returned against Bell charged two counts of promoting prostitution in the first degree, alleging that he induced D.W. to engage in prostitution when she was under the age of sixteen (Count I) (AS 11.66.110(a)(2)), and that he induced C.R. to engage in prostitution by means of force (Count II) (AS 11.66.110(a)(1)). Count III of the indictment, as it went to the jury, alleged that Bell was guilty of attempted promotion of prostitution in the first degree, AS 11.66.110(a)(1) and AS 11.31.100(a), regarding M.J. The indictment also alleged that Bell managed, supervised, controlled or owned a prostitution enterprise other than a house of prostitution in violation of AS 11.66.120(a)(1) (Count IV). Bell was convicted of Counts I and IV. On Count II, Bell was acquitted of the charge but convicted of the lesser-included offense of promoting prostitution in the third degree, AS 11.66.130. On Count III, Bell was found not guilty of the charge but guilty of the lesser-included offense of attempted promotion of prostitution in the third degree, AS 11.66.130 and 11.31.100(a). Bell was not sentenced on Counts II and III. Superior Court Judge Milton M. Souter sentenced Bell to a five-year term with two years suspended on Count I, and a four-year term with three years suspended on Count IV. The sentences for these offenses were to run concurrently. Subsequently, Judge Souter refused to reduce the sentence.

On appeal, Bell argues that: (1) he should have been allowed to present a reasonable mistake of age defense to the charge contained in Count I; (2) a partially inaudible tape recording should not have been admitted into evidence; (3) the search warrant for recording of conversations was improperly issued and executed; (4) supplemental instructions given to the jury were unduly coercive; (5) the sentences imposed by the trial court violated his double jeopardy rights; and (6) Judge Souter gave improper consideration to a letter Bell wrote, while awaiting sentencing, to the fourteen-year-old daughter of another inmate.

I. MISTAKE OF AGE

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[1] Bell asserts that the trial court erred in refusing to give a proposed jury instruction providing for a reasonable mistake of age defense to the charge of inducing a person under the age of sixteen to engage in prostitution in violation of AS 11.66.110(a)(2).[FN1] Bell argues that AS 11.66.110(b) violates his due process rights under the United States and Alaska constitutions by expressly precluding mistake of age as a defense to the charge of violating AS 11.66.110(a)(2). We find this argument unpersuasive and conclude that the legislature may, consistent with the requirements of constitutional due process, preclude mistake of age from constituting a defense to the ***833** crime of promoting prostitution in the first degree.

FN1. AS 11.66.110 provides:

> PROMOTING PROSTITUTION IN THE FIRST DEGREE.
>
> (a) A person commits the crime of promoting prostitution in the first degree if he
>
> (1) induces or causes a person to engage in prostitution through the use of force;
>
> (2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or
>
> (3) induces or causes a person in his legal custody to engage in prostitution.
>
> (b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.
>
> (c) Promoting prostitution in the first degree is a class B felony.

The jury was instructed on the elements of this offense. The court then instructed that:

> It is not a defense to the crime charged in Count I of the Indictment that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.

The instruction proposed by Bell stated:

> It is a defense to Count I of the indictment, Inducing a Person Under 16 Years of Age to Engage in Prostitution, that the defendant reasonably and in good faith believed that the female person was of the age of sixteen years or older, even though, in fact, she was under the age of sixteen years. If from all the evidence you have a reasonable doubt as to the question whether defendant reasonably and in good faith believed that she was sixteen years of age or older, you must give the defendant the benefit of that doubt and find him not guilty.

It is apparent that the legislature considered procurement of a person under sixteen to be an aggravated form of promoting prostitution. The commentary to the Revised Criminal Code, 2 Senate Journal, Supplement No. 47, at 109 (1978), states that by denying a defendant the defense of reasonable mistake as to age, creation of strict liability was intended as to the element of the offense involving age of the victim.[FN2] Supporting the validity of the legislature's decision in this regard is the supreme court's opinion in *Hentzner v. State,* 613 P.2d 821 (Alaska 1980), in which the court held:

FN2. *See also* Alaska Criminal Code Revision Part 4, at 103 (Tent. Draft 1977) (Commentary to AS 11.66.140).

> Where a crime involved may be said to be *malum in se,* that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case the requirement of criminal intent is met on

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proof of conscious action, and it would be entirely acceptable to define the word "wilfully" to mean no more than a consciousness of the conduct in question.

Id. at 826. *See also Wheeler v. State,* 659 P.2d 1241, 1254 n. 18 (Alaska App.1983).

[2] Bell correctly states the well-recognized rule in this jurisdiction that criminal intent is a necessary ingredient of criminal liability and that one charged with criminal conduct must have an awareness or consciousness of wrongdoing. *Speidel v. State,* 460 P.2d 77, 78 (Alaska 1969). In *Speidel,* the awareness of wrongdoing was in the context of a larceny-type crime, for which courts have historically required a specific intent to wrongfully deprive. In *Alex v. State,* 484 P.2d 677 (Alaska 1971), the supreme court discussed the intent required for non-larceny crimes:

> However, as applied to crimes generally, what is imperative, is that an accused's act be other than simply inadvertent or neglectful. What is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a "wrongdoing." It is, however, no defense that one was not aware that his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing.

Id. at 681–82.[FN3]

> FN3. *See also State v. Rice,* 626 P.2d 104, 115 (Alaska 1981) (Matthews, J., concurring) (a statute prohibiting the transportation of illegally taken game was overbroad, because it included "within its ambit the conduct of people who have no reason to believe that what they are doing is criminal").

[3][4] We believe this language is applicable to Bell's actions, since he was consciously committing the acts proscribed by law. As an element of this offense, Bell was required to be aware that he was procuring women to engage in acts of prostitution. Indeed, the jurors in this case were instructed that they must be convinced beyond a reasonable doubt

> that the defendant engaged in conduct which caused or induced [D.W.] to engage in prostitution; [and] that the defendant engaged in said conduct with the specific intent to cause or induce [D.W.] to engage in prostitution.

Thus, while Bell was not required to know the age of those whom he procured, this is not to say that the offense did not require *mens rea* or a culpable mental state.

We also note that AS 11.66.110(b) is in accord with the common law view that there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be illegal or immoral. [FN4] As Bell recognizes ***834** on appeal, his conduct would still have been illegal even if D.W. had been sixteen or over. AS 11.66.130(a)(2). [FN5] Moreover, although it might be arguable that the offense of prostitution should be considered a *malum prohibitum* crime, we think it manifest that *promoting* prostitution is an offense "which reasoning members of society regard as condemnable," and thus, is *malum in se. Hentzner v. State,* 613 P.2d at 826. Accordingly, there can be little doubt that *Hentzner* 's basic requirement of an awareness or consciousness of wrongdoing is satisfied, despite the fact that AS 11.66.110(b) precludes mistake of age as a defense to the offense of promoting prostitution in the first degree.

> FN4. In the landmark case of *Regina v. Prince,* L.4., 2 Cr.Cas.Res. 154 (1875), the defendant was convicted of taking a girl under sixteen years of age from under the care of her father, even though the defendant reasonably believed she was older. The defense of mistake of age was disallowed on the ground that removal of an unmar-

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> ried girl from the lawful custody of her parents would have been a crime even had she been as old as he believed. Hence, the defendant acted at his peril.
>
> FN5. AS 11.66.130 provides, in relevant part:
>
> (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, he ...
>
> (2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution ....
>
> (b) Promoting prostitution in the third degree is a class A misdemeanor.

In continuing to press his claim that AS 11.66.110(b) imposes an unconstitutional standard, Bell relies upon *State v. Guest,* 583 P.2d 836 (Alaska 1978), in which the supreme court upheld a trial court's decision to instruct the jury on a defense of reasonable mistake of age in a statutory rape case. Following the reasoning of *Speidel* and *Alex,* the court stated that an intent requirement must be read into former AS 11.15.120 to save it from unconstitutionality. To refuse a defense of mistake of age in a statutory rape case, according to the *Guest* court, would be to impose significant criminal liability without any criminal mental element. *Id.* at 839.

Bell relies most heavily upon the following language in *Guest:*

> It has been urged in other jurisdictions that where an offender is aware he is committing an act of fornication he therefore has sufficient criminal intent to justify a conviction for statutory rape because what was done would have been unlawful under the facts as he thought them to be. We reject this view. While it is true that under such circumstances a mistake of fact does not serve as a complete defense, we believe that it should serve to reduce the offense to that which the offender would have been guilty of had he not been mistaken. Thus, if an accused had a reasonable belief that the person with whom he had sexual intercourse was sixteen years of age or older, he may not be convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was eighteen years of age or older, he may still be criminally liable for contribution to the delinquency of a minor.

Id. (citations and footnotes omitted). The court cited in support of its position section 2.04(2) of the Model Penal Code (Proposed Official Draft 1962), which provides:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

[5] We believe the problem addressed in *Guest* is distinguishable from the issue at hand. As we have stated, Bell did not lack criminal intent; he intended to promote prostitution. *See Hentzner v. State,* 613 P.2d at 826; *Wheeler v. State,* 659 P.2d at 1251. The court in *Guest* was careful to point out that fornication was not itself a crime, so that it could not have been considered as a lesser-included offense of statutory rape. Also, although the court went on to observe that Guest *might* still have ***835** been guilty of contributing to the delinquency of a minor under former AS 11.40.130 if he did not have a reasonable belief that his partner was under eighteen, it is clear that Bell was *necessarily* guilty of promoting prostitution in the third degree if the facts were as he supposed them to be.

This distinction is supported by analysis of other authorities. The revised criminal code contains no provision paralleling the second sentence of MPC § 2.04(2), quoted by the *Guest* court. Instead,

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AS 11.81.600(b)(2) provides:

> (b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that no culpable mental state must be proved
>
> (2) *if an intent to dispense with the culpable mental state requirement for that element clearly appears.*

(Emphasis added.) AS 11.66.110(b), by proscribing any defense to AS 11.66.110(a)(2) based upon mistake of age, clearly demonstrates a legislative intent to dispense with knowledge of age.

More importantly, despite the language of MPC § 204(2), the Model Penal Code takes essentially the same approach as the Revised Code to in its treatment of criminal intent for the offense of promoting prostitution. MPC § 251.2(2) (1980) makes the conduct proscribed by AS 11.66.130(a)(2) —promoting prostitution in the third degree—a misdemeanor, while § 251.2(3)(c) provides that the same conduct shall be a felony if "the actor promotes prostitution of a child under 16, *whether or not he is aware of the child's age.* " Similarly, New York Penal Law § 230.30 (1978), from which AS 11.66.110 appears to be derived, provides that it shall be a felony to "knowingly" advance or profit from the prostitution of a person less than sixteen years old, while New York Penal Law § 15.20(3) (1967) provides that

> Notwithstanding the use of the term "knowingly" in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.

We find it highly persuasive that these statutory schemes are, when applied to the precise conduct engaged in by Bell, in consonance with the approach taken in the Revised Code.

[6][7] Under the Revised Alaska Criminal Code, it is Bell's intentional procurement of a person under the age of sixteen years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. The act of procuring another for purposes of prostitution is *malum in se,* without regard to the age of the person procured, and thus, as we have indicated, in a prosecution for procuring a person under the age of sixteen years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. *Hentzner v. State,* 613 P.2d at 826. We hold that AS 11.66.110(b), which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. We therefore conclude that the trial court did not err in rejecting Bell's challenge to the instruction on mistake of age.

II. PARTIALLY INAUDIBLE TAPE

Bell argues that error occurred when a recording of a telephone conversation between Bell and C.R. was played for the jury. At trial, Bell's attorney objected to admission of the recorded telephone conversation, contending that parts of the tape were substantially inaudible. The tape of another conversation was played without objection. Before this tape was played, the trial judge gave a cautionary instruction ***836** admonishing the jury to consider only what it actually heard on both tapes.[FN6]

FN6. The jury was instructed:

> [I] want to admonish the jury that there are portions of these tapes that are impossible to hear .... Consider only what you hear, only what you actually hear on the tapes, together with any other evidence .... But don't speculate what is on the tape where there isn't credible evidence .... The tapes are going to be hard to understand. Don't guess at what's on

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those tapes.

[8] The trial court's decision to admit the phone tape is reversible error only if it constituted an abuse of discretion. *Robinson v. State,* 593 P.2d 621, 624 n. 5 (Alaska 1979). In *Dana v. State,* 623 P.2d 348 (Alaska App.1981), we considered the correctness of the trial court's admission of a tape which had "significant gaps" due to equipment failure. We held that there could be no abuse of discretion in admitting the flawed tape unless its prejudicial impact outweighed its probative value. *Id.* at 353–54.

[9] In the present case, after weighing the possibility of prejudice against the probative value of the tape, and taking into account the other evidence at trial, the cautionary instruction, and the fact that most of the tape is audible, we conclude that Judge Souter did not abuse his discretion in admitting the tape.

III. ISSUANCE AND EXECUTION OF THE GLASS WARRANT

[10] Bell argues that procedures outlined in the federal electronic surveillance act should supplement the requirements, enumerated in *State v. Glass,* 583 P.2d 872 (Alaska 1978), that must be met before electronic monitoring of conversations is permitted. We considered and rejected a similar argument in *Jones v. State,* 646 P.2d 243, 248 (Alaska App.1982). *See also Gallagher v. State,* 651 P.2d 1185, 1187 (Alaska App.1982). Our holdings in *Jones* and *Gallagher* are dispositive of this issue.

Bell also contends that probable cause for the issuance of a *Glass* warrant did not exist because it was not known whether relevant conversations would occur between Bell, M.J. and C.R., and because M.J. and C.R. were neither reliable nor credible. Bell's motion to suppress on this ground was denied at the omnibus hearing.

[11][12] The judge's determination that probable cause existed is entitled to great deference by this court. *Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 590–91, 21 L.Ed.2d 637, 645 (1969). We find ample facts to support issuance of the search warrant. C.R. and M.J. stopped working for Bell less than a week before they testified at the proceeding to issue the *Glass* warrant. Since C.R. had worked for Bell for nearly six months and given him $5,000 of the money she made by prostitution, it was logical to assume she could contact him and that he would have some interest in talking to her. Although M.J. had worked for Bell for only a few weeks, the same reasoning applies. We believe the court correctly found that sufficient probable cause existed to issue the *Glass* warrant. *United States v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 745–46, 13 L.Ed.2d 684, 689 (1965); *Martel v. State,* 511 P.2d 1055, 1055 n. 1 (Alaska 1973); *Rosa v. State,* 633 P.2d 1027, 1029–30 (Alaska App.1981).

[13] Bell, relying on *Spinelli v. United States,* and *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), additionally contends that the search warrant should not have been issued because C.R. and M.J. were neither reliable nor credible. Bell's reliance on the rulings in *Aguilar* and *Spinelli* is misplaced, because those cases set forth criteria for ascertaining the reliability and credibility of informants who have provided hearsay information. Neither C.R. nor M.J. was a confidential informant; both testified personally and were under oath at the time. The magistrate thus had ample opportunity to assess their credibility. Accordingly, the *Aguilar-Spinelli* standards do not apply in this case, and Bell's argument is without merit.

Next, Bell argues that the recordings should have been suppressed because the police failed to comply with Alaska Rule of Criminal Procedure 37(b)(2), and because the police failed to mail a copy of the warrant***837** and receipt to Bell in compliance with the provision of the warrant requiring that Criminal Rule 37(b)(1) and (2) be satisfied. [FN7]

FN7. Alaska R.Crim.P. 37 provides, in pertinent part:

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> (b) *Execution and Return With Inventory.* The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant
>
> (1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or
>
> (2) shall leave the copies and the receipt at the place from which the property was taken ....

The court ordered that a copy of the warrant and receipt be mailed to Bell within ten days of May 27, 1980, when the warrant was executed. Officer George Novaky stated in an affidavit that, although he did not specifically advise Bell of the recording at the time of Bell's arrest and although Bell was not sent a copy of the search warrant, Novaky included information concerning the recording in police reports made available to Bell on June 16, 1980. Additionally, on June 13, 1980, Bell obtained actual notice of the recording when he appeared at a bail hearing with his attorney. At the bail hearing, Officer Michael Grimes testified that electronic surveillance was used to record Bell's conversation. Bell's attorney then declined to question Grimes, and the tape was played. It is unclear from the record whether Bell received notice of the recording in a copy of Officer Novaky's complaint at the time of his arraignment on May 28, 1980; consequently, we assume that Bell first received notice at the bail hearing on June 13, 1980—slightly more than two weeks after police recorded Bell's conversations.

[14] Under the circumstances, Bell has shown no prejudice stemming from untimely notification of execution of the warrant authorizing his telephone conversation to be monitored and recorded. Nor does it appear that the late notification was the result of bad faith on the part of investigating officers. We hold that the untimely notice to Bell did not justify suppression of the recording made pursuant to the *Glass* warrant. *See Gallagher v. State,* 651 P.2d 1185 (Alaska App.1982).

IV. COERCIVE INSTRUCTION DURING DELIBERATIONS

[15] Bell argues that a supplemental instruction issued by Judge Souter was coercive and that it was essentially an " *Allen* charge." [FN8] We disagree. During deliberations, the jury sent a note to the judge inquiring if inability to agree on one count of the indictment constituted a hung jury. The judge replied:

> FN8. *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

> If you were to be unable to agree to a verdict on one Count of the Indictment, you would be a hung jury as to that one Count, but you would not be a hung jury as to the remaining Counts unless you were also unable to agree to your verdicts on them also. *In my opinion you have not deliberated long enough yet to be able to validly reach the conclusion that you cannot agree to a verdict on any one or more Counts of the Indictment.* [Emphasis added.]
>
> The jury subsequently returned its verdicts on the four counts, as well as the two lesser-included offenses.

The Alaska Supreme Court proscribed *Allen* charges in *Fields v. State,* 487 P.2d 831, 836 (Alaska 1971). In *Fields,* the jury was instructed, after extensive deliberations and at least two prior communications indicating a deadlock, that it was required to continue deliberations until a unanimous verdict was reached. This instruction was found to be so coercive as to require reversal of the conviction. We find that Judge Souter's instruction lacked the coerciveness proscribed by *Fields.* We note in this regard that Standard 15–4.4(b) of the ABA Standards Relating to Trial by Jury specifically provides that a court may require continued deliberations if a jury is unable to agree.[FN9] In this

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case, the jury had not deliberated*838 for an extended time, the communication did not unequivocally indicate a deadlock, and the court's instruction did not imply that the jury would be required to deliberate until unanimity was reached. Under these circumstances the supplemental instruction did not constitute an abuse of discretion and Bell's argument must fail.

> FN9. ABA Standard Relating to Trial by Jury § 15–4.4(b) (1980) provides:
>
> > If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
> >
> > The Commentary to Standard 15–4.4(b) states:
> >
> > This paragraph confirms that a trial judge may send the jury back for further deliberations notwithstanding its indication that it has been unable to agree....
>
> ....
>
> > There is no coercion if a court requires jurors to deliberate a reasonable length of time.

V. DOUBLE JEOPARDY

Bell additionally argues that his sentences on Count I [FN10] and Count IV [FN11] violate double jeopardy under *Whitton v. State,* 479 P.2d 302 (Alaska 1970). The *Whitton* court adopted the following analysis to determine whether or not a double jeopardy violation had occurred:

> FN10. Bell's conviction on Count I was for inducing or causing a person under 16 years of age [D.W.] to engage in prostitution, AS 11.66.110(a)(2). *See supra* n. 1.
>
> FN11. Conviction on count IV was for violating AS 11.66.120(a)(1), a class C felony, which provides:
>
> > (a) A person commits the crime of promoting prostitution in the second degree if he
> >
> > (1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution ....
> >
> > AS 11.66.150(2) defines a "prostitution enterprise" as
> >
> > [A]n arrangement in which two or more persons are organized to render sexual conduct in return for a fee.
> >
> > The jury was instructed in the language of both these statutes.

> The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments ....
>
> If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy.
>
> *Id.* at 312 (footnotes omitted).

We must therefore compare AS 11.66.110(a)(2) and AS 11.66.120(a)(1) as applied to the facts of Bell's case, to determine whether dif-

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ferences in intent or conduct were involved in this case. Then, if there are differences, we must decide whether, in light of the societal interests to be protected, the differences were so substantial as to warrant multiple punishment.

[16] AS 11.66.110(a)(2) proscribes the conduct of inducing or causing a person under the age of sixteen to engage in prostitution. AS 11.66.120(a)(1) prohibits managing, supervising, controlling or owning a prostitution enterprise. We believe that, under the *Whitton* analysis, the offenses proscribed by the two statutes in question involve different intents and different conducts. Bell's conviction on Count I was based squarely upon his inducement of D.W. Bell's conviction under AS 11.66.120(a)(1), on the other hand, required proof of management of a prostitution enterprise. No showing of inducement is necessary to establish the offense, since a prostitution enterprise can be comprised entirely of persons who willingly take part in the business, without inducement or promotion. Clearly Bell's conduct in arranging for two or more people to provide sexual services for a fee, a part of which would accrue to him, goes beyond the act of inducing a single person under the age of sixteen to engage in prostitution.***839** The finding that Bell managed a prostitution business with at least two women working for him involved the element of management and required proof of an enterprise, neither of which were involved in the inducement charge. We thus conclude that Bell's intent and conduct clearly differed on the two charges.

We must also determine whether such differences in intent or conduct are substantial in relation to the societal interests involved. As we have stated in connection with Bell's mistake of age claim, AS 11.66.110(a)(2) imposes criminal liability for nonforcible inducement of individuals under sixteen to engage in acts of prostitution with others. This liability is imposed without regard to any pecuniary gain on the part of the offender. We believe that the primary aim of this provision is to protect individuals, particularly those who are young and therefore more vulnerable, from being led into committing acts of prostitution by the efforts of others. By contrast, AS 11.66.120(a)(1) seeks to prevent and punish the commercial aspects of ongoing organized prostitution by subjecting persons who manage prostitution-related activities as business enterprises to sanctions greater than those applicable to persons who commit individual acts of prostitution, without regard to age of the persons managed. We therefore conclude that multiple punishment was appropriate in this case because of the differences in intent and conduct and because of the differing societal interests furthered by the two statutes in question.

VI. REFUSAL TO REDUCE SENTENCE

Finally, Bell contends that denial of the motion to reduce his sentence was error. While incarcerated prior to sentencing, Bell wrote a letter to L.S., the fourteen-year-old daughter of a fellow inmate. The letter was produced at the sentencing hearing, and the father of L.S. was called to testify. He stated that Bell had threatened him with violence if he did not testify favorably to Bell. Judge Souter stated that the threats convinced him to increase Bell's sentence by one year. The judge stated that, although the letter could easily be interpreted as an attempt "to strike a sexual relationship" with L.S., he would give Bell the "benefit of the doubt" and not consider it in sentencing him. Later, Bell moved for reconsideration of the sentence, based on discovery of a letter from the father of L.S. to Bell; the letter indicated that the father had committed perjury at Bell's sentencing. [FN12] A hearing was subsequently held on Bell's motion to reconsider the sentence.

> FN12. The letter from L.S.'s father, written to Bell prior to his sentencing, contained a postscript which stated, "Tell [L.S.] I love her and when I write I'll tighten it for you. I'll get you a picture 'a pose'."

Judge Souter refused to reduce Bell's sentence, reasoning that, in writing to L.S., Bell had been "attempting to arrange for [L.S.] to become a pros-

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titute for him or to be involved with him in a sexual relationship." The original sentence was based on Judge Souter's belief that Bell had threatened L.S.'s father; at that point Judge Souter did not believe that Bell had "propositioned" L.S. On resentencing, Judge Souter changed his reasoning for Bell's sentence; he was persuaded that L.S.'s father had lied, but he was also persuaded that Bell *had* been trying to establish a sexual relationship with the fourteen-year-old L.S.[FN13]

FN13. Judge Souter stated:

> The court was not persuaded of this fact when the presentation of evidence concluded at the sentencing hearing, but the contents of the postscript [on the letter from L.S.'s father to Bell] have caused the court to re-examine this question and to resolve it contrary to the way it was resolved at the sentencing hearing.

[17] Bell now claims that, because the trial court did not reduce his sentence after finding that Bell had not threatened L.S.'s father, double jeopardy was violated. However, he fails to cite any authority supporting his theory that failure to reduce a sentence may violate double jeopardy. Judge Souter's reinterpretation of Bell's letter to L.S. in light of the letter from ***840** L.S.'s father to Bell was not unreasonable. Nor can we find that Judge Souter abused his discretion in refusing to reduce the original sentence, based on his reinterpretation of the letter. Since there was no increase in the original sentence, no violation of double jeopardy is involved.

[18] Bell also contends that the effective increase in the period of incarceration based upon the letter was not justified under the sentencing goals set forth in *State v. Chaney,* 477 P.2d 441, 442 (Alaska 1970). The fact that Bell attempted to arrange a romantic involvement with a fourteen-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of sixteen indicates a lack of remorse on Bell's part and a greater need for deterrence of Bell himself; it therefore justifies imposition of a more severe sentence. We conclude that Bell's sentence was not clearly mistaken.

The conviction and sentence are AFFIRMED.

Alaska App.,1983.
Bell v. State
668 P.2d 829

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Westlaw

110 S.Ct. 3157
497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, 58 USLW 5044, 30 Fed. R. Evid. Serv. 1
(Cite as: 497 U.S. 836, 110 S.Ct. 3157)

Supreme Court of the United States
MARYLAND, Petitioner
v.
Sandra Ann CRAIG.

No. 89-478.
Argued April 18, 1990.
Decided June 27, 1990.

Defendant was convicted in the Maryland Circuit Court, Howard County, Raymond J. Kane, Jr., J., of sexual offenses and assault and battery arising from her operation of preschool and abuse of preschool students, and defendant appealed. The Court of Special Appeals, affirmed, 76 Md.App. 250, 544 A.2d 784,. Defendant petitioned for writ of certiorari. The Court of Appeals, 316 Md. 551, 560 A.2d 1120, reversed and remanded. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) confrontation clause did not categorically prohibit child witness in child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television; (2) finding of necessity for use of one-way closed circuit television procedure had to be made on case specific basis; but (3) observation of child's behavior in defendant's presence and exploration of less restrictive alternatives to use of one-way closed circuit television procedure were not categorical prerequisites to use of one-way television procedure as a matter of federal constitutional law.

Vacated and remanded.

Justice Scalia filed a dissenting opinion, in which Justices Brennan, Marshall and Stevens joined.

Opinion on remand, 322 Md. 418, 588 A.2d 328.

West Headnotes

[1] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

The central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

A face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-of-court statements and hearsay in general. Most Cited Cases

In narrow circumstances, the confrontation clause permits the admission of hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿662.1

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110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

Face-to-face confrontation with witnesses is not an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Child assault victim's testimony at trial of child abuse defendant through use of one-way closed circuit television procedure authorized by Maryland child witness protection statute did not impinge upon the truth seeking nor symbolic purposes of the confrontation clause; procedure required that child witness be competent to testify and testify under oath, defendant retained full opportunity for contemporaneous cross-examination, and judge, jury and defendant were able to view witness' demeanor and body by video monitor. Md.Code, Courts and Judicial Proceedings, § 9-102, U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

If the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure permitting a child witness in abuse case to testify at trial in the absence of face-to-face confrontation with the defendant. U.S.C.A. Const.Amends. 6, 14.

[7] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Determination of whether use of procedure permitting a child witness to testify in a child abuse case without face-to-face confrontation with the de-

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fendant is justified by the State's interest in protecting witness from the trauma of testifying must be made on a case specific basis; trial court must determine whether use of one-way closed circuit television procedure is necessary to protect welfare of particular child witness, must find that child witness would be traumatized by the presence of the defendant, not by the courtroom generally, and must find that the emotional distress suffered by child witness in presence of defendant is more than mere nervousness, excitement or reluctance to testify. Md.Code, Courts and Judicial Proceedings, §§ 9-102, 9-102(a)(1)(ii); U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases
Testimony of child witnesses in child abuse case by one-way closed circuit television would be admissible under the confrontation clause to the extent that a proper finding was made that use of procedure was necessary to protect child witness from trauma; witnesses were under oath, were subject to full cross-examination and could be observed by judge, jury and defendant as they testified. Md.Code, Courts and Judicial Proceedings, § 9-102 ; U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases
Observation of child abuse victims' behavior in defendant's presence and consideration of less restrictive alternatives to one-way closed circuit television procedure, although possibly strengthening grounds for use of protective measures, were not categorically prerequisites to use of television testimony procedure as a matter of federal constitutional law. Md.Code, Courts and Judicial Proceedings, § 9-102; U.S.C.A. Const.Amends. 6, 14.

****3158** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***836** Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a 6-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the

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child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although ****3159** the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against ***837** them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e.g., Kirby v. United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. *Coy, supra,* at 1021. Pp. 3162-3166.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 3166-3170.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 3166-3167.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her ac-

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cusers in court. The fact that most States have enacted similar****3160** statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e.g., Globe Newspaper Co. v. Superior Court of Norfolk County,* 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature ***838** documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 3167-3169.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis.* Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 3169-3170.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P. 3170.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 3170-3171.

316 Md. 551, 560 A.2d 1120 (1989). Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. 3171.
J. Joseph Curran, Jr., Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Gary E. Bair* and *Ann N. Bosse,* Assistant Attorneys General, and *William R. Hymes.*

***839** *William H. Murphy, Jr.,* argued the cause for respondent. With him on the brief were *Maria Cristina Gutierrez, Gary S. Bernstein, Byron L. Warnken,* and *Clarke F. Ahlers.* *

* Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth,* Attorney General of Florida, and *Richard E. Doran* and *Bradley R. Bischoff,* Assistant Attorneys General, *Don Siegelman,* Attorney General of Alabama, *Doug Baily,* Attorney General of Alaska, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *Duane Woodard,* Attorney General of Colorado, *John J. Kelly,* Chief State's Attorney of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Warren Price III,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Neil F. Hartigan,* Attorney General of Illinois, *Linley E. Pearson,* Attorney General of Indiana, *Thomas J. Miller,* Attorney General of Iowa, *Robert T. Stephan,* Attorney General of Kansas, *Frederic J. Cowan,* Attorney General of Kentucky, *William J.*

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Guste, Jr., Attorney General of Louisiana, *James E. Tierney,* Attorney General of Maine, *James M. Shannon,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *William L. Webster,* Attorney General of Missouri, *Marc Racicot,* Attorney General of Montana, *Robert M. Spire,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *Robert J. Del Tufo,* Attorney General of New Jersey, *Hal Stratton,* Attorney General of New Mexico, *Robert Abrams,* Attorney General of New York, *Lacy H. Thornburg,* Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert H. Henry,* Attorney General of Oklahoma, *Ernest D. Preate,* Attorney General of Pennsylvania, *Hector Rivera Cruz,* Attorney General of Puerto Rico, *T. Travis Medlock,* Attorney General of South Carolina, *Roger A. Tellinghuisen,* Attorney General of South Dakota, *Charles W. Burson,* Attorney General of Tennessee, *Jim Mattox,* Attorney General of Texas, *R. Paul Van Dam,* Attorney General of Utah, *Godfrey R. de Castro,* Attorney General of the Virgin Islands, *Mary Sue Terry,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, and *Joseph B. Mayer,* Attorney General of Wyoming; for the District Attorney of Kings County, New York, et al. by *Charles J. Hynes, Peter A. Weinstein, Jay Cohen, Robert T. Johnson, Anthony Girese,* and *Howard R. Relin;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the National Association of Counsel for Children et al. by *Jacqueline Y. Parker, Philip J. McCarthy, Jr.*, and *Thomas R. Finn;* for People Against Child Abuse by *Judith D. Schretter, Wallace A. Christensen,* and *Paul A. Dorf;* and for the Stephanie Roper Foundation by *Gary B. Born.*

Briefs of *amici curiae* urging affirmance were filed for the Illinois Public Defender Association et al. by *David P. Bergschneider;* for the National Association of Criminal Defense Lawyers by *Maria Cristina Gutierrez* and *Annabelle Whiting Hall;* and for Victims of Child Abuse Laws National Network (Vocal) by *Alan Silber.*

Briefs of *amici curiae* were filed for the American Psychological Association by *David W. Ogden;* for the Appellate Committee of the California District Attorney's Association by *Jonathan B. Conklin;* for the Institute for Psychological Therapies by *Louis Kiefer;* and for Richard A. Gardner by *Alan Silber.*

***840** Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a 6-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland ****3161** statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[FN1] To invoke the procedure, the ***841** trial judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9-102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined

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and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant.***842** The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

FN1. Maryland Cts. & Jud.Proc.Code Ann. § 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

"(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communic- ate.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit televi- sion:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time."

For a detailed description of the § 9-102 procedure, see *Wildermuth v. State,* 310 Md. 496, 503-504, 530 A.2d 275, 278-279 (1987).

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate," § 9-102 (a)(1)(ii), if required to testify in the courtroom. App. 7-59. The Maryland Court of Appeals characterized the evidence as follows:

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"The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig....' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.' " 316 Md. 551, 568-569, 560 A.2d 1120, 1128-1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial ****3162** court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App. 65-66. The trial court further found that, "based upon the evidence presented ... the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress ... such that each of these children cannot reasonably***843** communicate." *Id.,* at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md.App. 250, 544 A.2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A.2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, *id.,* at 556-562, 560 A.2d, at 1122-1125, but concluded:

"[U]nder § 9-102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." *Id.,* at 566, 560 A.2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9-102 procedure, the Court of Appeals held that, "as [it] read *Coy* [v. *Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." *Id.* 316 Md., at 554-555, 560 A.2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 U.S. 1041, 110 S.Ct. 834, 107 L.Ed.2d 830 (1990).

***844** II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

We observed in *Coy v. Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U.S., at 1016, 108 S.Ct., at 2801 (citing *Kentucky v. Stincer,* 482 U.S. 730, 748, 749-750, 107 S.Ct. 2658, 2669, 2669, 2670, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting)); see also *Pennsylvania v. Ritchie,* 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987) (plurality

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opinion); *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970); *Snyder v. Massachusetts,* 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Dowdell v. United States,* 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911); *Kirby v. United States,* 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899); *Mattox v. United States,* 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See *Coy, supra,* 487 U.S., at 1015-1016, 108 S.Ct., at 2800; *Mattox, supra,* 156 U.S., at 242, 15 S.Ct. at 339 (Confrontation Clause intended to prevent conviction by affidavit); *Green, supra,* 399 U.S., at 156, 90 S.Ct., at 1934 ****3163** (same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p. 662 (1833).

We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy v. Iowa,* we expressly "le[ft] for another day ... the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial.* ' " 487 U.S., at 1021, 108 S.Ct., at 2803 (quoting *Green, supra,* 399 U.S., at 175, 90 S.Ct., at 1943 (Harlan, J., concurring)). The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U.S., at 1014-1015, 108 S.Ct., at 2799-2800. In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that ***845** any exception to the right "would surely be allowed only when necessary to further an important public policy"-*i.e.,* only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. *Id.,* at 1021, 108 S.Ct., at 2803; see also *id.,* at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." *Id.,* at 1021, 108 S.Ct., at 2803. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy.*

[1] The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox, supra,* 156 U.S., at 242-243, 15 S.Ct., at 339-340.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U.S., at 242, 15 S.Ct., at 339, but also "(1) insures that the witness will give his statements under oath-thus impressing him with ***846** the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to

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observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green, supra,* 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

The combined effect of these elements of confrontation-physical presence, oath, cross-examination, and observation of demeanor by the trier of fact-serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. See *Stincer, supra,* 482 U.S., at 739, 107 S.Ct., at 2664 ("[T]he right to confrontation is a functional****3164** one for the purpose of promoting reliability in a criminal trial"); *Dutton v. Evans,* 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]' "); *Lee v. Illinois,* 476 U.S. 530, 540, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 514 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also *Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); *Strickland v. Washington,* 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed.2d 674 (1984).

[2] We have recognized, for example, that face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy, supra,* 487 U.S., at 1019-1020, 108 S.Ct., at 2802 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or ***847** reveal the child coached by a malevolent adult"); *Ohio v. Roberts,* 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2537 n. 6, 65 L.Ed.2d 597 (1980); see also 3 W. Blackstone, Commentaries * 373-* 374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy,* 487 U.S., at 1017, 108 S.Ct., at 2801 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution' ") (quoting *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," *Green,* 399 U.S., at 157, 90 S.Ct., at 1934, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware v. Fensterer,* 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); *Roberts, supra,* 448 U.S., at 69, 100 S.Ct., at 2540 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement' ") (quoting *Green, supra,* 399 U.S., at 166, 90 S.Ct., at 1939); see also *Stincer,* 482 U.S. at 739-744, 107 S.Ct., at 2664-2667 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); *Davis v. Alaska,* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1109-1110, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer, supra,* 380 U.S., at 406-407, 85 S.Ct., at 1069; 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974).

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[3] For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite***848** the defendant's inability to confront the declarant at trial. See, *e.g., Mattox,* 156 U.S., at 243, 15 S.Ct., at 339 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"); ****3165** *Pointer, supra,* 380 U.S., at 407, 85 S.Ct., at 1069 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In *Mattox,* for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U.S., at 240-244, 15 S.Ct., at 338-340. We explained:

> "There is doubtless reason for saying that ... if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.,* at 243, 15 S.Ct., at 339-340.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts,* 448 U.S., at 63, 100 S.Ct., at 2537. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Id.,* at 64, 100 S.Ct., at 2538 (quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973), and citing *Mattox, supra*). We have recently held, ***849** for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily v. United States,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Given our hearsay cases, the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant-a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

[4] In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts, supra,* 448 U.S., at 63, 100 S.Ct., at 2537 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox, supra,* 156 U.S., at 243, 15 S.Ct., at 339-340. "[W]e have attempted to harmonize the goal of the Clause-placing limits on the kind of evidence that may be received against a defendant-with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily, supra,* 483 U.S., at 182, 107 S.Ct., at 2782. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, *e.g., Kirby,* 174 U.S., at 61, 19 S.Ct., at 578 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying

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declarations is an exception which arises from the necessity of the case"); *Chambers, supra,* 410 U.S., at 295, 93 S.Ct., at 1045 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with witnesses****3166** appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee ***850** of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim.L.Bull. 99, 107-108 (1972).

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, *e.g., Illinois v. Allen,* 397 U.S. 337, 342-343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); *Ritchie,* 480 U.S., at 51-54, 107 S.Ct., at 998-1000 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); *Taylor v. Illinois,* 484 U.S. 400, 410-416, 108 S.Ct. 646, 653-657, 98 L.Ed.2d 798 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry v. Leeke,* 488 U.S. 272, 280-285, 109 S.Ct. 594, 599-602, 102 L.Ed.2d 624 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy,* our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. See 487 U.S., at 1021, 108 S.Ct., at 2803 (citing *Roberts, supra,* 448 U.S. at 64, 100 S.Ct., at 2538; *Chambers, supra,* 410 U.S. at 295, 93 S.Ct., at 1045); *Coy, supra,* 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring).

***851** III

[5] Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition, see *Mattox,* 156 U.S., at 242, 15 S.Ct., at 389; see also *Green,* 399 U.S., at 179, 90 S.Ct., at 1946 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effect-

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ive confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," ****3167***Coy, supra,* 487 U.S., at 1020, 108 S.Ct., at 2802, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts,* 448 ***852** U.S., at 66, 100 S.Ct., at 2539. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe Newspaper Co. v. Superior Court of Norfolk County,* 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982); see also *New York v. Ferber,* 458 U.S. 747, 756-757, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation,* 438 U.S. 726, 749-750, 98 S.Ct. 3026, 3040-3041, 57 L.Ed.2d 1073 (1978); *Ginsberg v. New York,* 390 U.S. 629, 640, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts,* 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber, supra,* 458 U.S., at 757, 102 S.Ct., at 3354. In *Globe Newspaper,* for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 U.S., at 608-609, 102 S.Ct., at 2620-21. This Term, in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that " '[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and ***853** psychological well-being of a minor" is "compelling." ' " *Id.,* at 109, 110 S.Ct. at 1696 (quoting *Ferber, supra,* 458 U.S., at 756-757, 102 S.Ct., at 3354-55).

[6] We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See *Coy,* 487 U.S., at 1022-1023, 108 S.Ct., at 2803-2804 (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; [FN2] 24 States have authorized the use of ****3168** one-way ***854** closed circuit television testimony in child abuse cases; [FN3] and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[FN4]

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FN2. See Ala.Code § 15-25-2 (Supp.1989); Ariz.Rev.Stat.Ann. §§ 13-4251 and 4253(B), (C) (1989); Ark.Code Ann. § 16-44-203 (1987); Cal.Penal Code Ann. § 1346 (West Supp.1990); Colo.Rev.Stat. §§ 18-3-413 and 18-6-401.3 (1986); Conn.Gen.Stat. § 54-86g (1989); Del.Code Ann., Tit. 11, § 3511 (1987); Fla.Stat. § 92.53 (1989); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Ill.Rev.Stat., ch. 38, ¶ 106A-2 (1989); Ind.Code §§ 35-37-4-8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan.Stat.Ann. § 38-1558 (1986); Ky.Rev.Stat.Ann. § 421.350(4) (Baldwin Supp.1989); Mass.Gen.Laws § 278:16D (Supp.1990); Mich.Comp.Laws Ann. § 600.2163a(5) (Supp.1990); Minn.Stat. § 595.02(4) (1988); Miss.Code Ann. § 13-1-407 (Supp.1989); Mo.Rev.Stat. §§ 491.675-491.690 (1986); Mont.Code Ann. §§ 46-15-401 to 46-15-403 (1989); Neb.Rev.Stat. § 29-1926 (1989); Nev.Rev.Stat. § 174.227 (1989); N.H.Rev.Stat.Ann. § 517:13-a (Supp.1989) ; N.M.Stat.Ann. § 30-9-17 (1984); Ohio Rev.Code Ann. §§ 2907.41(A), (B), (D), (E) (1987); Okla.Stat., Tit. 22, § 753(C) (Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa.Cons.Stat. §§ 5982, 5984 (1988); R.I.Gen.Laws § 11-37-13.2 (Supp.1989); S.C.Code Ann. § 16-3-1530 (G) (1985); S.D.Codified Laws § 23A-12-9 (1988); Tenn.Code Ann. §§ 24-7-116(d), (e), (f) (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 4 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989); Wis.Stat. §§ 967.04(7) to (10) (1987-1988); Wyo.Stat. § 7-11-408 (1987).

FN3. See Ala.Code § 15-25-3 (Supp.1989); Alaska Stat.Ann. § 12.45.046 (Supp.1989); Ariz.Rev.Stat.Ann. § 13-4253 (1989); Conn.Gen.Stat. § 54-86g (1989); Fla.Stat. § 92.54 (1989); Ga.Code Ann. § 17-8-55 (Supp.1989); Ill.Rev.Stat., ch. 38, ¶ 106A-3 (1987); Ind.Code § 35-37-4-8 (1988); Iowa Code § 910A.14 (Supp.1990); Kan.Stat.Ann. § 38-1558 (1986); Ky.Rev.Stat.Ann. §§ 421-350(1), (3) (Baldwin Supp.1989); La.Rev.Stat.Ann. § 15:283 (West Supp.1990); Md.Cts. & Jud.Proc.Code Ann. § 9-102 (1989); Mass.Gen.Laws § 278:16D (Supp.1990); Minn.Stat. § 595.02 (4) (1988); Miss.Code Ann. § 13-1-405 (Supp.1989); N.J.Stat.Ann. § 2A:84A-32.4 (Supp.1989); Okla.Stat., Tit. 22, § 753(B) (West Supp.1988); Ore.Rev.Stat. § 40.460 (24) (1989); 42 Pa. Cons.Stat. §§ 5982, 5985 (1988); R.I.Gen.Laws § 11-37-13.2 (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 3 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989).

FN4. See Cal.Penal Code Ann. § 1347 (West Supp.1990); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Idaho Code § 19-3024A (Supp.1989); Minn.Stat. § 595.02(4)(c)(2) (1988); N.Y.Crim.Proc.Law §§ 65.00 to 65.30 (McKinney Supp.1990); Ohio Rev.Code Ann. §§ 2907.41(C), (E) (1987); Va.Code Ann. § 18.2-67.9 (1988); Vt.Rule Evid. 807(e) (Supp.1989).

The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Wildermuth v. State,* 310 Md. 496, 518, 530 A.2d 275, 286 (1987). The *Wildermuth* court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its *Interim Report* (Nov.1984) documented the existence of the [child abuse] problem in our State. *Interim Report* at 1. It brought the picture up to date in its *Final Report*

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(Dec.1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979, 4,615 cases of child abuse were investigated; in 1984, ***855** 8,321. *Final Report* at iii. In its *Interim Report* at 2, the Commission proposed legislation that, with some changes, became § 9-102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' *Id.,* at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." *Id.,* at 517, 530 A.2d, at 285.

Given the State's traditional and " 'transcendent interest in protecting the welfare of children,' " *Ginsberg,* 390 U.S., at 640, 88 S.Ct., at 1281 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as *Amicus Curiae* 7-13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual ****3169** Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug.1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

[7] The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See *Globe Newspaper Co.,* 457 U.S., at 608-609, 102 S.Ct., at 2621 (compelling interest in protecting ***856** child victims does not justify a *mandatory* trial closure rule); *Coy,* 487 U.S., at 1021, 108 S.Ct., at 2803; *id.,* at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring); see also *Hochheiser v. Superior Court,* 161 Cal.App.3d 777, 793, 208 Cal.Rptr. 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, *e.g., State v. Wilhite,* 160 Ariz. 228, 772 P.2d 582 (1989); *State v. Bonello,* 210 Conn. 51, 554 A.2d 277 (1989); *State v. Davidson,* 764 S.W.2d 731 (Mo.App.1989); *Commonwealth v. Ludwig,* 366 Pa.Super. 361, 531 A.2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than "mere nervousness or excitement or some reluctance to testify," *Wildermuth, supra,* 310 Md., at 524, 530 A.2d, at 289; see also *State v. Mannion,* 19 Utah 505, 511-512, 57 P. 542, 543-544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate," § 9-102(a)(1)(ii), clearly suffices to meet constitutional standards.

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of elicit-

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ing truth, cf. *Coy, supra,* 487 U.S., at 1019-1020, 108 S.Ct., at 2802-03, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child ***857** abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See *supra,* at 3166-3167. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, *e.g., Coy, supra,* 487 U.S., at 1032, 108 S.Ct., at 2809 (BLACKMUN, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as *Amicus Curiae* 18-24; *State v. Sheppard,* 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Goodman & Helgeson, ****3170**Child Sexual Assault: Children's Memory and the Law, 40 U. Miami L.Rev. 181, 203-204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich.L.Rev. 809, 813-820 (1987).

[8] In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

[9] The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there ***858** is a " 'case-specific finding of necessity.' " 316 Md., at 564, 560 A.2d, at 1126 (quoting *Coy, supra,* 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify ... should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md., at 564, 560 A.2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." *Id.,* at 565, 560 A.2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9-102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id.,* at 566, 560 A.2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that " § 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." *Id.,* at 566, 560 A.2d, at 1127; see also *Wildermuth,* 310 Md., at 523-524, 530 A.2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md., at 567, 560 A.2d, at 1128.

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Reviewing the evidence presented to the trial court in support of the finding required under § 9-102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required ***859** to limit the defendant's right of confrontation through invocation of § 9-102 ... was not made here." *Id.,* at 570-571, 560 A.2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." *Id.,* at 568, 560 A.2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's presence****3171** on the child witnesses." *Id.,* at 569, 560 A.2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' He failed to find-indeed, on the evidence before him, *could not have found*-that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Id.,* at 570-571, 560 A.2d, at 1129 (emphasis added).

The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to ***860** explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See *id.,* at 568-571, 560 A.2d, at 1128-1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," § 9-102(a)(1)(ii). See *id.,* at 568-569, 560 A.2d, at 1128-1129; see also App. 22-25, 39, 41, 43, 44-45, 54-57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [*Coy*] before § 9-102 may be invoked," 316 Md., at 554-555, 560 A.2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitu-

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tion against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted ***861** with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We ... conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face ****3172** his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." *Ante,* at 3167.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I-your father (or mother) whom you see before you-did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

***862** I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Ante,* at 3166. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." *Ante,* at 3163-3164. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for-"face-to-face" confrontation-but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for-"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' " *Coy v. Iowa,* 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988), quoting *California v. Green,* 399 U.S. 149, 175, 90 S.Ct. 1930, 1943-44, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

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***863** The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' " *ante,* at 3165. (emphasis added by the Court). But *Roberts,* and all the other "precedents" the Court enlists to prove the implausible, ****3173** dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial-that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial,* did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Ante,* at 3166. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to ***864** describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. *Perry v. Leeke,* 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"-in 1791 as today-could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.,* "[i]n *judicial proceedings,* [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who ***865**

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knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him.* " The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confrontation**3174 Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." *Ante,* at 3166. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." *Coy, supra,* 487 U.S., at 1020-1021, 108 S.Ct., at 2803.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See *ante,* at 3166-3167. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. *Idaho v. Wright,* 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638. "In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts,* 448 U.S., at 65, 100 S.Ct., at 2538. We have permitted a few exceptions to this general rule-*e.g.,* for co-conspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," *United States v. Inadi,* 475 U.S. 387, 395, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986). "Live" closed-circuit television testimony, however-if it can be called hearsay at all-is surely an example of hearsay as "a weaker substitute for live testimony," *id.,* at 394, 106 S.Ct., at 1126, which can be employed only when the genuine article is unavailable. "When ***866** two versions of the same evidence are available, long-standing principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Ibid.* See also *Roberts, supra* (requiring unavailability as precondition for admission of prior testimony); *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[FN1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, un-cross-examined testimony when the witness is unable to undergo hostile questioning, etc. *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green,* as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Coy,* 487 ***867** U.S., at 1020, 108 S.Ct., at 2802. To say ****3175** that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

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FN1. I presume that when the Court says "trauma would impair the child's ability to communicate," *ante,* at 3170, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9-102 (a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," *ante,* at 3167, an "interest in protecting" such victims "from the emotional trauma of testifying," *ante,* at 3169. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest-as far as the Confrontation Clause is concerned [FN2]-is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

FN2. A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question-initially, at least, and perhaps exclusively-the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants-specifically, in the ***868** present context, innocent defendants accused of particularly heinous crimes. The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am.J.Crim.L. 227, 230-233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 708-711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra,* at 239-240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as wide-

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spread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, ****3176** concluded that there was an "absence of credible testimony and [a] lack of ***869** significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.,* at 9; answers were suggested by telling the children what other witnesses had said, *id.,* at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.,* at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." *Id.,* at 10-11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.,* at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation,***870** because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." *Ante,* at 3169. If so, that is a defect in the Constitution-which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

U.S.Md.,1990.

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Maryland v. Craig
497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, 58
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(Cite as: 535 F.Supp.2d 176)

H

United States District Court,
D. Maine.
UNITED STATES of America
v.
William C. BURHOE, Defendant.

No. CR-06-57-B-W.
Feb. 27, 2008.

Background: Defendant was indicted by a federal grand jury for the alleged possession of a firearm by a person previously involuntarily committed to a mental institution. Defendant moved for hospitalization proceeding. Thereafter, defendant requested to be present during competency hearing, and requested that the court rescind its hospitalization extension.

Holdings: The District Court, John A. Woodcock, Jr., J., held that:
(1) skipping a competency hearing and initiating a hospitalization proceeding was not an appropriate sanction for failure to maintain active order of custody over defendant, and
(2) defendant was entitled to be present during competency hearing in District of Maine.

Ordered accordingly.

West Headnotes

[1] Mental Health 257A ⚿436.1

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak436 Custody and Confinement
257Ak436.1 k. In General. Most Cited Cases

Skipping a competency hearing and initiating a hospitalization proceeding in its place was not an appropriate sanction for the government's failure to maintain an active order of custody over defendant while competency determination was being resolved, where government's failure to move for an extension of custody while mental health professionals completed *Sell* determination as to whether defendant required involuntary medication was apparently inadvertent, lasted approximately one month, and had been remedied by a subsequent order, and it otherwise remained in defendant's best interest to remain in medical center pending the *Sell* determination. 18 U.S.C.A. §§ 4241(d)(2)(A), 4246 .

[2] Criminal Law 110 ⚿636(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(3) k. During Preliminary Proceedings and on Hearing of Motions. Most Cited Cases

Defendant was entitled to be present during competency hearing in District of Maine; defendant's presence in Maine would satisfy his right to counsel, such as it was, and would have the added benefit of the defendant's physical presence before the court. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. §§ 4241, 4247(d).

***176** David W. Bate, Law Office of David W. Bate, Bangor, ME, for Defendant.

F. Todd Lowell, Office of the U.S. Attorney, Bangor, ME, for Plaintiff.

ORDER ON DEFENDANT'S MOTION FOR A § 4246 HOSPITALIZATION PROCEEDING AND FOR THE RIGHT TO BE PHYSICALLY PRESENT AT A § 4247(d) HEARING PURSUANT TO § 4241

JOHN A. WOODCOCK, JR., District Judge.

Under 18 U.S.C. § 4241, a defendant whose

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competence is at issue is entitled to ***177** a hearing to determine his competence, and under 18 U.S.C. § 4246, a defendant who has been found incompetent and unlikely to improve is entitled to a hearing to determine whether he should be hospitalized. Over the Defendant's objection, the Court concludes that skipping a § 4241 hearing and initiating a § 4246 proceeding in its place would not be an appropriate sanction for the Government's failure to maintain an active order of custody while a § 4241 determination is being resolved. The Court grants Defendant's request to be present at the 18 U.S.C. § 4247(d) hearing held pursuant to 18 U.S.C. § 4241, and orders that Mr. Burhoe be brought to Maine for the hearing. Finally, over Mr. Burhoe's objection, the Court declines to rescind its prior Order, which authorized the Attorney General to retain him for hospitalization until the Court rules on the § 4241 issue or until April 30, 2008, whichever is earlier.

I. STATEMENT OF FACTS

On September 7, 2006, a federal grand jury indicted William C. Burhoe for an alleged violation of 18 U.S.C. § 922(g)(4), possession of a firearm by a person previously involuntarily committed to a mental institution. *Indictment* (Docket # 1). On October 6, 2006, the Government moved for detention and for a psychiatric examination. *Mot. for Psychiatric or Psychological Evaluation* (Docket # 8); *Mot. for Detention* (Docket # 9). On the same day, the Court ordered Mr. Burhoe committed to the custody of the Attorney General to undergo a psychiatric examination to determine his competency to stand trial.[FN1] *Order* (Docket # 10). Following the receipt of a psychological report, the Court held a competency hearing on June 15, 2007 pursuant to 18 U.S.C. § 4246(d). By written order dated June 20, 2007, the Court found that "the defendant is presently suffering from a mental disease or defect that renders him unable to understand the nature and consequences of the proceedings against him and unable to assist properly in his defense." *Order* at 1 (Docket # 42). The Court committed Mr. Burhoe to the custody of the Attorney General to hospitalize him for treatment

FN1. The Defendant later moved for reconsideration based on his contention that he had established a rapport with a particular treating psychologist and would likely deteriorate if moved out of state to a federal facility for the evaluation. *Def.'s Mot. to Recon. Order for Competency Evaluation* (Docket # 12). The Court denied the motion. *Order* (Docket # 22).

> for such reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the proceedings to go forward; and for an additional reasonable period of time until-(A) his mental condition is so improved that trial may proceed, if the Court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceeding to go forward; or (B) the pending charges against him are disposed of according to law; whichever is earlier.
> *Id.* at 2.

On October 29, 2007, the Court received a psychiatric report from the Bureau of Prisons. The report concluded that Mr. Burhoe remained not competent to proceed to trial and recommended antipsychotic medication, opining that there is a substantial probability that Mr. Burhoe can be restored to competency if he receives antipsychotic medication. At the same time, however, the report noted that Mr. Burhoe had refused to voluntarily undergo the recommended therapy. The report recommended that the Court require ***178** Mr. Burhoe to undergo involuntary prescriptive treatment.

The October report left unanswered certain questions relevant to the analysis dictated by *Sell v. United States,* 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). Accordingly, on November 13, 2007, after a conference with counsel, the Court ordered that the Federal Medical Center prepare a supplemental report, addressing the *Sell* concerns. *Order* (Docket # 62). On November 20, 2007, the

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Government moved to extend Mr. Burhoe's hospitalization to January 11, 2008, and on November 21, 2007, the Court granted the motion without objection by the Defendant. *Mot. to Extend Period of Hospitalization* (Docket # 66); *Order* (Docket # 68). The Court received a faxed copy of a supplemental report on February 8, 2008, and a hard copy on February 19, 2008. On February 14, 2008, Mr. Burhoe moved for a § 4246 hospitalization proceeding and the same day, the Court held a conference of counsel. *Def.'s Mot. for a § 4246 Hospitalization Proceeding* (Docket # 69) (*Def.'s Mot.*). At the conference, it was agreed that an evidentiary hearing will be necessary, whether it is a *Sell* hearing or a § 4246 hospitalization hearing. On February 15, 2008, the Court granted the Government's motion, without objection, to extend the hospitalization period to April 30, 2008. *Order on Government's Second Mot. to Extend Period of Hospitalization* (Docket # 74). On February 25, 2008, Mr. Burhoe filed another motion, requesting to be present during the hearing, and asking the Court to rescind its second hospitalization extension. *Def.'s Mot. to be Present During § 4241(d) Hearing* (Docket # 78) (*Def.'s Mot. to be Present*).

II. DISCUSSION

A. THE DEFENDANT'S MOTION FOR A § 4246 PROCEEDING

[1] Mr. Burhoe first contends that the lapse of the custodial order on January 11 requires that the case be treated as a § 4246 hospitalization proceeding. *Def.'s Mot.* He asserts that "January 11, 2008 [was] the 'end of the time period' authorized by this Court pursuant to § 4241(d)(2)(A) " and the Court is required "to determine whether 'the defendant's mental condition has not so improved as to permit the trial to proceed.' " *Id.* at 2. He goes on to state that "[i]f the defendant's mental condition has not so improved, then § 4246 hospitalization proceedings must commence immediately." *Id.* He cites § 4241(d) as support. *Id.*

The Court disagrees with Mr. Burhoe on a number of bases. First, the statute contemplates a resort to § 4246 only if the court has made a determination that "the defendant's mental condition has not so improved as to permit proceedings to go forward." 18 U.S.C. § 4241(d). The Court has made no such determination. Second, a § 4246 proceeding is not a procedural default provision for § 4241. If the Government fails to comply with the custodial timing requirements of § 4241, the statute does not contemplate that § 4246 proceedings must be commenced as a sanction for the Government's miscue. [FN2] ***179** Third, the Defendant's position improperly conflates custody with a § 4241 determination. The remedy for the Government's failure to obtain an ongoing custodial order is to resolve the custody issue, not to make assumptions about the defendant's mental condition and to proceed with a hospitalization hearing.

> FN2. This is particularly true here, where the Government's failure to move for an extension of Mr. Burhoe's custody while the mental health professionals completed the supplemental *Sell* report was apparently inadvertent, lasted approximately one month, and has been remedied by a subsequent order. Further, the parties agreed both before and after the lapse in the custodial extension that it is in Mr. Burhoe's best interest to remain at Butner while the *Sell* determination is resolved. *Order* at 1 ("[t]he parties agree that it is in the best interest of the defendant for him to remain at the medical center pending the determination of whether the involuntary administration of medication is appropriate under *Sell.* "); *Order on Government's Mot. to Extend Period of Hospitalization* (Docket # 68) ("The parties agree that an extension of the defendant's hospitalization is necessary in order to allow the doctors at the Butner facility to issue a supplemental order and they agree that an extension for that purpose is in the best interest of the defendant.").

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> Mr. Burhoe now contends that remaining at Butner until the *Sell* issue is decided is not in his best interest. *Def.'s Mot. to be Present* at 2. He asks that the Court rescind its *Order on Government's Second Motion to Extend Period of Hospitalization* based upon his current position. In the circumstances of this case, there is no reason to alter the Court's Order dated February 15, 2008, which extended his hospitalization period "until the Court rules on the pending request to involuntarily medicate the defendant ... or no later than April 30, 2008, unless further extended by the Court." *Order on Government's Second Mot. to Extend Period of Hospitalization* at 2 (Docket # 74). As the § 4241 hearing will be held forthwith, the current custodial order merely maintains the status quo. To rescind its custodial order makes little sense. An immediate recission would likely result in Mr. Burhoe's transportation to a jail, not a medical center, and it seems apparent as the parties earlier agreed that Mr. Burhoe's best interests are served for the time being by the availability of greater not fewer mental health services.

But, the Court disagrees on a more fundamental level with the Defendant. Mr. Burhoe's motion contains the implicit view that the § 4241 procedure under which the court determines competency is a matter to be avoided and that he would be better protected by a § 4246 proceeding. The Court takes serious exception to Mr. Burhoe's premise. By safeguarding the rights of a defendant whose competency to stand trial is in doubt, the § 4241 procedure is designed to protect, not to punish defendants. The combined statutory protections under § 4241 and its companion provisions include the right to a mental competency evaluation by mental health professionals, the right to challenge their determinations by separate evaluation, and the right to a hearing. These statutory protections have been judicially enhanced by the *Sell* restrictions against involuntary treatment.

Moreover, if the Court concludes that the defendant's mental condition has not so improved as to permit proceedings to go forward, the additional protections of § 4246 may become effective. Thus, a defendant has the possibility of dual protections, both a § 4241 hearing and a § 4246 hearing. To sanction the Government's failure to obtain currently effective custodial orders by ordering that the matter proceed directly to § 4246 would be to sanction the defendant for the Government's lapse, depriving him of his statutory right to have his competency to stand trial judicially evaluated and determined.

B. THE DEFENDANT'S MOTION FOR PHYSICAL PRESENCE AT THE § 4247(d) HEARING OR THE PHYSICAL PRESENCE OF HIS ATTORNEY WITH HIM AT A VIDEO CONFERENCE HEARING

[2] Mr. Burhoe requests that he "be transported from FMC Butner to the District of Maine to enable him to participate, in person, at all hearings in this matter." *Def.'s Mot. to be Present* at 1. Whether a defendant is entitled to the full panoply of constitutional rights at a § 4247(d) hearing to determine competency under § 4241 is not settled. *United States v. Hamilton,* 107 F.3d 499, 504 (7th Cir.1997) ("And it is unclear whether the Confrontation Clause applies to pretrial competency hearings."); *United States v. Algere,* 457 F.Supp.2d 695, 702 (E.D.La.2005) (concluding that conducting a *Sell* hearing by videoconference***180** in which the Court appears by video teleconference and all other participants and witnesses are present in the same place as the defendant does not violate any rule or constitutional provision). Mr. Burhoe's presence in Maine will satisfy his right to counsel, such as it is, and will have the added benefit of the defendant's physical presence before the Court. Expert witnesses from North Carolina will be free to testify by video conference.[FN3]

FN3. The Court had tentatively scheduled

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the § 4241 hearing for March 5, 2008 at 3:00 p.m. In view of the fact that Mr. Burhoe will now have to be brought to Maine for the hearing, the Court will schedule a conference with counsel and the United States Marshal to determine how quickly Mr. Burhoe can be brought here and, if his physical presence cannot be secured in Maine by March 5, the Court will reset the hearing for an earliest possible date.

III. CONCLUSION

The Court:

1) DENIES the Defendant's Motion for a § 4246 Hospitalization Proceeding (Docket # 69);

2) GRANTS IN PART the Defendant's Motion to be Present during the hearing, by ORDERING the Defendant brought to Maine for the § 4247(d) hearing under § 4241 (Docket # 78); and

3) DENIES the Defendant's motion to rescind the Court's February 15, 2008 *Order on Government's Second Motion to Extend Period of Hospitalization* (Docket # 78).

SO ORDERED.

D.Me.,2008.
U.S. v. Burhoe
535 F.Supp.2d 176

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477 F.3d 716, 07 Cal. Daily Op. Serv. 1494
(Cite as: 477 F.3d 716)

▷

United States Court of Appeals,
Ninth Circuit.
HUU THANH NGUYEN, Petitioner–Appellant,
v.
Silvia GARCIA, Warden; Edward S. Alameida, Jr., Director, Director of Corrections, California State Department of Corrections, Respondents–Appellees.

No. 05–56596.
Argued and Submitted Oct. 24, 2006.
Filed Feb. 9, 2007.

Background: State prisoner convicted of attempted murder filed petition for writ of habeas corpus, challenging admission during mental competency hearing of his post-*Miranda* invocation of right to counsel. The United States District Court for the Central District of California, James V. Selna, J., denied petition. Prisoner appealed.

Holding: The Court of Appeals, Bea, Circuit Judge, held that admission during pre-trial mental competency of invocation of right to counsel did not violate Fifth Amendment privilege against self-incrimination.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿1023(3)

110 Criminal Law
110XXIV Review
110XXIV(C) Decisions Reviewable
110k1021 Decisions Reviewable
110k1023 Appealable Judgments and Orders
110k1023(3) k. Preliminary or interlocutory orders in general. Most Cited Cases

California law does not allow the separate appeal of a competency determination. West's Ann.Cal.Penal Code § 1368(c).

[2] Habeas Corpus 197 ⚿842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review de novo. Most Cited Cases

Habeas Corpus 197 ⚿846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear error. Most Cited Cases

The district court's decision to deny a petition for writ of habeas corpus is reviewed de novo, and its factual findings are reviewed for clear error. 28 U.S.C.A. § 2254(d).

[3] Habeas Corpus 197 ⚿450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In general. Most Cited Cases

Habeas Corpus 197 ⚿452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or constitutional questions. Most Cited Cases

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A habeas court will defer to the state court's determination of the federal issues unless that determination is contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C.A. § 2254(d)(1).

[4] Habeas Corpus 197 ⚿452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or constitutional questions. Most Cited Cases

Only United States Supreme Court holdings, but not dicta, constitute "clearly established federal law" for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) deference standard. 28 U.S.C.A. § 2254(d)(1).

[5] Habeas Corpus 197 ⚿841

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k841 k. In general. Most Cited

Review of the district court's decision in a habeas proceeding is de novo, and the Court of Appeals may affirm on any ground supported by the record, even if it differs from the rationale of the district court. 28 U.S.C.A. § 2254(d).

[6] Constitutional Law 92 ⚿4687

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4684 Defendant as Witness
92k4687 k. Silence. Most Cited
(Formerly 92k268(10))

It would be fundamentally unfair and a deprivation of due process to allow defendant's post-arrest silence after receiving *Miranda* warnings to be used to impeach the defendant's explanation subsequently offered at trial. U.S.C.A. Const.Amend. 5.

[7] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿410.36

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)4 Adoptive Admissions; Silence
110k410.32 Silence
110k410.36 k. Post-arrest silence; custody. Most Cited Cases
(Formerly 110k407(1))

Admission during pre-trial mental competency hearing of defendant's post- *Miranda* invocation of right to counsel did not violate defendant's Fifth Amendment privilege against self-incrimination; the references to defendant's invocation of his right to counsel were not used to show defendant's guilt, but rather to show cognition, and the privilege against self-incrimination was inapplicable at competency hearing. U.S.C.A. Const.Amend. 5.

[8] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

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Under California law, the goal of the competency hearing is not to examine the defendant's sanity at the time of the commission of the offense; rather, the goal is to determine whether the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. West's Ann.Cal.Penal Code § 1367(a).

[9] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the effect of being found competent to stand trial and assist counsel in no way affects the determination of the defendant's guilt; it merely removes a procedural barrier to the commencement of trial. West's Ann.Cal.Penal Code § 1367(a).

[10] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the effect of being found incompetent to stand trial is the suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him. West's Ann.Cal.Penal Code § 1367(a).

[11] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the effect of being found competent to stand trial is the continuation of criminal proceedings to the guilt phase of trial. West's Ann.Cal.Penal Code § 1367(a).

[12] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

The Fifth Amendment privilege against self-incrimination exists to prohibit the government from forcing the defendant to talk and then using the defendant's own statements to satisfy its burden of establishing guilt. U.S.C.A. Const.Amend. 5.

[13] Criminal Law 110 ⚿411.71

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)15 Persons to Whom Made
110k411.71 k. Statements in connection with mental examination. Most Cited Cases
(Formerly 110k412(4))

Under California law, immunity for competency hearing statements is necessary to ensure that an accused is not convicted by use of his own statements made at a court-compelled examination. U.S.C.A. Const.Amend. 5; West's Ann.Cal.Penal Code § 1369.

[14] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

A defendant seeking to establish incompetence

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can be compelled to talk without violating his Fifth Amendment right against self-incrimination; a defendant may be required to be a witness to his own competency, if not his own crime. U.S.C.A. Const.Amend. 5.

***718** Allen Bloom, San Diego, CA, for the petitioner-appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Kevin Vienna, Deputy Attorney General, Lise Jacobsen, Deputy Attorney General, Quisteen S. Shum, Deputy Attorney General, San Diego, CA, for the respondents-appellees.

Appeal from the United States District Court for the Central District of California; James V. Selna, District Judge, Presiding. D.C. No. CV–03–01385–JVS.

Before EUGENE E. SILER, JR.,[FN*]TASHIMA, and BEA, Circuit Judges.

FN* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

BEA, Circuit Judge.

In *Wainwright v. Greenfield,* 474 U.S. 284, 295, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Supreme Court held that prosecution evidence the defendant maintained silence after his arrest, offered to show he wasn't all *that* crazy, and to rebut defendant's insanity defense in the guilt phase of trial, constituted a violation of due process. Here, we consider whether *Wainwright,* or other applicable federal law, prohibits the prosecutor's mention that defendant requested counsel to show he was able to cooperate in his own defense—not at the guilt phase of trial but during a hearing to determine whether the defendant was mentally competent to stand trial. We conclude that the state court decision finding *Wainwright* inapplicable to a state court competency hearing is not "contrary to" clearly established federal law and therefore affirm the denial of appellant's petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254.

I.

In the early morning of November 15, 1997, a fight broke out at a billiard hall in Stanton, California. The fight continued in the parking lot of the billiard hall and shots were fired. Two of the shots fired struck the outer wall of the billiard hall and one shot pierced the front window and struck an interior wall. No one was killed or hit, but probably not for lack of trying. The owner of the billiard hall saw someone firing a weapon out of the passenger window of a Nissan Maxima. After hearing the shots, Deputy Albert Macias observed a beige Nissan Maxima automobile speed away from the billiard hall parking lot. A brief pursuit ended when the Maxima spun out of control. Appellant Huu Thanh ***719** Nguyen ("Nguyen") was the sole occupant of the vehicle.

Deputy Macias ordered Nguyen out of the car and then handcuffed Nguyen and placed him in the back of the patrol car. Macias read Nguyen his *Miranda* rights after arresting him, and Nguyen responded that he understood each of his rights. Nguyen then stated he wanted to tell Macias what had happened. Nguyen told Macias that a friend had fired the shots. Nguyen stated he drove off to allow his friend to escape, and that Nguyen had tossed the gun out of his window because it was not his. After telling Deputy Macias these details, Nguyen stated he wanted to talk with a lawyer. Macias stopped his interrogation.

The gun used to fire the shots was found 30 to 50 feet from where the Maxima came to rest. Gunshot residue was found on Nguyen's left hand, on the interior and exterior of the passenger door, and on the windshield.

In January 1998, Nguyen was charged with attempted first degree murder, Cal.Penal Code §§

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187(a), 664, assault with the personal use of a firearm, *id.* § 245(a)(2), shooting at an occupied building, *id.* § 246, and being a felon in possession of a firearm, *id.* § 12021(a)(1).[FN1] He was charged to have committed the attempted murder willfully, deliberately, and with premeditation. Before the jury trial, the proceedings in the criminal prosecution were suspended pursuant to California Penal Code §§ 1367 – 69 for a hearing to determine whether Nguyen was competent to stand trial. [FN2]

FN1. Nguyen stood twice convicted, once in 1992 and once in 1993, of felony burglary offenses. Cal.Penal Code §§ 459–60.

FN2. Under California law,

> [a] person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational man- ner.

Cal.Penal Code § 1367(a).

The competency hearing was held in March 1999 before a jury impaneled solely to decide whether Nguyen was competent to stand trial on the charges lodged against him.[FN3] At this competency hearing, Dr. Paul Blair testified for the defense. He testified that he had evaluated Nguyen twice, once in September 1992 (at the request of a public defender who was defending Nguyen for the 1992 burglary charge) and again in January 1999. Dr. Blair opined that Nguyen "is not competent to participate in his own defense at this point in time, nor is he competent to discuss with you in a legitimate, forthright manner...." During cross examination of Dr. Blair, the prosecutor mentioned Nguyen's ***720** request for an attorney on the night of the billiard hall shooting:

FN3. In California, competency hearings are distinct from the criminal prosecution: "when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." Cal.Penal Code § 1368(c). If a jury has been impaneled to decide the guilt of the defendant, the jury is "retained on call" pending resolution of the defendant's competency unless such retention would cause "undue hardship." *Id.* A separate jury may be impaneled to determine the sole issue of the defendant's competency. *See id.* §§ 1368(c), 1369(e), (f); *People v. Turner,* 34 Cal.4th 406, 424, 20 Cal.Rptr.3d 182, 99 P.3d 505 (2004). Defendant has the burden of proving by a preponderance of the evidence that he is mentally incompetent. *Id.* § 1369(f).

> Here, of course, the competency hearing preceded the guilt phase trial; the composition of the competency jury was totally different from that of the eventual guilt phase jury.

Q: Let me ask you this, Dr. Blair. If Mr. Nguyen on the day of his arrest in November of 1997 gave a police officer a rational, apparently cogent statement, even—even a defense to what he was suspected of doing, saying he may not have been involved, telling him that he didn't want to speak to him any longer, *wanted a lawyer,* would that mean that he's competent to stand trial today? [FN4]

FN4. There was neither an objection to this question nor a motion to strike the answer.

A: No.
(emphasis added).

The prosecution's psychiatric expert, Dr.

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Kaushal Sharma, testified about his interview with Nguyen. Sharma explained that Nguyen described in detail the charges against him and explained his defenses. Nguyen's request for an attorney on the night of the shooting was not mentioned during Sharma's testimony. But Sharma testified that Nguyen's statement that he understood his *Miranda* rights demonstrated "mental intact functioning."

Deputy Macias, the arresting officer, testified as to the arrest, his recitation of the *Miranda* rights, and Nguyen's acknowledgment of the rights (including his request for an attorney) and explanation of the events of the crime. Finally, during closing arguments of the competency hearing, the prosecution mentioned Nguyen's acknowledgment of his *Miranda* rights as evidence of his competency:

> When [Macias] says, "You have the right to an attorney. Do you understand that? One will be appointed to you free of charge before speaking to me." "Yes," he understands that.
>
> That tends to show circumstantially that he's aware of at least the element that he's involved in a criminal court proceeding. He's aware of going to court, things that he says to the deputy could be used against him, he has a right to a lawyer free of charge before talking to the sheriff's deputy. So circumstantially, that tends to show to a reasonable person he's aware of things.

SER 435–36. Following closing arguments, the jury empaneled only for the competency hearing found Nguyen mentally competent to stand trial.

On November 16, 1999, a jury composed totally of persons who had not served on the jury which determined competency convicted Nguyen of the charged offenses and found true the allegations that Nguyen had acted willfully, deliberately, and with premeditation and that he personally used the firearm in committing the attempted murder. Nguyen makes no assertion that his invocation of his right to counsel was at all mentioned during the criminal phase of trial. On January 21, 2000, Nguyen was sentenced to state prison for 25 years to life pursuant to California's Three Strikes Law.

[1] Nguyen appealed the judgment, asserting, *inter alia,* that his due process rights were violated when his request to talk to an attorney was used against him during the competency hearing. Nguyen relied on *Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) as support for this contention. On direct appeal, the California Court of Appeal rejected Nguyen's application of *Wainwright* on the ground that evidence of a defendant's invocation of *Miranda* rights as an indicum of competency during a competency hearing is distinguishable from the use of post-*Miranda* silence to overcome a plea of insanity during the criminal phase of trial. Specifically, the court stated that whereas the criminal phase of trial involves a penalty—a potential***721** guilty verdict—a "mental competency hearing does not involve any penalty...." Therefore, "what applies to a criminal case does not necessarily apply to a competency proceeding." On these grounds, the state appellate court held that it was not a violation of due process to use Nguyen's invocation of his right to counsel as evidence during the competency hearing. Without comment, the California Supreme Court denied Nguyen's petition for review.[FN5]

> FN5. California law does not allow the separate appeal of a competency determination: "A determination of mental competency is a nonappealable interlocutory ruling and may be reviewed only on an appeal from a final judgment in the underlying criminal proceeding." 5 Witkin, *California Criminal Law, Criminal Trial* § 716 (3d ed.); *see also People v. Mickle,* 54 Cal.3d 140, 180, 284 Cal.Rptr. 511, 814 P.2d 290 (1991) ("We conclude that the verdict finding defendant competent is a nonappealable, interlocutory ruling. It may be reviewed on appeal only from a final judgment in the underlying criminal proceeding.").

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Nguyen then filed a petition for writ of habeas corpus with the United States District Court for the Central District of California. Nguyen raised only one claim in his petition: "[Nguyen's] constitutional right to due process was violated when his post-*Miranda* warning invocation of his right to counsel was admitted, over defense objections,[FN6] as evidence of his mental competency at a hearing under California Penal Code section 1368."

> FN6. The record does not contain any defense objection, much less "objections," to the question in answer to which Deputy Macias stated Nguyen requested an attorney. *See supra* page 719–20. However, in view of the basis of our decision, the case does not turn on whether a claimed evidentiary error was properly preserved below or whether any error meets the standard for plain error.

The district court adopted its magistrate's Report, denied Nguyen's habeas petition, and dismissed Nguyen's habeas petition with prejudice. The district court held the California Court of Appeal's decision was not an objectively unreasonable application of either *Wainwright,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, or *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding that it is a violation of due process to use a defendant's invocation of his right to remain silent to impeach defendant's testimony at trial, where such claim of right to remain silent follows a *Miranda* warning).

Here, a certificate of appealability was granted on one issue: "[w]hether the state court's decision—that Petitioner had suffered no violation of his Miranda rights when his invocation of his right to counsel was brought out at his competency hearing—was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court...." [FN7] Accordingly, Nguyen appeals the district court's denial of his federal habeas petition and claims the state court's decision holding *Wainwright* is inapplicable to competency hearings is contrary to federal law. The holding in *Wainwright,* Nguyen posits, extended *Doyle* from silence to the request for an attorney and is not limited to issues of guilt or non-guilt.

> FN7. We note that Nguyen's Notice of Appeal was timely under Fed. R.App. P. 4(a)(6) because Nguyen received no notice of the entry of Judgment.

II.

A.

[2] The district court's decision to deny Nguyen's petition for writ of habeas corpus is reviewed *de novo,* and its factual findings are reviewed for clear error. *Rios v. Garcia,* 390 F.3d 1082, 1084 (9th Cir.2004).

***722** [3][4] The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, 110 Stat. 1214, ("AEDPA") applies to this case because Nguyen's petition for writ of habeas corpus was filed after April 24, 1996. Under AEDPA, habeas relief is proper only if the state court's adjudication of the merits of a habeas claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[FN8] We will "defer to the state court's determination of the federal issues unless that determination is 'contrary to, or involved an unreasonable application of, clearly established Federal law.' " *Himes v. Thompson,* 336 F.3d 848, 852 (9th Cir.2003) (quoting *Lockyer v. Andrade,* 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)). The relevant state court decision here is the decision of the California Court of Appeal, as that is the last reasoned state decision. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Only United States Supreme Court holdings, but not dicta, constitute "clearly established federal law" for purposes of the AEDPA deference standard. *See Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Lambert v. Blodgett,* 393 F.3d 943, 974 (9th Cir.2004) (quoting

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Lockyer, 538 U.S. at 71–72, 123 S.Ct. 1166).

FN8. AEDPA provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

B.

[5][6] Because resolution of this case turns on whether the state court's decision is contrary to the holdings in *Wainwright,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, and *Doyle,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91, we begin by examining these holdings.[FN9] First, in *Doyle,* defendants charged with selling marijuana testified at trial that they had not sold marijuana but been set up by law enforcement in an effort to buy marijuana. *Id.* at 612–13, 96 S.Ct. 2240. To impeach the ***723** veracity of the defendants' exculpatory story, the prosecutor on cross-examination questioned each defendant why they had not told this story at the time of their arrest. *Id.* at 613–14, 96 S.Ct. 2240. On these facts, the Supreme Court considered whether the prosecutor's use of post-*Miranda* silence to impeach a defendant's exculpatory testimony given at trial violates due process. The Court held that it did and thereby proscribed the use of an arrestee's post-*Miranda* silence to impeach trial testimony: "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doyle,* 426 U.S. at 618, 96 S.Ct. 2240; *see also United States v. Hale,* 422 U.S. 171, 182–83, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) (White, J., concurring). Hence, "it would be fundamentally unfair and a deprivation of due process to allow the arrested persons's silence to be used to impeach an explanation subsequently offered at trial." *Doyle,* 426 U.S. at 619, 96 S.Ct. 2240.

FN9. The "contrary to" clause is the correct clause for analysis in this case. We have explained that a state court decision is contrary to federal law if the court either " 'applies a rule that contradicts the governing law set forth' by the Supreme Court or arrives at a different result in a case, that is 'materially indistinguishable from a [Supreme Court] decision.' " *Luna v. Cambra,* 306 F.3d 954, 960 (alteration in the original) (quoting *Penry v. Johnson,* 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), *as amended* 311 F.3d 928 (9th Cir.2002)). The state court did not apply the holdings of *Wainwright* and *Doyle* to the facts of Nguyen's case; rather, it distinguished *Wainwright* and *Doyle* on the basis that errors in those cases occurred during the guilt phase of a trial, not during a hearing to determine competency to stand trial. The state court thus found *Wainwright* and *Doyle* inapplicable to a competency hearing. Whether Nguyen is entitled to habeas relief depends on whether this decision is contrary to federal law. That the district court applied the "unreasonable application" clause in its analysis is immaterial to our analysis. Our review of the district court's decision is de novo, and we may "affirm on any ground supported by the record, even if it differs from the rationale of the district court." *Pollard v. White,* 119 F.3d 1430, 1433 (9th

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Cir.1997).

Wainwright presented the Court with a variation on the theme of *Doyle.* The question in *Wainwright* was whether post-*Miranda* silence could be used as evidence to prove a defendant's sanity, following a defendant's plea of insanity, during the criminal phase of trial. 474 U.S. at 285, 106 S.Ct. 634. Pursuant to the state law applicable in *Wainwright,* "when a defendant pleads not guilty by reason of insanity and when his evidence is sufficient to raise a reasonable doubt about his sanity, the State has the burden of proving sanity beyond a reasonable doubt." *Id.* at 286, 106 S.Ct. 634. If the State were unable to meet this burden, the defendant would be entitled to an acquittal. *Id.* at 286 n. 1, 106 S.Ct. 634 (citing cases). The Court found *Doyle* analogous:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, *the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction.* The implicit promise, the breach, and the consequent penalty are identical in both situations.

Id. at 284–85, 106 S.Ct. 634 (emphasis added). The Court ruled the use of post-*Miranda* silence to disprove insanity unfairly penalized the defendant in contravention of the Due Process Clause of the Fourteenth Amendment. *Id.* at 293–95, 106 S.Ct. 634.

In sum, the due process violations found in these decisions are a result of the fundamental unfairness of the prosecution's use of post-*Miranda* silence to infer the defendant's guilt and thereby aid in persuading a jury to convict. Such use amounts to "penalizing" the defendant for invocation of their rights. *Compare Doyle,* 426 U.S. at 617–18, 96 S.Ct. 2240, *with Wainwright,* 474 U.S. at 295, 106 S.Ct. 634. After all, that the defendant will not be penalized is implicit in the opening line of the *Miranda* warnings: "You have the right to remain silent...." *See Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). It would not be much of a "right" if its *use* penalizes the user.

C.

[7] We now consider whether reference to a defendant's post-*Miranda* invocation of his right to counsel during a ***724** pretrial competency hearing causes the same penalty at issue in *Wainwright* and *Doyle.* A review of the nature of competency hearings demonstrates that the penalty contemplated in *Wainwright* and *Doyle* simply does not occur in the context of competency hearings.

1.

It has long been a principle of our law that one who becomes "mad" after committing an offense should not be tried for the offense "for how can he make his defense?" William Blackstone, 4 *Commentaries* 24; *see also Drope v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). The Supreme Court has held that failure "to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Id.* at 172, 95 S.Ct. 896 (citing *Pate v. Robinson,* 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)).

[8] To protect against the improper trial of mentally incompetent defendants, California has established a competency hearing procedure to determine a defendant's competency *prior to* a criminal trial. *See* Cal.Penal Code §§ 1367 – 69. The goal of the competency hearing is not to examine the de-

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fendant's sanity *at the time of the commission of the offense* (the issue in *Wainwright*); rather, the goal is to determine whether "the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." *Id.* § 1367(a); *see also Godinez v. Moran,* 509 U.S. 389, 401 n. 12, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) ("The focus of a competency hearing is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings."); *People v. Masterson,* 8 Cal.4th 965, 971, 35 Cal.Rptr.2d 679, 884 P.2d 136 (1994) ("The *sole purpose* of a competency proceeding is to determine the defendant's present mental competence, i.e., whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner." (emphasis added)). California law "presume[s] that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." Cal.Penal Code § 1369(f) . The California Supreme Court explained that "[a]lthough it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings." *People v. Lawley,* 27 Cal.4th 102, 131, 115 Cal.Rptr.2d 614, 38 P.3d 461 (2002).

[9][10][11] The effect of being found competent in no way affects the determination of the defendant's guilt; it merely removes a procedural barrier to the commencement of trial. *See Jackson v. Indiana,* 406 U.S. 715, 739, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) ("[C]riminal responsibility at the time of the alleged offenses, however, is a distinct issue from [one's] competency to stand trial."). Indeed, the Supreme Court has carefully distinguished a pretrial competency determination from a guilt/innocence determination: "In a competency hearing, the 'emphasis is on [the defendant's] capacity to consult with counsel and to comprehend the proceedings, and ... this is by no means the same test as those which determine criminal responsibility at the time of the crime.' " *Medina v. California,* 505 U.S. 437, 448, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), (alteration and omission***725** in the original) (quoting *Pate v. Robinson,* 383 U.S. 375, 388–89, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (Harlan, J., dissenting)). Regarding California's competency procedure, California state courts have explained:

> The purpose of [a competency hearing] is not to determine guilt or innocence. It has no relation to the plea of not guilty by reason of insanity. Rather, the sole purpose of [the competency hearing] is the humanitarian desire to assure that one who is mentally unable to defend himself not be tried upon a criminal charge.
>
> *Tarantino v. Superior Court,* 48 Cal.App.3d 465, 469, 122 Cal.Rptr. 61 (1975).

The effect of being found incompetent is the "suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him." *Medina,* 505 U.S. at 448, 112 S.Ct. 2572; *see also Dusky v. United States,* 362 U.S. 402, 402–03, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam). The effect of being found competent is the continuation of criminal proceedings to the guilt phase of trial. [FN10]

> FN10. We acknowledge that using a defendant's post-*Miranda* invocation of the right to counsel to establish competency to stand trial may help to remove a procedural barrier to trial and eliminates the tactical advantage of indefinite pretrial delay, during which time witnesses die and evidence deteriorates. The removal of a procedural barrier to trial and the loss of a tactical advantage, however, do not raise the same constitutional concern at issue in *Wainwright.* One has a constitutional right not to have one's silence be used to prove guilt. No one has a constitutional right to stall trial until evidence is lost and witnesses expire.

Likewise, the use of a defendant's invoc-

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> ation of *Miranda* rights at a suppression or evidentiary hearing does not raise the same constitutional concern at issue in *Wainwright.* Thus, use of evidence procured in violation of *Miranda* warnings has never been barred in such non-jury, non-guilt phase proceedings. For example, in *United States v. Lemon,* 550 F.2d 467, 473 (9th Cir.1977), we held that although "[s]tatements taken in violation of Miranda may not be used to prove the prosecution's case at trial," such statements "elicited prior to the giving of Miranda warnings may be used during a motion to suppress to show defendant's consent to a search." We relied on *Lemon* in *United States v. Patterson,* 812 F.2d 1188, 1193 (9th Cir.1987), *cert. denied,* 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988), where we held that statements taken in violation of *Miranda* may be used in an affidavit to establish probable cause for a search warrant.

2.

[12] Not only are competency hearings entirely distinct in purpose from the guilt phase of trial, but competency hearings do not invoke the same concerns of self-incrimination—the right *Miranda* is designed to protect—that are relevant during the guilt and penalty phases of trial. The Fifth Amendment privilege against self-incrimination exists to prohibit the government from forcing the defendant to talk and then using the defendant's own statements to satisfy its burden of establishing guilt. *See Oregon v. Elstad,* 470 U.S. 298, 304–05, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (explaining that use of voluntary statements does not violate the Fifth Amendment); *Estelle v. Smith,* 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). These concerns have no place at a competency hearing.

[13] In California, the court may order a competency hearing and *compel* a defendant to submit to psychiatric evaluation as part of the competency determination. Cal.Penal Code § 1369. Accordingly, California state courts have expressly held there is no Fifth Amendment right against self incrimination during competency hearing proceedings so long as statements ***726** made during a competency hearing are immune from later use by the prosecution to establish guilt. *Tarantino,* 48 Cal.App.3d at 469–70, 122 Cal.Rptr. 61. Immunity for competency hearing statements "is necessary to ensure that an accused is not convicted by use of his own statements made at a court-compelled examination.... Hence, the rule protects both an accused's privilege against self-incrimination and the public policy of not trying persons who are mentally incompetent." *People v. Arcega,* 32 Cal.3d 504, 522, 186 Cal.Rptr. 94, 651 P.2d 338 (1982).

This judicially-created immunity is buttressed by the Supreme Court's holding in *Estelle,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359. There, in holding that the Fifth Amendment privilege against self-incrimination extends to psychiatric examinations that are later used in the penalty phase of trial, [FN11] the Court declared that "[t]he essence" of the Fifth Amendment privilege against self-incrimination "is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Id.* at 462, 101 S.Ct. 1866 (emphasis omitted) (quoting *Culombe v. Connecticut,* 367 U.S. 568, 581–82, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961)). Since neither conviction nor punishment are the result of a competency hearing, the rationale underlying *Estelle's* holding simply does not extend to statements used solely at such a hearing.[FN12]

> FN11. In *Estelle,* a psychiatrist spoke with the defendant during competency proceedings to determine whether he was competent to stand trial. *Estelle,* 451 U.S. at 456–57, 101 S.Ct. 1866. Later, during the penalty phase of trial, the psychiatrist testi-

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fied against the defendant—on the basis of their discussions during the competency hearing—to establish that the defendant posed great risk to society. *Id.* at 459–60, 101 S.Ct. 1866.

FN12. In dicta, the Court expressed as much in *Estelle:* "Indeed, if the application of [the psychiatrist's] findings had been confined to [a competency hearing], no Fifth Amendment issue would have arisen." *Estelle,* 451 U.S. at 465, 101 S.Ct. 1866.

[14] Unlike guilt or punishment, incompetency can rarely be determined without the participation of the person claimed to be incompetent. Furthermore, because under California law the *defendant* bears the burden to establish *incompetence* by a preponderance of the evidence, the use of a defendant's own statements during a competency hearing in no way affects the government's evidentiary burden. Cal.Penal Code § 1369(f). In short, a defendant seeking to establish incompetence can be compelled to talk: a defendant may be required to be a witness to his own competency, if not his own crime.[FN13]

FN13. This conclusion is in line with previous holdings regarding the right against self-incrimination at analogous pretrial hearings. For example, in *United States v. Mitchell H.,* 182 F.3d 1034, 1035–36 (9th Cir.1999), we held that the privilege against self-incrimination does not apply to a juvenile transfer hearing because the hearing is not a criminal hearing, and statements during the hearing, like statements made during a competency hearing, cannot be used at a later criminal trial. We noted that "a juvenile transfer hearing is a close cousin of a competency hearing" because both hearings " 'deal with whether a defendant should be exempted from criminal prosecution because he falls within a category of persons who, in the eyes of the law, are not viewed as fully responsible for their acts.' " *Id.* at 1035 n. 3 (quoting *United States v. A.R.,* 38 F.3d 699, 703 (3d. Cir.1994)).

Miranda exists to provide "procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The privilege ***727** against self-incrimination, in turn, exists to protect the defendant from being forced to be a witness against himself. *Estelle,* 451 U.S. at 462, 101 S.Ct. 1866; *see also United States v. Patane,* 542 U.S. 630, 637, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) (noting "that the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial" in lieu of producing other evidence). We fail to see how *Wainwright* and *Doyle,* which hold that a defendant shall not be penalized for invoking *Miranda* rights, should apply to a hearing at which the Fifth Amendment privilege against self-incrimination is inapplicable. Here, reference to Nguyen's post-arrest invocation at the competency hearing was not used to satisfy the prosecutorial burden of proof of guilt; it was used, rather, to show cognition.

III.

On these bases, we hold that the California Court of Appeal's decision not to apply *Wainwright* and *Doyle* to Nguyen's competency hearing was not "contrary to" federal law. The court correctly explained that "the nature of the proceeding in this case distinguishes it from *Wainwright,* " and that "[a] mental competency hearing does not involve any penalty...." [FN14] Absent a holding by the Supreme Court to apply the principles of *Wainwright* and *Doyle* to competency hearings, we are bound by the strictures of AEDPA to defer to the state court's determination. *See Carey v. Musladin,* 549U.S. 70, —— – ——, 127 S.Ct. 649, 652–54, 166 L.Ed.2d 482 (2006). [FN15]

FN14. Having determined that the state court's decision was not contrary to estab-

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lished federal law, we need not address Nguyen's contention that reference to his post-*Miranda* invocation of his right to counsel during the competency hearing was not harmless error under *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

FN15. We reject Nguyen's contention that *Medina v. California,* 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), extended *Wainwright* to competency hearings. In *Medina,* the sole issue before the Court was whether the Due Process Clause permitted California to place the burden of establishing incompetence on the defendant. *Id.* at 439, 112 S.Ct. 2572. The Court held that California's competency determination framework did not violate due process. *Id.* at 448–53, 112 S.Ct. 2572. Nothing in the decision suggests the principles of *Wainwright* and *Doyle* should apply in the context of competency hearings.

AFFIRMED.

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886 P.2d 1298, 63 USLW 2444
(Cite as: 886 P.2d 1298)

H

Court of Appeals of Alaska.
David C. REUTTER, Appellant,
v.
STATE of Alaska, Appellee.

No. A-4889.
Dec. 9, 1994.

Defendant was convicted in the Superior Court, First Judicial District, Sitka, Larry C. Zervos, J., of sexual abuse of minor in first and second degree. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) statute permitting child sexual abuse victim to testify via one-way closed circuit television was constitutional; (2) finding that qualifications of witnesses were sufficient to allow them to testify as experts was not abuse of discretion; and (3) determination that child's inability to testify at trial would be caused by defendant's presence was supported by evidence.

Affirmed.

West Headnotes

[1] Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Although statute permitting child sexual abuse victim to testify via one-way closed circuit television did not explicitly require finding of necessity based on likelihood of serious emotional distress and did not specifically require finding that victim's emotional distress would be caused specifically by presence of defendant, these requirements were deemed implicit part of statutory provision. AS 12.45.046.

[2] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

In order to find it necessary to subordinate defendant's right of face-to-face confrontation to child victim's need for protection by authorizing child sexual abuse victim to testify via one-way closed circuit television, determination of child's inability to effectively communicate must be based on case specific evidence establishing that child witness would be traumatized, not by court generally, but by presence of defendant, that confrontation would pose threat of serious emotional harm to child, and that use of closed circuit television was necessary to protect welfare of child. AS 12.45.046(a)(2).

[3] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

No dilution of right to confrontation should be permitted by allowing child sexual abuse victim to testify via one-way closed circuit television without express finding that requirements of statute authorizing closed circuit testimony have been met by clear and convincing evidence. AS 12.45.046.

[4] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts

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110k478 Knowledge, Experience, and Skill

110k478(1) k. In general. Most Cited Cases

Rule regarding expert testimony gives trial court broad latitude to allow witness to testify as expert when court finds that testimony will be helpful to fact finder; there is no requirement that witness possess particular license or academic degree, provided that fact finder can receive appreciable help from witnesses' testimony. Rules of Evid., Rule 702(a).

[5] Criminal Law 110 ⚿1153.12(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.12 Opinion Evidence
110k1153.12(2) k. Competency of witness. Most Cited Cases
(Formerly 110k1153(2))

Trial court's decision to allow witness to testify as expert is reviewable only for abuse of discretion. Rules of Evid., Rule 702(a).

[6] Criminal Law 110 ⚿479

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k479 k. Bodily and mental condition. Most Cited Cases
(Formerly 110k478(1))

Determination that qualifications of witnesses were sufficient to allow them to testify as experts in defendant's prosecution for child sexual abuse was supported by evidence that, although witnesses did not possess expertise in field of psychology, witnesses had professional experiences that made their opinions helpful to court, that witnesses had considerable contact with victim, and that witnesses did not pretend to address deep psychological issues. Rules of Evid., Rule 702(a).

[7] Criminal Law 110 ⚿465

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k465 k. Facts forming basis of opinion. Most Cited Cases

Even if expertise of witnesses who testified in defendant's prosecution for child sexual abuse to some degree fell short of meeting standard established for expert's testimony, their opinions were properly admitted under more permissive standard governing opinion testimony by lay witnesses, where, although testimony of challenged witnesses was necessarily informed by their educational and professional backgrounds, their opinions were almost wholly based on reasonable inferences drawn from their recent observations of child victim. Rules of Evid., Rules 701, 702(a).

[8] Criminal Law 110 ⚿366(1)

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k366 Acts and Statements of Person Injured
110k366(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿419(2.15)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.15) k. Present sense impression. Most Cited Cases

Criminal Law 110 ⚿419(2.20)

110 Criminal Law
110XVII Evidence

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110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) k. Then-existing state of mind or body. Most Cited Cases

Testimony of expert witnesses relating to various statements made by child sexual abuse victim were properly admitted under hearsay exceptions governing present sense impression, excited utterance, and existing mental or emotional condition. Rules of Evid., Rule 803(1-3).

[9] Criminal Law 110 ⚖1158.1

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.1 k. In general. Most Cited Cases
(Formerly 110k1158(1))

Appellate court will reverse factual findings only when they are clearly erroneous.

[10] Witnesses 410 ⚖228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Determination that child sexual abuse victim's inability to testify at trial would be caused by defendant's presence, rather than by general courtroom setting, and that, therefore, child could testify via one-way closed circuit television, was supported by evidence regarding child's chronological age, her developmental level, and degree of emotional and psychological injury that she had already suffered and would likely suffer if forced to testify in court. AS 12.45.046.

***1299** William E. Olmstead, Olmstead & Conheady, Juneau, for appellant.

Nancy R. Simel, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Charles E. Cole, Atty. Gen., Juneau, for appellee.

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

OPINION

BRYNER, Chief Judge.

David C. Reutter was convicted by a jury of one count of sexual abuse of a minor in the first degree, AS 11.41.434(a)(1), and one count of sexual abuse of a minor in the second degree, AS 11.41.436(a)(2). The convictions stemmed from Reutter's sexual abuse of his nine-year-old daughter, A.R. At trial, over Reutter's objection, Superior Court Judge Larry C. Zervos permitted A.R. to testify via one-way closed-circuit television from a room adjacent to the courtroom. Reutter appeals, contending that this arrangement violated his constitutional right to confrontation. We affirm.

FACTS

1. *Background Facts*

On February 15, 1992, Reutter locked A.R. out of their house in Sitka. The Division of Family and Youth Services (DFYS) became involved and placed A.R. and her mother, Patti Reutter, in a local women's shelter operated by Sitkans Against Family Violence (SAFV). Patti eventually returned home to Reutter. DFYS removed A.R. from the shelter and placed her in a foster home.

While A.R. was staying at the shelter, and afterwards while staying at the foster home, she attended support-group sessions at the SAFV shelter for child victims of domestic violence. During one of the support-group sessions, A.R. told Elizabeth Willis,[FN1] the children's program coordinator and A.R.'s "child advocate," about Reutter's sexual abuse. Willis immediately notified DFYS. A.R.'s case was assigned to DFYS social worker Sandra Beare-Spencer, who reported the allegations of sexual abuse to the Sitka police and arranged for A.R. to be physically examined by Sitka family practitioner Dr. Debra Pohlman. Pohlman found that A.R. had a larger than normal vaginal opening and that she had scarring in the area, both signs of ***1300** sexual abuse. The state then filed a Child In Need of Aid

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(CINA) petition to determine the most appropriate custodial placement for A.R.

> FN1. Throughout the proceedings Willis was also referred to by her former married name, Elizabeth Sayer or Elizabeth Willis Sayer.

2. *The CINA Hearing*

A.R. was placed with relatives in Chevak pending the CINA determination. She returned to Sitka in May to testify at the CINA hearing. When A.R. first entered the courtroom to testify, she appeared confident and very happy to see her parents. However, during her testimony, she became anxious and distracted by stares and smiles from her parents and by the whispering and conferring between her parents and their attorneys. Soon, A.R. simply "shut down." The court was forced to recess, and A.R. had to be taken from the courtroom. According to Beare-Spencer, A.R. became "[v]ery, very upset. Her face contorted[,] ... her eyebrows were together and ... her arms were tight in front of her, and she was leaning against a wall and just shaking. She ... was extremely upset." A.R. told Beare-Spencer that "she couldn't talk about what happened, that her mom was going to be hurt, that her dad would hurt her mom."

Later, the court attempted to take A.R.'s testimony by placing her in the district attorney's office with just Willis and her guardian *ad litem,* Mary Hughes; the assistant attorney general who was handling the CINA proceeding questioned her by telephone from the courtroom. However, the electronic equipment in the district attorney's office malfunctioned, causing A.R. to become even more upset. The hearing was postponed for several days. When it reconvened, A.R. was placed in a grand jury room, again with just Willis and Hughes present in the same room. From there, she was able to answer some questions over the speakerphone, but she still refused to testify regarding the sexual abuse.

3. *Pretrial Hearing*

On May 8, 1992, the same day the CINA hearing began, Reutter was indicted for sexually abusing A.R. Prior to trial, the state moved, pursuant to AS 12.45.046(a)(2), to have A.R. be allowed to testify via one-way closed-circuit television or through one-way mirrors. Reutter opposed on confrontation clause grounds. Judge Zervos conducted a two-day evidentiary hearing to determine whether A.R. should be permitted to testify without actually confronting Reutter. At the hearing, the state presented testimony from Beare-Spencer, Willis, Jan Rutherdale (the assistant attorney general who had handled the CINA proceeding), and Martha Ann Lyman (the mental health clinician who treated A.R. while she was staying in Chevak). In addition, Judge Zervos considered a psychological evaluation of A.R. that had been written by Dr. Christiane Brems of the Yukon-Kuskokwim Mental Health Center.

In the course of the hearing, Reutter questioned the qualifications of each of the state's witnesses to testify as experts on the issue of whether A.R. should be allowed to testify without confronting Reutter. Judge Zervos overruled the objections and allowed the witnesses to testify.

Beare-Spencer, the DFYS social worker assigned to A.R.'s case, indicated that she had worked as a social worker for DFYS in Sitka for five years. She had a bachelor's degree in sociology and was only eighteen hours away from receiving a master's degree from Boise State University. She testified that her primary responsibility at DFYS was "protecting children from physical or emotional harm" and that, when making decisions regarding when to intervene, she relied primarily on the on-the-job training and experience that she received, first in Idaho, and then in Sitka.

Beare-Spencer testified that she had spent "[q]uite a bit" of time with A.R. and had talked to her often on the telephone in the previous six months and that she had even spent "four solid days with her" while they traveled to Chevak together. She testified that she knew "a lot of who [A.R.] is,"

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but that there was a part of A.R. that she did not know because A.R. "closes down" when she ***1301** becomes upset. When asked whether she believed A.R. could testify in the presence of Reutter, she answered: "She can't do it." Beare-Spencer based her answer on her observations of A.R.'s emotional condition during and after the CINA proceeding and on A.R.'s statement to Beare-Spencer regarding her desire to protect her mother by remaining silent. Reutter objected, on hearsay grounds, to Beare-Spencer's testimony concerning A.R.'s statement. Judge Zervos overruled the objection.

The prosecution also asked Beare-Spencer whether, in her opinion, "Reutter's presence would significantly impair the substance of [A.R.'s] testimony if she were forced to testify." Reutter objected, arguing that the witness did not have the psychological expertise to testify regarding "this child's psyche." Judge Zervos overruled the objection, and Beare-Spencer testified that she did not believe that A.R. could testify in an open courtroom.

Next, Elizabeth Willis, A.R.'s child advocate, testified. Willis testified that, prior to becoming a child advocate in Sitka, she completed "early childhood trainings" and had taken many classes and workshops in psychology. In addition, she testified that she operated a day-care business for five years in Anchorage before she moved to Sitka. She testified that she and A.R. developed a trusting relationship soon after A.R. arrived at the SAFV shelter and that they thereafter exchanged letters. Willis had accompanied A.R. at the previous CINA hearing.

Willis was asked whether, in her opinion, A.R. would be able to testify in the presence of her father. Reutter again objected for lack of expert qualification. The court again overruled the objection. Willis stated that she believed that A.R.'s ability to effectively communicate would be affected by Reutter's presence in the courtroom. She based her opinion on A.R.'s statements after the CINA hearing that she was unable to talk because Reutter had been staring and smiling at her and whispering about her. Again, Reutter objected on hearsay grounds, but was overruled.

Jan Rutherdale, the state's CINA counsel, testified next. Rutherdale stated that, for the previous three and one-half years, she had been employed by the attorney general's office in Juneau, exclusively handling child-in-need-of-aid and juvenile-delinquency matters. Prior to becoming an assistant attorney general, she had worked as an assistant public defender in Juneau. In the years of her practice, she testified, she had interviewed roughly twenty children. Over Reutter's objection, the trial court found Rutherdale to have substantial expertise in the behavior of witnesses; the court also indicated that Rutherdale was qualified to testify about A.R.'s conduct at the CINA hearing-"what happened on the days in question."

Rutherdale testified that she first met A.R. the evening before the CINA hearing. On the morning of the CINA hearing, A.R. seemed to be "friendly" and "bouncy," but a little immature. Rutherdale recalled that A.R. did not appear to be too shy to testify, that she was happy to see her parents, and that she was able to answer some preliminary questions. She testified that A.R. soon became distracted by her parents and was unable to continue. The first question that A.R. was unable to answer was "[Do you] remember the night that you were removed from your house?" Again over Reutter's objection, Rutherdale testified that, based on her previous experience with and observations of A.R. in the courtroom and on questions that A.R. asked her about the conduct of her parents during the proceeding, Rutherdale did not think that A.R. would testify in Reutter's presence: "[S]he was just so affected by his presence. I mean, ... it was like her attention to me evaporated and-and all she could think about or ... react to was her father." She testified that A.R. asked her in a whispered voice why her parents were talking to each other during her testimony.

Rutherdale further testified that A.R. had been

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a very isolated child, that the Reutters had restricted her movement considerably, and that the particular dynamics of her family "may make it impossible for her to testify." ***1302** She stated that she did not know whether A.R. would ever be able to testify to the sexual abuse under any circumstances. When asked by the trial court whether A.R. would be able to testify in the presence of Reutter if the testimony occurred outside a formal courtroom setting, Rutherdale responded: "[T]he problem with getting Mr. Reutter and her in a small room, I think that might almost be worse."

Next, the trial court requested that Martha Ann Lyman be called to testify telephonically. She testified that, as a mental health clinician in the Yukon-Kuskokwim delta region, she treated A.R. for three sessions during A.R.'s stay in Chevak. She testified that A.R. was very bright, but guarded and distrustful. She stated that she thought A.R. should not be forced to testify in the presence of Reutter because she would not feel safe doing so, she would suffer emotional harm, and she would not "be able to give a real open testimony in front of her father."

In addition to the foregoing testimony, Judge Zervos considered the psychological evaluation of A.R. that had been submitted by Dr. Brems. Brems' report stated that A.R. "currently functions in the low average range of intelligence," but that this level of function "may be largely explained by her academic deprivation." Brems concluded that A.R. exhibited "strong traits of a borderline personality disorder "; and Brems summarized the results of her evaluation as follows:

> [T]his is a child who has been severely traumatized and whose sexual trauma has resulted in clear implications for all areas of functioning. Specifically it is likely that her social, academic, and psychological deprivation have interfered with her cognitive and perceptual-motor development. With regard to intrapsychic functioning, her coping is impaired and she has difficulty controlling affect and behavior. She tends to isolate herself from others to avoid being overwhelmed by her own needs which would result in acting out. Hence, she initiates a vicious cycle of isolation and lack of nurturance in her own life. Her view of the world is largely hostile and unpredictable, leaving her in a conflict, as she also has very strong dependency and security needs.

Finally, prior to issuing his written decision on the state's motion to allow A.R. to testify by closed-circuit television, Judge Zervos reviewed a tape recording of the previous CINA proceeding.

Judge Zervos ultimately granted the state's motion to take A.R.'s testimony via closed-circuit television. In a written order issued on August 11, 1992, the judge set out specific findings and conclusions in support of the decision. Specifically, in conclusion number six of the decision, Judge Zervos stated:

> It is clear that [A.R.] will not testify because of fear, guilt or severe psychological distress. It is also clear that [A.R.'s] failure to testify is due, in large part, to the presence of her father. Therefore, under the statutes and the case law the confrontation clause must give way in the most minimal way possible. Allowing the child's testimony to be taken outside of the defendant's presence may facilitate the child's ability to testify. Denying the request to take the testimony outside the defendant's presence, based in [sic] past attempts, guarantees the child's silence.

4. *Trial*

At the time of trial, Judge Zervos finalized the arrangements for A.R.'s testimony. A.R. testified from a separate room adjacent to the courtroom. In the room with A.R. were the videocamera operator, the prosecutor, Reutter's counsel, and A.R.'s guardian *ad litem,* Mary Hughes; Hughes, who was to provide moral support for A.R., remained out of the camera's focus. Reutter was given the option of observing A.R. from a third room, outside the presence of both A.R. and the jury. He elected instead to remain in the courtroom, so that the jury could observe his reaction to A.R.'s testimony. Reutter

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had continuous access to his attorney by a telephone connected to the room from which ***1303** A.R. testified.[FN2]

> FN2. The trial court indicated that it would declare a recess any time Reutter wished to confer with his attorney. Objections by either attorney would be handled in the same way; the court would declare a recess and discuss the objection outside the presence of the jury. The trial court instructed the attorneys not to make objections and arguments while the videotape was running, but to request an immediate hearing.

Although Reutter preserved a general, continuing objection to the taking of A.R.'s testimony via one-way closed-circuit television, he indicated that he did not object to the specific procedure outlined above.

The state called A.R. to testify as its first witness. Before A.R. testified, the trial court instructed the jury as follows:

> Ladies and gentlemen, what we're going to do next is a little unusual. As you'll see for the rest of the trial, most all witnesses will always testify in this chair here. But the parties have decided, both the prosecution and the defense, that because of the age of [A.R.] and of twelve strangers and me sitting up here in this black robe, it may be less disconcerting to her to take the testimony in another room in a closed circuit kind of TV arrangement.
>
> She will be testifying live and we'll be able to witness everything. Of course, you can watch her as she testifies on these monitors. [The attorneys] will be in the room asking questions of her.

On direct examination, A.R. testified that her father had touched her "in [her] privates" on several occasions and that he "made [her] touch his private part." She testified that, in February, her father had "pulled up" on her "privates," making them bleed. She testified that her father had told her, "Don't tell no one" and that he would "hurt" her if she did tell someone. A.R. testified that, although she did not tell anyone, her father hurt her anyway.

During a break between direct and cross-examination, Reutter encountered A.R. in the hallway and said, "Hi, [A.R.], hi, honey, I love you." Since such direct contact had been forbidden by the court under the previously issued CINA order, Judge Zervos admonished Reutter not to let it happen again. Cross-examination was eventually postponed until the day after direct examination was completed, since only fifteen minutes remained in the trial day and Reutter decided that he would rather start fresh the next morning.

Before proceedings commenced the next morning, the prosecutor reported that Patti Reutter had intercepted A.R. after trial the previous day and had whispered, "Don't say nothing," and "Daddy loves you, Daddy loves you." The trial court admonished Patti Reutter not to interfere with A.R.'s testimony and not to have any contact with her inside the courthouse building. Then, after a short recess, the prosecutor reported:

> [A.R. is] in my office, basically in tears, refuses to come forward. She's basically locked in the office at this point so she just doesn't run away.
>
> The reason being as they-she arrived this morning with Ms. Willis, I mean, essentially she was a little nervous as we expected her to be. As Mr. and Mrs. Reutter took a seat in the hallway they saw each other, they were waving back and forth. And as Ms. [Willis] and Ms. Hughes would actually testify to, you could just see her just, the term is shut down. And now she is basically sitting on the floor, refuses to budge, period.

A.R. nevertheless eventually did testify on cross-examination.

DISCUSSION

In moving for an order allowing A.R. to testify

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by closed-circuit television outside Reutter's physical presence, the state relied on AS 12.45.046. This statute permits the trial court to order the testimony of a child to be communicated to the jury and the defendant by closed-circuit television, but only in exceptional cases, and only upon a case-specific ***1304** showing of actual necessity.[FN3] For such testimony to be received, the accused must be charged with an assault under chapter 41 of the Alaska Revised Criminal Code. AS 12.45.046(a). The crime charged must involve a victim or witness who is under the age of thirteen; the proposed witness must be either the alleged child-victim or the child-witness. *Id.* In such cases, the court may order testimony to be taken by closed-circuit television, "if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate." AS 12.45.046(a)(2).

FN3. The full text of AS 12.45.046 is as follows:

> **Testimony of children in criminal proceedings.** (a) In a criminal proceeding under AS 11.41 involving the prosecution of an offense committed against a child under the age of 13, or witnessed by a child under the age of 13, the court
>
> (1) may appoint a guardian ad litem for the child;
>
> (2) on its own motion or on the motion of the party presenting the witness or the guardian ad litem of the child, may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.
>
> (b) In making a determination under (a)(2) of this section, the court shall consider factors it considers relevant, including
>
> (1) the child's chronological age;
>
> (2) the child's level of development;
>
> (3) the child's general physical health;
>
> (4) any physical, emotional or psychological injury experienced by the child; and
>
> (5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.
>
> (c) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the defendant, the court, and the finder of fact in the proceeding. If the court authorizes use of closed circuit televised testimony under this subsection,
>
> (1) each of the following may be in the room with the child when the child testifies:
>
> (A) the prosecuting attorney;
>
> (B) the attorney for the defendant; and
>
> (C) operators of the closed circuit television equipment;
>
> (2) the court may, in addition to persons specified in (1) of this subsection, admit a person whose presence, in the opinion of the court, contributes to the well-be-

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ing of the child.

(d) When a child is to testify under (c) of this section, only the court and counsel may question the child. The persons operating the equipment shall do so in as unobtrusive a manner as possible. If the defendant requests, the court shall excuse the defendant from the courtroom, shall permit the defendant to attend in another location, and shall afford the defendant a means of viewing the child's testimony and of communicating with the defendant's attorney throughout the proceedings. Upon request of the defendant or the defendant's attorney, the court shall permit a recess to allow them to confer. The court shall provide a means of communicating with the attorneys during the questioning of the child. Objections made by the attorneys to questions of a child witness may be resolved in the courtroom if the court finds it necessary.

(e) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may authorize the use of one-way mirrors in conjunction with the taking of the child's testimony. The attorneys may pose questions to the child and have visual contact with the child during questioning, but the mirrors shall be placed to provide a physical shield so that the child does not have visual contact with the defendant and jurors.

(f) If the court does not find under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures will result in the child's inability to effectively communicate, the court may, after taking into consideration the factors specified in (b) of this section, supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance so as to safeguard the child from emotional harm or stress. In addition to other procedures it finds appropriate, the court may

(1) allow the child to testify while sitting on the floor or on an appropriately sized chair;

(2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age; and

(3) order a recess when the energy, comfort, or attention span of the child warrants.

On appeal, Reutter contends that, on its face, AS 12.45.046 violates the confrontation clauses of the federal and Alaska constitutions. Alternatively, Reutter maintains that the application of this statute in his case resulted in a violation of his right to confrontation under both constitutions. Reutter lastly claims that the manner in which the ***1305** questioning of A.R. occurred separately violated his constitutional right to due process.

1. *Constitutionality of AS 12.45.046*

A. Applicable Constitutional Standard

The confrontation clause of the sixth amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." [FN4] In *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the United States Supreme Court held that the federal constitution's confrontation clause protects not only the right to effective cross-examination but also the right to a face-to-face confrontation between the accuser and the accused. *Coy* left open the question of

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whether the right of face-to-face confrontation was absolute. *Id.* at 1021, 108 S.Ct. at 2803.

> FN4. The Alaska Constitution uses similar language to secure the right to confrontation. The Alaska Constitution, article I, section 11, provides, in relevant part: "In all criminal prosecutions, the accused.... is entitled ... to be confronted with the witnesses against him."

The Court answered this question two years later in *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). *Craig* holds that the right to literal confrontation is not absolute. Rather, in exceptional cases, the right may be required to yield in order to protect the state's vital interest in protecting the physical and psychological well-being of child abuse victims:

> In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857, 110 S.Ct. at 3170.

In reaching this conclusion, the Court in *Craig* set out the factors that trial courts must consider before finding it necessary to subordinate the accused's right of face-to-face confrontation to a child victim's need for protection:

> The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than "mere nervousness or excitement or some reluctance to testify[.]"

Id. at 855-56, 110 S.Ct. at 3169 (citations omitted) (quoting *Wildermuth v. State,* 310 Md. 496, 530 A.2d 275, 289 (1987)).

The *Craig* Court did not specify the minimum level of emotional trauma that would justify a denial of confrontation. Instead, the Court found the Maryland statute that was at issue in the case to be clearly sufficient to meet constitutional standards. That statute required the trial court to determine that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *See* Md.Cts. & Jud.Proc.Code Ann. § 9-102(a)(1)(ii) ***1306** (1989) (quoted in *Craig,* 497 U.S. at 841 n. 1, 110 S.Ct. at 3161 n. 1).

This court has read *Craig* to establish a rule premised on actual necessity:

> We are convinced that, at a minimum, the constitution forbids denying the accused face-to-face confrontation with an accuser in a criminal trial absent specific evidence and an express finding that the probable effect of the defendant's presence on the witness would significantly impair the substance of the witness's testimony. A mere

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finding of some general, or *de minim[i]s* effect will not suffice. Likewise, generalized, subjective impressions or assumptions will not substitute for case-specific evidence.

Blume v. State, 797 P.2d 664, 674 (Alaska App.1990) (footnotes omitted).

B. AS 12.45.046's Compliance with the Constitutional Standard

[1] In the present case, Reutter correctly notes that AS 12.45.046 does not, on its face, comport with the minimal requirements of *Craig.* Although the statute does incorporate procedures aimed at maintaining the rigorously adversarial atmosphere that *Craig* demands in order to ensure effective cross-examination, it does not explicitly require a finding of necessity based on the likelihood of serious emotional distress. Nor does it explicitly address another *Craig* requirement: a finding that the child witness' emotional distress will be caused specifically by the presence of the defendant, rather than the general courtroom atmosphere.

In our view, however, although these requirements are not explicitly stated in AS 12.45.046, they should be deemed an implicit part of the statutory provision. Nothing in AS 12.45.046 is incompatible with or otherwise bars a reading of the provision to be consistent with *Craig.* Such a reading is in keeping with the legislature's intent to promote the state's vital interest in protecting the emotional well-being of child victims and witnesses. [FN5] Such a reading is also in keeping with the traditional preference for interpreting statutes in a manner that avoids constitutional problems.

FN5. The legislative intent behind AS 12.45.046 was stated as follows:

> It is the purpose of this Act that, in providing alternative methods for taking the testimony of a child in certain criminal proceedings in which that child was the victim or is to be a witness, the legislature is acting (1) to balance the need for the victim's or witness's testimony against the right of the defendant to confront witnesses; (2) to mitigate the mental and emotional distress that may arise as the child is required to testify; and (3) to minimize possible victim harassment by limiting the opportunities for unnecessary examination of the child by the parties' counsel.
>
> CS for House Bill No. 323, section 1, ch. 92 SLA 1988 (Judiciary).

We have previously found AS 12.45.046 to be in "substantial accord" with *Craig* "as to the minimal requirements of the confrontation clause." *Blume,* 797 P.2d at 674. *See also Brandon v. State,* 839 P.2d 400, 409 & n. 6 (Alaska App.1992); *Renkel v. State,* 807 P.2d 1087, 1094 & n. 7 (Alaska App.1991). We have similarly found AS 12.45.046 in substantial accord with the Maryland statute that *Craig* upheld. *Blume,* 797 P.2d at 674. Like Alaska's statute, the Maryland provision upheld in *Craig* did not expressly require a finding that the child witness would suffer "serious emotional distress" as a result of the presence of the defendant. [FN6] Rather, the Maryland Court of Appeals had interpreted***1307** its statute to include this requirement, and the *Craig* Court ratified the Maryland court's interpretation. *See Craig,* 497 U.S. at 858, 110 S.Ct. at 3170. Other states have shown little reluctance to construe similar statutory provisions as being consistent with *Craig* 's requirements.[FN7]

FN6. *See* Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989):

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

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(i) The testimony is taken during the proceeding; and

(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit televi- sion:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

Quoted in Craig, 497 U.S. at 840-41 n. 1, 110 S.Ct. at 3161.

FN7. *See State v. Chisholm,* 250 Kan. 153, 825 P.2d 147, 151-52 (1992). *Accord Thomas v. People,* 803 P.2d 144, 149-51 (Colo.1990); *People v. Weninger,* 243 Ill.App.3d 719, 183 Ill.Dec. 224, 229-30, 611 N.E.2d 77, 82-83 (1993); *Brady v. State,* 575 N.E.2d 981, 986 (Ind.1991); *State v. Naucke,* 829 S.W.2d 445, 450 (Mo.1992) (en banc); *State v. Peters,* 133 N.H. 791, 587 A.2d 587, 590 (1991); *State v. Self,* 56 Ohio St.3d 73, 564 N.E.2d 446, 453-54 (1990); *Shipman v. State,* 816 P.2d 571, 574-75 (Okla.Crim.App.1991); *Gonzales v. State,* 818 S.W.2d 756, 764 (Tex.Crim.App.1991); *State v. Lomprey,* 173 Wis.2d 209, 496 N.W.2d 172, 175 (1992), *review denied* 497 N.W.2d 130. *Cf. Starnes v. State,* 307 S.C. 247, 414 S.E.2d 582 (1991).

[2] In short, we conclude that AS 12.45.046 must be construed to incorporate the requirements of *Craig.* In order to comply with *Craig,* a determination of "the child's inability to effectively communicate" under AS 12.45.046(a)(2) must be based on case-specific evidence establishing that (1) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," *Craig,* 497 U.S. at 856, 110 S.Ct. at 3169; (2) confrontation would pose a threat of serious emotional harm to the child-in other words, "that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis,* "; and (3) the use of the special procedure authorized under AS 12.45.046 is therefore

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"necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* at 855, 110 S.Ct. at 3169.

One additional problem of interpretation remains. *Craig* did not determine the standard of proof governing these requirements. In *Blume v. State,* this court similarly found it unnecessary to decide the standard of proof required under *Craig.* We did acknowledge, however, that a finding of necessity under *Craig* would, at a minimum, have to be based on proof by a preponderance of the evidence. *Blume,* 797 P.2d at 674. The issue of standard of proof is squarely presented in Reutter's case and may no longer be avoided. Our decision on this point must be guided by the due process analysis specified in *Santosky v. Kramer,* 455 U.S. 745, 755, 102 S.Ct. 1388, 1395-96, 71 L.Ed.2d 599 (1982), which ties the applicable standard of proof to a consideration and balancing of three factors: "the private interests affected, the public interests, and a societal judgment about how the risk of error should be distributed between the litigants." *See W.M.F. v. State,* 723 P.2d 1298, 1300 (Alaska App.1986).

Given the constitution's express protection of confrontation as an individual right of the accused, and given further the traditional significance of that right, the private interest affected by AS 12.45.046 is of utmost significance. On the other side of the balance, however, the public unquestionably has a vital interest in promoting the well-being of children who are victims of or witnesses to acts of assault and sexual abuse. Yet the public also has a vital and undeniable interest ***1308** in protecting the innocent against conviction. Because of the integral role confrontation plays in the adjudication of innocence and guilt, and its direct bearing on the integrity of fact-finding at trial, *see Coy,* 487 U.S. at 1017-20, 108 S.Ct. at 2801-03, it would be difficult to maintain that the public's interest in securing the right of confrontation against unnecessary incursion should be deemed any less significant than its interest in protection of the child victim or witness of abuse.

[3] These considerations counsel that any risk of error in balancing the individual right against the countervailing public interest must fall on the side of protecting the innocent from an unjust conviction. In our view, the preponderance of the evidence standard cannot provide such protection, and no dilution of the right to confrontation should be permitted without an express finding that the requirements of AS 12.45.046, including the *Craig* requirements that are implicit therein, have been met by clear and convincing evidence. So construed, AS 12.45.046 is not constitutionally infirm. FN8

FN8. Reutter argues that we should construe the Alaska Constitution's confrontation clause to provide broader protections than those provided for by the federal constitution, as interpreted by the United States Supreme Court in *Craig.* However, Reutter points to nothing in the text, context, or history of the Alaska Constitution that would justify construing article I, section 11 more broadly than the sixth amendment under the circumstances presented here; nor has Reutter advanced any cogent argument to support the conclusion that we should reject, as unpersuasive, the United States Supreme Court's interpretation of the federal constitution's confrontation clause. *See Mitchell v. State,* 818 P.2d 1163, 1165 (Alaska App.1991) (broader interpretation of the Alaska Constitution justified only if United States Supreme Court's interpretation of the federal constitution is unpersuasive or if the text, context, or history of the Alaska Constitution justify departure). Under the circumstances presented here, we decline to construe article I, section 11, of the Alaska Constitution more broadly than the United States Supreme Court has interpreted the federal constitution.

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2. *Constitutionality of AS 12.45.046 as Applied to this Case*

In applying AS 12.45.046 to the circumstances of Reutter's case, Judge Zervos interpreted the statute to incorporate the *Craig* requirements and found the clear and convincing evidence standard of proof to be applicable. Reutter nonetheless argues that the application of AS 12.45.046 to his case violated his right to confrontation. Reutter advances this argument in three prongs: (1) he contends that the trial court erred in allowing unqualified expert witnesses to testify and in admitting hearsay statements through their testimony; (2) he argues that the trial court's findings and conclusions are erroneous; and (3) he maintains that insufficient evidence was presented to support the conclusion that the applicable constitutional standards were met. We address each facet of Reutter's argument in turn.

A. Expert Qualifications and Hearsay

[4][5] Reutter argues that the trial court erroneously received expert testimony from three of the four witnesses who testified at the evidentiary hearing: DFYS Social Worker Sandra Beare-Spencer, child advocate Betsy Willis, and Assistant Attorney General Jan Rutherdale. He contends that the witnesses were asked questions that called for psychological education and expertise beyond their qualifications.

Reutter relies on Alaska Rule of Evidence 702(a):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule, however, gives the trial court broad latitude to allow a witness to testify as an expert when the court finds that the testimony will be helpful to the factfinder. There is no requirement that a witness possess a particular license or academic degree, provided that the factfinder can receive appreciable help from the witness' testimony. ***1309** *Handley v. State,* 615 P.2d 627, 630-31 (Alaska 1980); *Dymenstein v. State,* 720 P.2d 42, 45 (Alaska App.1986). The trial court's decision to allow a witness to testify as an expert is reviewable only for an abuse of discretion. *Handley,* 615 P.2d at 630; *New v. State,* 714 P.2d 378, 380 (Alaska App.1986).

[6] In the present case, all of the challenged witnesses had professional experiences that made their opinions helpful to the trial court, and all had considerable contact with A.R. While these witnesses did not possess expertise in the field of psychology, neither did they pretend to address deep psychological issues. The trial court did not abuse its discretion in finding the qualifications of these witnesses sufficient to allow them to testify as experts. *See, e.g., Kosbruk v. State,* 820 P.2d 1082, 1086-87 (Alaska App.1991); *see also Hilburn v. State,* 765 P.2d 1382, 1386 (Alaska App.1988).

[7] Moreover, although the testimony of the challenged witnesses was necessarily informed by their educational and professional backgrounds, their opinions were almost wholly based on reasonable inferences drawn from their own recent observations of A.R. In this regard, Alaska Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Hence, even if the expertise of Beare-Spencer, Willis, and Rutherdale to some degree fell short of meeting the standard established for experts under Alaska Rule of Evidence 702, their opinions were properly admitted under Alaska Rule of Evidence 701's more permissive standard governing opinion testimony by lay witnesses. *See, e.g., In re D.J.A.,*

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793 P.2d 1033, 1036 (Alaska 1990); *see also Callahan v. State,* 769 P.2d 444, 446 (Alaska App.1989). FN9

FN9. To the extent Reutter means to suggest that the testimony of a qualified psychologist or psychiatrist should be a prerequisite to a finding of necessity under AS 12.45.046, the suggestion is unwarranted under the peculiar circumstances of this case. Although there is much to be said for the proposition that psychological evidence will normally be necessary to meet the requirements of AS 12.45.046, *cf. Craig v. State,* 322 Md. 418, 588 A.2d 328, 335-36 (1991), Reutter disregards the fact that Judge Zervos had available and did consider the extensive written evaluation of A.R. submitted by Dr. Brems, a clinical psychologist. While Brems did not expressly address the *Craig* requirements, her evaluation of A.R. provided perspective for the court's assessment of the opinions of Beare-Spencer, Willis, and Rutherdale.

An even more significant flaw in Reutter's argument is his disregard of Judge Zervos' reliance on evidence of A.R.'s "shutdown" at the CINA proceeding-a virtual dry run of the situation that could have arisen had A.R. been called upon to testify in Reutter's presence at the criminal trial. Judge Zervos was able to review the tape recording of the CINA hearing, and the bulk of the testimony presented by the challenged witnesses was devoted to describing in greater detail the recorded events that Judge Zervos heard on the tape. The availability of this experiential base for predicting A.R.'s probable reaction to Reutter's presence at trial adds a unique dimension to Reutter's case and significantly reduces the need for speculation based on psychological prediction.

[8] Reutter also advances a conclusory argument that the state's witnesses were improperly allowed to introduce inadmissible hearsay. Reutter's claim pertains to testimony of the witnesses relating various statements made by A.R., primarily those in connection with her inability to testify at the CINA hearing.FN10 "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in ***1310** evidence to prove the truth of the matter asserted." Alaska Rule of Evidence 801(c). As correctly recognized by Judge Zervos, the bulk of the contested testimony was not introduced to prove the truth of the matter asserted and was therefore not hearsay; the limited statements arguably admitted to prove the truth of the matter they asserted were properly received under the hearsay exceptions governing present sense impression, excited utterance, and existing mental or emotional condition. Alaska Rule of Evidence 803(1), (2), & (3). We find no abuse of discretion. *Hawley v. State,* 614 P.2d 1349, 1361 (Alaska 1980); *Lipscomb v. State,* 700 P.2d 1298, 1306 (Alaska App.1985).FN11

FN10. The hearsay statements that Reutter contends were improperly admitted are as follows: (1) Beare-Spencer's recapitulation, in response to the prosecutor's inquiry into the basis of her opinion that A.R. would not be able to communicate effectively in Reutter's presence, of A.R.'s concern that her father would hurt her mother if she talked about what happened to her; (2) Willis' testimony, in response to the prosecutor's inquiry into the nature of her relationship with A.R., that A.R. had first disclosed to her that she had been sexually abused by Reutter; (3) Willis' testimony that some of the bases for her opinion that A.R. would not be able to communicate effectively in Reutter's presence were A.R.'s statements, "I can't talk when he's smiling at me[, h]e's staring at me [, h]e's whispering about me"; and (4) Rutherdale's testimony that one of the bases for her opinion

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that A.R. would not be able to communicate effectively in Reutter's presence was A.R.'s whispered concern about her parents' talking to each other during her testimony.

FN11. Both parties have assumed, without discussing the issue, that the formal rules of evidence should apply to a finding of necessity under AS 12.45.046. The assumption is questionable. *See* A.R.E. 101(c)(1). Our conclusion that no hearsay violations occurred makes it unnecessary for us to decide the point.

B. Errors in Factual Findings and Legal Conclusions

[9] Reutter argues that the trial court made several erroneous factual findings in its written order that affected its decision to allow A.R. to testify via one-way closed-circuit television. This court will reverse factual findings only when they are clearly erroneous. *Matter of R.K.*, 851 P.2d 62, 66 (Alaska 1993). "Findings are clearly erroneous when the reviewing court is left with a definite and firm conviction after reviewing the entire record that a mistake has been made." *Id.* Having carefully reviewed the record, we conclude that Reutter's claims of erroneous fact findings are either unfounded or involve facts that were clearly inconsequential to the resolution of the disputed legal issues. The trial court's findings and conclusions are not clearly erroneous.

C. Sufficiency of the Evidence

[10] Reutter further contends that, even if no other error occurred, Judge Zervos could not have properly concluded, based on the evidence presented, that A.R.'s inability to testify at trial would be caused by Reutter's presence, rather than by the general courtroom setting. He argues that, while the witnesses at the evidentiary hearing all testified that A.R. would not be able to testify in front of her father, they also indicated that A.R. would likely not testify even if Reutter were not present. In effect, Reutter challenges the trial court's conclusions number five and six, which read:

5. The court recognizes that it may be that [A.R.] also has difficulty testifying in front of a room full of people. However, it is very clear, based on the CINA hearing, that [A.R.] does have great difficulty in testifying in front of her parents. The court concludes, based on what has gone on before, that if the child were brought into the courtroom in an attempt to have her testify in front of her father, that she would "shut down" as she did in the CINA hearing and not testify under any other circumstances after that.

6. It is clear that [A.R.] will not testify because of fear, guilt or severe psychological distress. It is also clear that [A.R.'s] failure to testify is due, in large part, to the presence of her father. Therefore, under the statutes and the case law the confrontation clause must give way in the most minimal way possible. Allowing the child's testimony to be taken outside of the defendant's presence may facilitate the child's ability to testify. Denying the request to take the testimony outside the defendant's presence, based in [sic] past attempts, guarantees the child's silence.

Reutter makes the mistake of viewing the evidence in the light most favorable to his case, rather than in light of the factual findings made by the trial court. Judge Zervos' findings were based on a careful consideration of the factors specified in AS 12.45.046(b). As directed by the statute, the judge considered A.R.'s chronological age, her developmental level, and the degree of ***1311** emotional and psychological injury that she had already suffered and would likely suffer if forced to testify in court. As we have already determined, Judge Zervos' factual findings are not clearly erroneous. In our view, these findings amply support the court's ultimate conclusions that "[A.R.] will not testify because of fear, guilt or severe psychological distress," and that requiring her to testify in Reutter's presence would virtually guarantee her silence.

Reutter's argument also overlooks the unique

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significance of A.R.'s "shut down" at the prior CINA hearing and the central role of that event in Judge Zervos' determination. As Judge Zervos concluded, "Denying the request to take the testimony outside the defendant's presence, *based in [sic] past attempts,* guarantees the child's silence." (Emphasis added.) Even if the opinions expressed by the witnesses at the evidentiary hearing were fully discounted, their compelling testimony concerning A.R.'s demeanor and conduct at the CINA hearing provided strong support for the court's conclusion that A.R.'s inability to testify stemmed from Reutter's presence, not the generally stressful atmosphere prevailing in the courtroom.

We conclude that the evidence presented below was sufficient to support the trial court's finding of necessity under AS 12.45.046 and that application of the statute to Reutter's case did not result in a violation of his constitutional right to confrontation. FN12

FN12. Reutter separately alleges a violation of his right to procedural due process occasioned by the specific manner in which the court implemented A.R.'s questioning outside Reutter's presence. In particular, Reutter asserts that (1) A.R. refused to respond during the cross-examination; (2) his attorney was not able to gauge the reaction of the jury while he cross-examined A.R.; and (3) the jury was not able to view his interaction with A.R. during her testimony. However, Reutter did not complain to the trial court that he was unable to effectively cross-examine A.R.; from the record as a whole, it appears that Reutter's attorney did cross-examine A.R. effectively. Moreover, any difficulty that Reutter experienced in attempting to cross-examine appears to have been brought on, not by the closed-circuit television procedure, but by the inappropriate encounters between A.R. and her parents. *Cf. Brandon v. State,* 778 P.2d 221, 227-28 (Alaska App.1989) (no violation of defendant's right of confrontation when witness' absence results from conduct of the accused). With respect to the remaining assertions, it is sufficient to observe that, although Reutter continued throughout the trial to object to the taking of A.R.'s testimony by closed-circuit television generally, he specifically stated that he did not object to the procedure that the trial court implemented. Reutter's claims of interference with the jury's view of his interaction with A.R. are wholly unsubstantiated by the record.

The convictions are AFFIRMED.

Alaska App.,1994.
Reutter v. State
886 P.2d 1298, 63 USLW 2444

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166 F.3d 75, 51 Fed. R. Evid. Serv. 1
(Cite as: 166 F.3d 75)

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United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Vincent GIGANTE, also known as "Chin," Defendant–Appellant.

Docket No. 98–1001.
Argued Oct. 20, 1998.
Decided Jan. 22, 1999.

Following jury trial, defendant was convicted in the United States District Court for the Eastern District of New York, Jack B. Weinstein, J., of violation of Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labor payoff conspiracy, based on evidence including testimony of one witness via closed-circuit television, which District Court permitted, 971 F.Supp. 755. The District Court, 982 F.Supp. 140, later dismissed one count of conspiracy to murder. Defendant appealed. The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that: (1) admission of ill witness's testimony via two-way, closed-circuit television from a remote location did not violate defendant's right of confrontation; (2) any errors in admitting statements under coconspirator exception to hearsay definition were harmless; and (3) finding that defendant was competent to stand trial was not clearly erroneous.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of Trial. Most Cited Cases

Admission of witness' testimony via two-way, closed-circuit television from a remote location did not violate defendant's Sixth Amendment right of confrontation, where witness was fatally ill and was part of witness protection program, and defendant was too ill to participate in distant deposition; testimony preserved salutary effects of in-court testimony, and testimony afforded greater protection of defendant's rights than would have been provided by pretrial deposition, which also would have been permissible under the circumstances. U.S.C.A. Const.Amend. 6; Fed.Rules Cr.Proc.Rules 2, 15, 57(b), 18 U.S.C.A.

[2] Criminal Law 110 ⚿1158.9

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.9 k. In General. Most Cited Cases
(Formerly 110k1158(4))

District court's factual finding that witness could not appear in court due to illness would be reviewed for clear error.

[3] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

The right to face-to-face confrontation of witnesses is not absolute. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿1137(1)

110 Criminal Law
110XXIV Review

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110XXIV(L) Scope of Review in General
110XXIV(L)11 Parties Entitled to Allege Error
110k1137 Estoppel
110k1137(1) k. In General. Most Cited Cases

Defendant waived any claim of error that he was deprived of right of confrontation because witness, who testified via two-way, closed-circuit television, allegedly could not see defendant himself on television monitor, where defendant explicitly declined the option of being viewed by witness. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿543(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(1) k. In General. Most Cited Cases

Criminal Law 110 ⚿1153.10

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.10 k. Hearsay. Most Cited Cases
(Formerly 110k1153(1))

Decision to permit admission of a deposition in lieu of trial testimony on ground that witness is unavailable rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[6] Criminal Law 110 ⚿627.2

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.2 k. Depositions. Most Cited Cases

The exceptional circumstances required to justify the deposition of a prospective witness are present if that witness' testimony is material to the case and if the witness is unavailable to appear at trial. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[7] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of Trial. Most Cited Cases

Although closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment, and, upon a finding of exceptional circumstances, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿511.1(6.1)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.1 In General
110k511.1(6) Particular Offenses
110k511.1(6.1) k. In General. Most Cited Cases

Although admission of coconspirator testimony, under exception to hearsay definition, could not be based solely on finding that there was general overriding conspiracy among various alleged or-

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ganized crime groups, admission of statements suggesting defendant's involvement in specific conspiracies to murder two individuals was not clearly erroneous where defendant's involvement was corroborated by other evidence. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[9] Criminal Law 110 ⚿427(5)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(5) k. Weight and Sufficiency. Most Cited Cases

To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant, and, second, that the statement was made during the course of and in furtherance of that conspiracy. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[10] Criminal Law 110 ⚿1158.14

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.14 k. Hearsay. Most Cited Cases
(Formerly 110k1158(4))

Criminal Law 110 ⚿1169.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.7 k. Acts, Declarations, and Admissions of Accomplices and Codefendants. Most Cited Cases

District court findings underlying admission of statement under coconspirator exception to the hearsay definition will not be disturbed unless they are clearly erroneous, and any improper admission of coconspirator testimony is subject to harmless error analysis. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[11] Criminal Law 110 ⚿422(1)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(1) k. In General. Most Cited Cases

Conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment, to admit statement under coconspirator exception to hearsay definition. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[12] Criminal Law 110 ⚿427(1)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(1) k. In General; Existence of Conspiracy. Most Cited Cases

While hearsay statement itself may be considered in establishing the existence of the conspiracy, for purpose of admitting statement under coconspirator exception to hearsay definition, there must be some independent corroborating evidence of the defendant's participation in the conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[13] Criminal Law 110 ⚿427(1)

110 Criminal Law
110XVII Evidence

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110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(1) k. In General; Existence of Conspiracy. Most Cited Cases

The identities of both the declarant and the witness who heard the hearsay evidence are non-hearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy, for purpose of admitting statement under coconspirator exception to hearsay definition. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[14] Criminal Law 110 ⚿423(3)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k423 Furtherance or Execution of Common Purpose
110k423(3) k. Character of Acts or Declarations. Most Cited Cases

Statements made during the course and in furtherance of a conspiracy must be such as to prompt the listener to respond in a way that promotes or facilitates the carrying out of a criminal activity, for purpose of admitting statement under coconspirator exception to hearsay definition, which can include those statements that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[15] Criminal Law 110 ⚿419(2.20)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Criminal Law 110 ⚿422(7)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(7) k. Admissibility of Declarations of Coconspirator as Affected by Acquittal of Declarant. Most Cited Cases

Criminal Law 110 ⚿423(3)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k423 Furtherance or Execution of Common Purpose
110k423(3) k. Character of Acts or Declarations. Most Cited Cases

While idle chatter among conspirators does not satisfy the "in furtherance" requirement for admitting statement under coconspirator exception to hearsay definition, such statements may admissible as declarations against penal interest or under the state of mind hearsay exception. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[16] Conspiracy 91 ⚿23.1

91 Conspiracy
91II Criminal Responsibility
91II(A) Offenses
91k23 Nature and Elements of Criminal Conspiracy in General
91k23.1 k. In General. Most Cited

A conspiracy may involve only two or three individuals.

[17] Criminal Law 110 ⚿427(1)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Con-

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spirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(1) k. In General; Existence of Conspiracy. Most Cited Cases

Even in the context of organized crime, there is a limit to the proper use of the coconspirator exception to the hearsay definition to admit coconspirator testimony; the district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the organized crime organization. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[18] Criminal Law 110 ⚿427(5)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(5) k. Weight and Sufficiency. Most Cited Cases

When a conspiracy is charged under the Racketeer Influenced and Corrupt Organizations Act (RICO), the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against the defendant under coconspirator exception to the hearsay definition. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[19] Criminal Law 110 ⚿1169.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.7 k. Acts, Declarations, and Admissions of Accomplices and Codefendants. Most Cited Cases

Although statements of other individuals about alleged murder conspiracy in which defendant refused to get involved were not admissible under coconspirator exception to hearsay definition, in prosecution of defendant for other charged conspiracies, any error was harmless because some of statements would have been admissible on other grounds, and substantial direct and circumstantial evidence connected defendant to each of crimes for which he was convicted. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[20] Criminal Law 110 ⚿1158.23

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.20 Preliminary Proceedings
110k1158.23 k. Competency to Stand Trial. Most Cited Cases
(Formerly 110k1158(2))

Court of Appeals upholds a district court's finding of competence to stand trial unless that finding is clearly erroneous; under this highly deferential standard, where there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.

[21] Criminal Law 110 ⚿625.15

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
110k625.15 k. Evidence. Most Cited Cases

Finding that defendant was competent to stand trial was not clearly erroneous, despite testimony of four psychiatrists that defendant was incompetent, in view of testimony of witnesses, who were allegedly former organized crime associates of defendant's, that defendant was forceful and active leader of organized crime family who had put on a "crazy act" for many years in order to avoid apprehension by law enforcement, and fact that two of testifying psychiatrists later changed their opinions.

*78 Andrew Weissmann and Daniel Dorsky, As-

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sistant United States Attorneys (Zachary W. Carter, United States Attorney, and David C. James and George A. Stamboulidis, Assistant United States Attorneys, E.D.N.Y., Brooklyn, N.Y., of counsel), for Appellee.

Steven R. Kartagener, New York, N.Y. (Michael A. Marinaccio, Culleton, Marinaccio & Foglia, White Plains, N.Y., on the brief), for Defendant–Appellant.

Before: OAKES and WALKER, Circuit Judges, and KNAPP, District Judge. FN*

FN* The Honorable Whitman Knapp, of the United States District Court for the Southern District of New York, sitting by designation.

JOHN M. WALKER, JR., Circuit Judge:

Defendant-appellant Vincent Gigante appeals from a judgment of conviction entered December 18, 1997, after a jury trial in the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*), convicting Gigante of racketeering in violation of the RICO statute, 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy to murder in violation of 18 U.S.C. § 1959(a)(5); an extortion conspiracy in violation of 18 U.S.C. § 1951; and a labor payoff conspiracy in violation of 18 U.S.C. § 371.

Gigante raises three challenges to his conviction. First, he contends that the district court violated his confrontation rights under the Sixth Amendment by allowing a government witness to testify via two-way closed-circuit television from a remote location. Second, he argues that the trial court improperly allowed testimony under the co-conspirator exception to the hearsay definition. Finally, Gigante argues that the district court erred in finding that he was competent to stand trial. For the reasons set forth below, we reject each of Gigante's arguments and affirm his conviction.

BACKGROUND

This case arises from the government's continuing efforts to thwart the criminal activity of La Cosa Nostra, also known as the Mafia. The New York Mafia is comprised of five organized crime families: the Bonnano, Colombo, Gambino, Lucchese and Genovese families, each spearheaded by a boss. *See United States v. Orena,* 32 F.3d 704, 708 (2d Cir.1994). The government asserted that Vincent Gigante was the boss of the Genovese family and supervised its criminal activity.

Gigante was charged with two major categories of crimes: murder and labor racketeering. The government alleged that Gigante was the ultimate authority behind the murders of many fellow members of the Mafia, which were generally intended to enforce the rules of the organization or to prevent cooperation with the authorities. The government also charged Gigante with conspiring to use extortion and kickbacks to effect the criminal infiltration of the window replacement industry in and around New York City. He followed a long line of other organized crime figures whom the government had already convicted for their participation in this "Windows" scheme. *See, e.g., United States v. Amuso,* 21 F.3d 1251, 1254 (2d Cir.1994) (describing progression of Windows prosecutions).

The government presented its case against Gigante in large part through the testimony of six former members of the Mafia who had become cooperating witnesses: Alphonso D'Arco, once the acting boss of the Lucchese ***79** family; Salvatore Gravano, the former Gambino family underboss; Peter Chiodo, who was a Lucchese captain; Phillip Leonetti and Gino Milano, past members of La Cosa Nostra in Philadelphia; and Peter Savino, a former associate of the Genovese family. The government also introduced a wealth of tapes recorded over many years of surveillance of Gigante and other Mafia figures, and supported this evidence with the testimony of law enforcement officers.

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The cooperating witnesses testified at length about the structure and rules of La Cosa Nostra, described Gigante's place in the Mafia hierarchy, and detailed his efforts to hide his complicity through continuous public demonstrations of mental instability. The tapes and witnesses revealed Gigante's complicity in planning and approving murders within the Mafia and in assisting in the direction of the Windows extortion scheme.

The jury acquitted Gigante or failed to reach a verdict on all charges surrounding the murders of Jerry Pappa, Anthony Capongiro, Fred Salerno, John "Keys" Simone, Frank Sindone, Frank "Chickie" Narducci, Rocco "Rocky" Marinucci, and Enrico "Eddie" Carini. The jury found Gigante guilty of the more recent conspiracies to murder Peter Savino and John Gotti, although the court later dismissed the charge of conspiracy to murder Gotti as time-barred. *See United States v. Gigante,* 982 F.Supp. 140, 159 (E.D.N.Y.1997). Gigante was also convicted on all the extortion and labor payoff counts related to the Windows scheme. *See id.* at 177–81 (reprinting completed jury verdict sheet). Gigante was sentenced to twelve years in prison, five years of supervised release, and a fine of $1,250,000. This appeal followed.

DISCUSSION

I. *The Use of Two–Way Closed–Circuit Television Testimony*

[1] Gigante argues that the admission of Peter Savino's testimony via two-way, closed-circuit television testimony from a remote location violated his Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Gigante maintains that no compelling government interest justified the deprivation of his constitutional right to a face-to-face confrontation with Savino.

Preliminarily, we note the government's argument that Gigante waived his right to confront Savino. The government asserts that by refusing to attend a deposition of Savino pursuant to Rule 15, Fed.R.Crim.P., Gigante waived his right to a face-to-face confrontation. More fundamentally, the government argues that Gigante waived his confrontation rights through his own misconduct, with protracted attempts to delay his own trial by feigning incompetence. We need not resolve these questions relating to possible waiver, however, because Gigante's claim fails on the merits: under the circumstances of this case, the procedures by which Savino testified did not violate Gigante's confrontation rights.

Peter Savino, a former associate of the Genovese crime family, was a crucial witness against Gigante, providing direct testimony of his involvement in the Windows scheme. As a cooperator with the government since 1987, Savino was a participant in the Federal Witness Protection Program. At the time of Gigante's trial in 1997, Savino was in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed location.

The government made an application for an order allowing Savino to testify via closed-circuit television due to his illness and concomitant infirmity. Judge Weinstein held a hearing to determine whether Savino was able to travel to New York to testify at Gigante's trial. At this hearing, an emergency medicine physician employed by the Federal Witness Protection Program testified that he had examined Savino and that "it would be medically unsafe for [Savino] to travel to New York for testimony." Defense counsel cross-examined the government physician and then presented an oncologist of their own who testified that "it would not be life-threatening" for Savino to travel to New York.

[2] Judge Weinstein held in a published opinion that "[m]edical reports and testimony ***80** for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." *United States v. Gigante,* 971 F.Supp. 755, 756 (E.D.N.Y.1997). Although Gigante attacks this determination, we review this factual finding for clear error. Judge Weinstein's holding was supported by evidence in the record and was not clearly erro-

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neous.

Because of Savino's illness, Judge Weinstein permitted him to testify via two-way, closed-circuit television, basing his decision upon his "inherent power" under Fed.R.Crim.P. 2 and 57(b) to structure a criminal trial in a just manner. *Gigante,* 971 F.Supp. at 758–59. During his testimony, Savino was visible on video screens in the courtroom to the jury, defense counsel, Judge Weinstein and Gigante. Savino could see and hear defense counsel and other courtroom participants on a video screen at his remote location.

Gigante's argument that this procedure deprived him of his right to confront Savino amounts to the argument that his Sixth Amendment right could only be preserved by a face-to-face confrontation with Savino *in the same room.* We disagree. While the use of remote, closed-circuit television testimony must be carefully circumscribed, Judge Weinstein's order in this case adequately protected Gigante's confrontation rights.

[3] The Supreme Court has declared that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa,* 487 U.S. 1012, 1016, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). In *Coy,* the Court reversed the defendant's conviction for sexual assault after a 13–year–old alleged victim was permitted to testify out of sight of the defendant. *See id.* at 1022, 108 S.Ct. 2798. However, the right to face-to-face confrontation is not absolute; in *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Court held that one-way closed-circuit television testimony by a child witness in an abuse case may be permissible upon a case-specific finding of necessity. *See id.* at 857, 110 S.Ct. 3157.

The Supreme Court explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845, 110 S.Ct. 3157. The salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence. *See id.* at 845–46, 110 S.Ct. 3157.

[4] The closed-circuit television procedure utilized for Savino's testimony preserved all of these characteristics of in-court testimony: Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself.[FN1] Gigante forfeited none of the constitutional protections of confrontation.

> FN1. There is some dispute over whether Savino could see Gigante himself in the background of his monitor. However, it is clear that Judge Weinstein afforded defense counsel the opportunity to place Gigante's televised visage squarely before Savino (Mr. Culleton was to cross-examine Savino):
>
> > THE COURT: Is this where you wish the camera—
> >
> > MR. CULLETON: Exactly. He can look at me and I'll be looking at him.
> >
> > THE COURT: You don't want him to look at the defendant?
> >
> > MR. CULLETON: Not necessary.
> >
> > THE COURT: And you don't want the defendant to look directly eye to eye?
> >
> > MR. CULLETON: We don't need it. Absolutely not, Judge.
>
> Gigante, having explicitly declined the option of being viewed by Savino, has waived any claim of error based on that

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deprivation.

In *Craig,* the Supreme Court indicated that confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig,* 497 U.S. at 850, 110 S.Ct. 3157. Gigante ***81** seeks to hold the government to this standard, and challenges the government to articulate the important public policy that was furthered by Savino's testimony. However, the Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy,* it is not necessary to enforce the *Craig* standard in this case.

A more profitable comparison can be made to the Rule 15 deposition, which under the Federal Rules may be employed "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Fed.R.Crim.P. 15(a). That testimony may then be used at trial "as substantive evidence if the witness is unavailable." Fed.R.Crim.P. 15(e). Unavailability is defined by reference to Rule 804(a) of the Federal Rules of Evidence, which includes situations in which a witness "is unable to be present or to testify at the hearing because of ... physical or mental illness or infirmity." Fed.R.Evid. 804(a)(4).

[5][6] The decision to permit a deposition under Rule 15 "rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion." *United States v. Johnpoll,* 739 F.2d 702, 708 (2d Cir.1984) (internal citations omitted). "It is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial." *Id.* at 709. Under the circumstances of this case, Judge Weinstein could have admitted Savino's testimony pursuant to Rule 15 without offending the confrontation clause. *See United States v. Salim,* 855 F.2d 944, 954–55 (2d Cir.1988); *Johnpoll,* 739 F.2d at 710.

Judge Weinstein considered the utility of a Rule 15 deposition for preserving Savino's testimony, and noted that the government was "able to make the threshold showing entitling it to a [Rule 15] deposition." *Gigante,* 971 F.Supp. at 758. Had Judge Weinstein allowed a deposition, this would not have been an abuse of discretion, given the medical evidence of Savino's poor health. However, due to the joint exigencies of Savino's secret location and Gigante's *own* ill health and inability to travel, Judge Weinstein concluded that "deposing the witness is not appropriate," and that "contemporaneous testimony via closed circuit televising affords greater protection of [Gigante's] confrontation rights than would a deposition." *Id.* at 758–59.

We agree that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted, which would have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.

[7] Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. However, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. Because this procedure may provide

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at least as great protection of confrontation rights as Rule 15, we decline to adopt a stricter standard for its use than the standard articulated by Rule 15. Upon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice.

The facts of Savino's fatal illness and participation in the Federal Witness Protection Program, coupled with Gigante's own inability to participate in a distant deposition, satisfy this exceptional circumstances requirement,***82** and Judge Weinstein did not abuse his discretion by allowing Savino to testify in this manner. Savino's testimony did not deprive Gigante of his right to confront his accuser under the Sixth Amendment.

II. *The Admission of Coconspirator Testimony*

[8] Gigante contends that Judge Weinstein admitted substantial prejudicial testimony by misconstruing the proper scope of Fed.R.Evid. 801(d)(2)(E), which provides that "a statement is not hearsay if ... [it] is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Gigante argues that these evidentiary rulings constituted reversible error.

[9][10] To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant; and second, that the statement was made during the course of and in furtherance of that conspiracy. *See Orena,* 32 F.3d at 711; *United States v. Maldonado–Rivera,* 922 F.2d 934, 958 (2d Cir.1990) (citing *Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)). We will not disturb a district court's findings on these issues unless they are clearly erroneous. Moreover, any improper admission of coconspirator testimony is subject to harmless error analysis. *See Orena,* 32 F.3d at 711.

[11][12][13] The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment. *See id.* at 713. In addition, while the hearsay statement itself may be considered in establishing the existence of the conspiracy, "there must be some independent corroborating evidence of the defendant's participation in the conspiracy." *United States v. Tellier,* 83 F.3d 578, 580 (2d Cir.1996); *see also* Fed.R.Evid. 801(d)(2). The identities of both the declarant and the witness who heard the hearsay evidence, however, are non-hearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy. *See Tellier,* 83 F.3d at 580 n. 2; Fed.R.Evid. 801(d)(2) advisory committee's note to 1997 Amendment.

[14][15] As to the second requirement, statements made during the course and in furtherance of a conspiracy "must be such as to prompt the listener ... to respond in a way that promotes or facilitates the carrying out of a criminal activity." *Maldonado–Rivera,* 922 F.2d at 958. This can include those statements "that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." *Id.* at 959. In addition, while idle chatter among conspirators does not satisfy the "in furtherance" requirement of Rule 801(d)(2)(E), often these statements are admissible as declarations against penal interest or under the state of mind hearsay exception. *See United States v. Paone,* 782 F.2d 386, 390–91 (2d Cir.1986).

[16] A conspiracy may involve only two or three individuals. In the context of a RICO prosecution of organized criminals, however, the relevant conspiracy may grow quite large. For example, the Windows conspiracy, of which Gigante was a part, was a sprawling criminal enterprise involving both the Genovese and Colombo crime families and enveloping an entire industry. *See United States v. Gigante,* 39 F.3d 42, 44 (2d Cir.1994) (describing

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Windows scheme). The conspiratorial ingenuity of La Cosa Nostra expands the normal boundaries of a criminal enterprise, and Rule 801(d)(2)(E) must expand accordingly to encompass the full extent of the conspiracy.

[17][18] However, even in the context of organized crime, there is a limit to the proper use of Rule 801(d)(2)(E) to admit coconspirator testimony. The district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia. And when a RICO conspiracy is charged, the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against ***83** the defendant under Rule 801(d)(2)(E). *See Tellier,* 83 F.3d at 581.

Early in Gigante's trial, Judge Weinstein announced his finding that "there is a general overriding conspiracy among all of these alleged Mafia groups." He then admitted some evidence under Rule 801(d)(2)(E) based solely on this finding of a general conspiracy. This was error. The district court's rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia. This is not to say that there can never be a conspiracy comprising many different Mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place—organized crime membership alone does not suffice.

Although we find that Judge Weinstein construed Rule 801(d)(2)(E) too broadly, many of the statements contested by Gigante were properly admitted. For example, Gigante contends that it was error to admit Alphonse D'Arco's testimony that Jimmy Ida (of the Genovese Family) told D'Arco that Gigante wanted him to help locate and murder Savino in Hawaii. Similarly, Gigante contests the district court's admission of D'Arco's testimony that Vittorio Amuso (his boss in the Lucchese family) told D'Arco that Gigante was aware of and approved of the plot to murder John Gotti. Gigante argues that there was no independent corroborating evidence of his involvement in a conspiracy to murder either Savino or Gotti. However, there was substantial corroborating evidence that could support findings by Judge Weinstein that Gigante was boss of the Genovese family, that the Genovese family was involved in the conspiracies to murder Savino and Gotti, and that Gigante, as boss, was necessarily involved in these conspiracies. The admission of these statements was not clearly erroneous.

[19] On other occasions, the district court erred in admitting evidence under Rule 801(d)(2)(E). Gigante argues that Judge Weinstein improperly admitted a tape recording of Gotti, Gravano and John D'Amato (street boss of a New Jersey family) discussing a conspiracy to murder Corky Vastola, and stating that they needed to secure Gigante's permission to utilize a particular person to kill Vastola. The evidence indicated that Gigante refused this permission. The discussions between Gotti, Gravano and D'Amato should have been excluded, because there was no evidence that Gigante ever joined in a conspiracy with those figures to murder Vastola. The government argues that these discussions reveal Gigante's role in a general process and network of criminal conspiracy and activity. However, these discussions were not "in furtherance of" a specific criminal purpose, and the fact that Gigante might have conspired with Gotti and Gravano to commit other crimes on other occasions is irrelevant.

Nonetheless, to the extent that these or any other statements were erroneously admitted under Rule 801(d)(2)(E), they did not "effect actual prejudice resulting in 'substantial and injurious effect or influence in determining the jury's verdict.' " *Ayala v. Leonardo,* 20 F.3d 83, 92 (2d Cir.1994) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Several admitted statements would have been properly admissible

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either as declarations against penal interest or under the state of mind exception to the hearsay rule. The jury acquitted Gigante on some of the charges against him, convicted him on other charges, and were unable to reach a verdict on still other allegations. This demonstrates that the jury was able to distinguish among the charges against Gigante and weigh the evidence on each separate count. There was substantial direct and circumstantial evidence connecting Gigante to each of the crimes for which he was convicted. Having considered all of Gigante's evidentiary arguments, we hold that any errors by the district court were harmless.

III. *Competency to Stand Trial*

[20] Gigante also challenges the trial court's determination that he was competent to stand trial. We uphold a district court's finding of competence unless that finding is ***84** clearly erroneous. *See United States v. Morrison,* 153 F.3d 34, 46 (2d Cir.1998). Under this highly deferential standard, " '[w]here there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.' " *United States v. Nichols,* 56 F.3d 403, 411 (2d Cir.1995) (quoting *United States v. Villegas,* 899 F.2d 1324, 1341 (2d Cir.1990)).

[21] Judge Weinstein was not the first judge to make a finding regarding Gigante's competency. Gigante's trial had been previously assigned to Judge Eugene Nickerson, who conducted the first hearings to determine whether Gigante was competent to stand trial. Four separate psychiatrists testified that Gigante was incompetent, although reservations were expressed that he might be malingering. *See United States v. Gigante,* 925 F.Supp. 967, 968 (E.D.N.Y.1996).

Judge Nickerson then received testimony from former members of the Mafia (many of whom later testified at Gigante's trial), and made the factual findings that "Gigante was a forceful and active leader of the Genovese family from at least 1970 on" and that Gigante had put on a "crazy act" for many years in order "to avoid apprehension by law enforcement." *Id.* at 976. After being presented with these findings, two of the examining psychiatrists changed their opinion, indicating that they now thought Gigante was malingering; one said Gigante was competent to stand trial, and the other said it was quite possible that Gigante was competent. The remaining psychiatrists held to their earlier findings of incompetence. *See United States v. Gigante,* 987 F.Supp. 143, 146 (E.D.N.Y.1996). Judge Nickerson found "the weight of medical opinion to show that Gigante is mentally competent to stand trial." *Id.* at 147.

When Gigante renewed his claim of incompetence due to Alzheimer's disease, Judge Nickerson recused himself, and the case was reassigned to Judge Weinstein. *See Gigante,* 982 F.Supp. at 146. Gigante presented new evidence of incompetence in the form of a Positron Emission Tomography (PET) scan of Gigante's brain and the results of a battery of tests designed to identify malingering. The defense experts who presented this evidence testified that Gigante was incompetent to be tried. The government then presented a witness who testified that it was possible that the results of these tests were due to the drugs Gigante was receiving. *See id.* at 147. Judge Weinstein held that Gigante was competent and ordered that the trial proceed. *See id.* at 148.

Judge Nickerson and Judge Weinstein, after conducting separate hearings, reached the identical conclusion that Gigante was malingering, and that he was competent to stand trial. This was a permissible conclusion in light of the expert testimony and extensive evidence of Gigante's attempts to elude prosecution, and we do not find it to be clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

C.A.2 (N.Y.),1999.
U.S. v. Gigante
166 F.3d 75, 51 Fed. R. Evid. Serv. 1

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166 F.3d 75, 51 Fed. R. Evid. Serv. 1
(Cite as: 166 F.3d 75)

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HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 22, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 3/19/12

The JUDICIARY Committee considered: **HB 359**

HOUSE BILL NO. 359
"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

HB 359-SEX CRIMES; TESTIMONY BY VIDEO CONFERENCE

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 359 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
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COR
CRT
EED
DEC
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LAW
LEG
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DPS
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UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	CRT		X	
	LEG(H)JUD			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	LAW			X
2	DPS			X
3	ADM(POA)		X	
4	ADM(OPA)		X	
5	COR		X	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	✓			
	Holmes	X			
	Keller	X			
	Pruitt	X			
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VC

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MEMORANDUM March 18, 2012

SUBJECT: Online Enticement and Prostitution Provisions in CSHB 359(JUD)
(Work Order No. 27-GH2627\M)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Doug Gardner
Director

There are two matters that I want to bring to your attention regarding the CS for HB 359 you requested.

1. Section 19. The way the bill is currently drafted with regard to online enticement in the first degree in section 19 of the bill, online enticement that is B felony conduct and online enticement that is A felony conduct would both be serious felonies. It would appear that the intention of the committee is for the A felony offense of online enticement provided for in AS 11.41.452(e) to be a serious felony, but not online enticement that is a B felony (online enticement is an A felony when the offender is a registered sex offender). Given that in other situations, such as sexual assault in the second degree, which is a B felony, the legislature has not included a class B felony as a serious felony, I suggest that citation to AS 11.41.452(e) should be included to clarify this situation.

2. Section 6. The language as currently drafted in (c)(1) of this section uses the term "patronizes" to refer to the conduct of the defendant who commits the offense of prostitution under AS 11.66.100(a). While some might describe this as "nit-picking," patronizes may include conduct that is not necessarily criminal, and read literally, has a vague meaning in describing the conduct in AS 11.66.100(a). The use of the term "patron" is the correct term to use in this context to describe the relationship the statute intends to cover, and the term "patron" is also consistent with AS 11.66.130(a)(2), where the same type of relationship between a prostitute and a "patron" is being described. Given that time was of the essence, we made this change and included it in the draft you were sent to try and assist in expediting this matter. Please confer with the committee and determine if this change is acceptable.

DDG:med
12-105.med

Enclosure

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MEMORANDUM March 20, 2012

SUBJECT: Approved Change to Final of CSHB 359(JUD)
(Work Order No. 27-GH2627\B)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Doug Gardner
Director

During final review of Amendment M.3 to CSHB 359(JUD), in preparation for creating a final of the bill passed out of committee on March 19, 2012, an error was discovered on page 7, line 5. The amendment should have been drafted as an "or" and not "and." The draft that you are receiving, with Ms. Lesh's permission, was drafted with an "or" in place of "and" so that forfeiture of property under AS 11.66.145 can be ordered if a defendant is found to have violated **AS 11.66.100(c) or 11.66.110 - 11.66.135**. Please review this change to make sure that this change conforms to the intent of the committee.

DDG:ljw
12-215.ljw

Enclosure

27-GH2627\M
Gardner
3/17/12

CS FOR HOUSE BILL NO. 359(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of distribution of indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally

punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

*** Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, or **sex**

traffickers [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

* **Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.360; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

* **Sec. 4.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors

if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection to either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [TO ANOTHER PERSON ANY] material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 5.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

*** Sec. 6.** AS 11.66.100 is amended by adding new subsections to read:

(c) Prostitution is a class C felony if

(1) the defendant violates (a) of this section as a patron of a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution under (c) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was 18 years of age or older.

*** Sec. 7.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

*** Sec. 8.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

*** Sec. 9.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes, or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

* **Sec. 10.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property **under** [PURSUANT] to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 11.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 12.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been

compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 13.** AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of **AS 11.66.100 - 11.66.135** [AS 11.66.110 - 11.66.135] shall be forfeited.

* **Sec. 14.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or

B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* **Sec. 15.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

* **Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may, at the court's discretion, allow a witness, including a psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness is in a place from which people customarily travel by air to the court and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, at the court's discretion, determines that another person may be present. Any person present with the witness must be identified on the record. In this subsection, "contemporaneous two-way video

conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow people at two or more places to interact by two-way video and audio transmissions simultaneously.

*** Sec. 17.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of **not** [NO] more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

*** Sec. 18.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

* **Sec. 19.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor,** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

* **Sec. 20.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or

an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 21.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460.

*** Sec. 22.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court

order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

* **Sec. 23.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when, under AS 47.12.040(a)(2), the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and

information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

*** Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony. (a) **In General.** In every trial, the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may, at the court's discretion, authorize the contemporaneous two-way video conference testimony at trial of a witness only if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The video conference technician shall be the only person in the presence of the witness unless the court, at the court's discretion, determines that another person may be present. Any person present with the witness must be identified.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 7 - 11, 14, and 17 - 23 of this Act apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 6, 12, 13, 16, and 24 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree."

*** Sec. 27.** This Act takes effect July 1, 2012.

3/19
Jeg./Lori

27-GH2627\M.1
Gardner
3/19/12

AMENDMENT #16

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

M OK

Page 12, line 14, following "**minor**":

Insert "**under AS 11.41.452(e)**"

pg. 1 of
Gardner memo
3/18/12
incorporate
by memorandum

27-GH2627\M.2
Gardner
3/19/12

AMENDMENT #13 OK

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

Page 4, lines 9 - 10:

Delete "**material is** [TO ANOTHER PERSON ANY] material that **the person knows**"

Insert "**person knows that the material** [TO ANOTHER PERSON ANY MATERIAL THAT]"

27-GH2627\M.3
Gardner
3/19/12

AMENDMENT #14 m OK

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

Page 7, line 5:

Delete "**AS 11.66.100 - 11.66.135**"

Insert "**AS 11.66.100(c) and 11.66.110 - 11.66.135**"

((~or'
3/20 per Doug G. - suggested changing to 'or'))

#15 m OK

pg. 8, ln. 27

after court 1

- Rick Svodney
- Anne Carpeneti

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

477 F. 3rd
- Garcia dec.
- Berkeland 5th

MEMORANDUM March 19, 2012

SUBJECT: Confrontation Clause Issues Regarding Video Testimony in Mental Competency Hearings; U.S. and Alaska Constitutions (HB 359; Work Order No. 27-GH2627\A)

- Nguyen
- Burhoe

TO: Representative Lindsey Holmes
Attn: James Waldo

FROM: Doug Gardner
Director

The question you asked is whether the following provision in HB 359 violates the Confrontation Clause of the United States Constitution, Amendment VI, and Alaska Constitution, article I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him"):

> *** Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:
> (h) In a hearing to determine competency under this section, the court may allow the testimony of a witness, including the psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness would be required to travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court. In this subsection, "contemporaneous two-way video conference"
> (1) means a conference among people at different places by means of transmitted audio and video signals;
> (2) includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

The U.S. Supreme Court, in *Crawford v. Washington*, 541 U.S. 36, 43 (2004), held that the Confrontation Clause is essentially a trial right, and not a right of the accused during pre-trial hearings. The Alaska Supreme Court has held that, while the Confrontation Clause in the Sixth Amendment applies to the states, the court is not bound by the United States Supreme Court's interpretation of the Confrontation Clause, suggesting that the Alaska Supreme Court may be *more* protective of a defendant's right to confrontation as provided in article I, § 11 of the Alaska Constitution, and require a face-to-face

confrontation during a competency hearing. So, there is some risk that the above-proposed legislation will be challenged as violative of the defendant's right to confrontation.

With the limited time available to respond to your opinion request, the purpose of this memorandum is to spot issues regarding application of the Confrontation Clause to a pre-trial mental competency evaluation under AS 12.47.100, in a criminal case. I did not have time to evaluate whether video teleconferencing might be considered by a court as a constitutionally acceptable procedure in place of a "face-to-face" hearing, under a Confrontation Clause analysis.

Comparison to Grand Jury Rule; Criminal Rule 6(u)

Proposed section 16 of HB 359 provides for video, rather than merely telephonic participation by witnesses at a competency hearing under AS 12.47.100. My understanding from you is that a suggestion was made that the bill is similar to Criminal Rule 6(u), which allows telephonic participation, and does not require video teleconferencing at a grand jury proceeding, if the conditions of the rule are met, primarily that the witness would be required to travel more than 50 miles to testify. As a practical matter, there may be some similarity between HB 359 and Criminal Rule 6(u). However, from a constitutional perspective, grand jury proceedings have long been recognized as ex parte proceedings, where the defendant does not have a right to be present and confront witnesses. *Cassell v. State*, 645 P.2d 219 (1982). It is likely that the comparison of section 16 of the bill to Criminal Rule 6(u) was a practical one only, since the confrontation clause issues at grand jury are different from a competency hearing in accordance with proposed section 6 of the bill.

Confrontation Clause Does Not Apply to "Pre-trial" Proceedings

The United States Supreme Court in *Crawford v. Washington*, *supra*, made clear that the right of confrontation was a trial right, not a pre-trial right. *Crawford*, 541 U.S. at 68. The following passage from *State v. Rivera*, 192 P.3d 1213 (N.M. 2008), does a good job of summarizing the vast majority of state courts that have analyzed whether the right to confrontation applies to a pretrial hearing regarding suppression of evidence:

> The distinction follows from the difference in focus between pretrial hearings and trials on the merits. A trial focuses on the ultimate issue of an accused's guilt or innocence, whereas in a pretrial hearing the focus is generally on the admissibility of evidence. Thus, "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial." *United States v. Raddatz*, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *Brinegar v. United States*, 338 U.S. 160, 173, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) ("There is a large difference between the

> two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.").
>
> * * *
>
> Nothing in the Supreme Court's recent pronouncements suggests that the Court has changed its interpretation of the Confrontation Clause. Instead, recent cases continue to focus on the protections afforded a defendant *at trial.* For example, in *Giles v. California*, 554 U.S. 353, ——, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488 (2008), the Court noted that "[t]he [Sixth] Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present *at trial* for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." (Emphasis added.) Similarly, in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Court emphasized a defendant's right to confront a witness against him at trial. The Court concluded that, "[w]here testimonial evidence is at issue [at trial], the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 124 S.Ct. 1354.
>
> Recently, other states have rejected an interpretation of *Crawford* that would require confrontation of witnesses at pre-trial hearings. *See, e.g., People v. Felder*, 129 P.3d 1072, 1073 (Colo.Ct.App. 2005) ("Nothing in *Crawford* suggests that the Supreme Court intended to alter its prior rulings allowing hearsay at *pretrial* proceedings, such as a hearing on a suppression motion challenging the sufficiency of a search warrant."); *Sheriff v. Witzenburg*, 122 Nev. 1056, 145 P.3d 1002, 1006 (2006) ("We conclude that the Sixth Amendment Confrontation Clause and *Crawford* do not apply to a preliminary examination."); *State v. Wolnarowicz*, 720 N.W.2d 635, 641 (N.D. 2006) ("In *Crawford*, the United States Supreme Court did not indicate it intended to change the law and apply the Confrontation Clause to pretrial hearings. . . . . The Sixth Amendment right to confrontation is a trial right, which does not apply to pretrial suppression hearings."); *State v. Rhinehart*, 153 P.3d 830, 834–35 (Utah Ct.App. 2006) ("The Confrontation Clause pertains to a criminal defendant's right to confront and cross-examine the witnesses against the defendant at trial; it does not afford the right to confront and cross-examine witnesses at a preliminary hearing, and *Crawford* does not alter the Court's previous holdings with respect to this matter.").

Most of the case law interpreting *Crawford* has developed in the context of pretrial evidentiary suppression hearings, as can be seen from the above passage, which is fairly

typical of courts considering confrontation clause issues, and represents the majority opinion in this area. However, as Mr. Mittman noted in the March 4, 2012, memorandum submitted by the ACLU to the committee regarding confrontation clause concerns with section 16 of HB 359, while no court has ruled that the Confrontation Clause applies to a mental competency hearing, there may be reasons why the Alaska Supreme Court might do so.

Mr. Mittman referred the committee to the holding in *State v. Gary F.*, 432 S.E.2d 793, 800 (W.Va. 1993), where the court ruled that the Confrontation Clause applied to a pre-trial hearing involving a decision about whether a case should be transferred from juvenile to adult court. Reference to this decision should not be minimized, as the same issues present in *State v. Gary F.* are very similar to the inquiry under AS 12.47.100, where a court must determine whether a defendant is mentally competent to stand trial. Like the inquiry in *Gary F.*, the inquiry under AS 12.47.100 regarding the competency of a witness to stand trial is an issue that once decided in a pre-trial context, is not an issue that will be later litigated at trial.

Unlike the issues discussed by *Crawford*, and the other cases interpreting *Crawford* in the context of application of the Confrontation Clause to suppression hearings, where the defendant will ultimately have the right to confront the evidence at trial in front of a jury, mental competency to stand trial under AS 12.47.100 is not an issue that will be litigated before a jury. In other words, once a finding is made under AS 12.47.100, the defendant doesn't have a subsequent opportunity to confront, in person, the witnesses the court relied on at the pre-trial hearing since the issue will not be before the jury.

The considerations of application of the Confrontation Clause to pre-trial suppression hearings in *Crawford*, where the Court was aware that, after a pre-trial hearing, the defendant would have a confrontation right at trial to confront essentially the same evidence, may be distinguishable in the context of AS 12.47.100. In the context of a hearing under AS 12.47.100, the Alaska Supreme Court may extend the Confrontation Clause to a hearing conducted pursuant to AS 12.47.100, as a narrow exception to *Crawford*, and heightened protection for a criminal defendant in a competency hearing for the reasons discussed above. Please note, I did not have time to address the sufficiency of video teleconferencing to preserve a defendant's Confrontation Clause right. I would note, as Mr. Mittman has in the ACLU's memorandum, that video teleconferencing may be subject to close scrutiny in this context in a criminal case. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Blume v. State*, 797 P.2d 664, 674 (Alaska App. 1990).

DDG:ljw
12-213.ljw

Leg.Legal 465-2029

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT #3 OK

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 4, line 29 through page 5, line 3:

Delete all material and insert:

"(c) Prostitution is a class C felony if

(1) the defendant ~~is a patron of~~ patronizes a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT #4

OFFERED IN THE HOUSE JUDICIARY COMMITTEE BY OK

TO: HB 359

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

27G-2-B
3/15/2012
(2:24 pm)
Carpeneti

AMENDMENT #5

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY OK

TO: HB 359

Page 17, line 1, following "testimony":

Insert "at trial"

Page 17, line 11, following "stand.", through line 15:

Delete all material.

Insert "The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified."

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT #3 3/16/12

OFFERED IN THE HOUSE JUDICIARY COMMITTEE
TO: HB 359

M BY Gruenberg
lyn
no obj. OK

Page 4, line 29 through page 5, line 3:

Delete all material and insert: (amdt. to amdt. #3)

"(c) Prostitution is a class C felony if

(1) the defendant ~~is a patron of~~ patronizes a prostitute;

(2) the prostitute is under 18 years of age; and ok.

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT #4

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY Rep. Gruenberg and Rep. Holmes

TO: HB 359

no objection. OK

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

#1 delete Sec. 20

#2 f.n.

#3-5 fax

27G-2-B
3/15/2012
(2:24 pm)
Carpeneti

AMENDMENT #15

OFFERED IN THE HOUSE JUDICIARY COMMITTEE
TO: HB 359

M BY Holmes
— no objection
OK

Page 17, line 1, following "testimony":
Insert "at trial"

Page 17, line 11, following "stand.", through line 15:
Delete all material.
Insert "The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified."

memo for HFIN

Amt. #6 (~~conceptual~~)

M Rep. Gruenberg
— pg 17, ln. 1

insert word 'only'
(between witness + if)

('only if')
Q.

no obj;
OK

M
Peggy

M Rep. Gruenberg

Amdt. 7

pg. 8, ln. 22 "lives" → is

no obj.

OK

Amdt. 8

Pg. 8, line 18

M Rep. Gruenberg (Keller) follow 'may' ln. 18

(travel by air))

for good cause shown,

in its discretion,

OK

Conceptual

Wtd

Amdt 9
Rep. Keller
Rep. Gruenberg

Rick Sv. eg. delay of competency hearing (cost) raises issues..

is not a consideration

RS - Bethel → Anchorage.

define "good cause shown"

3/16 Amdt. 10 HB 359

pg 5, ln. 19, except the defend,

w/d following 'witness'

Amdt. 11

M pg. 5, ln. 19 Δ the to 'a'

Rep. Greenberg no obj OK.

Amdt. 12

M pg. 16, ln. 31 the court may

Rep. Holmes in its discretion, auth.

no obj. OK.

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 4, line 29 through page 5, line 3:

Delete all material and insert:

"(c) Prostitution is a class C felony if

(1) the defendant is a patron of a prostitute;

(2) the prostitute is under 18 years of age;

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

Sec. 11.81.640. Application of AS 11.81.600 — 11.81.630. AS 11.81.600 — 11.81.630 apply only to this title. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Stated in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).
Cited in Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); Cole v. State, 828 P.2d 175 (Alaska Ct. App. 1992); Alvarez v. Ketchikan Gateway Borough, 91 P.3d 289 (Alaska Ct. App. 2004).

Article 7. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "access device" means a card, credit card, plate, code, account number, algorithm, or identification number, including a social security number, electronic serial number, or password, that is capable of being used, alone or in conjunction with another access device or identification document, to obtain property or services, or that can be used to initiate a transfer of property;

(2) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(3) "animal" means a vertebrate living creature not a human being, but does not include fish;

(4) "benefit" means a pre
third person pursuant to th
(5) "building", in additio
structure adapted for overn
when a building consists of
rooms, each unit is consider
(6) "cannabis" has the me
(7) "conduct" means an a
(8) "controlled substance'
(9) "correctional facility"
confinement of persons und
(10) "credit card" means
credit plate, courtesy card,
without fee by an issuer for
credit;
(11) "crime" means an off
crime is either a felony or a
(12) "crime involving dom
(13) "criminal street gang
(A) who have in common
marking, style of dress, or
(B) who, individually, joi
commit, within the precedi
association with the group, t
following:
(i) AS 11.41;
(ii) AS 11.46; or
(iii) a felony offense;
(14) "culpable mental sta
"criminal negligence", as th
(15) "dangerous instrume
(A) any deadly weapon or
attempted to be used, or th
physical injury; or
(B) hands or other object
blood by applying pressure
(16) "deadly force" means
under circumstances that th
serious physical injury; "de
firearm in the direction of a
believed to be and intentio
physical injury by means of
(17) "deadly weapon" me
causing death or serious phy
or an explosive;
(18) "deception" means to
(A) create or confirm anot
be true, including false im
intention or other state of m
(B) fail to correct another'
or confirmed;
(C) prevent another from
property or service involved;

HB 367

<TARGET><BILL>HB 367</BILL><SUBJECT>HB 367</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Rep. Alan Dick
Rep. Beth Kerttula
Rep. Bob Herron
Rep. Bob Miller
Rep. Charisse Millett
Rep. Paul Seaton

State Capitol, Room 432
Juneau, AK 99801-1182

Chair

Rep. Wes Keller
Phone: (907) 465-2186
Fax: 465-3818

House Health and Social Service Committee

Sponsor Statement for HB 367

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

HB 367 would include Fetal Alcohol Spectrum Disorders (FASD) as a mitigating factor in sentencing. This would allow some flexibility in sentencing if the defendant is found by the court to be affected by FASD and this condition substantially impaired the defendant's judgment, behavior, and capacity to recognize reality or ability to cope with the ordinary demands of life.

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) are disproportionately represented within Alaska's criminal justice system. HB 367 does not require a judge to use the mitigating factor and it DOES NOT automatically adjust a presumptive sentence. The defense would have to provide clear and convincing evidence that the defendant's disability *significantly affected the defendant's conduct* and *substantially impaired judgment, behavior, and capacity to recognize reality* in order to apply the mitigating factor.

Evidence shows that directing people with mental illness and other brain disorders to supported services, both inside and outside of Corrections, significantly reduces the high financial and social costs associated with re-incarceration and recidivism. Felons and repeat offenders with FASD are more likely to stop committing crimes when they are given the same supports that benefit people with mental illness and other disabilities, which can include Therapeutic Court, housing and employment assistance, case management, counseling and rehabilitation.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **CSHB367-ACS-TRC-4-04-12**
Fiscal Note Number
Publish Date

Identifier (file name) CSHB367-ACS-TRC-4-04-2012
Title Mitigation at sentencing for defendant with FASD
Sponsor House Health and Social Services
Requester

Dept. Affected Alaska Court System
Appropriation Trial Courts
Allocation
OMB Component Number 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0..0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by Nancy Meade, General Counsel
Division Alaska Court System
Approved by Nancy Meade for Christine Johnson, Administrative Director
Alaska Court System

Phone 907-463-4736
Date/Time 4/04/2012 11:00 a.m.
Date 4/4/2012

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB367-ACS-TRC-4-04-12

Analysis

House Bill 367 adds a new factor to the list of mitigating factors in AS 12.55.155(d) that the court shall consider at sentencing if proven. If proven, the court may then impose a sentence below the presumptive range for certain crimes. Specifically, except for defendants convicted of offenses against persons and first degree arson, a defendant may show that he or she committed the offense while suffering from a diagnosed fetal alcohol spectrum disorder, that the disorder substantially impaired the defendant's judgment (or behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life), and that the disorder significantly affected his or her conduct.

The court cannot predict the number of cases in which defendants will attempt to prove this factor as a mitigator at sentencing, but believes the sentencing hearings will be held and handled in the normal course without a fiscal impact. The Alaska Court System therefore submits a zero fiscal note.

Alaska State Legislature

Rep. Alan Dick
Rep. Beth Kerttula
Rep. Bob Herron
Rep. Bob Miller
Rep. Charisse Millett
Rep. Paul Seaton

State Capitol, Room 432
Juneau, AK 99801-1182

Chair

Rep. Wes Keller
Phone: (907) 465-2186
Fax: 465-3818

House Health and Social Service Committee

MEMO

To: Representative Carl Gatto, Chair
Judiciary

Fm: Representative Wes Keller

Date: March 29, 2012

Re: Request for Hearing on HB367 pending referral

Please consider this as a request for you to schedule HB367 "Fetal Alcohol Spectrum Disorder as Mitagator" before the House Judiciary Committee. Included with the formal request please find a packet of information and documents in pdf format.

HB367 would include Fetal Alcohol Spectrum Disorder (FASD) as *impaired brain function* under the state's existing definition of *mental disease or defect.* FASD could apply as a mitigating factor in sentencing. This would allow some flexibility in sentencing those who are affected by FASD when there is *clear* and *convincing* evidence that the defendant has an *impaired brain* as defined under *the mental disease* or *defect.*

Thank you for your consideration your consideration of this request.

Alaska State Legislature

Rep. Alan Dick
Rep. Beth Kerttula
Rep. Bob Herron
Rep. Bob Miller
Rep. Charisse Millett
Rep. Paul Seaton

State Capitol, Room 432
Juneau, AK 99801-1182

Chair

Rep. Wes Keller
Phone: (907) 465-2186
Fax: 465-3818

House Health and Social Service Committee

Sponsor Statement for HB 367

"An Act relating to inclusion of fetal alcohol spectrum disorders, traumatic and acquired brain injury and intellectual disability in the definition of 'mental disease or defect'; and relating to mitigation at sentencing in a criminal case for a defendant affected by a mental disease or defect."

HB 367 would include Fetal Alcohol Spectrum Disorders (FASD) as *impaired brain function* under the state's existing definition of *mental disease or defect*. If HB 367 passed, FASD could apply as a mitigating factor in sentencing. This would allow some flexibility in sentencing for those who are affected by FASD when there is clear and convincing evidence that the defendant has an *impaired brain function* as defined under *mental disease or defect.*

HB 367 does not require a judge to use the mitigating factor and it DOES NOT automatically adjust a presumptive sentence. The defense would have to prove that the defendant's disability *significantly affected the defendant's conduct* and *substantially impaired judgment, behavior, and capacity to recognize reality* in order to apply the mitigating factor.

Evidence shows that directing people with mental illness and other brain disorders to supported services, both inside and outside of Corrections, significantly reduces the high financial and social costs associated with re-incarceration and recidivism. Felons and repeat offenders with an FASD are more likely to stop committing crimes when they are given the same supports that benefit people with mental illness and other disabilities, which can include Therapeutic Court, housing and employment assistance, case management, counseling and rehabilitation.

27-LS1454\M
Gardner
3/26/12

CS FOR HOUSE BILL NO. 367( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE HEALTH AND SOCIAL SERVICES COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

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

*** Section 1.** AS 12.55.155(d) is amended to read:

(d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that

significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(12) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense**;**

(20) except in the case of an offense defined under AS 11.41 or AS 11.46.400, the defendant committed the offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this paragraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB367**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB367-DOA-OPA-3-30-12
Title: Fetal Alcohol Spec. Disorder as Mitigator
Sponsor: Health & Social Services
Requester: House Health & Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen
Division: Office of Public Advocacy
Approved by: John Cramer, Deputy Commissioner
Department of Administration

Phone: 907-269-3504
Date/Time: 3/30/12 3:00 PM
Date: 3/30/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB367
2012 LEGISLATIVE SESSION

Analysis

AS 12.55.155(d) allows a sentencing court to impose a sentence less than the presumptive range where mitigating factors have been proven. This bill amends AS 12.55.155(d) by adding section 20, which allows the court to find a factor of mitigation where the defendant committed the offense while affected by fetal alcohol spectrum disorder.

The Office of Public Advocacy (OPA) does not anticipate a fiscal impact from this change. Accordingly, OPA submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB367**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB367-DOA-PDA-3-30-12
Title: Fetal Alcohol Spec. Disorder as Mitigator
Sponsor: Health & Social Services
Requester: House Health & Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 3/30/12 2:15 PM
Approved by: John Cramer, Deputy Commissioner — Date: 3/30/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB367
2012 LEGISLATIVE SESSION

Analysis

AS 12.55.155(d) allows a sentencing court to impose a sentence less than the presumptive range where mitigating factors have been proven. This bill amends AS 12.55.155(d) by adding section 20, which allows the court to find a factor of mitigation where the defendant committed the offense while affected by fetal alcohol spectrum disorder.

The Public Defender Agency does not anticipate a fiscal impact from this change. Accordingly, the Agency submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 367**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HB367-LAW-CRIM-03-30-12
Title: An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been...
Sponsor: Health & Social Services
Requester: (H) Health & Social Services

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Sheila Bugbee, Administrative Officer — Phone: 465-3675
Division: Administrative Services — Date/Time: 3/30/12 12:00 PM
Approved by: Michael C. Geraghty, Attorney General — Date: 3/30/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

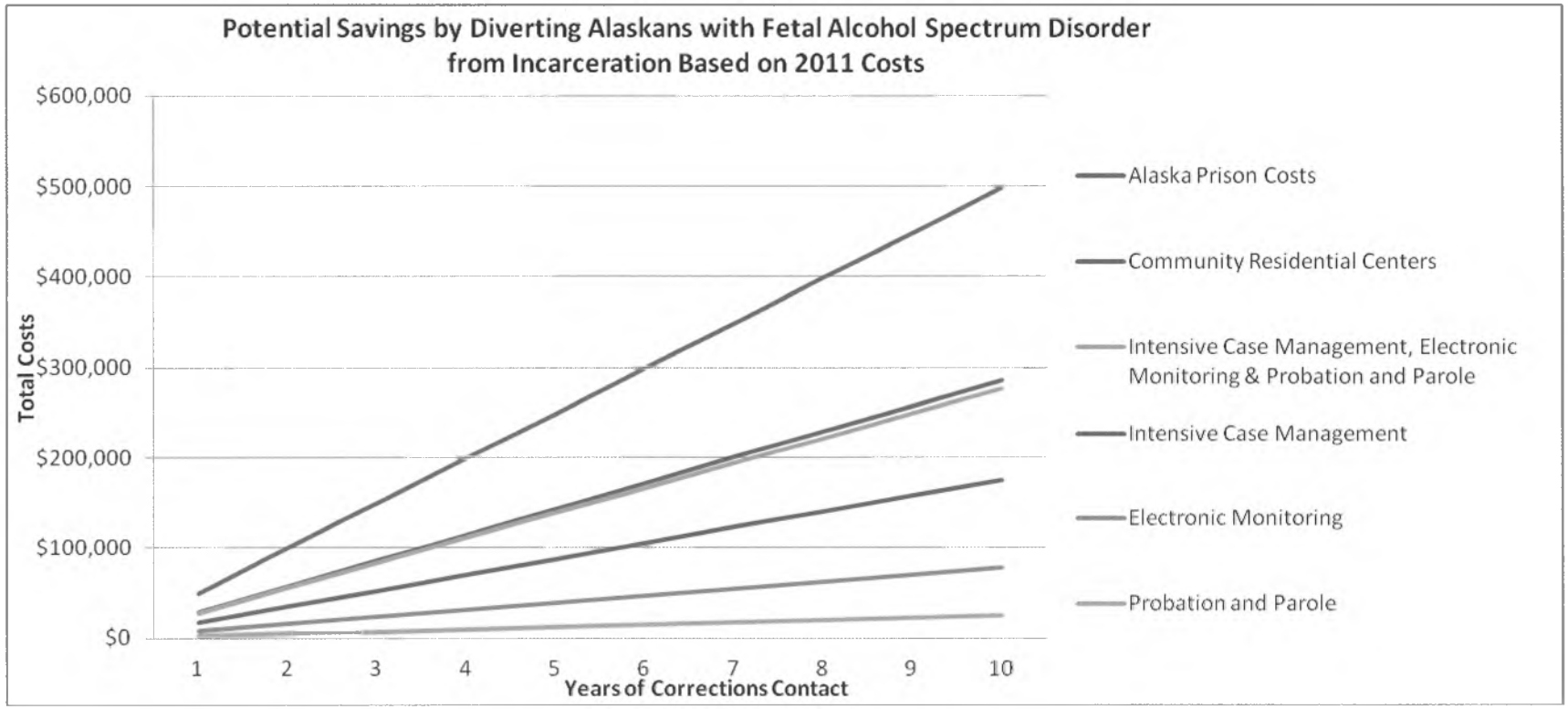
STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 367

Analysis

HB 367 would add a mitigating factor at sentencing. It would allow a new mitigator if the defendant was affected by a fetal alcohol spectrum disorder that significantly affected the defendant's behavior. If proven, the court would have discretion to reduce the term of imprisonment to below the presumptive range.

The fiscal impact for the Department of Law is indeterminate because it will require expert testimony on the issue of whether the person suffers from such a disorder and if so, did it significantly affect his or her behavior.

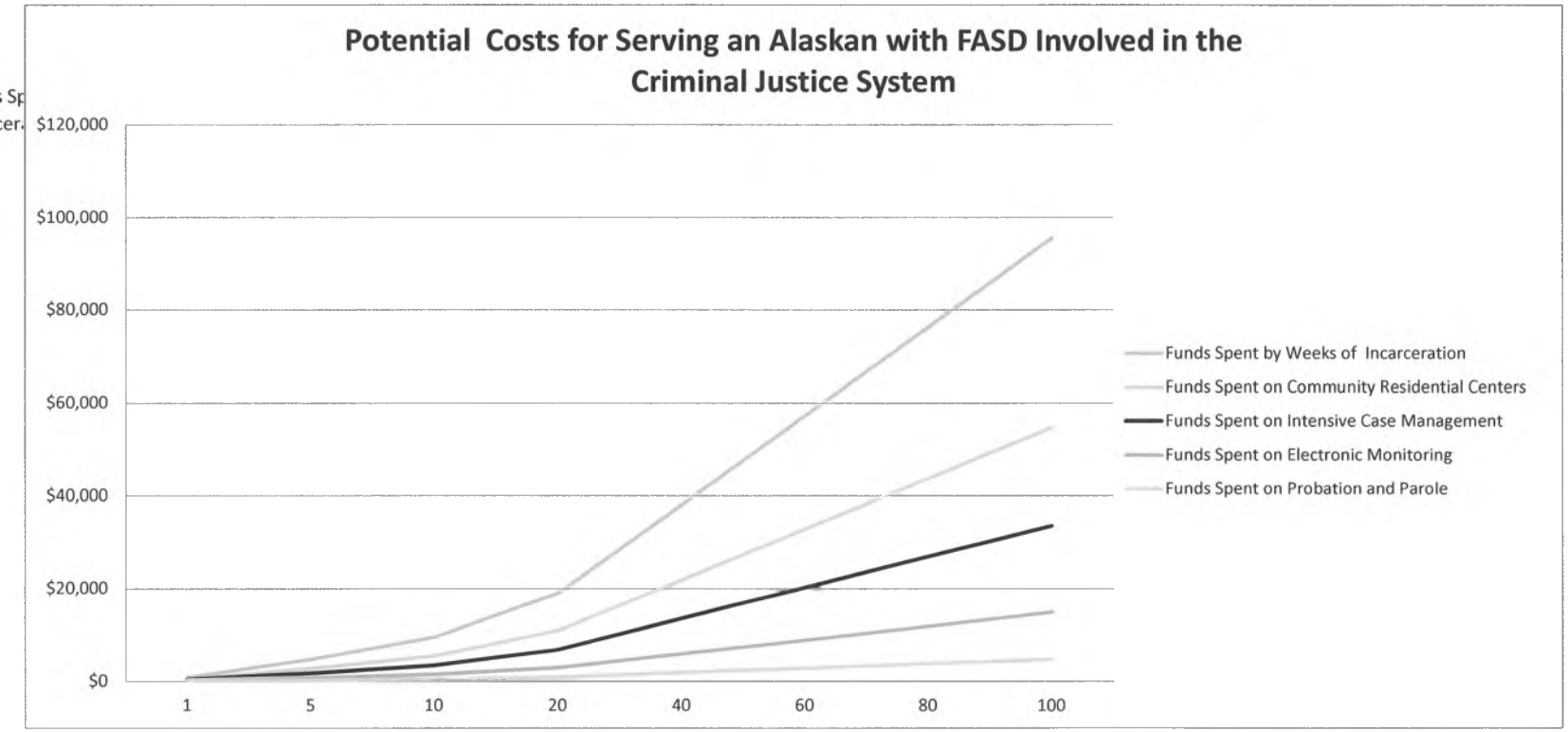


	Alaska Prison Costs	Community Residential Centers	Intensive Case Management, Electronic Monitoring & Probation and Parole	Intensive Case Management	Electronic Monitoring	Probation and Parole
Daily Costs	$136.44	$78.34	$76.01	$48.00	$21.25	$6.76
Yearly Costs	$49,800.60	$28,594.10	$27,743.65	$17,520.00	$7,756.25	$2,467.40

Prepared by: Advisory Board on Alcoholism and Drug Abuse/Alaska Mental Health Board 3.30.12

http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf

	AK Prison Costs	Community Residential Centers	ICM	Electronic Monitoring	Probation and Parole
Day	$136.44	78.34	$48	21.25	6.76
Year	$49,800		$17,520		



Alaska FASD Partnership

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm
Email: akfasdpartnership@alaska.gov

SB 151/HB 367 - Inclusion of FASD as a Mitigating Factor

The Need for SB 151/HB 367

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) are disproportionately represented within Alaska's criminal justice system. The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

SB 151/HB 367 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission: "The legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder." [1]

A draft resolution being proposed by the Commission on Youth At Risk of the American Bar Association for consideration at this year's annual ABA meeting states: "... the American Bar Association urges lawyers and judges, as well as bar associations and law school clinical programs, to support training that includes law school law enforcement, and legal/judicial education curricula on enhanced awareness of the child and adult disability of Fetal Alcohol Spectrum Disorders (FASD) and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and that they work with medical, mental health, and FASD disability experts to promote: ... (d) applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

Overview of the changes proposed in SB 151/HB 367

SB 151/HB 367 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "defendant committed [an] offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct."

SB 151/HB 367 would, for the purposes of the subsection on mitigating factors, define fetal alcohol spectrum disorder as any "a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy."

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[1] Alaska Criminal Justice Assessment Commission (2000). *Final Report.* Retrieved October 12, 2010 from www.hss.ajc.state.ak.us/reports/CJAC Final 2004.pdf, at p.71.

The legislation *DOES NOT*:

1) *require* a judge to use the mitigating factor;
2) *automatically* adjust a presumptive sentence; the defendant would have to prove by *clear and convincing evidence* 1) that he or she has a fetal alcohol spectrum disorder and 2) that the condition "significantly affected the defendant's conduct" before the judicial officer can consider the possibility of adjusting the presumptive sentence; or
3) the goal is not a "get out of jail free" card, but an attempt to be "smarter" within the justice system to better direct people who have impaired brain function to services both within and after release from the criminal justice system.

What are mitigating factors?

The Legislature has decided in the presumptive sentencing law that judges should give jail time within certain ranges in all felonies (with the exception of "class C felonies" where the minimum presumptive term is 0 years). The amount of the presumptive term depends on the severity of the crime and whether or not a defendant has prior felonies. There are 34 statutory aggravating factors that could result in a sentence above the presumptive range, if proved by clear and convincing evidence. A judge must sentence a person to at least the minimum presumptive term unless a "mitigating factor" is shown by clear and convincing evidence. There are 19 statutory mitigating factors. With the current mental disease or defect mitigating factor, the defendant must *also* show by clear and convincing evidence that the condition "significantly affected the defendant's conduct." The proposed fetal alcohol spectrum disorder mitigating factor also requires proof by clear and convincing evidence that the condition "significantly affected the defendant's conduct" before a judge could consider it. If the required showing has been made for any mitigating factor, it is legally possible for the judge to sentence below the minimum term (but if the minimum term is more than 4 years, the lower limit is half the minimum presumptive term).

There are special rules when there is a factor in a case that does not fit within the statutory list but which is so important in a case that it would be manifestly unjust to sentence a person without considering the factor. If the sentencing judge finds that such a "non statutory mitigating factor" exists, then the judge must refer the case to a three judge sentencing panel. If at least two judges on the panel agree, the panel can sentence with the same lower limits applicable to a statutory mitigating factor. If the panel does not agree, the case is referred back to the original judge to impose at least the minimum presumptive term. The "three judge panel" method is very cumbersome, time consuming and expensive. SB 151/HB 367 is a "statutory mitigating factor" and would not require any referral to a three judge sentencing panel.

What are Fetal Alcohol Spectrum Disorders?

FASD is not a medical diagnosis, but an umbrella term for the range of diagnoses associated with damage caused by maternal alcohol consumption during pregnancy. These medical diagnoses can include Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (PFAS), Alcohol-Related Birth Defects (ARBD), and Alcohol-Related Neurodevelopmental Disorder (ARND). Note that the term, Fetal Alcohol Effects (FAE), is no longer commonly used, having been replaced by the PFAS, ARBD and ARND diagnoses.

Each diagnosis has its own symptoms and attributes, but common among all the diagnoses is permanent, life-long brain damage – often affecting decision-making, judgment and impulse control.

FASD is a brain-based disorder, similar to autism, traumatic and acquired brain injury, and other cognitive impairments.

FASDs appear in individuals differently. Some alcohol-exposed individuals may exhibit impulsivity, hyperactivity and risky behaviors. Some have difficulties with memory, while others have very good memories. Some have low IQs, while others have normal IQs.

Experts report that the different presentations are influenced by many variables, including when the mother drank, how much she drank, the genetic makeup (or genotype) of the baby, and the genotype of the mother.

Primary behavior characteristics of people with impaired brain function include: impulsiveness, memory difficulties, anger and frustration, difficulty pairing actions to consequences. Secondary behaviors that develop in reaction to or as a result of the primary disability, include substance abuse and mental health problems, anger and aggression, homelessness, involvement with the criminal justice system, and more.

Neurologist Dr. Susan Hunter-Joerns, a member of the Juneau FASD Diagnostic Team, wrote that structural brain damage "often significantly impair[s] cognitive behavior, common sense, the ability to understand right from wrong, cause-and-effect, consider consequences, ability to recognize social norm ... even though defendants may verbally seem able to talk about the issues. Making long term goals, planning appropriate actions, delaying gratification, and understanding the legal system, are often significant problems."

Who in Alaska is qualified to give a diagnosis of FAS/FASD?

Though some physicians may be qualified to diagnose all the disorders on the FASD spectrum, the preferred method of diagnosis, according to Susan Astley, Professor of Epidemiology and Pediatrics at the University of Washington and director of the Washington State FASD Diagnostic and Prevention Network, is by an interdisciplinary diagnostic team using current, rigorous FASD diagnostic guidelines. This preferred method is also advocated for nationally by the Centers for Disease Control and Prevention.

Each diagnosis on the spectrum requires evaluation and testing related to the Central Nervous System (CNS) to detect damage that cannot be measured alone by physical attributes. Interdisciplinary diagnostic teams using the 4-Digit Diagnostic Code include evaluations by a medical professional, psychologist, occupational therapist, and speech-language pathologist. These evaluations can detect the nuances of the disability.

How many diagnostic teams and/or physicians are available to give FASD diagnoses in Alaska?

Currently, through the Division of Behavioral Health FASD Diagnostic Team Provider Agreement, Alaska has eight active FASD diagnostic teams – in Bethel, Fairbanks, Mat-Su, Kenai, Juneau, Sitka, and two in Anchorage (Southcentral Foundation and ASSETS). Alaska also has a trained diagnostic team at Alaska Psychiatric Institute (API) for children who enter the service system through that door. In the past there were teams in Dillingham and Kodiak — both locations that are interested in reviving their teams at some point, but do not have the resources to do it at this time. Alaska also has had team in Nome, Copper Center, and Ketchikan. The majority of FASD diagnoses in Alaska are determined by the diagnostic teams overseen by DHSS.

How many people are diagnosed with FAS/FASD in Alaska annually?

In 2011, Alaska's FASD diagnostic teams diagnosed 179 individuals. The average per year number is around 153 per year, according to the Alaska Department of Health & Social Services.

What is Alaska's diagnostic standard based on?

In 1999, the DHSS Office of FAS, in conjunction with the statewide FASD Steering Committee, agreed to use the 4-Digit Diagnostic Code as the standard diagnostic system for Alaska's developing Diagnostic Team Network. The 4-Digit Diagnostic Code was developed at the University of Washington's FASD Diagnostic and Prevention Network by Drs. Susan Astley and Sterling Clarren. The 4-Digit Diagnostic Code measures: 1) facial features, 2) growth deficiency, 3) central nervous system damage/dysfunction, and 4) prenatal alcohol exposure. The client's diagnosis is derived after a thorough evaluation by an interdisciplinary team of professionals, which generally includes a physician (or nurse practitioner), psychologist, occupational therapist, speech-language pathologist, social worker, and family advocate. For more information on the FASD 4-Digit Code, visit: http://depts.washington.edu/fasdpn/htmls/4-digit-code.htm.

The 4-Digit Diagnostic Code is considered the "gold standard" for FASD diagnosis and provides a reliable, evidence-based diagnostic process that gives detailed information about the individual client and how best to help that person work with their disability to reach their full potential. All team members are required to complete the University of Washington FASD 4-Digit Diagnostic Code Training Course.

The economic benefits of SB 151/HB 367

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management, including electronic monitoring and probation/parole, is about $76 per day ($48 for intensive case management, $21 for electronic monitoring, $7 for probation/ parole) – for a savings of $21,900 per person, per year.[2]

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD, T/ABI and other brain-based disabilities can live successfully in the community as contributing citizens, *and* provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does SB 151/HB 367 further the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

FASD in other jurisdictions

Judges nationwide are experiencing repeat offenders diagnosed with these disorders who, as a direct result of their disabilities, are effectively unable to understand the charges against them, or comply with the conditions of their sentence. There is a growing body of research affirming that FASDs are

[2] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf . *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

brain disorders effectively impairing "judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

Kate Burkhart, attorney and executive director of the Alaska Advisory Board on Alcoholism and Drug abuse, wrote that the language in SB 151/HB 367 "is commensurate with the federal sentencing guidelines and other western state laws that provide for such a mitigating factor. While none of the western states surveyed expressly include FASD in their definitions of mental defect, Utah includes a broad definition that would include FASD. The other states and federal guidelines would permit but do not mandate consideration of FASDs in sentencing unless they impair comprehension or ability to form intent."

Burkhart noted that Utah defines "mental illness" as "a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of an injury, or residual effect of a physical or mental disease that includes, but is not limited to, mental retardation" which is further defined to mean "significant sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior."

Idaho permits consideration of mental condition creating an "inability to appreciate the wrongfulness" of conduct or to conform to legal requirements at sentencing."

Washington permits the courts to consider "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

Nationally, advocates within the American Bar Association are proposing a resolution urging lawyers, judges, bar associations and law school clinical programs to promote "applying FASD as a factor in the mitigation of juvenile and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism." The resolution also asks, "that state and federal laws and policies reflect the serious effects of prenatal alcohol exposure by a) including persons diagnosed with FASD, or suffering from the affects of prenatal alcohol exposure, within the statutory definition of developmental disabilities ... and b) enhancing identification and diagnosis of ... persons with FASD." Their intent is that this resolution would be approved by the ABA House of Delegates at the annual meeting in Chicago in August 2012.

Internationally, Alaska is among the forerunners in awareness, diagnosis, and prevention of fetal alcohol spectrum disorders, both nationally and internationally. However, Canada and parts of Australia are leading the world in establishing laws and practices that address FASD as a brain-based disability with specific interventions and solutions.

The Canadian Bar Association passed a resolution in 2010 acknowledging that FASDs involve a range of neurological and behavioral challenges that can include "impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control."

The resolution also acknowledged that "the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others" and " these normative assumptions and sentencing principals such as specific and general deterrence, are not valid for those with FASDs.

Following are other highlights addressed in the CBA's resolution:

- sentencing options available to courts are often ineffective in changing the behavior of those with FASD and those with FASD are frequently repeat offenders

- some courts have ruled that absolutely no rehabilitative or deterrent purpose is served by incarceration of those with FASD;
- laws, programs or activities could ameliorate the disadvantages experienced by those with FASD whose behavior is judged on a standard that they are incapable of meeting because of their disability;
- the Canadian bar is resolved to urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

In Heather Douglas' article, *The sentencing response to defendants with fetal alcohol spectrum disorder* (2010) published by Thomas Reuters in Australia, the author notes that "as a result of deficits in executive function resulting in memory difficulties, inability to plan and failure to recognize the consequences of actions, many of those with FASD are likely to fail to pay fines and to breach probation orders ... Suspended sentences will not be useful in a context where cause and effect is not understood. In prison, highly suggestible FASD sufferers are likely to be victimized. While FASD clients cannot be cured of all their symptoms, techniques and approaches have been identified that can be employed by professionals to help the person reach his or her potential."

Conclusion

The state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism and a safer general public.

Chasnoff, M.D., an international expert on FASD, wrote in an article "Is Fetal Alcohol Spectrum Disorders a Mitigating Factor in Criminal Litigation and Sentencing?" in *Psychology Today* (2011), "We are in an ethical conundrum. Children, youth and young adults with FASD are more likely than not to end up before the court on criminal or civil charges, but the legal system has not come close to resolving how their cases should be treated. Most individuals with FASD have normal IQs, and most can relate a story as to how they ended up before the judge. Most can even state they understand the charges against them. But the truth is that neurocognitive damage that inhibits executive functioning, decision-making, and emotional and behavioral regulation has tremendous bearing on the capacity of these individuals to understand the ramifications of their actions. These people look normal, they speak normally, but they often have only a superficial understanding of the charges against them."

As noted by Canadian Judge Barry Stuart in R. v. Sam (1993), FASD takes away someone's "... ability to act within the norms expected by society." It is "manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a 'normal' offender cannot serve the same ends when imposed on an offender with FASD," he said. "Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD," Judge Stuart concluded.

Alaska FASD Partnership

Over 75 organizations and individuals supporting:

Advocacy ▪ Diagnosis ▪ Case Management ▪ Prevention ▪ Substance Abuse Treatment for Pregnant Women ▪ Parent Navigation ▪ Training for Parents ▪ Public Awareness ▪ Alternatives to Incarceration ▪ Court Interpreters ▪ Peer Support ▪ Training for Judges, Public Defenders, and Prosecutors ▪ Training for Educators and Medical Professionals ▪ Traditional Healing ▪ Supported Housing and Employment ▪ Family Support

March 30, 2012

Representative Wes Keller
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Keller,

It is with great pleasure that the Alaska FASD Partnership supports HB 367 to include FASD as a mitigating factor in sentencing.

The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management, including electronic monitoring and probation/parole, is about $76 per day ($48 for intensive case management, $21 for electronic monitoring, $7 for probation/parole) – for a savings of $21,900 per person, per year.[1]

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*" the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD and other brain-based disabilities can live successfully in the community as contributing citizens, ***and*** provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does HB 367 further

[1] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf . *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm ▪ email: akfasdpartnership@alaska.gov

the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

Additionally, the state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism, and a safer general public.

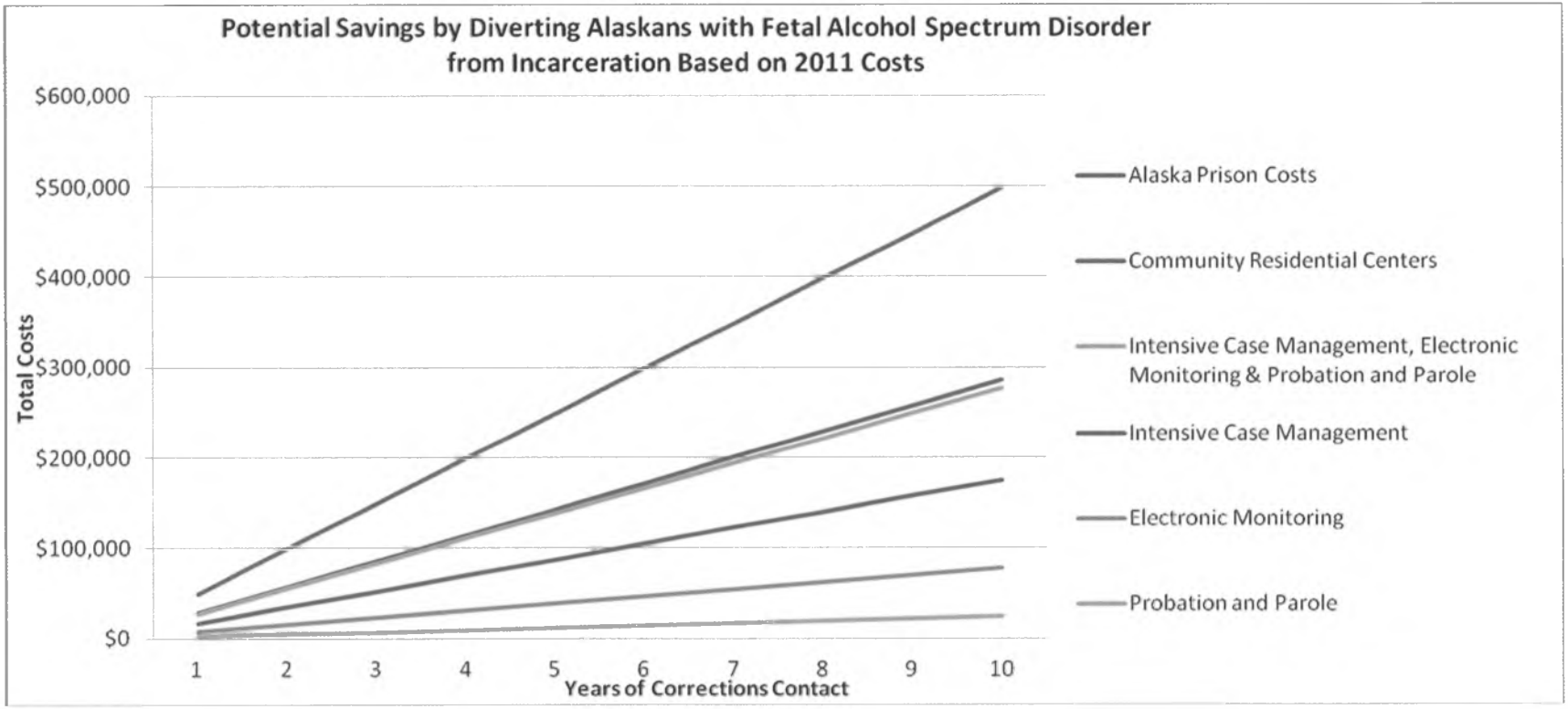
Thank you for the time and effort you have put into supporting this important effort.

Sincerely,

Monica Charles-Leinberger

Monica Charles-Leinberger, Chair
Alaska FASD Partnership

Partnership members include: *Abused Women's Aid in Crisis, Advisory Board on Alcoholism and Drug Abuse, Alaska Behavioral Health Association, Alaska Center for Children & Adults, Alaska Children's Services, Alaska Mental Health Board, Alaska Mental Health Trust Authority, Alaska Peer Support Consortium, Alaska Youth & Family Network, Aleutian Pribilof Islands Association, All-Alaska Pediatric Partnership, Anchorage Coordinated Resources Project, Anchorage School District (Anchorage), Anchorage Tlingit & Haida Indian Tribes of Alaska, Arctic FASD Regional Training Center, Assets Inc., Association for the Education of Young Children-SEAK , Big Brothers Big Sisters of Alaska, Boys & Girls Home of Alaska, Camp Fire USA Alaska Council, Central Council of the Tlingit & Haida Indian Tribes of Alaska, Christian Health Associates, Copper Basin Neurodevelopmental Center, Deltana Community Services Partnership, Dena A Coy/Southcentral Foundation, Diocese of Juneau, Fairbanks Community Behavioral Health Center, Family Centered Services of Alaska, Frontier Community Services, Gastineau Human Services, Governor's Council on Disabilities and Special Education, Hoonah Indian Association, Hope Community Resources, Independent Living Center, Kenai Peninsula FASD Program, Ketchikan Indian Community, Kinetictions, Kobuk Valley Consulting, Kodiak Area Native Association, Juneau Family Health and Birth Center, Juneau FASD Diagnostic Clinic, Juneau Partnerships for Families and Children, Lower Kuskokwim School District, Lynn Canal Counseling Services, Nenana City School District, Ninilchik Traditional Council, Nome Youth Facility, Nondalton Tribe, Regional Wellness Forum, Set Free Alaska, Inc. (Wasilla), Southcentral Foundation FAS Diagnostic Team, Southeast Regional Health Consortium, Southeast Regional Resource Center, Southern Kenai Peninsula Communities Project, Sprout Family Services, Stone Soup Group, Tongass Substance Screening, UAA Department of Health Sciences, UAA Center for Human Development, Volunteers of America-Alaska ...and many individuals.*



	Alaska Prison Costs	Community Residential Centers	Intensive Case Management, Electronic Monitoring & Probation and Parole	Intensive Case Management	Electronic Monitoring	Probation and Parole
Daily Costs	$136.44	$78.34	$76.01	$48.00	$21.25	$6.76
Yearly Costs	$49,800.60	$28,594.10	$27,743.65	$17,520.00	$7,756.25	$2,467.40

Prepared by: Advisory Board on Alcoholism and Drug Abuse/Alaska Mental Health Board 3.30.12

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

March 28, 2012

Representative Wes Keller
Alaska State Capitol, Room 432
Juneau, Alaska 99801

Re: Letter of Support for HB 367

Dear Representative Keller,

The Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse support HB 367 recognizing the special needs presented by Alaskans experiencing fetal alcohol spectrum disorders (FASD) in the justice system.

Alaska's judges, prosecutors, defenders, and court staff work to ensure that everyone who appears in court is treated fairly and with respect. However, Alaskans experiencing FASD often present with special needs and situations that impede the course of justice. Low cognitive functioning, inability to understand and stay within accepted social norms, limited short term memory, impulsivity, and impaired judgment can all result in a person experiencing FASD not being able to explain his or her actions, understand why they resulted in a criminal charge, or understand the criminal justice process. Usually, these impairments do not rise to the level of legal incompetence – but they often make it hard for judges and juries to make decisions that serve our notions of fairness and justice.

Based on research in other jurisdictions, an estimated 60% of inmates experience an FASD, brain injury, or similar organic cognitive impairment. The cost of incarceration is very high and usually does not result in restoration or rehabilitation. In fact, according to a 2009 ISER Study,[1] the cost of prison far exceeds the cost of services. CSSD 151 allows judges – **at their discretion** – to modify presumptive sentences to take into account the defendant's disabilities and to provide the sort of sentence needed to prevent recidivism and ensure a just outcome for victims, defendants, and our communities.

We thank you for your work on behalf of all Alaskans.

Sincerely,

J. Kate Burkhart
Executive Director

[1] *The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* published by Institute of Social and Economic Research (ISER), University of Alaska (January 2009). Available online at www.iser.uaa.alaska.edu.

DISABILITY LAW CENTER OF ALASKA

ANCHORAGE
3330 Arctic Boulevard
Suite 103
Anchorage, AK 99503
(907) 565-1002
FAX (907) 565-1000
1-800-478-1234
www.dlcak.org

March 29, 2012

Representative Wes Keller
State Capitol Room 432
Juneau AK, 99801

Re: Support for HB 367

Dear Representative Keller:

The Disability Law Center of Alaska supports the objective of HB 367, which is to allow the courts to take into consideration during sentencing whether the defendant was diagnosed with a fetal alcohol spectrum disorder. If these conditions cannot be considered as mitigating factors, then as one jurist observed, these individuals are paying for their disability with their freedom.

Thank you for your efforts in correcting this manifest injustice.

Sincerely,

DISABILITY LAW CENTER OF ALASKA

David C. Fleurant
Executive Director

MEMBER OF THE NATIONAL DISABILITY RIGHTS NETWORK

HJR

4

<TARGET><BILL>HJR 4</BILL><SUBJECT>HJR
4</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Representative Peggy Wilson
House District 2

MEMORANDUM

Date: March 11, 2011

To: Representative Carl Gatto, Chair
House Judiciary Committee

From: Representative Peggy Wilson PW

Re: HJR 4 - Constitutional Amendment:Transportation Fund

I would like to request the House Judiciary Committee schedule a hearing on HJR4.

HJR 4 will put a constitutional amendment before voters to change the Alaska constitution to allow a dedicated fund for Capital Transportation Projects.

Alaska is geographically the largest state in the country, and the future of the economic and social well being of its citizens is critically dependent on a reliable transportation system. This change to the State Constitution, allowing a dedicated transportation fund, is needed to create and maintain a modern, reliable transportation system for Alaska.

Thank you for your consideration.

ALASKA STATE LEGISLATURE

Interim:
P.O. Box 109
Wrangell, AK 99929
Phone: (907) 874-3088
Fax: (907) 874-3055

Session:
State Capitol, Room 406
Juneau, AK 99801-1182
Phone: (907) 465-3824
1-800-686-3824
Fax: (907) 465-3175

REPRESENTATIVE PEGGY WILSON
HOUSE DISTRICT 2

SPONSOR STATEMENT
House Joint Resolution 4

"Proposing amendments to the constitution of the State of Alaska creating a transportation infrastructure fund"

HJR 4 will put a constitutional amendment before voters to amend the Alaska constitution to reinstate a dedicated fund for Transportation Projects.

The crafters of the constitution allowed for 3 dedicated funds at the time of statehood. They realized that some funds would be needed no matter the economic or political climate. Transportation, one for land and one for sea, were two of the funds that predated the constitution. They lasted for several years until they were eliminated. HJR 4 will reinstate a transportation fund.

In FY10, 87% of our transportation budget came from the federal government. There have been several major deposits to the Federal Highway Fund to keep the expired federal transportation reauthorization program going. After 2 years we are still operating under the old reauthorization guidelines. All indicators show that the new reauthorization bill will be unfavorable for states with small populations due to an emphasis on mass transit and green transportation. It favors toll roads and bridges and other transportation that pays for itself or that can be supported with a public private partnership. Our own DC delegation have told the legislature that Alaska needs to rely less on the federal government and start shouldering some of the burden of improving our transportation infrastructure.

The roads, bridges, airports, ferries and transit systems that make up our state's transportation system are essential to mobility, commerce and economic development. This system enhances economic competitiveness, increases safety and enhances quality of life. There is a growing imbalance between system use and capacity as well as the need for new infrastructure to access our valuable resources. To insure Alaska has the infrastructure necessary to develop our resources as well as providing a quality of life for our citizens we must commit to funding transportation. Having a dependable revenue stream from year to year will allow Alaska to tackle today's congestion and maintenance projects as well as developing the needed access to resources and energy.

Version I has removed one of the revenue streams, airport leases and airspace leases, because federal grants requirements state that the revenue from those leases be used directly on the airports they were collected from.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HJR 4**
() Publish Date

Identifier (file name): HJR4-DOR-TRS-3-18-11
Title: Transportation Infrastructure Fund
Sponsor: Representative Peggy Wilson
Requester: House Transportation Committee

Dept. Affected: Revenue
Appropriation: Taxation and Treasury
Allocation: Treasury Division
OMB Component Number: 121

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services				233.0	238.0	242.0	246.0
Travel							
Services				215.0	220.0	224.0	227.0
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**448.0**	**458.0**	**466.0**	**473.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
1178 Temporary Code				448.0	458.0	466.0	473.0
TOTAL	**0.0**	**0.0**	**0.0**	**448.0**	**458.0**	**466.0**	**473.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

initial version

Prepared by: Pamela Leary, Comptroller and Jerry Burnett, Deputy Commissioner — Phone 907-465-2350
Division: Treasury Division — Date/Time 3/18/11; 2:39pm
Approved by: Ginger Blaisdell, Director of Administrative Services — Date 3/18/11; 3:43pm
Department of Revenue

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HJR 4

Analysis

This resolution provides for a Transportation Infrastructure Fund which is assumed to be established in the amount of $1 billion with additional recurring funding from state fuel taxes, registration and driver's license fees, identification card fees, studded tire taxes, state airport lease and space fees, and other designated fees and funds. It is anticipated the fund will be managed with an asset allocation of 38% fixed income, 10% international equity, and 52% domestic equity. Costs of the fund include investment management fees, audit, accounting and custody fees and are projected based on the assumptions provided by the division's investment advisor and the division's cost allocation plan.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HJR 4**
() Publish Date

Identifier (file name) HJR004-OOG-DOE-2-11-11
Title: Constitutional amendment related to creating a transportation infrastructure fund
Sponsor: Representatives P. Wilson, Thompson, Fairclough, Costello
Requester: House Transportation Committee

Dept. Affected: Office of the Governor
Appropriation: Elections
Allocation: Elections
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services			1.5				
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF			1.5				
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 2/11/2011, 4:08pm
Approved by: Linda J. Perez, Administrative Director — Date: 2/11/2011
Administrative Services

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HJR 4

Passage of this resolution would require the constitutional amendment to appear on the 2012 general election ballot. The cost of providing information about the constitutional amendment in the Official Election Pamphlet, as required by AS 15.58, is $1.5. Should the addition of this question require printing an 8-1/2 by 18 inch ballot, the cost will increase to $22.0.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 25, 2011

SUBJECT: Effect of federal laws regarding aviation fuel tax changes in CSHB 30( ) (Work Order No. 27-LS0198\D)

TO: Representative Peggy Wilson
Attn: Becky Rooney

FROM: Brian J. Kane BJK
Legislative Counsel

You have asked the following regarding CSHB 30( ): Is there a problem with sec. 7 of the bill placing a portion of the aviation fuel tax into the transportation infrastructure fund in that it violates 49 U.S.C. 47133?

The pertinent part of sec. 7 of the bill reads as follows:

> All other proceeds of the taxes on aviation fuel shall be paid into **the transportation infrastructure fund established in art. IX, sec. 18, Constitution of the State of Alaska** [A SPECIAL AVIATION FUEL TAX ACCOUNT IN THE STATE GENERAL FUND. THE LEGISLATURE MAY APPROPRIATE FUNDS FROM THIS ACCOUNT FOR AVIATION FACILITIES].

The concern that has been brought to your attention involves a federal statute dealing with aviation fuel, 49 U.S.C. 47133, which, in part, reads as follows:

> (a) Prohibition. - Local taxes on aviation fuel (except taxes in effect on December 30, 1987) or the revenues generated by an airport that is the subject of Federal assistance may not be expended for any purpose other than the capital or operating costs of -
> (1) the airport;
> (2) the local airport system; or
> (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property.

The state tax on aviation fuel was in place well before December 30, 1987, so it would seem that the state aviation tax is exempted from the requirements of this federal statute. Thus, the money can be used in any manner the state chooses, not just on airport-related

projects. Under the current AS 43.40.010(e), money in the special aviation fuel tax account *may* be appropriated by the legislature for aviation facilities. Thus, even in current statute there is no requirement for the money to be spent on airport-related projects. The change being made in sec. 7 of the bill is simply replacing the "special aviation fuel tax account" with the transportation infrastructure fund as the place where the tax revenue will be deposited.

If I may be of further assistance, please advise.

BJK:ljw
11-138.ljw

ATIF With Payout Rate of 6%

HB30 Calculation of balances for the Transporation Infrastructure Fund assuming $1 billion starting appropriation.
DRAFT at March 25, 2011

(in 000's)

		Balance to generate earnings	Earnings	Revenue	Value Based Approriation	Admin Expenses	DMV expenses	Ending bal	Mgt fees	50% of Revenue Approriation	**Total Appropriation**
Year 0	July 1, 2013			1,000,000				1,000,000			
Year 1	FY 2014	1,040,282	62,417	80,564		(328)	(13,000)	1,129,653	(452)		
Year 2	FY 2015	1,169,483	70,169	80,564	(62,945)	(109)	(5,000)	1,171,598	(469)	40,282	**103,227**
Year 3	FY 2016	1,211,411	72,685	80,564	(66,621)	(109)	(5,000)	1,212,367	(485)	40,282	**106,903**
Year 4	FY 2017	1,252,164	75,130	80,564	(68,661)	(109)	(5,000)	1,253,524	(501)	40,282	**108,943**
Year 5	FY 2018	1,293,305	77,598	80,564	(70,299)	(109)	(5,000)	1,295,495	(518)	40,282	**110,581**
Year 6	FY 2019	1,335,259	80,116	80,564	(71,785)	(109)	(5,000)	1,338,481	(535)	40,282	**112,067**
Year 7	FY 2020	1,378,228	82,694	80,564	(74,291)	(109)	(5,000)	1,381,522	(553)	40,282	**114,573**
Year 8	FY 2021	1,421,251	85,275	80,564	(76,810)	(109)	(5,000)	1,424,608	(570)	40,282	**117,092**
Year 9	FY 2022	1,464,320	87,859	80,564	(79,357)	(109)	(5,000)	1,467,714	(587)	40,282	**119,639**
Year 10	FY 2023	1,507,409	90,445	80,564	(81,927)	(109)	(5,000)	1,510,817	(604)	40,282	**122,209**
Year 11	FY 2024	1,550,495	93,030	80,564	(84,511)	(109)	(5,000)	1,553,905	(622)	40,282	**124,793**
Year 12	FY 2025	1,593,566	95,614	80,564	(87,096)	(109)	(5,000)	1,596,975	(639)	40,282	**127,378**
Year 13	FY 2026	1,636,618	98,197	80,564	(89,681)	(109)	(5,000)	1,640,025	(656)	40,282	**129,963**
Year 14	FY 2027	1,679,651	100,779	80,564	(92,266)	(109)	(5,000)	1,683,055	(673)	40,282	**132,548**
Year 15	FY 2028	1,722,664	103,360	80,564	(94,851)	(109)	(5,000)	1,726,064	(690)	40,282	**135,133**
Year 16	FY 2029	1,765,656	105,939	80,564	(97,434)	(109)	(5,000)	1,769,053	(708)	40,282	**137,716**
Year 17	FY 2030	1,808,627	108,518	80,564	(100,015)	(109)	(5,000)	1,812,021	(725)	40,282	**140,297**
Year 18	FY 2031	1,851,578	111,095	80,564	(102,596)	(109)	(5,000)	1,854,968	(742)	40,282	**142,878**
Year 19	FY 2032	1,894,508	113,670	80,564	(105,175)	(109)	(5,000)	1,897,895	(759)	40,282	**145,457**
Year 20	FY 2033	1,937,418	116,245	80,564	(107,753)	(109)	(5,000)	1,940,801	(776)	40,282	**148,035**

Assumptions:

50% of Revenues are available for appropriation every year

Earnings real rate of return=	6.00%
Payout rate	6.00%

Revenue estimates are based on average estimates provided in the Fall Revenue Sources Book (which may not be 100% available)as follows:

	Avg Rev	% per HB329		Available
Studded Tire Tax	414	100%		414
Vehicle Registration,Drivers license, ID card fees	37,900	100%		37,900
Vehicle Rental Tax	7,500	50%		3,750
Motor Fuel Tax	38,500	100%		38,500
Airport Lease Fees	0	40%		0
	84,314			80,564

Management fees are based on ending MV balance
First 5 yrs appropriations are average of previous years
Administrative expenses are based on DOT Fiscal note HB329-DOT-CO-2-9-10
DMV expenses are based on DOA Fiscal note HB329-DOA-DMV-02-24-10

MATANUSKA-SUSITNA BOROUGH
TRANSPORTATION ADVISORY BOARD
RESOLUTION SERIAL NO. 11-06

A RESOLUTION OF THE MATANUSKA-SUSITNA BOROUGH TRANSPORTATION ADVISORY BOARD SUPPORTING HOUSE JOINT RESOLUTION 4, A CONSTITUTIONAL AMENDMENT TO REINSTATE A TRANSPORTATION INFRASTRUCTURE FUND; SENATE BILL 37, HOUSE BILL 30 AND 31, THE CREATION AND FUNDING OF AN ALASKA STATE TRANSPORTATION INFRASTRUCTURE FUND.

WHEREAS, The roads, bridges, airports, ferries and transit systems that make up our state's transportation system are essential to mobility, commerce and economic development; and

WHEREAS, These systems increase safety, enhance economic competitiveness, and lead to a better quality of life; and

WHEREAS, To ensure Alaska has the infrastructure necessary to develop our resources as well as improve the living conditions for our citizens, we must commit to funding transportation; and

WHEREAS, Having a dependable revenue stream from year to year will allow Alaska to manage current congestion and maintenance projects as well as develop access to needed resources and energy; and

WHEREAS, The use of state funds for construction means we will have greater control and funding will go towards completing projects as opposed to the expensive and lengthy federal process; and

WHEREAS, The Matanuska-Susitna Borough has benefited from the use of state funds and has seen projects such as the Bogard Road Extension, Machen Road, and Museum Drive Extensions get done faster

and cheaper than they would have using the federal guidelines; and

WHEREAS, In FY10, 87 percent of Alaska's transportation budget came from the federal government; and

WHEREAS, There have been several major deposits to the Federal Highway Fund to keep the expired federal transportation reauthorization program afloat; and

WHEREAS, After two years we are still operating under the old reauthorization guidelines; and

WHEREAS, All indicators show that the new reauthorization bill will be unfavorable for states with small populations such as Alaska due to an emphasis on mass transit and green transportation; and

WHEREAS, Alaska's own Washington D.C. delegation have told the legislature that Alaska needs to rely less on the federal government and start shouldering some of the burden of improving our transportation infrastructure; and

NOW, THEREFORE, BE IT RESOLVED, that the Matanuska-Susitna Borough Transportation Advisory Board supports HJR 4 which will place a constitutional amendment before voters to change the Alaska Constitution to reinstate a dedicated fund for Transportation Projects.

BE IT FURTHER RESOLVED, that the Matanuska-Susitna Borough Transportation Advisory Board supports SB 37, HB 30 and HB 31 creating and funding a State of Alaska Transportation Infrastructure Fund.

ADOPTED by the Matanuska-Susitna Borough Transportation Advisory Board this 23rd day of February, 2011.

Kimwood Wahl co-chair
MICHAEL CAMPFIELD, Chair

ATTEST:

Mary Brodigan
MARY BRODIGAN, CLERK

February 9, 2011

The Honorable Peggy Wilson
Alaska State House
State Capitol Room 408
Juneau, AK 99801

Dear Representative Wilson:

The undersigned business associations, working together under the banner of the Business Advocacy Committee, represent hundreds of firms and tens of thousands of employees from every major industry in Alaska. Our organizations share a common vision for Alaska's future – one in which a thriving private-sector economy creates good jobs for Alaskans and attractive economic opportunities for investors. State government, focused on the right issues, can help make this vision a reality.

Our organizations have identified five priority areas to be dealt with during this legislative session. Progress on each of these priorities will make Alaska a better place for business by encouraging private-sector investment and job creation. We urge you and your colleagues to address these issues.

OIL TAX REFORM

Taxes on the oil industry account for nearly nine out of every ten dollars in revenue the state collects. While current oil prices are exceedingly high relative to historic standards, North Slope oil production is only one-third the level of its peak. Alaska's taxation policy should encourage more investment to reverse this dramatic, continuing production decline. We support meaningful reform of Alaska's oil production tax system that reduces the state's tax burden on all Alaska oil and gas exploration and development activities and encourages increased production.

REGULATIONS

The Alaska Coastal Zone Management Program (ACMP) is due to sunset in 2011. We are comfortable renewing the program in its current form. *However, we oppose any changes to the ACMP that diminish the program's ability to provide concise, streamlined, and predictable permitting in Alaska's coastal zone.*

LITIGATION REFORM

Alaska's resource industries are ongoing targets of anti-development groups utilizing the court system and the state and federal appeals processes to stop and delay responsible resource development. Other businesses, local governments and community development projects can also be subject to frivolous lawsuits. Meanwhile, state agencies are forced to spend inordinate amounts of staff and financial resources dealing with third-party lawsuits at the expense of their mission to serve the public at-large. *We support efforts to bring more accountability to the appeals and litigation processes for community and resource development projects.*

FISCAL RESPONSIBILITY

Unrestricted general fund spending within the state's operating budget has increased from $3.1 billion in fiscal year 2006 to $4.8 billion in fiscal year 2011. We do not believe such spending growth is sustainable especially in light of the continuing decline in North Slope oil production. The Legislature and Governor must do more to control growth in the operating budget. *We recommend the Legislature*

hold unrestricted general fund spending in the operating budget to $3.5 billion – a level of spending equal to fiscal year 2010. With regard to the capital budget, we encourage the state to focus on strategic investments that help generate new private sector investment.

STRATEGIC TRANSPORTATION INFRASTRUCTURE

There is strong agreement the long-term economic benefits derived from investment in Alaska's transportation infrastructure far exceed the cost of the initial investment. Considering the vastness of Alaska, the state's current transportation infrastructure is inadequate and requires continued planning, upgrades, and expenditures to assure Alaska citizens are provided with essential services. *We support a state funded transportation program that is adequately and predictably funded, provides continuity between succeeding administrations, and addresses all modes of transportation.*

Working together we can improve Alaska's business climate. We request an opportunity to meet with you to discuss these matters in more detail. A representative from the Business Advocacy Committee will be in touch with your office to schedule a meeting.

Sincerely,

Steve Borell, Executive Director
Alaska Miners Association

Marilyn Crockett, Executive Director
Alaska Oil and Gas Association

Rachael Petro, President & CEO
Alaska State Chamber of Commerce

Rebecca Logan, General Manager
Alaska Support Industry Alliance

Aves Thompson, Executive Director
Alaska Trucking Association

John MacKinnon, Executive Director
Associated General Contractors – Alaska

Mike Satre, Executive Director
Council of Alaska Producers

Scott Hawkins, President
Prosperity Alaska

Jason Brune, Executive Director
Resource Development Council for Alaska, Inc.

ALASKA MUNICIPAL LEAGUE
2011 STATEWIDE PRIORITIES

- **REVENUE SHARING:**
  We recommend the Governor include in his budget recommendation, a one-time COLA to Revenue Sharing, based on the cumulative Anchorage CPI for 2007 through 2010, with appropriation of said funds.

- **UNFUNDED MANDATES:**
  We believe that any state or federal legislation, or rule, that requires an implementation or operation cost, shall be fully funded by the implementing agency. This includes "optional" exemptions handed down to local governments that will diminish the local tax base.

- **ENERGY:**
  We believe the Legislature must aggressively facilitate affordable energy for all Alaskans through:
  1. The support of oil and gas, as it remains the primary source of energy for most of Alaska;
  2. The encouragement of connectivity between communities, as well as incentives for energy project funding;
  3. An actual time certain process that selects and prioritizes projects;
  4. Full funding of the PCE (Power Cost Equalization) Endowment fund through joint congressional and state appropriations;

- **PERS:**
  We support a sustainable salary base to pay off the PERS unfunded obligations. AS 39.35.625, and any other similar statutes or regulations that require termination studies, should be repealed. Simply following AS 39.35.255(a)(2), amended with inflation adjustment language, will provide a more efficient, cost effective and equitable method of ensuring that the required PERS salary base is maintained.

- **TRANSPORTATION:**
  We believe the Legislature should implement:
  1. The dedication of funds for the Alaska Transportation Infrastructure Fund;
  2. A matching grant component for acquiring federal funds and to help local governments to develop otherwise financially difficult projects;
  3. A local government seat at the table during allocation considerations of the Transportation Infrastructure Fund.

ALASKA MUNICIPAL LEAGUE
2011 FEDERAL PRIORITIES

- **PAYMENT IN LIEU OF TAXES (PILT):**
  We support full funding of the PILT program, to the authorized levels of P.L. 103-379 (over 300 million nationwide).

- **SECURE RURAL SCHOOLS AND COMMUNITY SELF-DETERMINATION ACT (SRS/ TIMBER RECEIPTS):**
  We support the reauthorization and enhancement of the Secure Rural Schools program (PL 110-343). Reauthorization should maintain coupling between payments to boroughs and active natural resource management; and the connection between sustainable natural resource management and the stability and well being of forest boroughs and communities.

- **CLEAN WATER ACT:**
  While supporting Clean Water Act provisions that protect wetland habitats and rivers and streams of Alaska, we do not support federal efforts to change the definition of the Clean Water Act from navigable waters to "waters of the United States," and also oppose federal efforts to further expand the authority and responsibilities of the federal agencies in regard to these waters.

- **ARCTIC ISSUES:**
  We support ratification of the United Nation's Convention on the Law of the Sea. Until that ratification takes place, the US cannot participate in deliberations which affect the national security; environmental concerns relating to the use of the seas; and to economic development for Alaska's coastal communities.

- **LAND USE DESIGNATIONS:**
  We oppose decisions on land use designations that are not completely reviewed through the proper Congressional system already in place.

- **ENERGY EFFICIENCY GRANTS:**
  We support full funding of the Energy Efficiency and Conservation Block Grant (EECBG) Program to state and local governments.

- **DENALI COMMISSION:**
  We support reauthorization and appropriation of the Denali Commission to further construct and improve much-needed infrastructure throughout the State, especially in rural areas.

Legislative Priorities

The Alaska State Chamber of Commerce has adopted three state legislative priorities for the 2011 legislative session. The three statewide legislative priorities are:

Review and Reform Oil Tax Policy to Encourage New Oil Production
Concise and Predictable Permitting in Alaska's Coastal Zone
Create an Alaska Transportation Infrastructure (ATIF) That Will Invest in Alaska's Economy, Safety and Mobility

More than 70 State Chamber members considered over 33 proposals to develop the state and federal positions and priorities. In addition to these priorities, the State Chamber developed positions on a number of other critical issues facing the State of Alaska. The board ratified both the priorities and positions at a meeting Thursday, October 28, in Anchorage.

The legislative priorities will be delivered to the Governor and all sixty members of the State Legislature. "Legislative priorities brought forward are aimed at advocating for a competitive and attractive business climate in Alaska to spur investment and business growth," said Kip Knudson, Chair of the State Chamber. "More than ever, the State Chamber will take a lead role in advocating for a competitive business climate in Alaska and economic growth," Knudson said.

State Chamber members employ the vast majority of private sector workers. The State Chamber established its priorities and positions supported by concise action items needed to achieve each position. Alaska businesses are increasingly challenged by rising energy and logistics costs, burdensome state and federal regulations, lack of sufficient workforce, infrastructure deficiencies, and domestic and global competition. "The Alaska State Chamber is Determined to Improve our 'Dead Last Business Ranking' for Alaska," said Knudson.

The Alaska State Chamber is gravely concerned about the ability of the State of Alaska to continue to grow programs and services at a time when oil supply is dwindling dramatically. Our Legislative positions speak to the need to limit the growth of government programs. These positions and priorities encourage the State to find new streams of revenue to pay for any future expansion of government programs. Government services are an important source of funding for Alaskans businesses, as such a statewide sales and income tax would negatively affect all Alaskan

businesses. However, as government growth continues, Alaskans must prioritize the services they receive or be willing to fund them into the future.

Please join us in support of HJR 4

Associated General Contractors of Alaska

Alaska Municipal League

Alaska AFL-CIO

Alaska Teamsters Local # 959

Alaska Laborers Local 942 & 341

Alaska Transportation Priorities Project

Alaska Trucking Association

Alaska Harbormasters Association

American Society of Civil Engineers

Alaska Mobility Association

Alaska Airports

Alaska Owners and Pilots Association

Alaska Marine Pilots

Marine Transportation Advisory Board

Southeast Conference

SW Alaska Conference of Mayors

ALASKA ASSOCIATION OF HARBORMASTERS AND PORT ADMINISTRATORS
Kim Elliot, Executive Secretary
7 Maksoutoff Street
Sitka, AK 99835
Phone: (907) 747-7677
aahpa@gci.net

February 14, 2011

The Honorable Peggy Wilson
State Capitol Room 408
Juneau, AK 99801-1182

Dear Representative Wilson:

The Alaska Association of Harbormasters and Port Administrators (AAHPA) is a statewide professional organization comprised of senior managers from 31 municipal harbor systems. Our members operate and maintain the majority of the harbors in the State of Alaska.

The AAHPA strongly supports House Bill No. 30, which among other things provides a funding source for the State's Municipal Harbor Matching Grant Program (AS 29.60.800). This grant program was developed with substantial input and support from the AAHPA in 2006; however, it has received funding in only three of the State budgets enacted since then.

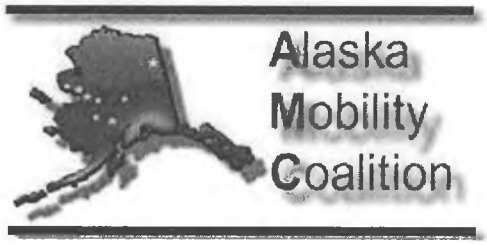
The primary target of this grant program is the small boat harbors constructed by the State of Alaska in the 1960s and 1970s, which have been transferred to local municipalities during the past several years. Most of these facilities were in less than stellar condition at the time ownership was transferred and are in need of major repairs or replacement.

These harbors play a critical economic role by enabling trade, transportation, commercial fisheries, tourism, and recreational opportunities across the State. Providing a stable funding source for the Municipal Harbor Matching Grant Program, as HB 30 will do, is a significant step in ensuring that we are able to adequately repair and maintain these valuable facilities throughout the State of Alaska.

Please contact me at (907) 228-6049 if you have any questions regarding AAHPA's support of HB 30.

Sincerely,

Steven R. Corporon, President
Alaska Association of Harbormasters and Port Administrators



Achieving mobility through community appropriate transportation services

3705 Arctic Blvd #1777
Anchorage, AK 99503.
907-240-2702

February 15, 2011

Representative Peggy Wilson
State Capitol, Rm 408
Juneau, AK 99801-1182

Dear Representative Wilson:

On behalf of the Alaska Mobility Coalition (AMC), we strongly support HJR4 (a constitution amendment creating a transportation infrastructure fund) and HB30 (transportation infrastructure fund).

The AMC is a private, non-profit membership organization that represents and advocates for public and community transportation in Alaska. The AMC has ninety seven members across the state from Bethel to Prince of Wales Island. The AMC membership provides over seven million rides annually for Alaskans to get to work, school, shopping trips, recreational opportunities and medical appointments. For more information on the AMC, I have attached a link to our website for your review (http://www.alaskamobility.org)

Alaska is one of just three states that do not provide general operating support for transit service. In addition, there are road maintenance, ferry operation and urban and rural trails that are neglected around the state because of the lack of infrastructure support. The federal government will be reducing its investment in transportation in Alaska in the next few years and it is time for legislature to dedicate its gas taxes and other transportation-related user fees for transportation infrastructure.

The Alaska Mobility Coalition would be honored to serve on the Transportation Infrastructure Fund Advisory Council as proposed in HB 30.

Thank you for your efforts in supporting transit in Alaska. I look forward to working with you and the Alaska legislature on your legislation during the current session.

Sincerely,

David M. Levy
Executive Director

ALASKA MINERS ASSOCIATION, INC.

Issues of Concern
for the Alaska Mining Industry for 2011

Actions needed by the Administration and/or the Legislature: January 2011

CRITICAL ITEMS: PERMITTING INTEGRITY – LITIGATION REFORM – ENERGY – INFRASTRUCTURE

Integrity of Permitting System - Ensure the integrity of the current, very rigorous, science-based state permitting process and fund it at a level that will ensure its integrity.

- Provide sufficient staff and funding for permitting functions of the Departments of Natural Resources, Fish & Game and Environmental Conservation.
- Establish public confidence in the permitting system.

Alaska Coastal Management Program (ACMP) – Ensure reforms made in 2003 are not compromised.

Litigation Reform – Support efforts to bring more accountability to the appeals and litigation processes for community and resource development projects.

Infrastructure - Advocate for and fund infrastructure that will provide access to remote areas of Alaska so natural resource projects can be developed.

- Settle on a route from the Parks Hwy to Nome and begin development of it.
- Establish an effective standard for pioneer roads.
- Fund roads between communities.

Energy - Advocate and adopt a state energy plan and fund interties, pipelines, hydroelectric, etc. to provide energy for resource development and communities.

- Ensure that Healy Plant #2 comes on line at the earliest possible date.
- Rationalize the management and control of the railbelt electrical intertie system.
- Fund and construct an intertie between the railbelt intertie and Bethel.
- Develop and implement a strategy to provide stable sources of energy to the railbelt.

PERMITTING PROCESS

Water Quality Standards - Continue to revise water quality standards to ensure standards are scientifically supportable and developed using Alaska-specific criteria. Also, ensure continued availability of mixing zones and adoption of anti-degradation regulations.

Non-Profit Foundation Money - Enact legislation to require public disclosure whenever funds from 501(c)(3) non-profit foundations are used to affect public policy; disclosure to include name of the source, amounts and purpose for which the moneys are given.

Financial Assurance - Ensure that financial assurance (bonding) requirements for environmental compliance are managed exclusively by the State. Aggressively oppose federal takeover.

Endangered Species Act/Essential Fish Habitat – Continue to aggressively oppose ESA listings in the courts to ensure decisions are based on sound science.

FISCAL ISSUES

Taxation - Maintain an equitable and stable tax structure at state and local government levels to ensure Alaska industry remains competitive.

State Fiscal Policy - Adopt a long range fiscal plan.

Annual Airborne Geophysical Mapping Program - Increase funding for the extremely effective airborne geophysical mapping program; initiate statewide baseline water quality mapping.

Mineral Education & Training - Continue to support mining engineering and geological engineering, geology, the Mining and Petroleum Training Service (MAPTS), and the Delta Mine

From: Steve Sorensen [mailto:steve.ak.ranch@gmail.com]
Sent: Monday, February 14, 2011 9:09 PM
To: Rep. Alan Dick; Rep. Bob Miller; Rep. David Guttenberg; Rep. Scott Kawasaki; Rep. Steve Thompson; Sen. John Coghill; Rep. Tammie Wilson
Cc: Sen. Albert Kookesh; Sen. Joe Thomas; Sen. Joe Paskvan
Subject: HJR 4 and HB 30

Key to Alaska's vitality is its transportation system. I vigorously support HJR 4 – the constitutional amendment to re-instate a dedicated transportation fund and HB 30 - the enabling statutes for the fund. This is long overdue and is sorely needed legislation and will greatly benefit interior Alaska. The Senate needs to get on board and proactively support this legislation.

Sincere Regards,

Steve Sorensen P.E.

"We loved a great many things - birds and trees and books and all things beautiful, and horses and rifles and children and hard work and the joy of life." Teddy Roosevelt

ASSOCIATED GENERAL CONTRACTORS of ALASKA

8005 Schoon Street • Anchorage, Alaska 99518
Telephone (907) 561-5354 • Fax (907) 562-6118

3750 Bonita Street • Fairbanks, Alaska 99706
Telephone (907) 452-1809 • Fax (907) 456-8599

March 24, 2011

Representative Peggy Wilson
State Capitol Building, Room 406
Juneau, AK 99801

RE: HJR4

Dear Representative Wilson:

On behalf of the Associated General Contractors of Alaska, a construction industry trade association of 675 business members, I offer support for HJR4.

HJR4 would put an initiative on the ballot for a constitutional amendment to dedicate certain revenue for a state funded transportation program.

A state funded transportation program has been a legislative priority of the AGC for many years, and dedication of funds is the most certain way to insure that a state funded program is maintained. HJR4 is companion legislation to HB30, the enabling legislation for a state funded program, which is also supported by AGC.

Like ballot initiatives of the recent past: the $315 million transportation bond issue in 2008 and the $397 million education facility bond issue in 2010, the AGC and other organizations put considerable effort into their public promotion, and eventual passage. The initiative in HJR4 will elicit even more support from stakeholders.

In closing, Alaska needs a state funded transportation program to begin to address our many transportation needs, and dedication of funds for such a program is an essential element.

Sincerely,

John MacKinnon
Executive Director
Associated General Contractors of Alaska

HJR

14

<TARGET><BILL>HJR 14</BILL><SUBJECT>HJR 14</SUBJECT><COMM>HJUD27</COMM></TARGET>

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

Interim:
716 W 4th Avenue, Rm 350
Anchorage, Alaska 99501-2133
Phone: (907) 269-0123
Fax: (907) 269-0124

Session:
Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr. MFG

received
02/10/11 8:55am BH

DATE: February 10th, 2011

RE: HJR 14: Constitutional Amendment Secretary of State References

****

Please consider this memorandum as a request for the House Judiciary Committee to schedule a hearing on House Joint Resolution 14. Accompanying this memo are the following documents:

- Sponsor Statement
- Sectional Analysis
- House Joint Resolution 14 (27-LS0422\A)
- Legislative Legal Counsel Memo from Jack Chenoweth, March 10, 2008
- Copy of passages from the Alaska Constitution

Thank you for considering my request for a hearing on House Joint Resolution 14. Please contact my legislative aide, Ted Madsen, at 465-2840 with any questions.

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature
House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
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Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
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Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Joint Resolution 14:
Constitutional Amendment:
Secretary of State References
Sponsor Statement

In 1970 Alaska voters approved amendments to the state constitution changing the name of "Secretary of State" to Lieutenant Governor." At that time, however, the drafting attorneys did not catch all of the references to "Secretary of State." HJR 14 corrects the two remaining references to "Secretary of State" in the state constitution. The proposed amendments, if approved by the legislature, would be placed before the voters in the next general election.

Member

Standing Committees:
Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature

House of Representatives

Representative Max F. Gruenberg, Jr.
House District 20
Anchorage (Mountain View, Russian Jack, East Anchorage)
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Rep.Max.Gruenberg@legis.state.ak.us

House Joint Resolution 14:
Constitutional Amendment:
Secretary of State References
Sectional Analysis

Section 1: Amends Article II, sec. 5, Constitution of the State of Alaska

Adds: **lieutenant governor**
Removes: [SECRETARY OF STATE]

Section 2: Amends Article III, sec. 25, Constitution of the State of Alaska

Adds: **lieutenant governor**
Removes: [SECRETARY OF STATE]

Section 3: The section states that the constitutional amendments will be placed on the ballot at the next general election as required by Article XIII, sec. 1 of the Alaska Constitution. Two thirds of each house must approve the proposed amendments and a majority of the electorate voting must ratify it.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 10, 2008

SUBJECT: HJR 37, correcting obsolete references in the state constitution to "secretary of state" (Work Order No. 25-LS1527\C)

TO: Representative Max F. Gruenberg, Jr.

FROM: Jack Chenoweth
Assistant Revisor

The joint resolution has been scheduled for a House State Affairs Committee hearing.

For whatever use you may choose to make of the material, set out below is a replication of my notes shared with the joint resolution's sponsor when this matter was last before the legislature in 2005.

*

In 1970, the legislature proposed and the voters, by a margin of 71% - 29% (yes = 46,102; no = 18,781), approved a series of amendments to the state constitution that changed the name of the constitutional office of "secretary of state" to the office of "lieutenant governor." In the 1970 joint resolution that proposed the amendments, SJR 2, a copy of which accompanies this memo, the drafting attorneys of the time did not catch all the references to "secretary of state." They missed the two that appear in article II, section 5 and article III, section 25. By proposing amendments to delete in those two sections the obsolete references to secretary of state and substituting references to lieutenant governor, this House joint resolution would correct the oversight.

Unlike statutes, corrections of errors and omissions in the state constitution cannot be completed editorially. Under article XIII, section 1,

> **Amendments.** Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it becomes effective thirty days after the certification of the election returns by the lieutenant governor.

Corrective changes of this kind might have been proposed by a constitutional convention called to make changes to the state constitution. However, when, at ten-year intervals since 1970, the proposals have been presented to the voters as referenda under article XIII, section 3, the voters have repeatedly failed to approve calls for state constitutional conventions. The voters defeated the calls for constitutional conventions in each of the 1972, 1982, 1992, and 2002 general elections.

JBC:med
08-168.med

Enclosure

Article 2 ~ The Legislature

Article 2, Sections:

1. Legislative Power; Membership
2. Members: Qualifications
3. Election and Terms
4. Vacancies
5. Disqualifications
6. Immunities
7. Salary and Expenses
8. Regular Sessions
9. Special Sessions
10. Adjournment
11. Interim Committees
12. Rules
13. Form of Bills
14. Passage of Bills
15. Veto
16. Action Upon Veto
17. Bills Not Signed
18. Effective Date
19. Local or Special Acts
20. Impeachment
21. Suits Against the State

§ 1. Legislative Power; Membership ~ The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty.

§ 2. Members: Qualifications ~ A member of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age.

§ 3. Election and Terms ~ Legislators shall be elected at general elections. Their terms begin on the fourth Monday of the January following election unless otherwise provided by law. The term of representatives shall be two years, and the term of senators, four years. One-half of the senators shall be elected every two years.

Editor's Note. The legislature has provided that the terms of legislators begin on the second Monday in January following a presidential election year and on the third Tuesday in January following a gubernatorial election year. See AS 24.05.080.

§ 4. Vacancies ~ A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.

§ 5. Disqualifications ~ No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member

of Congress. This section shall not apply to employment by or election to a constitutional convention.

Editor's Note. Senate Joint Resolution No. 2, "changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.

§ 6. Immunities ~ Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

§ 7. Salary and Expenses ~ Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation.

§ 8. Regular Sessions ~ The legislature shall convene in regular session each year on the fourth Monday in January, but the month and day may be changed by law. The legislature shall adjourn from regular session no later than one hundred twenty consecutive calendar days from the date it convenes except that a regular session may be extended once for up to ten consecutive calendar days. An extension of the regular session requires the affirmative vote of at least two-thirds of the membership of each house of the legislature. The legislature shall adopt as part of the uniform rules of procedure deadlines for scheduling session work not inconsistent with provisions controlling the length of the session. [Amended 1984]

§ 9. Special Sessions ~ Special sessions may be called by the governor or by vote of two-thirds of the legislators. The vote may be conducted by the legislative council or as prescribed by law. At special sessions called by the governor, legislation shall be limited to subjects designated in his proclamation calling the session, to subjects presented by him, and the reconsideration of bills vetoed by him after adjournment of the last regular session. Special sessions are limited to thirty days. [Amended 1976]

§ 10. Adjournment ~ Neither house may adjourn or recess for longer than three days unless the other concurs. If the two houses cannot agree on the time of adjournment and either house certifies the disagreement to the governor, he may adjourn the legislature.

§ 11. Interim Committees ~ There shall be a legislative council, and the legislature may establish other interim committees. The council and other interim committees may meet between legislative sessions. They may perform duties and employ personnel as provided by the legislature. Their members may receive an allowance for expenses while performing their duties.

§ 12. Rules ~ The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members. Each shall keep a journal of its

§ 17. Convening Legislature ~ Whenever the governor considers it in the public interest, he may convene the legislature, either house, or the two houses in joint session.

§ 18. Messages to Legislature ~ The governor shall, at the beginning of each session, and may at other times, give the legislature information concerning the affairs of the State and recommend the measures he considers necessary.

§ 19. Military Authority ~ The governor is commander-in-chief of the armed forces of the State. He may call out these forces to execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion. The governor, as provided by law, shall appoint all general and flag officers of the armed forces of the State, subject to confirmation by a majority of the members of the legislature in joint session. He shall appoint and commission all other officers.

§ 20. Martial Law ~ The governor may proclaim martial law when the public safety requires it in case of rebellion or actual or imminent invasion. Martial law shall not continue for longer than twenty days without the approval of a majority of the members of the legislature in joint session.

§ 21. Executive Clemency ~ Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This power shall not extend to impeachment. A parole system shall be provided by law.

§ 22. Executive Branch ~ All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.

§ 23. Reorganization ~ The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

§ 24. Supervision ~ Each principal department shall be under the supervision of the governor.

§ 25. Department Heads ~ The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as

otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Editor's Note. Senate Joint Resolution No. 2, "changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.

§ 26. Boards and Commissions ~ When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

§ 27. Recess Appointments ~ The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

Article 3 ~ The Executive

Article 3, Sections:

1. Executive Power
2. Governor: Qualifications
3. Election
4. Term of Office
5. Limit on Tenure
6. Dual Office Holding
7. Lieutenant Governor Duties
8. Election
9. Acting Governor
10. Succession: Failure to Qualify
11. Vacancy
12. Absence
13. Further Succession
14. Title and Authority
15. Compensation
16. Governor's Authority
17. Convening Legislature
18. Messages to Legislature
19. Military Authority
20. Martial Law
21. Executive Clemency
22. Executive Branch
23. Reorganization
24. Supervision
25. Department Heads
26. Boards and Commissions
27. Recess Appointments

§ 1. Executive Power ~ The executive power of the State is vested in the governor.

§ 2. Governor: Qualifications ~ The governor shall be at least thirty years of age and a qualified voter of the State. He shall have been a resident of Alaska at least seven years immediately preceding his filing for office, and he shall have been a citizen of the United States for at least seven years.

§ 3. Election ~ The governor shall be chosen by the qualified voters of the State at a general election. The candidate receiving the greatest number of votes shall be governor.

§ 4. Term of Office ~ The term of office of the governor is four years, beginning at noon on the first Monday in December following his election and ending at noon on the first Monday in December four years later.

§ 5. Limit on Tenure ~ No person who has been elected governor for two full successive terms shall be again eligible to hold that office until one full term has intervened.

§ 6. Dual Office Holding ~ The governor shall not hold any other office or position of profit under the United States, the State, or its political subdivisions.

§ 7. Lieutenant Governor Duties ~ There shall be a lieutenant governor. He shall have the same qualifications as the governor and serve for the same term. He shall perform such duties as may be prescribed by law and as may be delegated to him by the governor. [Amended 1970]

§ 8. Election ~ The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor. [Amended 1970]

§ 9. Acting Governor ~ In case of the temporary absence of the governor from office, the lieutenant governor shall serve as acting governor. [Amended 1970]

§ 10. Succession: Failure to Qualify ~ If the governor-elect dies, resigns, or is disqualified, the lieutenant governor elected with him shall succeed to the office of governor for the full term. If the governor-elect fails to assume office for any other reason, the lieutenant governor elected with him shall serve as acting governor, and shall succeed to the office if the governor-elect does not assume his office within six months of the beginning of the term. [Amended 1970]

§ 11. Vacancy ~ In case of a vacancy in the office of governor for any reason, the lieutenant governor shall succeed to the office for the remainder of the term. [Amended 1970]

§ 12. Absence ~ Whenever for a period of six months, a governor has been continuously absent from office or has been unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant. The procedure for determining absence and disability shall be prescribed by law.

§ 13. Further Succession ~ Provision shall be made by law for succession to the office of governor and for an acting governor in the event that the lieutenant governor is unable to succeed to the office or act as governor. No election of a lieutenant governor shall be held except at the time of electing a governor. [Amended 1970]

§ 14. Title and Authority ~ When the lieutenant governor succeeds to the office of governor, he shall have the title, powers, duties and emoluments of that office. [Amended 1970]

§ 15. Compensation ~ The compensation of the governor and the lieutenant governor shall be prescribed by law and shall not be diminished during their term of office, unless by general law applying to all salaried officers of the State. [Amended 1970]

§ 16. Governor's Authority ~ The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.

HJR 16

<TARGET><BILL>HJR 16</BILL><SUBJECT>HJR 16</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

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REPRESENTATIVE WES KELLER
DISTRICT 14
SPONSOR STATEMENT

HJR 16

"Proposing amendments to the Constitution of the State of Alaska relating to state aid for education."

For 50 years the State of Alaska has grow from a vast frontier into an important player in the nation and the world. While this is a fair assessment of ourselves, it does not address a growing need for quality higher education in the state. We have and continue to do everything possible for our university system, but that has, to a point, been at the expense of other private institutions of higher learning.

HJR 16 opens some of these doors for both public and private education by allowing the release of funds to more than just public schools. This Constitutional Amendment allows those students seeking to excel in secondary and post secondary education to attend a school that meets their needs.

This resolution is on the table with HB 145, but the language in this resolution goes far beyond this bill. It takes into account state sponsored scholarships for all students regardless of financial position. It says we support higher education for our youth at the best possible college, university or vocational program. Alaska has a wealth of educational opportunities that need our support. We do not need another Sheldon Jackson disaster.

HJR 16 is language that needs to be placed in front of the Alaska voters so they may decide on the future of higher education in the state.

E-Mail: Representative_Wes_Keller@legis.state.ak.us
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

AS 14.17.410. Public School Funding.

(a) A district is eligible for public school funding in an amount equal to the sum calculated under (b) and (c) of this section.

(b) *Public school funding consists of state aid, a required local contribution, and eligible federal impact aid determined as follows:*

(1) state aid equals basic need minus a required local contribution and *90 percent of eligible federal impact aid* for that fiscal year; basic need equals the sum obtained under (D) of this paragraph, multiplied by the base student allocation set out in AS 14.17.470 ; district adjusted ADM is calculated as follows:

(A) the ADM of each school in the district is calculated by applying the school size factor to the student count as set out in AS 14.17.450 ;

(B) the number obtained under (A) of this paragraph is multiplied by the district cost factor described in AS 14.17.460 ;

(C) the ADMs of each school in a district, as adjusted according to (A) and (B) of this paragraph, are added; the sum is then multiplied by the special needs factor set out in AS 14.17.420 (a)(1);

(D) the number obtained for intensive services under AS 14.17.420(a)(2) and the number obtained for correspondence study under AS 14.17.430 are added to the number obtained under (C) of this paragraph;

(2) the required local contribution of a city or borough school district is the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 , not to exceed 45 percent of a district's basic need for the preceding fiscal year as determined under (1) of this subsection.

(c) In addition to the local contribution required under (b)(2) of this section, a city or borough school district in a fiscal year may make a local contribution of not more than the greater of

(1) the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 ; or

(2) 23 percent of the district's basic need for the fiscal year under (b)(1) of this section.

(d) State aid may not be provided to a city or borough school district if the local contributions required under (b)(2) of this section have not been made.

(e) If a city or borough school district is established after July 1, 1998, for the first three fiscal years in which the city or borough school district operates schools, local contributions may be less than the amount that would otherwise be required under (b)(2) of this section, except that

(1) in the second fiscal year of operations, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the city or borough school district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 ; and

(2) in the third year of operation, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a three mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 .

(f) A school district is eligible for additional state aid in the amount by which the local contributions that would otherwise have been required under (b)(2) of this section exceed the district's actual local contributions under (e) of this section.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HJR 16
(H) Publish Date: 4/6/11

Identifier (file name): HJR016-OOG-DOE-3-17-11
Dept. Affected: Office of the Governor
Title: Constitutional amendment relating to state aid for education
Appropriation: Elections
Allocation: Elections
Sponsor: Representative Keller
Requester: House Education Committee
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services			1.5				
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF			1.5				
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 3/17/2011, 3:08pm
Approved by: Linda J. Perez, Administrative Director — Date: 3/17/2011
Administrative Services

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HJR 16

Passage of this resolution would require the constitutional amendment to appear on the 2012 general election ballot. The cost of providing information about the constitutional amendment in the Official Election Pamphlet, as required by AS 15.58, is $1.5. Should the addition of this question require printing an 8-1/2 by 18 inch ballot, the cost will increase to $22.0.

HOUSE BILL NO. 145

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE KELLER

Introduced: 2/9/11
Referred: Education, Finance

A BILL

FOR AN ACT ENTITLED

"An Act establishing the parental choice scholarship program to be administered by school districts for the purpose of paying the cost of attending grades kindergarten through 12 at public and private schools; and providing for an effective date."

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

*** Section 1.** AS 14 is amended by adding a new chapter to read:

Chapter 31. Parental Choice Scholarship Program.

Sec. 14.31.010. Parental choice scholarship program established. The parental choice scholarship program is established for the purpose of providing public funding of the cost of attending grades kindergarten through 12 at a public or private school selected by the student's parent or legal guardian. Each school district shall administer the program under the provisions of this chapter.

Sec. 14.31.020. Scholarship amount and eligibility. (a) A public school in the state may receive a scholarship under the parental choice scholarship program on behalf of a student who attends the school, regardless of the attendance area in the

school district in which the student resides.

(b) A private school qualifies to receive funding under the parental choice scholarship program if the school

(1) submits an application to the district in which the school is located on a form approved by the district indicating that the school intends to participate in the program;

(2) meets the accountability and enrollment standards under AS 14.31.025; and

(3) complies with AS 14.45.030 or 14.45.110 - 14.45.130 and academic accountability standards that include nondiscriminatory practices and regular reports to each student's parent or legal guardian on the student's progress.

(c) Notwithstanding the calculations required under AS 14.17, the district shall pay to a qualified school attended by the student under this section a parental choice scholarship that is equal to the lesser of

(1) the amount the school district in which the student resides would receive under AS 14.17 for a similarly situated student to attend a public school in the district, except that the amount may not exceed 100 percent of the funding the school receives and expends from all state and local sources for the student; or

(2) the actual annual cost to the school of educating the student, including prorated facility and operating expenses.

(d) If a parent or legal guardian has selected a public school outside of the attendance area in which the student resides for a scholarship under this section, the school district in which the student resides may contribute to the reasonable costs of transporting the student to the scholarship recipient school the state aid available under AS 14.09.010 for transportation of the student.

(e) A scholarship received for the benefit of a student under this section must be used for educational purposes. A scholarship is transferable among participating schools.

(f) A participating school shall include students who are enrolled under this section in the student count for purposes of calculating state aid under AS 14.17.610.

Sec. 14.31.025. Accountability and enrollment standards for a

participating school. (a) A district shall approve a school for participation in the parental choice scholarship program if the school

(1) operates in compliance with all applicable federal and state laws pertaining to health and safety;

(2) does not discriminate in its admission and hiring practices as prohibited under AS 14.18.010 - 14.18.100;

(3) admits students based on a random selection process, except that the school may apply a preference for siblings;

(4) requires criminal history background checks as provided under AS 12.62.400 for all individuals who are employed in or otherwise work in the school;

(5) if a private school, meets the following financial accountability standards:

(A) submits to the district an annual financial report that complies with uniform financial accounting standards approved by the district;

(B) submits to the district an annual auditor's report that the financial report provided under (A) of this paragraph is

(i) free of material misstatements;

(ii) fairly represents the actual annual per pupil costs claimed under the program; and

(iii) limited to records considered necessary to provide the report;

(C) demonstrates the school's financial ability to repay to the district any overpaid scholarship funds.

(b) A participating school is autonomous and may not be subject to additional regulation by the state unless authorized under AS 14.31.010 - 14.31.090.

Sec. 14.31.035. District duties. (a) In implementing the parental choice scholarship program, the district shall

(1) make scholarship payments directly to the school quarterly after receiving proof satisfactory to the district that the student claimed under a scholarship attends the school on a full-time basis;

(2) make available to students and students' parents or guardians a list

of schools that have been approved to participate in the program; and

(3) provide a standard application for use by a school to enroll a student under the program; a school may, however, supplement the application.

(b) If the district denies an application or revokes approval of a school to participate in the program, the district shall, after administrative and judicial appeal periods have lapsed, immediately notify the affected students and the students' parents or guardians.

Sec. 14.31.040. Regulations. The department shall adopt regulations necessary to carry out the program, including

(1) timelines that will result in the highest number of student and school participation;

(2) procedures for calculating for and distributing scholarships;

(3) procedures for application, renewal, and appeal for participating schools and students; and

(4) standards for approval, revocation, and denial for participating schools.

Sec. 14.31.045. Appropriations for scholarships. The legislature may appropriate parental choice scholarship program funds to the department for distribution to the districts. If the appropriation for the program is insufficient in a given fiscal year, the department shall distribute the available funds to the districts prorated by the number of participating students in the program.

Sec. 14.31.090. Definitions. In this chapter,

(1) "district" has the meaning given in AS 14.17.990;

(2) "private school" means a school located in the state that provides education to students attending grades kindergarten through 12, or any combination of those grades, and that does not receive direct state, local, or federal funding, except parental choice scholarship funding;

(3) "program" means the parent choice scholarship program;

(4) "student" means a person residing in the state who is at least five years of age but not more than 21 years of age.

* **Sec. 2.** This Act takes effect July 1, 2012.

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Court's ruling won't end all voucher issues

Apr 6, 2011|

The U.S. Supreme Court decision issued Monday gives us a glimpse into how school voucher programs in Indiana -- and other states -- might one day look.

Tax-credited contributions made to an Arizona scholarship organization that provides tuition scholarships to secular and religious schools can not be sued for violating the establishment clause, the court ruled Monday.

The court ruled in 2002 that school vouchers, even those that went to religious schools, do not violate the First Amendment clause often referred to as separation of church and state.

So as far as the U.S. law is concerned, school vouchers for parochial schools and tax-credited scholarship contributions that might fund students' tuition at religious-based schools are kosher.

But state laws are a different matter, and one shouldn't expect school voucher issues to be settled or go unchallenged in Indiana or in other states grappling with education reforms.

House Democrats' six-week walkout failed to stop House Bill 1003, the school voucher bill, which continues to wind its way through the General Assembly.

Proponents and opponents of House Bill 1003 speculate how it will change Indiana public and private schools for the better or worse. But in reality, House Bill 1003 is not likely the panacea proponents tout it to be, and it's not the nail in public education's coffin that opponents claim. But it is a potential game changer for both public and private institutions.

If it becomes law, school vouchers will influence how Hoosier children are educated. And since no bill is perfect, the voucher system would likely need tweaking in years to come.

While acknowledging Indiana's education system needs reform, we've not been quick to jump on the school voucher bandwagon -- nor are we doing that today. There are too many questions left unanswered. But it appears the Republican-controlled General Assembly is bent on making school vouchers the law.

If school vouchers are approved, Hoosiers should expect lengthy legal challenges, including whether vouchers comply with Indiana's Constitution. If the U.S. Supreme Court is any indicator, it is likely school vouchers are not the constitutional aberration some paint them to be. If this is the case, the question is whether they are as effective as some claim they are. That remains unknown as of now.

When these cases are inevitably filed, people are likely to barricade themselves behind tired arguments. In the rush to defend their positions, we hope both sides remember that the status quo in education is not working in Indiana -- or anywhere else. To find what might work requires change, and change is never easy to entrenched institutions.

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Court ruling on school money stirs voucher bill debate

By: MIKEL LIVINGSTON mlivingston@jconline.com 8:30 PM, Apr. 5, 2011|

U.S. Supreme Court ruling this week is already stirring debate on possible ramifications of controversial legislation that would create a school voucher program in Indiana.

On Monday the Supreme Court ruled 5-4 that ordinary taxpayers cannot challenge government programs that use tax breaks to direct money to religious activities. The ruling was directed at an Arizona scholarship program that has mainly benefited religious schools through tax breaks.

Opponents of private school vouchers, including those promoted by Indiana House Bill 1003, fear the ruling will make it more difficult to use federal courts to claim violations of the Constitution's prohibition on direct government aid to religion.

Chris McGrew, a former consultant for the Indiana Department of Education and former board member for the Indiana Coalition for Public Education, said the ruling will "embolden" and "empower" voucher supporters.

Arizona's program has allowed residents to send up to $500 to a tuition scholarship organization that they would have otherwise paid the state in taxes on their incomes, the bulk of which has gone to private religious schools.

Justice Anthony Kennedy wrote the Supreme Court's majority opinion, saying that because the program operates as a tax credit, instead of a direct appropriation of government money, "contributions result from the decisions of private taxpayers regarding their own funds."

Justice Elena Kagan, who voted against the ruling, predicted lawmakers elsewhere would adopt the "road map" Kennedy provided to subsidize religion without facing judicial review.

But McGrew said differing details in the bill will give some legal leverage.

"Constitutionally the ruling in Arizona is different enough, (the Indiana program) will come before the courts," McGrew said. "I just hate that taxpayers and our schools and students are going to have to pay for it."

Last week, Indiana House Democrats failed with an amendment that would have limited the vouchers to only students attending failing schools.

That amendment was defeated and the bill passed, moving to the Senate. The bill will be discussed by the Senate Education and Career Development Committee later today.

If passed in its current form, Indiana's scholarship program would not be limited to lower-income families, special need students or students in failing schools, making it the broadest voucher program in the nation. The program would be open for families earning up to $60,000 a year and within three years there would be no limit on the number of children who could enroll.

William McLauchlan, a Purdue University associate professor, has written extensively on the Indiana state constitution and the judicial behavior of Supreme Court justices. He said he believes Indiana's voucher bill violates both the state and federal constitutions.

McLauchlan said it's a near guarantee the voucher bill will be protested in court if passed, and he anticipates the Indiana Supreme Court would rule against it.

"I can't imagine, if it is a raw use of public funds for a system that supports private educational institutions, that it will stand the test, but there's no telling for sure," McLauchlan said.

Some private school leaders have also expressed reservations about the plan, but for different reasons.

Lafayette Christian School Principal Ken Goff said he and his staff are waiting for more specifics on the proposal before forming an opinion.

"We are still mixed on it," Goff said. "There are still a lot of details not specified yet. We want to make sure we can remain a private Christian school as we are."

Goff said maintaining the independence of a private school remains paramount.

"We're accredited by the state, so we take ISTEPs and we're accountable with that, but we do have some freedom as we are a private school," Goff said. "We just want to be sure if we accept (vouchers) we can keep that autonomy."

Monday's ruling and a 2002 decision that upheld the use of vouchers "should give state legislatures wide discretion in adopting school choice programs," said Tim Keller, executive director of the Arizona chapter of the Institute for Justice. The group represented both religious and secular scholarship organizations that receive the tax money.

"School choice programs are not about aiding religion," Keller said. "They're aimed at helping individual families."

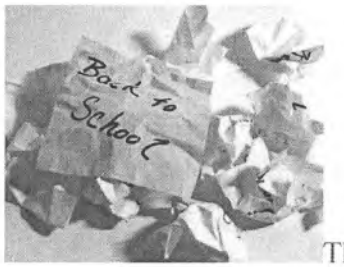
Contributing: Associated Press

Published on Monday, September 13, 2010 by Rethinking Schools

The Proving Grounds: School "Reform" in Washington, D.C.

by Leigh Dingerson

Washington, D.C., is leading the transformation of urban public education across the country—at least according to Time magazine, which featured D.C. Schools Chancellor Michelle Rhee on its cover, wearing black and holding a broom. Or perhaps you read it in Newsweek or heard it from Oprah, who named Rhee to her "power list" of "remarkable visionaries."



The model of school reform that's being implemented here is popping up around the country, heavily promoted by the same network of conservative think tanks and philanthropists like Bill Gates, Eli Broad, and the Walton Family Foundation that has been driving the school reform debate for the past decade. It is reform based on the corporate practices of Wall Street, not on education research or theory. (photo by Flickr user Avolore)

But there's nothing remarkably visionary going on in Washington. The model of school reform that's being implemented here is popping up around the country, heavily promoted by the same network of conservative think tanks and philanthropists like Bill Gates, Eli Broad, and the Walton Family Foundation that has been driving the school reform debate for the past decade. It is reform based on the corporate practices of Wall Street, not on education research or theory. Indications so far are that, on top of the upheaval and distress Rhee leaves in her wake, the persistent racial gaps that plague D.C. student outcomes are only increasing.

Chancellor Rhee helicoptered into Washington in 2007 promising to change the culture of the District of Columbia Public Schools (DCPS). Everyone cheered. But we weren't counting on the new culture coming straight out of Goldman Sachs. Suddenly, decisions were being made at the top and carried out with atomic force. Parents have been treated like consumers—informed about options and outcomes but denied a seat at the table. The district's teachers have been insulted in the national media, fired or laid off in record numbers, and replaced by less credentialed and less experienced newcomers. The model views teachers as a delivery system, not as professionals. High turnover is not just the result—it's the goal. Principals, too, are isolated and expendable. The district lauds the educational mavericks—principals whose "crusades" are described as "relentless" and "methodical"—those who see themselves as an army of one. We are becoming a district where the frontline workers are demoralized, people are looking out for themselves, and trust is all but gone.

Chancellor Rhee is the army of one at the top of the district's lurching reform. An articulate and supremely confident 39-year-old, Rhee is, for now, the movement's national poster child. Pundits debate her occasionally tactless comments in the media, but there has been little analysis of the reform model itself and how its "my way or the highway" culture affects students, parents,

and teachers. Adopting the rhetoric for just one moment, in a cost-benefit analysis, are D.C. students gaining the benefits, or are we all paying the price?

The Proving Grounds

DCPS has a reputation as one of the worst school systems in the nation. But it has not always been so troubled.

Washington, with its gleaming white facades and manicured parks, is home to a complicated mix of people and politics. Long a majority African American city, D.C. has only been self-governing since 1973, when a 100-year-long fight for home rule forced Congress to hold elections for the city's mayor and city council. Congress still reviews all legislation passed by the council before it becomes law and retains authority over the District budget.

The vast public sector employment created by the federal government helped establish a significant black middle class that supported its public schools. Many African American parents and grandparents remember *their* schools as neighborhood institutions and gateways to success. But many of D.C.'s middle-class blacks have left for suburban counties in Maryland and Virginia. What remains is a city with stark divisions—some of the most affluent neighborhoods in the nation, and some of the poorest.

Most of D.C.'s public schools are intensely segregated—like the city's neighborhoods. Though DCPS uses a traditional neighborhood boundary system, students from anywhere in the city may enter a lottery for available seats in any school after neighborhood enrollment is complete. At the elementary level, most schools reflect the demographics of their communities. But in the city's more affluent western wards, white parents begin pulling their children out of DCPS before middle school, sending them to one of the city's boutique charters or elite private schools. The availability of "out-of-boundary" slots increases, making middle and high schools in these neighborhoods the most integrated in the city. Every D.C. high school is majority students of color.

Many of the District's African American and Latino children are from economically isolated and badly neglected communities. For decades, there have been too few resources and too much infighting to support those communities and help their children succeed. Rather than digging deep to address the social, economic, and educational issues involved, however, District leadership has focused on attracting young white professionals back to the urban core. In the late '90s and early 2000s, construction cranes towered over the skyline as block after city block became home to yet another luxury condominium complex. These "urban pioneers"—mostly young, white professionals—have begun to staunch the city's declining population numbers. As they've settled in, they've also become players in school politics.

The current wave of education reform began with Adrian Fenty, a young and energetic city council member, born and raised in D.C. Elected in 2000 at the age of 30, Fenty proved to be a charismatic and effective politician, and was reelected without opposition in 2004. In September 2006 he easily won the Democratic primary for mayor. In hugely Democratic D.C., the primary

is, for all intents and purposes, the general election. It was only *after* his September victory that Fenty announced his plan to take over the District's schools.

Day One:
Teachers Feel the Heat

The day after he took office in January 2007, Fenty introduced legislation to eliminate the city's elected school board and consolidate control of the schools in the mayor's office. The council passed the bill in April, and submitted it for congressional approval. Both the House and Senate approved the bill in May, and it was signed into law by then-President Bush on June 1. Twelve days later, Fenty held a press conference to introduce his new chancellor, Michelle Rhee.

Rhee had just three years of teaching experience, through Teach for America, and no experience running a school, let alone a school system. After dipping her toes in teaching, Rhee had gone on to found and lead the New Teacher Project, an organization that collaborates with school districts to recruit, train, and develop teachers for high-needs schools.

Rhee lost no time proclaiming what was wrong in D.C.: "I know what the obstacles are in these systems that are not conducive to effecting change," Rhee said at the press conference.

The implications of her pronouncement were not lost on those who had been following the national education debate. Over the past decade, research funded by conservative foundations has systematically built a case for transforming teaching as a profession. It began with research connecting "high-quality" teachers to student academic gains. Therefore, pundits began to surmise, low-performing students must just have lazy or incompetent teachers. Once teachers were to blame, it was a hop, skip, and a jump to find the culprit—teachers' unions and collectively bargained contracts that guarantee teachers due process before dismissal. The rhetorical attack on teachers has been shrill enough to stifle what the *rest* of the decade's research has shown: that teachers generally get *better* with experience and support; that meaningful parent engagement, strong school leadership, and student-centered learning climates must also be present for schools to succeed; and that no single component by itself can carry a school and its students to their full potential.

Amidst the clamor of teacher bashing, some D.C. teachers experienced Rhee's comments as a bull's-eye drawn on their backs. "We were troubled by her remarks," recalls Kerry Sylvia, a veteran teacher at the city's Cardozo High School. It seemed clear that the "obstacles" that Rhee was referring to were district teachers.

Sweeping Change

In her first months, Rhee demonstrated the frenetic pace of activity that has become her trademark. In the southern heat and humidity of a D.C summer, Rhee crisscrossed the city, meeting with principals and cutting through the district's legendary red tape. Warehouses full of textbooks were emancipated, classrooms stocked. Checks were cut, paint was slapped on, and creaky gears started turning. Many—including principals and parents—were impressed. By the time school started, there was a palpable feeling of forward motion.

At the same time, Rhee was meeting privately with officials from the Gates and Broad foundations, the California-based NewSchools Venture Fund, the American Enterprise Institute, and other key players in the school reform movement. Adrian Fenty and Chancellor Rhee were their new darlings.

That spring, Rhee began firing principals. Sixty-one principals and assistant principals were fired at the end of the school year. Next came the teachers. By July of 2008, according to some reports (neither DCPS nor the Washington Teachers' Union will release actual numbers), Rhee had fired 250 teachers and 500 teachers aides, avoiding union due-process rules by utilizing the "highly qualified" certification requirements of the federal No Child Left Behind Act.

In October, stymied by her inability to negotiate a contract with the union (she wanted, among other things, new provisions in the contract to make it easier for her to fire teachers), Rhee announced that she would implement a little-used procedure allowing principals to place teachers on a 90-day "improvement plan," with the ability to fire them immediately after that.

All the Blame, Not Enough Support

It is worth noting that, as a so-called "education reformer," Rhee has not focused on content or pedagogy. There have been no initiatives to improve teacher induction or strengthen instructional practice. The focus has remained on management and staffing, and the tone has been judgmental rather than supportive.

One of Rhee's early priorities was to establish a new teacher evaluation system that would, in part, make it easier to fire teachers based on their students' performance on standardized tests. It's the latest Wall Street concept embraced by the reformers. Indeed, U.S. Secretary of Education Arne Duncan has proposed that federal funding be contingent upon states developing teacher evaluations directly linked to student test scores. Rhee hoped to set the standard.

Her "director of human capital strategy" took the lead in designing the new system, called IMPACT. It was launched in the 2009–10 school year and again put Rhee into the national spotlight.

IMPACT is a complicated web of more than 20 separate evaluation processes. For teachers unlucky enough to teach subjects and grade levels with test data, 50 percent of their evaluation is based on a patently preposterous calculation of their effect on student scores. Teachers also undergo five short observations by their principal or a "master teacher," based on an extensive "teaching and learning framework" with dozens of indicators. One of the biggest concerns has been that IMPACT will snare some of the district's best teachers in its web—those who refuse to teach to the tests or conform to a checklist of specific practices. The Washington Teachers' Union was worried enough to demand a working group to monitor IMPACT's implementation and results.

Meanwhile, after three years of contentious negotiation, the union and the chancellor announced agreement on a new contract in the spring of 2010. The contract attached bonus money to teacher evaluations and included a significant increase in salaries (ratification of the new contract was

stalled briefly when it was revealed that the salary increases were being funded with $64.5 million in one-time grants from the Broad and Walton foundations, among others, and that the grants were predicated on Rhee continuing as chancellor).

Throughout contract negotiations and the roll out of the IMPACT system, Rhee continued to target career teachers, in action and words. In the spring and summer of 2009 the district hired more than 900 new teachers—three times the usual number of summer hires. Then, in October, Rhee announced that a newly discovered budget shortfall required that 266 teachers be laid off. Because the layoffs were budget related, principals were free to ignore the "last hired-first fired" rules in the union contract. According to the union, a substantial number of the laid-off teachers were older, more senior teachers, rather than those who had been hired the previous spring and summer. Students and parents protested as beloved teachers and counselors were yanked out of buildings.

The layoffs created a firestorm of protest as classes were disrupted just weeks into the school year. The crisis got hotter when Rhee's budget shortfall could not be verified and to some appeared contrived. But the final straw for many teachers was when the chancellor, in an interview with *Fast Company* magazine, justified the layoffs by saying, "I got rid of teachers who had hit children, who had had sex with children, who had missed 78 days of school." Rhee was excoriated for the remark, which proved to be a gross overstatement, but the ousted teachers remained on the curb.

It was just one more in a series of what veteran teachers saw not only as personal attacks, but also as an indication that Rhee had no understanding of the challenges that they and their students face each day.

"It creates a very individualized and isolating feeling in the school," says Sylvia, whose school population includes almost 100 homeless teens. "Our kids come in with a host of real problems. . . . Teachers in the community need to be part of the process, not the object of it. . . . Feeling under attack all the time isn't conducive to collaboration."

Chris Bergfalk, a teacher at H.D. Cooke Elementary School, is convinced that the attacks on teachers spill over into the consciousness of parents as well. "You can feel it," he says. "Parents come into the classroom thinking that teachers are the enemy. . . . It takes more than one meeting, sometimes, before the parents decide that you're OK and basically competent. . . . I've never felt this level of suspicion and mistrust from my students' parents."

Crystal Sylvia, Kerry's sister and a social worker at a struggling but improving elementary school, has a different way of putting it. "We get the message: If we were here, working in the schools before the chancellor arrived, we are part of the problem."

In a fall 2009 survey of teachers conducted by DC VOICE, an education advocacy group, 80 percent of teachers, when asked whether they liked the way the school system was run, said "no." Many of those said their chief complaint was the lack of respect and the blame cast upon teachers. It is difficult to imagine any CEO who has so severely alienated her own workforce being dubbed a "remarkable visionary" in the national press.

But Rhee wasn't done. On July 23, 2010, she announced 165 additional teacher firings. Of those, 76 were dismissed as a result of poor evaluations under IMPACT. And, as feared, some of the fired teachers were among the most experienced, dynamic, and beloved educators in the system. Rhee boasted that more than 700 *additional* teachers had been judged "minimally effective" through IMPACT, and that a significant number of *them* would no doubt be fired after the next school year. The union's working group had not even met.

Even before the most recent dismissals, Rhee's transformation of the D.C. teacher workforce has been significant. Almost 40 percent of the teachers now working in DCPS entered the workforce since the chancellor arrived. In the recently completed school year, 120 of those teachers were placed through Teach for America—virtually guaranteeing continued high teacher turnover in district classrooms.

The Living Room Approach to Community Engagement

Chancellor Rhee's approach to parents and communities has been nearly as tone deaf as her dealings with teachers. "She creates lots of opportunities for people to learn what's going on," reflects Jill Weiler, a DCPS parent and community organizer. "I think she really does listen. But it doesn't seem to influence her." For example, in December 2007, Rhee announced the closing or consolidation of two dozen schools. Parents, teachers, and students were frustrated at Rhee's failure to *inform*, much less involve the impacted communities before the announcement. As required by district rules, Rhee subsequently held a series of community hearings at the affected schools, but made few changes to the plan.

Then, in April 2008, Rhee announced that as many as 10 high schools would undergo federally mandated "restructuring," and that several would be placed under external management. Rhee promised school communities a voice in selecting from among six "partner" organizations she had chosen. But at Anacostia High School, the parents' choice of outside partner was rejected. Instead, Rhee chose Friendship Public Charter School—a charter management organization with five D.C. charter schools—to take over operations at Anacostia. Marvin Tucker, a DCPS parent and assistant football coach at Anacostia, was frustrated by the process: "DCPS doesn't want parent participation. Neither does Friendship." The new management group fired 85 percent of Anacostia's teachers and disbanded the school's Local School Restructuring Team (LSRT)—a DCPS advisory council of teachers and parents at each school.

Rhee isn't deaf to all voices. Her inconsistency exploded into the media in December 2009 when she announced the replacement of the principal at Hardy Middle School—one of the top performing schools in the city, and also one of the most racially mixed. Hardy's art-centered curriculum draws students from across the city to fill seats not taken by students from the surrounding affluent Georgetown community. When a $48 million renovation at the school was completed in 2009, it became at least a more physically attractive option for neighborhood parents. But apparently there was still concern. After the chancellor abruptly announced that she was removing the popular (and by all measures, successful) principal, it was revealed that she had met in a private living room with a dozen Georgetown parents. The group had complained that they didn't feel "welcome" at Hardy.

The announcement set off a firestorm at Hardy, where teachers and parents—even the school's LSRT—had not been consulted or informed of the chancellor's decision. At a subsequent community meeting at the school, emotions were raw. The racial implications of the move were unavoidable, as Rhee tried to explain why she had met privately with a small group of white parents but failed to discuss the move with the school's mostly African American parent leadership. Jeffrey Watson, a parent of two Hardy students, charged that Georgetown neighborhood parents stayed away because they were not comfortable with the racial composition of the school, reported the *Washington Post*. "Don't play games with people in here. We're not stupid," Watson said at the school hearing. "Rather than having private meetings with them, tell them to walk on over." Despite impassioned pleas from teachers, parents, and students to reinstate the principal, Rhee refused to budge.

Her decisions at Hardy and elsewhere are clear nods to the District's changing demographics. Since 2000—with the proliferation of luxury condominiums and the boom in the housing market—the District has gained 16,000 residents. The city's white population has increased from 30 percent to 40 percent of the total, and the African American population has decreased from 60 percent to 54 percent. Per capita income (adjusted for inflation) has increased from $28,659 to more than $41,000.

The effort to bring middle-class whites back to the city's public schools may be a laudable one, Rhee's process notwithstanding. But for the district's high-profile reform efforts, there is another advantage, whether the chancellor intends it or not.

D.C.'s Education Miracle a Chimera?

Despite glowing reports from the adoring media, D.C.'s education miracle is a chimera at best. There have been dramatic drops in standardized assessment scores, and, on closer analysis, the highly touted increases in D.C. National Assessment of Educational Progress (NAEP) scores are a reflection of the changing demographics of the schools, not the result of any real improvement in the quality of education provided to D.C.'s poorest and neediest students.

Bergfalk has taught in the district for seven years, and was a finalist for D.C. Teacher of the Year in 2010. As a teacher, he is focused and energetic.He is also deeply skeptical. In March 2009, the district announced that the new NAEP scores showed dramatic student increases and progress in closing D.C.'s persistent achievement gap. Bergfalk decided to check it out for himself. Using NAEP's own interactive website, Bergfalk deconstructed the data.

"These test scores are not the result of an increase in student achievement. Instead, they are a result of a change in who was tested," says Bergfalk. He found that for the 4th-grade test, the percentage of African American kids in DCPS (the lowest scoring racial/ethnic group in D.C.) taking the test dropped from 67 percent of test takers to 53 percent of test takers between 2007 and 2009, while the percentage of Hispanic students (with average test scores 12 points higher) rose from 6 percent to 9 percent of test takers, and white students rose from 6 percent to 7 percent of test takers. Where aggregate scores appear to show improvement among DCPS students, the disaggregated data tell a different story. The district continues to have one of the highest achievement gaps among major U.S. cities.

Bergfalk found the same pattern on the 8th-grade NAEP reading test. The percentage of African American kids in DCPS taking the test dropped from 59 percent of test takers to 43 percent of test takers, which is why there was a statistically significant four-point increase overall from 2007 to 2009, but no statistically significant increase for any racial/ethnic subgroup. The overall increase, like that on the 4th-grade test, was again the result of a change in demographics rather than an increase in student achievement.

When DCPS released the results of local assessments in July 2010, the district touted what it called "unparalleled progress" in secondary school results. But at the elementary level, scores took a hit—in some schools dropping by more than 30 percent the past two years. Students in half of all D.C. public schools performed worse in the 2010 assessments than they did in 2009.

The Price of Autocratic Reform

In a Feb. 1, 2010, article, the *Washington Post* reported that approval ratings for Mayor Fenty and his schools chief had dropped precipitously. The poll showed Chancellor Rhee's approval rating had sunk from 59 percent of residents in January 2008 to 43 percent in early 2010.

The numbers are crucial for Fenty: The mayor is up for reelection this fall, and the race is being cast as hinging on public support for his school reform agenda. Fenty's challenger, Vincent Gray, the current chair of the city council, has been a critic of Rhee's leadership: "We need a mayor who understands that the best way to achieve real and lasting school reform is to involve the community. The best way to help every community in the district is to engage teachers, engage parents, engage principals, and engage students in the decision-making."

Mary Filardo, director of the 21st Century School Fund, agrees. "School change should be about students, families, and communities taking ownership of their schools. "Although there is the *illusion* that parents may have more access—that Michelle Rhee will answer their emails—there is meager civic life around the public schools."

Cathy Reilly, who leads the Senior High School Alliance of Parents, Principals, and Educators, notes: "It's not an empowering model. . . . The players in the system—parents, teachers, and principals—are supposed to understand that things are being 'fixed' and to get with the program, or get out."

For many parents and teachers, the problem with Rhee's approach was best summed up by Diane Ravitch, former undersecretary at the Department of Education under President George H.W. Bush. Ravitch, speaking at a reception in D.C. last spring, was asked what she thought of D.C. school reform. Ravitch responded with the timeless adage, "It's difficult to win a war when you're firing on your own troops."

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Michelle Rhee on D.C. Kids' 'Crappy Education'

Firebrand Schools Chancellor Michelle Rhee, the National Face for Education Reform, Could Lose Her Job

By Z. BYRON WOLF and LEE FERRAN

Sept. 16, 2010

"They are getting a crappy education," Rhee said while discussing the district's schoolchildren in an interview with ABC News. "I mean, you could try to sugar coat it all you want. Subpar, or whatever. But what it is in terms that everyone can understand -- they are getting a crappy education."

It could be comments like that, not to mention aggressive and controversial education policies, landed Rhee in the spotlight of a new documentary "Waiting for Superman," and could also cost her her job.

Rhee, who has become the national face of education reform, could end up jobless after D.C. voters ousted Mayor Adrian Fenty.

Under Rhee's three-year watch, more than 200 teachers have been fired, nearly 20 schools closed and pay has been tied to merit evaluations. But test scores have shot up for elementary and secondary school students, and teachers' salaries were raised.

"The situation we inherited three years ago in Washington, D.C., was absolutely deplorable," Rhee said. "People need to understand that and if that makes people uncomfortable, then so be it."

The victor in Tuesday's Democratic primary -- and therefore almost a sure winner come November in this overwhelmingly Democratic city -- is City Council Chairman Vincent Gray, a chief Rhee antagonist at oversight hearings.

Gray has not said he would fire Rhee, but he hasn't said he would keep her on either.

"I have said on many occasions that after this election is over, I'd like to sit down with Michelle Rhee and let us walk and talk through it, you know, how we might work together," Gray said on CNN Tuesday.

Rhee had campaigned for Fenty. The Washington Teacher's Union campaigned for Gray.

"This has been a significant change in direction and it's going to require me sitting down with Mayor Fenty, the chairman and other people to see what's in the best interests of our kids," Rhee said Wednesday in an interview with MSNBC.

Rhee Feels Guilty About Fenty Loss

"I do feel sort of bad and guilty," she said. "This man, Adrian Fenty, is truly the best leader I've ever worked for. We need more leaders like him who are willing to stake everything to make sure our kids are getting a good education."

Obviously, D.C. voters disagree. And so do the leaders of local and national teachers unions.

An op-ed Wednesday morning by George Parker, president of the Washington Teacher's Union, and Randi Weingarten, president of the American Federation of Teachers, made no mention of Rhee. The article was titled "No Turning Back for D.C. Kids." and it suggested that the teachers would be happier and work more collaboratively with Gray.

"Public education is a marathon, not a sprint. Yes, there's urgency to fixing our schools, but we have to set ourselves on a long-term path toward constant and sustainable progress," wrote the union leaders.

President Obama stayed out of the race, but Secretary of Education Arne Duncan appeared at an event with Fenty and Rhee in the closing days of the election. It was not a campaign event, but Duncan announced the award of $75 million in new federal funding for D.C. schools. He was noticeably absent from any event with Gray.

Wednesday, Nov. 26, 2008

Rhee Tackles Classroom Challenge

By Amanda Ripley / Washington

In 11th grade, Allante Rhodes spent 50 minutes a day in a Microsoft Word class at Anacostia Senior High School in Washington. He was determined to go to college, and he figured that knowing Word was a prerequisite. But on a good day, only six of the school's 14 computers worked. He never knew which ones until he sat down and searched for a flicker of life on the screen. "It was like Russian roulette," says Rhodes, a tall young man with an older man's steady gaze. If he picked the wrong computer, the teacher would give him a handout. He would spend the rest of the period learning to use Microsoft Word with a pencil and paper.

One day last fall, tired of this absurdity, Rhodes e-mailed Michelle Rhee, the new, bold-talking chancellor running the District of Columbia Public Schools system. His teacher had given him the address, which was on the chancellor's home page. He was nervous when he hit SEND, but the words were reasonable. "Computers are slowly becoming something that we use every day," he wrote. "And learning how to use them is a major factor in our lives. So I'm just bringing this to your attention." He didn't expect to hear back. Rhee answered the same day. It was the beginning of an unusual relationship.

The U.S. spends more per pupil on elementary and high school education than most developed nations. Yet it is behind most of them in the math and science abilities of its children. Young Americans today are less likely than their parents were to finish high school. This is an issue that is warping the nation's economy and security, and the causes are not as mysterious as they seem. The biggest problem with U.S. public schools is ineffective teaching, according to decades of research. And Washington, which spends more money per pupil than the vast majority of large districts, is the problem writ extreme, a laboratory that failure made. (See pictures of a diverse group of American teens.)

Rhee took over Anacostia High and the district's 143 other schools in June 2007, when Mayor Adrian Fenty named her chancellor. Her appointment stunned the city. Rhee, then 37, had no experience running a school, let alone a district with 46,000 students that ranks last in math among 11 urban school systems. When Fenty called her, she was running a nonprofit called the New Teacher Project, which helps schools recruit good teachers. Most problematic of all, Rhee is not from Washington. She is from Ohio, and she is Korean American in a majority-African-American city. "I was," she says now, "the worst pick on the face of the earth."

But Rhee came highly recommended by another prominent school reformer: Joel Klein, chancellor of New York City's schools. And Rhee was once a teacher--in a Baltimore elementary school with Teach for America--and the experience convinced her that good teachers could alter the lives of kids like Rhodes.

Anacostia High has a 24% graduation rate, and only 21% of its students read at grade level. Rhodes is well aware of the miserable statistics, and when he first saw his new chancellor from afar, he thought she looked petite, foreign and underqualified. "I was like, She doesn't look ready for urban kids." But after they exchanged e-mails, he agreed to meet her downtown. He realized almost at once that he had underestimated her. "She actually sat

with me," he says, "and talked eye to eye, like I was one of her co-workers." They decided to meet again, this time at Anacostia High. Rhodes began to talk about Rhee to his classmates, and they started writing an agenda for the meeting, detailing all the things that were wrong with the D.C. school system. They had much to tell.

Rhee has promised to make Washington the highest-performing urban school district in the nation, a prospect that, if realized, could transform the way schools across the country are run. She is attempting to do this through a relentless focus on finding--and rewarding--strong teachers, purging incompetent ones and weakening the tenure system that keeps bad teachers in the classroom. This fall, Rhee was asked to meet with both presidential campaigns to discuss school reform. In the last debate, each candidate tried to claim her as his own, with Barack Obama calling her a "wonderful new superintendent."

Hard as it is to imagine Washington schools ranking among the best in the country, the city does have some things working in its favor. The system is relatively small, making it easier to redirect. As in New York City, the board of education was recently dissolved, which means changes can be made without waiting for the blessing of a fractious body of overseers. And now that a third of Washington's kids are in charter schools, there is intense pressure on the public system to keep the students it still has. If they keep fleeing the system at the current rate, enrollment will drop 50% every 10 years.

Each week, Rhee gets e-mails from superintendents in other cities. They understand that if she succeeds, Rhee could do something no one has done before: she could prove that low-income urban kids can catch up with kids in the suburbs. The radicalism of this idea cannot be overstated. Now, without proof that cities can revolutionize their worst schools, there is always a fine excuse. Superintendents, parents and teachers in urban school districts lament systemic problems they cannot control: poverty, hunger, violence and negligent parents. They bicker over small improvements such as class size and curriculum, like diplomats touring a refugee camp and talking about the need for nicer curtains. To the extent they intervene at all, politicians respond by either throwing more money at the problem (if they're on the left) or making it easier for some parents to send their kids to private schools (if they're on the right).

Meanwhile, millions of students left behind in confused classrooms spend another day learning nothing.

See pictures of eighth-graders being recruited for college basketball.

See TIME's special report on paying for college.

A Teacher from Toledo

ONE DAY IN AUGUST, I SPENT THE MORNING with Rhee as she made surprise visits to Washington public schools. She emerged from her chauffeured black SUV with two BlackBerrys and a cell phone and began walking--fast--toward the front door of the first school. She wore a black pencil skirt, a delicate cream blouse and strappy high heels. When we got inside, she walked into the first classroom she could find and stood to the side, frowning like a specter. When a teacher stopped lecturing to greet her, she motioned for the teacher to continue. Rhee smiled only when students smiled at her first. Within two minutes, she had seen enough, and she stalked out to the next classroom.

In the hallway, she muttered about teachers who spend too much time cutting out elaborate bulletin-board decorations or chitchatting at "morning meetings" with their third-graders before the real work begins. "We're in Washington, D.C., in the nation's capital," she said later. "And yet the children of this city receive an education that every single citizen in this country should be embarrassed by." (See pictures of teens and how they would vote.)

In the year and a half she's been on the job, Rhee has made more changes than most school leaders--even reform-minded ones--make in five years. She has shut 21 schools--15% of the city's total--and fired more than 100 workers from the district's famously bloated 900-person central bureaucracy. She has dismissed 270 teachers. And last spring she removed 36 principals, including the head of the elementary school her two daughters attend in an affluent northwest-D.C. neighborhood.

Rhee is convinced that the answer to the U.S.'s education catastrophe is talent, in the form of outstanding teachers and principals. She wants to make Washington teachers the highest paid in the country, and in exchange she wants to get rid of the weakest teachers. Where she and the teachers' union disagree most is on her ability to measure the quality of teachers. Like about half the states, Washington is now tracking whether students' test scores improve over time under a given teacher. Rhee wants to use that data to decide who gets paid more--and, in combination with classroom evaluation, who keeps the job. But many teachers do not trust her to do this fairly, and the union bristles at the idea of giving up tenure, the exceptional job security that teachers enjoy.

Rhee grew up in a nice neighborhood in Toledo, Ohio, a middle child, between two brothers. Her parents immigrated from South Korea several years before she was born so that her father could study medicine at the University of Michigan. He became a specialist in rehabilitation and pain medicine, and her mother owned a women's clothing store. Education was highly valued in the family, as was independence. After Rhee finished sixth grade, her parents sent her to South Korea to live with an aunt and attend a Korean school, a harrowing experience for a child in a strange land with limited skills in its language. When she returned a year later, her parents sent her to a private school because they found the public schools lacking.

After Rhee graduated from Cornell University in 1992, she joined Teach for America. She spent three years teaching at Harlem Park Elementary, one of the lowest-performing schools in Baltimore. Her parents visited and were stunned by the conditions of the neighborhood. "The area where the kids lived reminded me of a scene after the Korean War," says her father Shang Rhee.

Rhee suffered during that first year, and so did her students. She could not control the class. Her father remembers her returning home to visit and telling him she didn't want to go back. She had hives on her face from the stress.

The second year, Rhee got better. She and another teacher started out with second-graders who were scoring in the bottom percentile on standardized tests. They held on to those kids for two years, and by the end of third grade, the majority were at or above grade level, she says. (Baltimore does not have good test data going back that far, a problem that plagues many districts, so this assertion cannot be checked. But Rhee's principal at the time has confirmed the claim.) The experience gave Rhee faith in the power of good teaching. Yet what happened afterward broke her heart. "What was most disappointing was to watch these kids go off into the fourth grade and just lose everything," Rhee says, "because they were in classrooms with teachers who weren't engaging them."

The summer after her second year of teaching, Rhee met Kevin Huffman, a fellow Teach for America member. They married two years later and had two daughters, Starr and Olivia, now 9 and 6. They moved to Colorado to be closer to Rhee's parents, but the marriage faltered. Huffman and Rhee separated, agreeing to joint custody of the kids. And then Rhee got the offer to run Washington's schools. Huffman, now head of public affairs for Teach for America, had no illusions about the challenges Rhee would face. But when he heard about

the job offer, he decided to follow her to D.C. "Even though moving didn't sound like a whole lot of fun," he says, "the reality is that I genuinely believed that she had the potential to be the best superintendent in the country. Most people think about their own longevity, about political considerations." He adds, "Very few people genuinely don't care about anything other than the end result for kids. Michelle will compromise with no one when it comes to making sure kids get what they deserve."

Scorched Earth

WHEN THEY ARRIVED IN WASHINGTON, Huffman and Rhee anted up. They enrolled Starr and Olivia in Oyster-Adams, a public elementary school. Although the school is considered among the best in the city, Rhee quickly concluded that it was inferior to the Colorado public school her daughters had been attending. Among other things, the homework was sporadic and unchallenging, she says. Rhee dismissed the principal before the school year was out, a move that sparked outrage across the city and in her own home. "That," she says, "was probably the decision I got the most grief about."

Rhee is, as a rule, far nicer to students than to most adults. In many private encounters with officials, bureaucrats and even fundraisers--who have committed millions of dollars to help her reform the schools--she doesn't smile or nod or do any of the things most people do to put others at ease. She reads her BlackBerry when people talk to her. I have seen her walk out of small meetings held for her benefit without a word of explanation. She says things most superintendents would not. "The thing that kills me about education is that it's so touchy-feely," she tells me one afternoon in her office. Then she raises her chin and does what I come to recognize as her standard imitation of people she doesn't respect. Sometimes she uses this voice to imitate teachers; other times, politicians or parents. Never students. "People say, 'Well, you know, test scores don't take into account creativity and the love of learning,'" she says with a drippy, grating voice, lowering her eyelids halfway. Then she snaps back to herself. "I'm like, 'You know what? I don't give a crap.' Don't get me wrong. Creativity is good and whatever. But if the children don't know how to read, I don't care how creative you are. You're not doing your job."

See pictures of a diverse group of American teens.

See pictures of the college dorm's evolution.

Rhee's ferocity has alienated many people--even those who support her ideas and could be helpful to her. This summer the chair of the Washington city council called dealing with Rhee a "nightmare." There has been talk of passing legislation to rein her in. "Michelle Rhee believes in scorched earth," says Randi Weingarten, president of the American Federation of Teachers, a national union that has become unusually involved in local matters in Washington. "I am not saying that D.C.'s school system doesn't need a lot of help. But I have been part of a lot of reforms, and the one thing I have never seen work is a hierarchical, top-down model."

Rhee is aware of the criticism, but she suggests that a certain ruthlessness is required. "Have I rubbed some people the wrong way? Definitely. If I changed my style, I might make people a little more comfortable," she says. "But I think there's real danger in acting in a way that makes adults feel better. Because where does that stop?"

The Data

ON RHEE'S TOUR OF SCHOOLS DURING the first week of classes this year, a parent stopped her to praise her accomplishments so far. Rhee listened with a small smile while systematically cracking each of her knuckles with the thumb of the same hand. Then she got back into her SUV and began furiously e-mailing. When she calls her staff, she does not say hello; she just starts talking. She answered 95,000 e-mails last year, according to her office.

She frequently sounds exasperated. "People come to me all the time and say, 'Why did you fire this person?'" she says. The whiny voice is back. "'She's a good person. She's a nice person.' I'm like, 'O.K., go tell her to work at the post office.' Just because you're a nice person and you mean well does not mean you have a right to a job in this district."

The data back up Rhee's obsession with teaching. If two average 8-year-olds are assigned to different teachers, one who is strong and one who is weak, the children's lives can diverge in just a few years, according to research pioneered by Eric Hanushek at Stanford. The child with the effective teacher, the kind who ranks among the top 15% of all teachers, will be scoring well above grade level on standardized tests by the time she is 11. The other child will be a year and a half below grade level--and by then it will take a teacher who works with the child after school and on weekends to undo the compounded damage. In other words, the child will probably never catch up.

The ability to improve test scores is clearly not the only sign of a good teacher. But it is a relatively objective measure in an industry with precious few. And in schools where kids are struggling to read and subtract, it is a prerequisite for getting anything else done. In their defense, Washington teachers and principals, like educators in many of the country's worst school districts, talk about trying to teach a seventh-grader who is eight months pregnant; about being assaulted by students; about holding meetings for parents, replete with free food, and no one showing up. Washington Teachers' Union leader George Parker worries that test-score data cannot take all this into account: "I don't think our teachers are afraid of demonstrating student growth, but you have to look at the dynamics of the children you're dealing with. If I'm teaching children who have computers at home, who have educated parents, those students can move a lot faster than kids whose parents can't read."

Rhee says she does not expect all kids to move up the charts at the same rate; the important thing is to demand that most do move up. "This is a cultural shift," says Kaya Henderson, Rhee's deputy. "For years, there were no data, and you were a good teacher because the parents or your principal told you so. And so this is a scary thing."

The most glaring example of the backward logic of schools is the way most teachers receive lifetime job security after one or two years of work. As Larry Rosenstock, CEO of eight California charter schools, noted at an education panel last spring, we don't give that kind of job security to pilots or doctors--or any others who hold our children's fate in their hands: "What is it that is so exceptional about teachers that they should have this unique right?"

Teachers got tenure rights in the early 20th century to protect them against meddling politicians and school-board members who treated their jobs as patronage pawns. But the rationale is plainly antiquated. Today dozens of federal and state laws protect teachers (and other people) from arbitrary firing. But most teachers still receive tenure almost automatically. In fact, even before they get tenure, they are rarely let go. Schools spend millions of dollars evaluating teachers, but principals have little incentive to shake up their staffs, and so most teachers end up scoring near the top. "What I'm finding is that our principals are ridiculously--like ridiculously--conflict-averse," Rhee says. "They know someone is not so good, and they want to give him a 'Meets expectations' anyway because they don't want to deal with the person coming into the office and yelling and getting the parents riled up."

Right now, schools assess teachers before they teach--filtering for candidates who are certified, who have a master's degree, who have other pieces of paper that do not predict good teaching. And we pay them the same regardless of their effectiveness.

By comparison, if we wanted to have truly great teachers in our schools, we would assess them after their second year of teaching, when we could identify very strong and very weak performers, according to years of research. Great teachers are in total control. They have clear expectations and rules, and they are consistent with rewards and punishments. Most of all, they are in a hurry. They never feel that there is enough time in the day. They quiz kids on their multiplication tables while they walk to lunch. And they don't give up on their worst students, even when any normal person would.

See pictures of teens and how they would vote.

See pictures of college mascots.

Students know this instinctively. Acquirra Carter, 14, attends Washington's Cardozo High School, where, she complains, kids walk out of classes when they get bored and certain teachers talk on their cell phones when they are supposed to be teaching. But there are exceptions, and Carter knows them when she sees them. "Some teachers find a way. Mrs. Brown, they would not dare walk out of her class. She has total control. Mrs. Lawton, nobody leaves her class. This boy whispered, and she knew it!"

Minefields in the Schoolyard

IN THE VIEW OF RHEE AND REFORMERS like her, the struggle to fix America's failing school system comes down to a simple question: How do you get the best teachers and principals to work in the worst schools? In her quest to figure this out, Rhee has already suffered a major setback. Earlier this year, she proposed a revolutionary new model to let teachers choose between two pay scales. They could make up to $130,000 in merit pay on the basis of their effectiveness--in exchange for giving up tenure for one year. Or they could keep tenure and accept a smaller raise. (Currently, the average teacher's salary in Washington is $65,902.) The proposal divided the city's teachers into raging, blogging factions. This fall, the union declined to put Rhee's proposal to a vote, and its relationship with her has become increasingly hostile.

In October, Rhee vowed to purge incompetent teachers through any means necessary. She has brought on extra staff to help principals navigate the byzantine termination process and says an unprecedented number of teachers have already been put on notice. But she cannot give teachers the huge raises she proposed unless the union agrees to a new contract. So this approach will be slower, more litigious and less inspiring. In other words, it will be all stick and no carrot. It's hard to say if anyone else would have been able to persuade the union to trade away tenure for cash bonuses, but Rhee's sometimes dismissive attitude made it harder for some teachers to trust her.

For now, Mayor Fenty says he still has full confidence in Rhee, and he claims that Washington residents share his enthusiasm. "Regular people love the fact that for once someone is making tough decisions for D.C. schools," says Fenty, who attended the district's public schools. But the disconnect between Rhee's confident, sweeping rhetoric and the tortured reality is sizable, and it is most apparent at ground level, in the schools she is trying to save.

Rhee likes to tell the story of how Rhodes got in touch with her. She recounted it on TV on The Charlie Rose Show in July: "A student sent me this e-mail and said, basically, If you really want to know what's wrong with our schools, you should come and talk to the kids because I'm afraid that by talking to the adults, you might not be getting the real story."

Rhodes has a more nuanced version of the story. After their initial meeting, they met for a second time at Anacostia High, in a room off the library. Rhodes had invited eight fellow students, and they gave Rhee their typed agenda. They talked about the need for better teachers, as Rhee emphasizes when she tells the story. But Rhodes says he also told her about the holes in the floors, the lack of supplies and the fact that most classes did not have enough books for the students to take home. Rhee listened but did not offer many specific solutions. "She was vague," Rhodes says. "I got the sense she didn't want to make promises she couldn't keep."

Then one day last May, Rhee dismissed Anacostia's principal. Rhodes was devastated. He sent Rhee a furious e-mail. "My principal is a mother, mentor and a teacher to us all," he wrote. "I refuse, NO! we refuse the students of Anacostia to let her go." Rhee wrote him back. "She told me not to worry about it," Rhodes says quietly.

One of the things that make school reform so wrenching and slow is that schools become embedded in people's hearts. This is true in rich neighborhoods and poor ones, with good

schools and bad. Rhodes talks about his school as if it were an extension of himself. He talks about "my teachers" and "my staff," and he refers to other students as "my colleagues." "I love Anacostia High School," he says. At the same time, he is dismayed by his school. He walks through his halls, pointing out the litter on the floor and the broken lockers. Rhodes is 6 ft. 8 in. (2 m) tall, so he has to look down to talk to almost everyone. He wears white tube socks under his black Nike flip-flops and carries his large frame deliberately, like a gentle overseer. "You see all these lockers? None of them work," he says. "This classroom over here is supposed to be for home economics, but it's never been fixed up."

Rhodes did not contact Rhee again. This year Anacostia has a new principal, and Rhodes admits that the school is functioning better. "All the children are wearing their uniforms," he says. "No kids are in the hallways." If you come to school without your uniform on, a security guard or an assistant principal will "snatch you up and just send you home." All the computers in his Microsoft Word classroom now work.

But on Nov. 19, Rhodes had to evacuate his school when fights broke out in the hallways and three students were stabbed. And he still doesn't use the school bathrooms, which are filthy and sometimes unsafe. He waits until he returns to his grandmother's house, where he lives.

Now that he is a senior, Rhodes spends much of his time worrying about getting into college. As we stand on the front steps of the school one autumn evening after class, I ask him what he wants to study. He answers quickly: "Public administration, with a minor in English." I ask him how he can be so sure. "Because someone told me that's what I have to do to take Chancellor Rhee's job," he says matter-of-factly, watching his drum corps practice and his baton twirlers twirl in the twilight.

SHELDON JACKSON COLLEGE, Appellant, v. STATE of Alaska, Avrum Gross, Attorney General for the State of Alaska, B. B. Allen, Commissioner of Administration for the State of Alaska, Kerry Romesburg, Executive Director, Post-Secondary Education Commission, Marshall L. Lind, Commissioner of Education for the State of Alaska, Appellees; INUPIAT UNIVERSITY OF the ARCTIC, Appellant, v. STATE of Alaska, Avrum Gross, Attorney General for the State of Alaska, B. B. Allen, Commissioner of Administration for the State of Alaska, Kerry Romesburg, Executive Director, Post-Secondary Education Commission, Marshall L. Lind, Commissioner of Education for the State of Alaska, Appellees

Supreme Court of Alaska
599 P.2d 127;1979 Alas. LEXIS 552
Nos. 3978, 4002
August 28, 1979

Editorial Information: Prior History

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Thomas B. Stewart, Judge.

Counsel Monte L. Brice, Ely, Guess & Rudd, Juneau, for Appellant Sheldon Jackson College.

B. Richard Edwards, Mark S. Bledsoe, Law Offices of B. Richard Edwards, Anchorage, for Appellant Inupiat University of the Arctic.

Ronald W. Lorensen, Assistant Attorney General, Avrum M. Gross, Attorney General, Juneau, for Appellee.

Robert C. Erwin, Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Amicus Curiae Catholic Bishop of Northern Alaska.

Judges: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant private universities challenged a decision of the Superior Court of the State of Alaska, First Judicial District, Juneau, which granted summary judgment in favor of appellee, the State of Alaska, and held that Alaska's tuition grant program, Alaska Stat. 14.40.751-.806, violated Alaska Const. art. VII, 1. The private universities had filed an action challenging the termination of the program.Tuition grant program that awarded students at private colleges difference between tuition at private and public colleges violated Alaska Constitution, which prohibited payment of public funds for direct benefit of a private educational institution.

OVERVIEW: The grant program awarded Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student's private college and that charged by a public college in the same area, not to exceed $ 2,500 annually. The attorney general found that the grants violated Alaska Const. art. VII, 1, which prohibited the payment of money from public funds for the direct benefit of any religious or other private educational institution. The trial court granted summary judgment for the State. On appeal, the court affirmed, holding that the grant program clearly violated 1 because (1) the class primarily benefitted by the tuition grant program consisted only of private colleges and their students; (2) the public funds expended under Alaska Stat. 14.40.776 constituted nothing less than a subsidy of the education received by the student at his private college and thus implicated fully the core concern of the direct benefit provision; (3) the magnitude of benefits bestowed under the program was substantial; and (4) the students to whom benefits were paid were merely conduits for the transmission of state funds to private colleges.

OUTCOME: The summary judgment in favor of the State was affirmed.

LexisNexis Headnotes

Constitutional Law >

Opinion

{599 P.2d 128} The final sentence of article VII, section 1 of our state constitution prohibits the payment of money from public funds "for the direct benefit of any religious or other private educational institution." 1 The question in this case is whether Alaska's tuition grant program, AS 14.40.751-.806, violates this provision.

The tuition grant program awards Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student's private college and the tuition charged by a public college in the same area, not to exceed $2,500.00 annually. The student is required to apply the entire amount of the grant towards his or her tuition. AS 14.40.776 (a).

In May of 1976 the attorney general issued an opinion declaring tuition grants to be invalid as a direct benefit to private schools in violation of article VII, section 1. The Department of Administration then stopped paying tuition grants. Appellant Sheldon Jackson College, a private educational institution, filed suit to enjoin the department's termination order, but agreed to dismiss the suit without prejudice when a proposition to amend article VII, section 1, to permit tuition grants was placed on the ballot to be voted on in the general election of November, 1976. 2

The ballot proposition was rejected by the voters 64,211 to 54,636. Sheldon Jackson then renewed its lawsuit and another private university, Inupiat University of the Arctic, filed a complaint in intervention. The superior court concluded that the tuition grant program provides direct benefits to private educational institutions and thus violates article VII, section 1. Summary judgment was thereupon granted in favor of the state. We affirm.

{599 P.2d 129} I

The minutes of the Alaska Constitutional Convention show that an unsuccessful motion was made to delete entirely the direct benefit prohibition of article VII, section 1. 3 The proponent of the motion argued that the state constitutional provisions prohibiting the establishment of religion 4 and prohibiting spending public funds for private purposes, 5 were sufficient to accomplish the objectives of the direct benefit clause. By rejecting this proposal the convention made it clear that it wished the constitution to support and protect a strong system of public schools. 6 Other authorities have also suggested that a constitutional provision barring aid to all private schools serves to enforce the separation of church and state without requiring executive or judicial inquiry into the sectarian affiliation of particular schools, 7 and furthermore disengages the state from the undesirable task of withholding benefits solely on the basis of religious affiliation. 8

At the same time, in expressly rejecting alternative language that would have prohibited "direct *or indirect* benefits," 9 the delegates to Alaska's Constitutional Convention made it abundantly clear that they did not wish to prevent the state from providing for the health and welfare of private school students, 10 or from focusing on the special needs of individual residents. 11 Article VII,

section 1 was thus designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system.

The Alaska Constitution is apparently unique in its express ban only on "direct" benefits. However, in construing state constitutional provisions that prohibit "support" for private schools, 12 or state and federal proscriptions against the establishment of religion, 13 the courts have frequently resorted to a distinction between "direct" and "incidental" benefits. 14 Though the distinction may at times appear more "metaphysical" {599 P.2d 130} than precise, 15 the analyses found in these decisions are helpful in determining generally the type of government action intended to be prohibited by article VII's direct benefit clause. The following generalizations can be drawn from these authorities.

First, constitutional provisions governing aid to private schools have generally been perceived as requiring neutrality rather than hostility from the state; 16 thus the breadth of the class to which statutory benefits are directed is a critical area of judicial scrutiny. 17 For example, though the police and fire protection afforded a private school may provide the school with quite direct benefits, as when a campus fire is extinguished, such benefits are provided without regard to status and affiliation, and have universally been presumed to be constitutional. 18 Conversely, a benefit flowing only to private institutions, or to those served by them, does not reflect the same neutrality and non-selectivity. 19

A second central criterion in determining the constitutionality of a state aid program, is the nature of the use to which the public funds are to be put. As is apparent from the convention debate, the core of the concern expressed in the direct benefit prohibition involves government aid to *Education* conducted outside the public schools. Though any state assistance that relieves the burden on a private school to provide for the health and welfare of its students will free the school to concentrate its funds on its private educational mission, numerous delegates voiced their understanding that the direct benefit clause would not bar such incidental support. 20 An analogous distinction has frequently been drawn in establishment clause cases, where the pertinent inquiry is whether a statute impacts "essentially secular educational functions" that are separable from the school's religious instruction. 21

Third, in determining whether a school is directly benefitted by public funds, a court must consider, though not in isolation, the magnitude of the benefit conferred. A trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may. 22

Finally, while a direct transfer of funds from the state to a private school will of course render a program constitutionally suspect, 23 merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies. The courts have expressly noted {599 P.2d 131} that the superficial form of a benefit will not suffice to define its substantive character. 24

II

The foregoing observations are readily applicable to the present case. First, the class primarily benefitted by the tuition grant program consists only of private colleges and their students. Though the appellants characterize the statute as merely equalizing the positions of private and public university students, effectively the chief beneficiaries are the private colleges themselves. Unlike a statute that provides comparable dollar subsidies to all students, 25 Alaska's tuition grant program is not neutral, inasmuch as the only incentive it creates is the incentive to enroll in

a private college. Subsidy programs suffering from similar deficiencies have been repeatedly struck down under a variety of state constitutional provisions, 26 as well as under the Federal Constitution. 27

Second, the public funds expended under AS 14.40.776 constitute nothing less than a subsidy of the education received by the student at his or her private college, and thus implicate fully the core concern of the direct benefit provision. While the program may be motivated, as was stated in the preface to the statute as it was originally passed, by the desire to "help retain qualified students in Alaska," 28 such a laudable purpose cannot escape article VII's mandate that Alaska pursue its educational objectives through public educational institutions.

Furthermore, the magnitude of benefits bestowed under the tuition grant program is quite substantial. For the last year in which the tuition grants were paid, 1975-76, Sheldon Jackson received approximately six hundred thousand dollars from the program. The grants were then $1,850 for each eligible student, 29 and for the 1976-77 school year the grants were to be $2,500. 30 According to Sheldon Jackson it has suffered {599 P.2d 132} "a substantially diminished capacity" to function as an educational institution as a result of the termination of the tuition grant program, as reflected in a reduction of students, faculty, income and curriculum offerings. Inupiat University claims a similar impairment of function.

Finally, though the tuition grants are nominally paid from the public treasury directly to the student, the student here is merely a conduit for the transmission of state funds to private colleges. Before the state will deliver a check to the student, the latter must certify under oath and under penalty of perjury that he or she will pay it over to the college. AS 14.40.786. Simply interposing an intermediary "does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the court has held with unvarying regularity that one may not do by indirection what is forbidden directly." *Wolman v. Essex,* 342 F. Supp. 399, 415 (S.D. Ohio), *aff'd mem.,* 409 U.S. 808, 93 S. Ct. 61, 34 L. Ed. 2d 69 (1972).

Based on the foregoing we have no difficulty in concluding that the tuition grant program is in its effect a direct benefit to private educational institutions and therefore violates article VII, section 1 of our constitution. Though Sheldon Jackson points out that several courts have upheld tuition grant programs involving college students, 31 and that aid programs involving colleges have more readily been found constitutional than similar programs involving elementary and secondary schools, 32 the cited decisions rely on the *de minimis* degree of church control in the benefitted sectarian colleges. Such reasoning obviously has no application with respect to article VII's direct benefit prohibition, which bans aid to all private educational institutions, including those with no religious affiliation.

Sheldon Jackson also argues that the direct benefit clause was not meant to apply to colleges and universities, but only to primary and secondary private educational institutions. We see no basis for this contention. Both the plain language of the constitution and the minutes of the constitutional debate 33 indicate that all private educational institutions were meant to be included. The judgment is AFFIRMED.

Footnotes

1 Art. VII, 1 of the Alaska Const. provides:

Public Education. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

2 The proposition would have appended the following language to art. VII, 1: "however nothing in this section shall prevent direct aid to students in accordance with the law." 1976 House Joint Resolution 73 am S. In addition an explanation of the amendment appeared on the ballot as follows:

This is a proposal to amend Article VII, Section 1 of the Constitution of the State of Alaska to allow public funds to be used to provide direct aid such as scholarships and tuition equalization grants to students attending private educational institutions. The Attorney General of the State of Alaska has interpreted Article VII, Section 1 of the constitution as it now reads, to prohibit the state from giving tuition equalization grants to students attending private colleges or universities in the state.

3 Proceedings of the Alaska Constitutional Convention 1526-28 (hereafter cited as Proceedings).

4 Art. I, 4 provides in part: "No law shall be made respecting an establishment of religion . . . ."

5 Art. IX, 6 provides: "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."

6 For example, delegate Armstrong, speaking for the committee which drafted art. VII, 7, stated that it had sought to "provide and protect for the future of our public schools." 2 Proceedings at 1514. Delegate Coghill expressed the thought that the amount of tax dollars available for the support of public schools might be lessened if public funds were used to support a great many private schools. *Id.* at 1520. In *Spears v. Honda,* 51 Haw. 1, 449 P.2d 130, 135 (1968), the need to ensure that public schools would not be neglected is expressed as the reason underlying Hawaii's constitutional bar to public aid of private schools. Hawaii, however, apparently had an elite private school system, a system having no strong parallels in the Territory of Alaska.

7 *See Gaffney v. State Bd. of Educ.,* 192 Neb. 358, 220 N.W.2d 550, 553 (1974).

8 *See Everson v. Bd. of Educ.,* 330 U.S. 1, 16, 91 L. Ed. 711, 724, 67 S. Ct. 504 (1947); *Spears v. Honda,* 51 Haw. 1, 449 P.2d 130, 137 (1968).

9 Proceedings, *supra* note 3 at 1528.

10 *Id.* at 1513-16, 1519-20, 1521-22, 1524.

11 *Id.* at 1514.

12 *E.g.,* Mo. Const. art. IX, 8.

13 U.S. Const. amend. I provides in part: "Congress shall make no law respecting an establishment of religion . . . ."

14 *See, e.g., Wolman v. Walter,* 433 U.S. 229, 250, 254, 53 L. Ed. 2d 714, 733, 97 S. Ct. 2593 (1977); *Meek v. Pittenger,* 421 U.S. 349, 364-65, 44 L. Ed. 2d 217, 231, 95 S. Ct. 1753 (1975); *Comm. for Publ. Educ. v. Nyquist,* 413 U.S. 756, 783 n. 39, 37 L. Ed. 2d 948, 969 n. 39, 93 S. Ct. 2955 (1973); *Americans United v. Rogers,* 538 S.W.2d 711, 719 (Mo.), *cert. denied,* 429 U.S. 1029, 50 L. Ed. 2d 632, 97 S. Ct. 653 (1976). Though the Federal Constitution does not explicitly refer to the relationship between the government and religious schools, the Supreme Court's "direct benefit" standard has been formulated almost exclusively in the context of school aid cases, *supra,* and is thus valuable precedent in construing our own constitutional provision.

15 *See* L. Tribe, American Constitutional Law 840 (1978).

16 *See Roemer v. Bd. of Publ. Works of Md.,* 426 U.S. 736, 747, 49 L. Ed. 2d 179, 188, 96 S. Ct. 2337 (1976); *Lemon v. Kurtzman,* 403 U.S. 602, 614, 29 L. Ed. 2d 745, 756, 91 S. Ct. 2105 (1971); *Everson v. Bd. of Educ.,* 330 U.S. 1, 18, 91 L. Ed. 711, 724-25, 67 S. Ct. 504 (1947).

17 *See, e.g., Comm. for Publ. Educ. v. Nyquist,* 413 U.S. 756, 782 n. 38, 37 L. Ed. 2d 948, 968 n. 38, 93 S. Ct. 2955 (1973); *Springfield Schl. Dist. v. Dept. of Educ.,* 483 Pa. 539, 397 A.2d 1154, 1163 (1979).

18 *See* citations *supra* notes 16 and 17.

19 *See infra* notes 26 and 27.

20 *See supra* note 10. In *Matthews v. Quinton,* 362 P.2d 932 (Alaska 1961); *cert. denied,* 368 U.S. 517, 7 L. Ed. 2d 522, 82 S. Ct. 530 (1962), a statute enabling private school children living far from their schools to ride public school buses at public expense, was held violative of the direct benefit prohibition. We do not rely on *Matthews* in reaching today's decision, and thus have no occasion to overrule or re-affirm it. A substantial question, however, can be raised as to its continuing vitality in light of the analysis which we employ in the present opinion.

21 *Roemer v. Bd. of Publ. Works of Md.,* 426 U.S. 736, 762, 49 L. Ed. 2d 179, 197, 96 S. Ct. 2337 (1976). *See Meek v. Pittenger,* 421 U.S. 349, 366, 44 L. Ed. 2d 217, 232, 95 S. Ct. 1753 (1975).

22 *Compare Lendall v. Cook,* 432 F. Supp. 971 (E.D. Ark. 1977)(program involving eight scholarships upheld), *with Meek v. Pittenger* (striking down a state loan of nonideological instructional materials, in part on the basis of the substantiality of aid to the overall functioning of the benefitted schools).

23 *Id.*

24 *Wolman v. Walter,* 433 U.S. 229, 250, 53 L. Ed. 2d 714, 733-34, 97 S. Ct. 2593 (1977) (striking down a loan of instructional materials to students after similar loan to schools had been struck down in *Meek); Comm. for Publ. Educ. v. Nyquist,* 413 U.S. 756, 785-86, 37 L. Ed. 2d 948, 970, 93 S. Ct. 2955 (1973) (striking down reimbursements to parents for private school tuitions).

25 *Minn. Civ. Lib. U. v. Roemer,* 452 F. Supp. 1316, 1322 (D.Minn. 1978)(tax deduction for parents of all school children upheld); *Americans United for the Sep. of Ch. and State v. Blanton,* 433 F. Supp. 97 (M.D. Tenn.), *aff'd mem.,* 434 U.S. 803, 98 S. Ct. 39, 54 L. Ed. 2d 65 (1977)(public and private college students eligible for grants); *Durham v. McLeod,* 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dismissed for lack of a substantial federal question,* 413 U.S. 902, 93 S. Ct. 3060, 37 L. Ed. 2d 1020 (1973)(loans to all college students). *But see Miller v. Ayres,* 213 Va. 251, 191 S.E.2d 261 (1972) (conditional grants to public and private college students held unconstitutional); *Weiss v. Bruno,* 82 Wash. 2d 199, 509 P.2d 973 (1973) (grants to needy private school children not saved by summer school grants to needy public school children).

26 *See Klinger v. Howlett,* 56 Ill. 2d 1, 305 N.E.2d 129 (1973); *Opinion of the Justices,* 357 Mass. 846, 259 N.E.2d 564 (1970); *Opinion of the Justices,* 109 N.H. 578, 258 A.2d 343 (1969).

27 *Comm. for Publ. Educ. v. Nyquist,* 413 U.S. 756, 782 n. 38, 37 L. Ed. 2d 948, 968 n. 38, 93 S. Ct. 2955 (1973) (tuition reimbursement to parents of non-public school children); *Sloan v. Lemon,* 413 U.S. 825, 37 L. Ed. 2d 939, 93 S. Ct. 2982 (1973)(tuition reimbursement); *Wolman v. Essex,* 342 F. Supp. 399, 412 (S.D. Ohio), *aff'd mem.,* 409 U.S. 808, 93 S. Ct. 61, 34 L. Ed. 2d 69 (1972)("the reimbursement grant aspects . . . . are directed only towards the parents of children who attend non-public schools"). *See also Meek v. Pittenger,* 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975)(auxiliary services only provided to non-public school students); *Publ. Funds for Publ. Schools of N.J. v. Marburger,* 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.,* 417 U.S. 961, 41 L. Ed. 2d 1134, 94 S. Ct. 3163 (1974) (private school students reimbursed for textbooks while public schoolers only loaned books); *Members of Jamestown Schl. Comm. v. Schmidt,* 427 F. Supp. 1338, 1348 (D.R.I.1977)(only private school students bused out of district); *Americans United for Sep. of Ch. and State v. Benton*, 413 F. Supp. 955 (D. Iowa 1976) (same).

28 Section 1 ch. 230 SLA 1970.

29 Section 2 ch. 136 SLA 1975.

30 AS 14.40.776(a)(2).

31 *Lendall v. Cook,* 432 F. Supp. 971 (E.D. Ark. 1977); *Americans United for Sep. of Ch. and State v. Bubb,* 379 F. Supp. 872 (D. Kan. 1974)(upheld with respect to most, but not all, church-related schools); *Americans United v. Rogers,* 538 S.W.2d 711 (Mo.), *cert. denied,* 429 U.S. 1029, 50 L. Ed. 2d 632, 97 S. Ct. 653 (1976).

32 *See Roemer v. Bd. of Publ. Works of Md.,* 426 U.S. 736, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976)(non-categorical grants to colleges); *Hunt v. McNair,* 413 U.S. 734, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)(state leaseback arrangement with Baptist college); *Tilton v. Richardson,* 403 U.S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1971) (construction grants to colleges).

33 The convention delegates were informed by the chairperson of the authoring committee that the committee intended the phrase "other private educational institutions" to include "any educational institution that is not run by the state." 2 Proceedings, *supra* note 3 at 1511. *See also id.* at 1532.

LEGAL SERVICES

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MEMORANDUM December 1, 2010

SUBJECT: Education Vouchers as Scholarships
(Work Order No. 27-LS0223\A)

TO: Representative Wes Keller
Attn: Jim Pound

FROM: Jean M. Mischel
Legislative Counsel

I have enclosed a draft version of an education voucher system based generally on the material provided, accommodating your desire to avoid a significant rewrite of the current funding system for public education and to base the draft on the "mission statement" rather than the model legislation provided. I tried to condense the proposal to that end but received no specific staff direction in doing so. The time allotted in your request does not allow for rewrites.

Although this proposal is unlike your previous education voucher request this session in that this draft attempts to provide vouchers as scholarships for use at both public and private schools, it is my opinion that the draft will not survive Alaska's express constitutional prohibition against providing public funds for the benefit of a private school under article VII, section 1. That section provides, in part:

> No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The Alaska Supreme Court has interpreted that section to mean that a tuition assistance program awarding students attending private colleges an amount equal to the difference between public and private college tuition is unconstitutional. Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

Sheldon Jackson is directly relevant to the proposed scholarship system. In that case, the Court established a three part test for determining the validity of public programs that provide economic benefit to private schools. First, the Court looks at the breadth of the class to which the economic benefits are directed. Second, the Court looks at how the public money is to be used; i.e., whether the benefit to the private school is incidental to education (as with fire and police protection) or whether it amounts to direct aid to education (as with tuition and books). Third, the Court looks at the magnitude of the benefit to private education. Significantly, the Court noted that channeling funds to a

private school through an intermediary (such as the student or parent) will not save an otherwise unconstitutional program providing aid to private schools.

In the Sheldon Jackson case, the Court struck down the state's tuition assistance program as violative of all three parts of the test. The class which the tuition assistance program benefitted consisted almost entirely of private schools, the funds were to be used directly for educational purposes (tuition), the benefit conferred on these schools was quite substantial, and the fact that the money was actually paid directly to the students, not the schools, did not mitigate the fact that the students were required to turn the money directly over to the private schools.

The proposed "scholarship" system (which appears to be a voucher system) suffers some of the same infirmities as the tuition assistance program did despite the inclusion of public schools. The money would go to private schools or public schools for the cost of education and facilities. A large part of the class benefitted would be private schools since the public schools currently receive public funding.

The second part of the test would also be violated because the vouchers would be used as a direct benefit to private education rather than an incidental benefit.

The third part of the test, the magnitude of the benefit, also presents a problem. The vouchers are to cover the entire cost of tuition or the cost of tuition plus the facilities spending. Obviously, the benefit to private schools would be substantial and, consequently, unconstitutional.

The proposed scholarship system is also potentially in violation of the "establishment" and "freedom of religion" clauses of article I, section 4 of the Constitution of the State of Alaska. I am aware that voucher systems in Wisconsin and Ohio have survived constitutional challenge under the U.S. First Amendment. See Zelman v. Simmon - Harris 536 U.S. 639 (2002). However, that does not mean scholarships would be upheld under art. I, section 4 of the state constitution. In addition, the Court in Sheldon Jackson noted that First Amendment cases upholding limited forms of assistance to religious schools have no relevance to the preceding analysis of article VII, section 1 of the state constitution. The prohibition against state aid to any private school is much broader than the prohibition under the First Amendment which relates only to religious schools. For example, the United States Supreme Court case upholding a Minnesota program of tax credits for public and private school expenses against a First Amendment challenge (Mueller v. Allen, 463 U.S. 388 (1983)) is not relevant to the analysis of the proposed voucher system in Alaska. Not only did that case involve a tax credit system rather than a voucher system, but it was challenged under the First Amendment. The case did not consider the kind of prohibition against direct aid to private schools found in the Alaska constitution. In other words, even if the scholarship system could survive scrutiny under the First Amendment, it would still violate article VII, section 1 of the state constitution.

In order to survive constitutional scrutiny under the state constitution, a voucher system, such as the proposed parental choice scholarship system, would have to satisfy all three parts of the Sheldon Jackson test and scrutiny under the First Amendment. It is difficult to imagine a voucher system, as I understand the voucher system to work, that would not violate the constitution. The system would have to benefit students in public as well as private schools without giving any substantial direct benefit to education in the private schools. By its nature, the voucher system seems to work against this.

The problem could be circumvented by amending article VII, section 1 of the state constitution as you have proposed in a separate draft resolution.

In addition to constitutional considerations, this draft leaves many unanswered and potentially very expensive questions. For example, do you really intend to make a home district pay transportation costs? How is the student count and scholarship funding affected if a student transfers midyear? How does a public school district which is paid under the existing formula (AS 14.17) account for direct scholarship payments to schools? The material provides no direction on these and other questions that arise under Alaska law.

If I may be of further assistance, please feel free to contact me.

JMM:ljw
10-436.ljw

Enclosure

HJR

33

<TARGET><BILL>HJR 33</BILL><SUBJECT>HJR 33</SUBJECT><COMM>HJUD27</COMM></TARGET>

2/24/12
PS

received

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA

MEMORANDUM

DATE: February 23, 2012

TO: Representative Carl Gatto

FROM: Representative Les Gara

RE: Hearing Request for CSHJR 33: Limiting Independent Expenditures

On behalf of the eight co-sponsors, we respectfully request that the Committee Substitute for House Joint Resolution 33, relating to the limiting of corporate and union independent expenditures to candidates for office, be scheduled for a hearing in the House Judiciary Committee. Please feel free to contact me, or my aide Toby Smith, with questions at 465-2647.

Attached you will find a background packet for CSHJR 33, including the Committee Substitute version of the bill which was moved out of the State Affairs Committee, a sponsor statement, and backup materials. Please note that included in this packet is a memo to the State Affairs Committee which outlines the changes that were made to the original version of the bill and which are now included in the Committee Substitute version.

We will let you know which witnesses will be testifying once the resolution has been scheduled.

Thank you for your consideration.

Representative Les Gara

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA
REPRESENTATIVE BERTA GARDNER
REPRESENTATIVE DAVID GUTTENBERG
REPRESENTATIVE LINDSEY HOLMES
REPRESENTATIVE BETH KERTTULA
REPRESENTATIVE CHRIS TUCK
REPRESENTATIVE SCOTT KAWASAKI
REPRESENTATIVE BOB MILLER

Sponsor Statement

CSHJR 33: Resolution Relating to Limiting Campaign Expenditures

Many Americans recognize that the ability of large contributions from corporations, wealthy individuals and organizations to political candidates harms the ability of average citizens to have a voice in their own government. Prior to the landmark United States Supreme Court ruling of Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), unlimited independent expenditures from corporations and unions was prohibited. Now, corporations and unions can make unlimited independent expenditures supporting or opposing a candidate for public office.

Additionally, a prior ruling, Buckely v. Vallejo, allowed individuals to make unlimited independent expenditures, the effects of which we are now seeing in the flood of Super PAC ads that are, this political season, distorting the political process.

Unless the United States Supreme Court reverses these rulings, the only way to reverse the harmful effects of these decisions is to amend the Constitution of the United States.

Therefore, this resolution calls upon the Alaska State Legislature to urge the United States Congress and the President of the United States to work across party lines and propose a constitutional amendment to prohibit corporations, wealthy individuals and unions from making unlimited independent expenditures.

Please feel free to contact our office if you have any questions.

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

ALASKA STATE LEGISLATURE

REPRESENTATIVE LES GARA

MEMORANDUM

TO: Chair Lynn and State Affairs Committee Members

FROM: Representative Les Gara

DATE: February 17, 2012

RE: HJR 33

Dear Chair Lynn and Committee Members:

We have crafted a proposed Committee Substitute to HJR 33 to make the following changes requested by Reps. Seaton and Johansen.

We have deleted the reference to limiting contributions by "individuals" as Reps. Johansen and Seaton have requested.

We have added the word "union" to the first whereas, as requested by Rep. Johansen, and deleted the "narrow five to four" reference to the Supreme Court *Citizens United* decision.

We have deleted the final whereas which referenced distortion of the political process.

We have made clear in the "Be It Resolved" section that we are only addressing "independent expenditures supporting or opposing candidates for public office" per the discussion between Reps. Seaton and Gruenberg.

I cannot speak for the committee members, or how they will vote, but these seemed to be the proposals the committee showed substantial support for during the last hearing.

Please let me know if you have any questions.

Thank you.

Rep. Les Gara

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-2647 • Fax (907) 465-3518
June-December: 716 W. 4th Avenue • Anchorage, AK 99501• (907) 269-0106• Fax (907) 269-0109
Representative_Les_Gara@legis.state.ak.us

27-LS1231\I
Bullard
2/16/12

CS FOR HOUSE JOINT RESOLUTION NO. 33( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GARA, Tuck, Holmes, Miller, Gardner, Kawasaki, Kerttula, Petersen

A RESOLUTION

Urging the United States Congress and the President of the United States to work to amend the Constitution of the United States to prohibit corporations, unions, and other organizations from making unlimited independent expenditures supporting or opposing candidates for public office.

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

WHEREAS a vast majority of Americans recognize that the influence of large contributions by corporations, unions, and other organizations harms the ability of average citizens to have a voice in their own government; and

WHEREAS the decision of the United States Supreme Court in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), allows corporations, unions, and other organizations to make unlimited independent expenditures supporting or opposing a candidate for public office; and

WHEREAS states and the United States Congress were permitted to ban unlimited independent expenditures from corporations, unions, and other organizations until the ruling of the United States Supreme Court in Citizens United v. Federal Election Commission; and

WHEREAS much of the hundreds of millions of dollars being spent by corporations, unions, and other organizations since the ruling of the United States Supreme Court in Citizens United v. Federal Election Commission is going to negative ads, which often misinform voters rather than lead to a productive discussion of the states' and nation's most important issues; and

WHEREAS, unless the United States Supreme Court reverses its ruling, the only way to reverse the harmful effects of the Citizens United ruling is to amend the Constitution of the United States;

BE IT RESOLVED that the Alaska State Legislature urges the United States Congress and the President of the United States to work across party lines to propose a constitutional amendment to prohibit corporations, unions, and other organizations from making unlimited independent expenditures supporting or opposing candidates for public office.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; all other members of the 112th United States Congress; and the presiding officers of the legislatures of each of the other 49 states.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HJR 33**
Fiscal Note Number:
() Publish Date:

Identifier (file name): HJR 33
Title: Amend U.S. Constitution Re Campaign Money
Sponsor: Representative Gara
Requester:

Dept. Affected:
Appropriation:
Allocation:
OMB Component Number:

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

None

Prepared by: House State Affairs Committee
Division: Representative Bob Lynn, Chair
Approved by:

Phone: (907) 465-2794
Date/Time: 02/08/2012 2:18pm
Date: 2/8/2012

(Revised 11/18/2011 OMB)

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 21, 2012

SUBJECT: Resolution relating to *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010)
(Work Order No. 27-LS1231\A)

TO: Representative Les Gara
Attn: Toby Smith

FROM: Alpheus Bullard
Legislative Counsel

This memorandum accompanies the resolution described above.

Your draft resolution related to "contributions" in addition to "independent expenditures." As I discussed with Toby, *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), does not address campaign contributions made to candidates.

Citizens United concerned independent election campaign expenditures made by corporations. The Court held that the government cannot suppress political speech, in the form of independent election campaign expenditures, on the basis of the speaker's corporate identity. Because one of the statutes involved in the case and considered by the Court concerned labor unions, it was also, arguably, a case about independent election campaign expenditures made by labor unions, though that is not made explicit in the opinion. Laws regulating corporate and union contributions to candidates, party committees, and political action committees, whether direct or in-kind, were not directly affected by the ruling.

While I modified the resolution to address only independent expenditures and redrafted the language of the resolution to conform with the *Manual of Legislative Drafting* (2011), you may wish to further amend the content and language of the resolution. Please review the draft to ensure that it remains consistent with your intent.

Please also note that the Lieutenant Governor's office will not e-mail resolutions and has asked our office not to draft resolutions requiring this.

If you have questions, would like a summary of the *Citizens United* decision, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:ljw
12-033.ljw

Enclosure

received 3/16/2012 PS

HJR 33
Amend U.S. Constitution
Re: Campaign Money

WOMEN'S SUMMIT

ALLIANCE for REPRODUCTIVE JUSTICE

2012 Women's Summit

Dear Representative Datto,

Please bring up for debate House Joint Resolution 33 and Senate Joint Resolution 13 to constitutionally limit and prohibit corporate contributions from corporations, unions and other organizations. A corporation should not be able to have more sway over our government than the people our government should represent. It seems we have become an oligarchy rather than a democracy. Please bring this resolution to the floor. One person should equal one vote.

Thank you for your service to our State.

Sincerely,

E. Shena Marcil

E. Shena Marcil
706 E. 73rd Ave #1
Anchorage, AK 99518
akshena@gmail.com

2012 Women's Summit Sponsor
Alliance for Reproductive Justice

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Business and Professional Women-North to the Future ♦ Alaska Aids Assistance Association ♦ YWCA Alaska
Planned Parenthood of the Great Northwest ♦ Pride Foundation ♦ Anchorage NOW
Alaska Federation of Business and Professional Women ♦ Juneau Democrats

Supporters
Kachemak Bay Family Planning Clinic ♦ ACLU of Alaska ♦ PFLAG

Melanie Lesh

From: Rep. Les Gara
Sent: Thursday, March 01, 2012 5:17 PM
To: Melanie Lesh
Cc: Toby Smith
Subject: HJR 33 Hearing?

Hi Melanie. We've substantially narrowed down our resolution seeking a federal constitutional amendment banning unlimited union and corporate "independent expenditures" – those are expenditures that are not connected to a campaign and spent independently of a candidate's control. I've spoken to committee members and it seems we have the support to pass it. I just spoke to Steve Thompson. I know it's not Carl's favorite bill – but can we get a hearing and get it out of committee?

The original resolution also sought to ban unlimited expenditures by individuals, and that was taken out – which is fine. I don't want to bug Carl – texted him this am just to check up on him.

3/5/12 mtg. ✓ Mel E

★ SJR 13

Sharman Haley

haley.sharman @ gmail.com

Melanie Lesh

From: Rep. Carl Gatto
Sent: Friday, March 02, 2012 8:02 AM
To: Melanie Lesh
Subject: Fwd: Three More Ways to Take Action on HJR 33

Begin forwarded message:

From: Ruth Danner <ruthdannerofjuneau@gmail.com>
Date: March 2, 2012 5:57:04 AM AKST
To: <Representative_Carl_Gatto@legis.state.ak.us>,
<Representative_Steve_Thompson@legis.state.ak.us>,
<Representative_Wes_Keller@legis.state.ak.us>,
<Representative_Bob_Lynn@legis.state.ak.us>,
<Representative_Lance_Pruitt@legis.state.ak.us>,
<Representative_Max_Gruenberg@legis.state.ak.us>,
<Representative_Lindsey_Holmes@legis.state.ak.us>,
<Representative_Mike_Hawker@legis.state.ak.us>
Subject: Re: Three More Ways to Take Action on HJR 33

Dear House Judiciary Committee Members:

I serve as an Assembly member here in Juneau, but am writing to you only as an individual. I have never heard a single individual say they support the Citizens United decision or unlimited corporate and union political contributions. The current situation concentrates too much money with a focused decision maker. Corporate and union funds come from their shareholders and union members and the initiatives they these entities choose to support do not represent the majority decision of the stakeholders.

Please hear HJR 33 and keep it moving.

Thank you for your consideration and for your service.

Sincere regards,

Ruth Danner
CBJ Assembly Member
1028 Arctic Circle
Juneau, Alaska 99801
(907) 321-2283
RuthDannerofJuneau@gmail.com

Melanie Lesh

From: B Knight <bknight15@hotmail.com>
Sent: Thursday, March 01, 2012 9:56 PM
To: Rep. Carl Gatto; Rep. Steve Thompson; Rep. Wes Keller; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Max Gruenberg; Rep. Lindsey Holmes; Rep. Mike Hawker
Subject: Please schedule a hearing for HJR 33

Dear Alaska House Judiciary Members,

I am writing to request that you schedule a hearing on HJR 33 sponsored by Rep. Les Gara. This resolution would send a unified message to Congress and the President to "work to amend the Constitution of the United States to prohibit corporations, unions, and other organizations from making unlimited independent expenditures supporting or opposing candidates for public office." This is not a Republican nor a Democrat issue.The very fabric of representative government was ripped away from all Americans with the US Supreme Court *Citizens United* decision. I hope you not only allow for a hearing of HJR 33 but support it as well.

Thank you,

Rebecca Knight
PO Box 1331
Petersburg, Alaska 99833

Legislators Tell Murkowski Their Concerns

By Dave Donaldson, APRN - Juneau | February 23, 2012 - 5:35 pm

Content blocked by your organization

Near the end of her presentation, Senator Murkowski asked legislators to communicate with the federal government and with her office about any concerns they might have.

She was quickly asked about two messages to the federal government that are pending action in the legislature this session.

A resolution by Anchorage Republican Charisse Millett asks the Department of the Interior and the Bureau of Land Management to clean up 137 abandoned oil wells drilled by the federal government within the National Petroleum Reserve. The wells were part of government-sponsored NPR-A exploration between 1942 and 1982 and have never been plugged or subject to remediation. Leaving them as they are is a violation of state and federal law. Murkowski said that is "Offensive."

> You want an action plan, let's raise hell. This is just wrong. It's just wrong and they can't handle the fact that they have turned their head to the responsibility. And yet, they won't let you walk anywhere up there without sixteen permits – and yet they have failed in their environmental stewardship in a way that is so egregious.

She told Millett that seven of the wells have been cleaned. The next thirty seven wells on the federal list would cost only $50-million to close – but the Interior Department refuses to work on more than one per year.

Another resolution pending in the House is by Anchorage Democrat Les Gara that calls for a Constitutional Amendment to prevent corporations or unions from being able to make unlimited, secret contributions to political campaigns. That was the result of the U-S Supreme Court's now-famous Citizens United decision that allows private money into the process without having the source of that money identified.

Murkowski said the decision has led to a phenomenal impact on this year's elections and is counter to the idea of transparent government.

> For lots of different reasons, people don't like to disclose. For lots of good reasons, we need to disclose. So here's where I am on Citizens United. If we can figure out a way that legislatively that we can require greater disclosure and we need to do it soon.

Murkowski pointed out that she was the beneficiary of a SuperPAC's support in the 2010 election. However, she said the principle supporters or all such groups should be made

public – however, she doesn't expect any federal action until after this year's campaigns are over.

Millett's resolution on what's called the Legacy Wells is in the Rules Committee and could be on the House floor at any time. Gara's resolution on Citizens United is in the House Judiciary Committee.

The Washington Post

Poll: Large majority opposes Supreme Court's decision on campaign financing

Advertisement

By Dan Eggen
Washington Post Staff Writer
Wednesday, February 17, 2010; 4:38 PM

Americans of both parties overwhelmingly oppose a Supreme Court ruling that allows corporations and unions to spend as much as they want on political campaigns, and most favor new limits on such spending, according to a new Washington Post-ABC News poll.

Eight in 10 poll respondents say they oppose the high court's Jan. 21 decision to allow unfettered corporate political spending, with 65 percent "strongly" opposed. Nearly as many backed congressional action to curb the ruling, with 72 percent in favor of reinstating limits.

The poll reveals relatively little difference of opinion on the issue among Democrats (85 percent opposed to the ruling), Republicans (76 percent) and independents (81 percent).

The results suggest a strong reservoir of bipartisan support on the issue for President Obama and congressional Democrats, who are in the midst of crafting legislation aimed at limiting the impact of the high court's decision.

"If there's one thing that Americans from the left, right and center can all agree on, it's that they don't want more special interests in our politics," Sen. Charles Schumer (D-N.Y.), who is spearheading the legislative effort, said in a statement after the poll was released Wednesday.

"We hope we can get strong and quick bipartisan support for our legislation, which passes constitutional muster but will still effectively limit the influence of special interests."

Under legislation being drafted by Schumer and Rep. Chris Van Hollen (D-Md.), companies with foreign ownership or federal contracting ties would be limited in their ability to spend corporate money on elections.

The lawmakers also want to require companies to inform shareholders about political spending; to mandate special "political activities" accounts for corporations, unions and advocacy groups; and to require that corporate executives appear in political advertising funded by their companies.

Other likely proposals include banning participation in U.S. elections by bank bailout recipients.

Senate Minority Leader Mitch McConnell (Ky.) and other Republican lawmakers have praised the high court ruling as a victory for free speech, however, and have signaled their intent to oppose any legislation intended to blunt the impact of the court's decision.

In *Citizens United v. Federal Election Commission*, the high court ruled 5-4 that corporations have the same rights as individuals when it comes to political speech and can therefore use their profits to support or oppose individual candidates. The decision appears to open the door to unlimited spending by corporations, trade groups and unions in the weeks leading up to an election, which has been explicitly

banned for decades.

Democrats have seized on the ruling as an example of judicial overreach and vowed to enact new limits on political spending by corporations, which have traditionally favored Republicans in their contribution patterns. Obama said in his State of the Union address that the ruling will "open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."

Republicans and business groups have rallied around the ruling, arguing that the decision merely levels the playing field with free-spending unions and other liberal interest groups.

Jeff Patch, communications director for the Center for Competitive Politics, which supports the court's decision, said the ruling's potential impact has been distorted by Obama and other Democratic critics.

"Campaign finance is an incredibly complex legal framework, and most Americans have an incentive to remain rationally ignorant about the laws and regulations at issue," Patch wrote in a news release.

The poll, however, suggests there may be political risks for the GOP in opposing limits that appear to be favored by the party's base.

Nearly three-quarters of self-identified conservative Republicans say they oppose the Supreme Court ruling, with most of them strongly opposed. Some two-thirds of conservative Republicans favor congressional efforts to limit corporate and union spending, though with less enthusiasm than liberal Democrats.

Indeed, the poll shows remarkably strong agreement about the ruling across all demographic groups, and big majorities of those with household incomes above and below $50,000 alike oppose the decision. Age, race and education levels also appeared to have little relative bearing on the answers.

The questions on corporate political spending were included as part of a poll conducted Feb. 4 to 8 by conventional and cellular telephone. The margin of sampling error for the for the full poll of 1,004 randomly selected adults is plus or minus three percentage points.

Polling director Jon Cohen contributed to this report.

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Outside Spending

Campaign contributions and lobbying expenditures are not the only ways that money is used influence public policy decisions.

Thus far, outside groups (parties, super PACs, corporations, unions, other groups, etc.) have spent **$55,573,113** during the 2012 election cycle to run ads, make phone calls, distribute literature and engage in other activities to sway the electorate about candidates and issues.

Organizations not directly affiliated with political parties accounted for **$51,794,091** of that amount, of which **$45,012,210** was spent by **305** super PACs.

A January 2010 Supreme Court decision (*Citizens United v. Federal Election Commission*) now permits corporations and unions to make such expenditures from their treasuries directly and through other organizations. The decision allows such activity to take place without complete or immediate disclosure of who funds such communications, preventing voters from understanding who is truly behind many political messages.

Read more...

Select a cycle: 2012

Top Groups Making Outside Expenditures in 2012 Elections, Excluding Party Committees

Organization	Total	View*	Independent Expenditures	Elec Comm	Comm Costs	Super PAC	527s†	501c
Restore Our Future	$17,534,037	C	$17,534,037	$0	$0	x		
Winning Our Future	$8,838,997	C	$8,838,997	$0	$0	x		
Make Us Great Again	$3,959,824	C	$3,959,824	$0	$0	x		
Endorse Liberty	$3,347,176	C	$3,347,176	$0	$0	x		
Our Destiny PAC	$2,453,204	C	$2,453,204	$0	$0	x		
Red, White & Blue	$1,954,534	C	$1,954,534	$0	$0	x		
Ending Spending	$1,742,479	C	$0	$1,742,479	$0	x		x
House Majority PAC	$1,612,169	L	$1,612,169	$0	$0	x		
Senate Conservatives Fund	$1,064,555	C	$1,064,555	$0	$0			
American Crossroads	$1,064,223	C	$1,064,223	$0	$0	x		

VIEW ALL GROUPS

* C = Conservative, L = Liberal

† Indicates that this organization has a 527 committee registered with the IRS. The committee's 527 spending outside of electioneering communications is NOT included in these totals. Read more about 527s.

Top 2012 Races Attracting Outside Spending, Excluding Party Committees

Race	Total	For Dems	Against Dems	For Repubs	Against Repubs
President	$43,528,889	$32,657	$1,461,187	$19,987,916	$22,018,847
New York District 26	$1,519,007	$173,341	$313,449	$68,917	$863,300
Texas Senate	$1,103,173	$0	$0	$634,413	$468,760
Nebraska Senate	$717,409	$406,345	$742	$310,322	$0
Oregon District 1	$664,485	$57,334	$0	$13,051	$594,100
Nevada District 2	$296,139	$0	$188,952	$104,937	$2,250
New York District 9	$270,442	$0	$68,555	$39,231	$162,656
Iowa District 3	$208,664	$0	$0	$0	$208,664
Utah Senate	$186,539	$0	$0	$51,351	$135,188
Massachusetts Senate	$166,017	$10,017	$0	$0	$156,000

VIEW ALL RACES

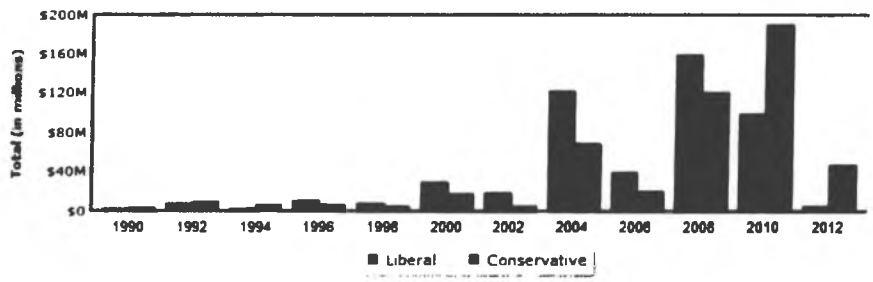
Why don't the numbers add up?

Top 2012 Candidates Attracting Outside Expenditures, Excluding Party Committees

Candidate	Race	Total	For Dems	Against Dems	For Repubs	Against Repubs	Results
Gingrich, Newt (R)	PRES	$18,805,570	$0	$0	$3,317,794	$16,487,776	
Romney, Mitt (R)	PRES	$8,912,582	$0	$0	$3,913,502	$4,999,080	
Perry, Rick (R)	PRES	$3,964,824	$0	$0	$3,964,824	$0	
Paul, Ron (R)	PRES	$3,857,090	$0	$0	$3,724,100	$132,990	
Santorum, Rick (R)	PRES	$2,511,525	$0	$0	$2,112,524	$399,001	
Huntsman, Jon (R)	PRES	$2,453,454	$0	$0	$2,453,454	$0	
Obama, Barack (D)	PRES	$1,522,126	$32,657	$1,461,187	$0	$0	
Corwin, Jane (R)	NY26	$649,611	$0	$0	$68,917	$480,694	
Cruz, Ted (R)	TXS2	$634,413	$0	$0	$634,413	$0	
Comilles, Robert (R)	OR01	$607,151	$0	$0	$13,051	$594,100	
VIEW ALL CANDIDATES							

GROUP FILTER: **Excluding Party Committees** | All Groups

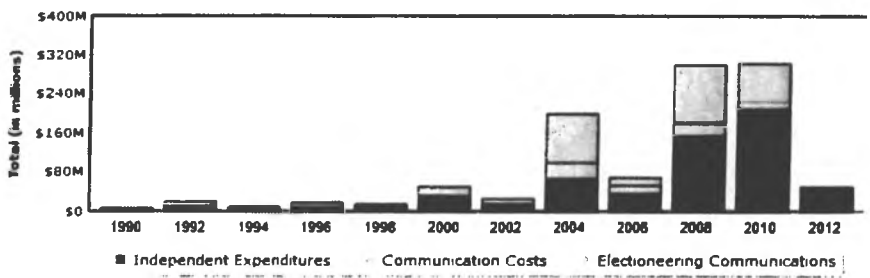
Total Liberal vs. Conservative Outside Spending, Excluding Party Committees



Total Outside Spending by Election Cycle, Excluding Party Committees

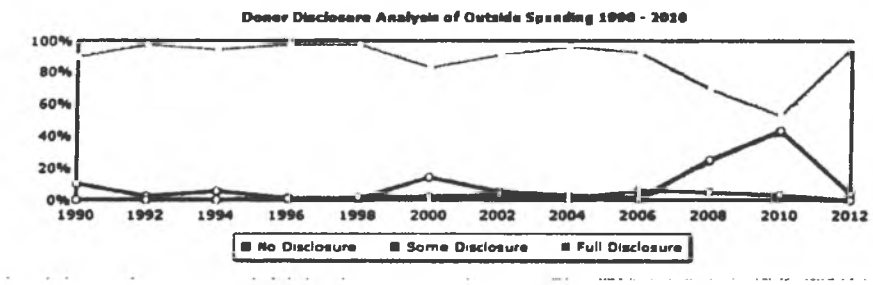
See: **entire cycle** | Year-to-date

Download:



Cycle	Total	Independent Expenditures	Electioneering Communications	Communication Costs
2012	$51,794,091	$49,804,457	$1,918,698	$70,936
2010	$304,679,091	$210,912,167	$79,958,557	$13,808,367
2008	$301,679,929	$156,841,894	$119,256,138	$25,581,897
2006	$68,852,502	$37,394,589	$15,152,326	$16,305,587
2004	$200,102,202	$68,716,443	$100,218,129	$31,167,630
2002	$27,289,285	$16,588,844	N/A	$10,700,441
2000	$50,796,592	$33,034,631	N/A	$17,761,961
1998	$15,191,107	$10,266,937	N/A	$4,924,170
1996	$17,884,043	$10,167,742	N/A	$7,716,301
1994	$9,538,844	$5,219,215	N/A	$4,319,629
1992	$19,635,123	$10,947,342	N/A	$8,687,781
1990	$7,213,219	$5,650,524	N/A	$1,562,695
Show/hide 1990-2004 cycles				

Outside Spending by Disclosure, Excluding Party Committees



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January 7, 2012

As Primary Looms in N.H., Donor Gives Lift to Gingrich

By MICHAEL D. SHEAR and NICHOLAS CONFESSORE

MANCHESTER, N.H. — As candidates spent the weekend trying to catch up to Mitt Romney in New Hampshire, with the primary just two days away, a longtime supporter of Newt Gingrich donated $5 million to a "super PAC" backing his presidential bid, providing a major boost to Mr. Gingrich's ailing campaign.

The donation by Sheldon Adelson was reported Saturday night by The Washington Post. He has long been a generous patron of Mr. Gingrich's political career. The super PAC, Winning Our Future, was formed last month by Becky Burkett, who served until earlier last year as chief development officer for American Solutions, a political action committee that Mr. Gingrich founded. The cash infusion from Mr. Adelson instantly catapults Winning Our Future into the top ranks of candidate super PACs, groups that can raise unlimited amounts of money from donors and spend it all on advertisements and other efforts to back a specific candidate, so long as they do not coordinate with the campaign.

Ms. Burkett declined to comment on the donation on Saturday.

Restore Our Future, a super PAC backing Mr. Romney, the former Massachusetts governor, and run by his former aides, spent millions of dollars in Iowa on advertisements attacking Mr. Gingrich. The withering barrage was widely credited with torpedoing Mr. Gingrich's standing in the state and opening the door for Mr. Romney to narrowly win last Tuesday's caucuses.

The group is already running ads in Florida and South Carolina attacking Mr. Gingrich, and had spent roughly $3.7 million by the beginning of last week.

Rick Santorum, who has emerged as the leading rival to Mr. Romney, began the weekend looking past Tuesday's primary to the 11-day battle in South Carolina that will follow.

Mr. Santorum, a former United States senator from Pennsylvania, picked up support from an important social conservative on Saturday, and his campaign completed the purchase of

time for television commercials that will run in South Carolina from Tuesday through Jan. 17, according to Republicans who have been tracking the television market. He planned to head south to Greenville, S.C., as soon as Sunday morning's debate was over.

"We feel great about South Carolina," Mr. Santorum said.

The new commercials would be the Santorum campaign's largest commitment yet in South Carolina, which will hold its primary on Jan. 21. Mr. Santorum was already getting support from his "super PAC," the Red, White and Blue Fund. It began running a 30-second commercial titled "Pride" on Saturday, which emphasizes what his advisers believe is his best appeal to South Carolina voters who remain wary of supporting Mr. Romney: his deeply conservative record.

"He's the principled conservative," the announcer says. Then, taking an implicit shot at Mr. Romney, who has been attacked for reversing some of the more liberal positions he advocated as the governor of Massachusetts, the announcer adds, "Rick Santorum, the conservative we can trust."

Mr. Santorum was set to receive the support of Gary Bauer, the chairman of the conservative group Campaign for Working Families, who said he planned to endorse Mr. Santorum officially when he arrives in South Carolina. Mr. Bauer, who declared in an interview last week that he would not take part in a concerted effort "to try and stop Mitt Romney," said he had concluded that Mr. Santorum's middle-class background made him a stronger general election candidate against President Obama.

"It's going to be a particularly bitter, nasty general election. That's what the White House is signaling with the class warfare rhetoric," Mr. Bauer said in an interview on Saturday. "In an election like that, you want the base of your party to be on fire for the candidate."

With just three days left before voting in the New Hampshire primary, Mr. Santorum made his closing argument the one that candidates have been leveling against Mr. Romney for months — that Mr. Romney is not conservative enough to be the party's standard-bearer.

Standing on the bench of a picnic table here on a balmy afternoon outside a small delicatessen, Mr. Santorum used his sharpest language yet, saying that Mr. Romney was the candidate of the "establishment" and would only perpetuate "the status quo."

"The leader in this race fashions himself as, 'I'm a C.E.O., I'm a good manager,' " Mr. Santorum said in a near shout as he spoke without a microphone. But, he said, the country

did not need a manager. "It needs someone with a bold vision to transform Washington to limit government, not to manage the problems that are in that city," he said.

Mr. Gingrich and Ron Paul both echoed Mr. Santorum's attack against Mr. Romney.

Mr. Gingrich released a flier called "Not Romney!" that hammers the message that "Romney is not a conservative" and "Romney is not electable." Mr. Paul has said that Mr. Romney "won't stand firm" for conservative principles.

Mr. Romney continued to largely ignore his rivals. Campaigning at a rally in Derry on Saturday morning, Mr. Romney hammered away at President Obama's leadership.

"What frightens me today is we have a president I don't think who understands the nature of America, the power of opportunity and freedom," Mr. Romney said. "He said he was going to bring big things to America. Well, he did, but they came with great big price tags and they didn't work out so well. Big things, bad things, expensive things."

Polls show that Mr. Romney leads the field by a wide margin in New Hampshire. But he and his allies spent the day trying to lower expectations, even as they sought to keep his supporters motivated.

"Let me tell you: don't get too confident with those poll numbers. I've watched polls come and go," Mr. Romney said at a breakfast rally on Saturday. "Things change very quickly. It's very fluid. I need to make sure you guys get your friends to go out and vote, and you vote as well."

Also on Saturday, five former United States ambassadors to the Vatican endorsed Mr. Romney, choosing a Mormon over two Roman Catholic rivals in the race for the Republican presidential nomination.

In a statement showcased by Mr. Romney's campaign, the ambassadors said they "are united in our wholehearted support for the candidacy of Mitt Romney for the presidency of the United States because of his commitment to and support of the values that we feel are critical in a national leader."

Jon M. Huntsman Jr., a former governor of Utah, continued to campaign across New Hampshire. At stops on Saturday morning, he beseeched voters to be serious about their choice.

"The pundits come into New Hampshire, as they are now, and say, 'Here's how it's going to happen folks,' " Mr. Huntsman said at a town-hall-style meeting in North Haverhill, where

about 100 people turned out. "Then the people of New Hampshire step in and it's a different reality. You always, always upend conventional wisdom, and I think you're going to do it again."

Mr. Paul had said he planned to support his party's eventual nominee, even though most of the other Republican candidates, he believed, would hew close to the status quo.

"I will support the Republican nominee, because I think they will be better" than President Obama, he said. "But I think it will be marginally better."

Gov. Rick Perry of Texas, who is not competing in New Hampshire but will appear in the debates here, planned to go to South Carolina on Sunday for a last effort to save his candidacy.

Reporting was contributed by Katharine Q. Seelye from Amherst, N.H.; Trip Gabriel and Richard A. Oppel Jr. from Concord, N.H.; Abby Goodnough from North Haverhill, N.H.; and Jeff Zeleny from Manchester.

The Washington Post

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Casino mogul Sheldon Adelson's family is bankrolling Gingrich Super PAC

By James V. Grimaldi, Updated: Wednesday, February 1, 11:51 AM

Family members of Las Vegas Sands casino magnate Sheldon Adelson donated $1 million last year to the independent committee behind presidential hopeful Newt Gingrich, in addition to the $10 million that Adelson and his wife, Miriam, have given the super PAC this year.

Newly released federal reports show that the Winning Our Future political action committee, which backs Gingrich's campaign, is more closely tied to the Adelson family than previously known. Of the $2 million in donations reported by the super PAC through the end of 2011, half of the money came from the daughters and son-in-law of Miriam Adelson, according to filings made to the Federal Election Commission late Tuesday.

After Gingrich's overwhelming loss to Mitt Romney in Tuesday's Florida GOP primary, Winning Our Future will likely need another infusion of cash if it plans to stay active in upcoming contests, particularly Super Tuesday, March 6, when 10 states hold primaries and caucuses. The super PAC may again turn to the Adelson family, which has single-handedly kept Gingrich's presidential bid alive with handsome donations to the group. The Adelsons are strong backers of Gingrich's views on Israel, where Miriam Adelson was born.

The large donations from the Adelson family members, who had maxed out in making individual contributions to Gingrich's campaign, helped Winning our Future launch a barrage of negative advertising against Romney. Sheldon Adelson is chairman of the Las Vegas Sands Corp., operator of casino resorts worldwide, and one of the richest men in America. Miriam Adelson is a physician.

The new reported donations come from Miriam Adelson's oldest daughter, Yasmin Lukatz, and Yasmin's husband, Oren Lukatz, who gave $250,000 each. Miriam Adelson's second daughter, Sivan Oschorn, gave $500,000. Miriam Adelson has four children; the two daughters who donated to the PAC are from her first marriage, to a Tel Aviv physician.

The Adelsons declined to comment, but friends of the couple said that they expect them to remain loyal to Gingrich. "He will stick with Newt until Newt drops out of the race," said an associate of Adelson who spoke on condition that he not be named so he could comment frankly about his longtime friend. "I think he'll do whatever he needs to do to support Newt and do whatever he needs to do to beat Barack Obama."

Winning Our Future, whose spokesman Rick Tyler declined to comment, has spent about $12 million to

promote Gingrich's candidacy so far, according to reports. It is unclear exactly how much the PAC has raised because the FEC has required the group to report those funds only through the end of December. The Adelsons gave $10 million in January.

The only other major donors to the PAC listed in the report were from Texas billionaire Harold Simmons, who is a major backer of Texas Gov. Rick Perry, and Alabama commercial real estate investor W. S. Propst. Each gave $500,000 each in December.

Super PACs, under recent court rulings, can accept unlimited amounts of donations as long as the committees do not coordinate with a campaign. Winning Our Future is run by former Gingrich associates who had previously worked for Gingrich's campaign and his similarly named 527 nonprofit organization.

Winning Our Future reported to the FEC as the address for Miriam Adelson's daughters and son-in-law — Ochshorn and the Lukatzes — as being the Venetian hotel in Las Vegas owned by Sheldon Adelson's Las Vegas Sands Corp.

Yasmin Lukatz serves on the board of trustees of the Dr. Miriam and Sheldon G. Adelson Educational Campus, a school in Las Vegas. A 2008 story from the Israeli news site Haaretz.com referred to Lukatz as a high-ranking Las Vegas Sands Corp. executive, and her biography on the campus Web site states that she is special assistant to Sheldon Adelson, chairman and CEO of Las Vegas Sands. But a company spokesman said Lukatz is no longer an employee of her stepfather's firm.

Little is known about Lukatz, who began making contributions to Republicans in 2007 and is listed in federal reports by campaigns as a homemaker or an executive at the Venetian. According to Haaretz.com, Yasmin Lukatz returned to Israel "to do military service as an officer in the Israel Air Force. Afterward she stayed on, concluding cum laude a first degree in law and business administration at Tel Aviv University. "

Before Oren Lukatz married Yasmin Oschorn in 2009, he had not made a campaign contribution to a candidate to federal office, records show. Since late 2010, he has made nearly $400,000 in donations, including the recent PAC gift.

His Twitter bio says that he was "born and raised in Israel, educated in Europe and in the United States." A graduate of the San Francisco Art Institute, Oren Lukatz's photography has been shown in U.S. galleries, according to his Web site. One recent show, "Road Closed Ahead," features "dead-end alleys, old motels, neglected buildings, empty pools and filthy streets" near the Las Vegas Strip, the Web site said.

Sivan Oschorn studied astrophysics and business administration, according to Haaretz.com, and she is married to attorney Patrick Dumont, a vice president of Las Vegas Sands, according to FEC filings. Dumont also is a major GOP contributor.

Staff researcher Lucy Shackelford contributed to this story.

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INDEPENDENT SPENDING IN ALASKA, 2006-2010

By Anne Bauer
NATIONAL INSTITUTE ON MONEY IN STATE POLITICS

Aug. 12, 2011

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OVERVIEW

OVERVIEW

The U.S. Supreme Court's January 2010 *Citizens United v. FEC* ruling permitted corporations and unions to spend unlimited amounts of money from their general treasuries to advocate for or against candidates. After the *Citizens United* ruling, the Alaska State Legislature passed a bill allowing corporations and unions to use their treasury funds to pay for independent expenditures that targeted candidates. Prior, those entities were only allowed to fund independent expenditures targeting ballot measures.

From 2006 through 2010, entities and individuals spent $2.6 million targeting ballot measures and nearly $1 million targeting candidates. Although no appreciable increase in spending was observed in 2010 when compared to previous elections, the targets shifted radically, from ballot measures to candidates. Nearly $1 million of the $1.2 million spent in 2010 targeted candidates, while all but $158 of the $2.5 million spent during the three previous elections targeted ballot measures.

TABLE 1: INDEPENDENT SPENDING COMPARED TO DIRECT CAMPAIGN CONTRIBUTIONS IN ALASKA, 2006–2010

ELECTION	TOTAL INDEPENDENT SPENDING FOR OR AGAINST CANDIDATES AND MEASURES	TOTAL DIRECT CONTRIBUTIONS TO CANDIDATES AND MEASURES	INDEPENDENT SPENDING COMPARED TO DIRECT CAMPAIGN CONTRIBUTIONS
2006	$1,930,767	$14,257,313	14%
2007	$166	$172,586	>1%
2008	$582,432	$16,994,996	3%
2010	$1,238,923	$10,276,910	12%
TOTAL	**$3,752,288**	**$41,701,805**	

The type of spender changed over the study period as well. Whereas the top spending sector in 2006 was business ($1.8 million), and tribal governments (nearly $397,000) in 2008, after the law changed in 2010, policy organizations led the spending with more than $810,000.

Despite being legally allowed to do so in 2010, corporations reported no independent expenditures, though we cannot know if they gave to policy organizations that do not have to publicly disclose their donors. Conservative policy organizations were among the top spenders in 2010, led by the Republican Governors Association with $705,807. Unions, spending for the first time in 2010, kicked out the next-largest amount at $279,068.

Advertising commanded most of the independent spending dollars in the study period 2006–2010, taking 71 percent, or $2.7 million. Candidate support activities such as phone banks and mailings took up another 24 percent, or $888,910.

METHODOLOGY

The National Institute on Money in State Politics collects independent spending reports in states that provide robust disclosure. These states define "independent expenditure" and "electioneering communication" in statute at least as thoroughly as the federal definition. In Alaska, electioneering communications are reported as expenditures on the 15-6 form if independent, and on the candidate's form if for self. (For example, a candidate can make what Alaska defines as an electioneering communication in support of his or her own candidacy). Therefore, only the expenditures reported on the 15-6 form were collected by the Institute.

The Institute used the information provided on disclosure reports filed by individuals and committees to assign an occupation code to the filers. When that information was not provided, staff conducted additional research to determine a filer's economic interest, where possible. The occupation codes are based on the Standard Industrial Classification system used by the federal government.

If an expenditure lists multiple targets, and the amount paid does not specify how much was attributable to each target, the target amount is left blank. Therefore, the total spent on each target may be under-reported.

The Institute does not equate money spent in opposition to one candidate with money spent in support of that candidate's opponent, and instead discusses money spent by race. Only expenditures made with the purpose of influencing state elections were reported.

STATE OF DISCLOSURE IN ALASKA

Alaska stands out among the 50 states as a leader in disclosing independent expenditures. The state requires meaningful reporting about who makes the expenditures, who the expenditures supported or opposed, what the expenditures paid for, and when they were made. The expenditures are reported on a form created specifically for that purpose, making them easy to find. Alaska requires timely filing for reports and then takes the important next step of making that information readily available to the public via an easily navigable online system. Alaska allows organizations and people to make independent expenditures on candidates and ballot measures. One unique feature of reporting in Alaska is that funders can take a neutral position on issues and candidates that draw their spending.

Alaska separately defines independent expenditures from other types of political communications:

- Independent expenditures are defined as "an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;"

- Electioneering communications are defined as those that "(A) directly or indirectly identifies a candidate; (B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and (C) occurs within the 30 days preceding a general or municipal election;"

- Express communications are defined as "a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;"

- Issue communications are those that "(A) directly or indirectly identifies a candidate; and (B) addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office."

Political communications "include advertisements in any media, billboards, handbills, websites, and other communications intended to influence the election outcome."[1]

Electioneering communications are generally reported as independent expenditures. Whether or not express communications and issue communications are reported depends on specific circumstances (Alaska Statute 15.13.110).

TOP INDEPENDENT SPENDERS & FUNDERS IN ALASKA, 2006–2010

At nearly $1.5 million, ConocoPhillips was the largest independent spender between 2006 and 2010, all of it opposing Measure 2 in 2006. The measure, had it passed, would have imposed a new, temporary, tax on natural gas leases.

TABLE 2: TOP INDEPENDENT SPENDERS IN ALASKA, 2006–2010

SPENDER	ELECTION	TOTAL
ConocoPhillips	2006	$1,473,182
Republican Governors Association	2010	$705,807
NANA Regional Corporation	2008	$380,993
Robert Gillam	2008	$178,808
Northwest & Canada Cruise Association	2006	$151,135
TOTAL		**$2,889,925**

The Republican Governors Association was the largest spender targeting a candidate, putting $705,807 on TV ads and direct mail opposing Democrat Ethan Berkowitz's 2010 gubernatorial run. No money was spent targeting Republican Governor Sean Parnell, and only $32,106 was spent supporting Berkowitz. Berkowitz raised 81 percent as much money as Parnell did, and lost the race by a significant margin.

Overall, the third-largest spender was NANA Regional Corporation—a corporation owned and operated by the Iñupiat—which spent $380,993 opposing Primary Measure 4 in 2008. The measure would have created two new water quality standards, specifically regulating the disposal of mining waste. The measure failed by a margin of roughly 24,600 votes of 192,000 cast.

Robert Gillam was the largest individual source of independent expenditures. He spent $178,808 to support Primary Measure 4 in 2008. Gillam is the founder of McKinley Capital Management, a hedge fund managing funds for institutional investors.

Rounding out the top spenders is the North West & Canada Cruise Association, which spent $151,135 against Measure 2 in 2006.[2]

2010 ELECTIONS IN ALASKA

In all, 24 entities made $1.2 million in independent expenditures in 2010. Most of that money —$977,585— targeted candidates. In comparison, candidates raised nearly $8.5 million in direct contributions.

Prior to 2010, when corporations and unions could not use their treasury funds on independent expenditures that targeted candidates, the 2006 gubernatorial race saw exactly $157 in independent expenditures. Four years and one U.S. Supreme Court ruling later, the 2010 gubernatorial race between Republican incumbent Gov. Sean Parnell and Democratic challenger Ethan Berkowitz attracted $737,913 in independent spending for and against—more than any other contest that election.

Berkowitz's campaign raised 81 percent of the amount Parnell raised—$690,282 for Berkowitz compared to $851,126 for Parnell. However, independent spending against Berkowitz actually exceeded the amount his campaign raised in contributions. The Republican Governors Association (RGA), which did not contribute directly to Parnell, spent $705,807 on TV ads and direct mail attacking Berkowitz.

Two unions spent money supporting Berkowitz. The Alaska Public Employees Association spent $8,655 and the National Education Association Alaska spent $23,451. Their PACs also contributed to Berkowitz's campaign:

$1,000 from the National Education Association Alaska and $2,000 from the Alaska Public Employees Association (the maximum allowed by law). Berkowitz lost the race by a significant margin.

TABLE 3: ALASKA'S 2010 GUBERNATORIAL RACE

CANDIDATE	DIRECT CONTRIBUTIONS TO CAMPAIGN	INDEPENDENT EXPENDITURES FOR	INDEPENDENT EXPENDITURES AGAINST	TOTAL
Berkowitz	$690,282	$32,106	$705,807	$1,428,195
Parnell	$851,125	$0	$0	$851,125
TOTAL	**$1,541,407**	**$32,106**	**$705,807**	**$2,279,320**

Other notable races included:

- House District 7: Several labor unions and labor coalitions independently spent $72,781 to oppose incumbent Republican Mike Kelly and support Democratic challenger Bob Miller. Miller unseated Kelly.
- Senate District P: This race drew $55,820 in independent spending. The majority of that went to two women battling for the open seat. Labor organizations spent $39,180 in support of Democrat Janet Reiser. Planned Parenthood and the Putting Alaska First Committee spent $14,538 in opposition of Republican Cathy Giessel. Giessel won the seat. As an interesting aside, a third contender with no party affiliation, Phillip Dziubinski, drew $2,002 in support from the Senate Democratic Campaign Committee. Reiser got no direct support from that group.
- Justice Fabe Retention Election: Alaska Family Action independently spent $42,392 to oppose Supreme Court Justice Dana Fabe's retention. Fabe raised no campaign funds in that election, but won retention.

2008 ELECTIONS IN ALASKA

Six entities made a total of $582,432 in independent expenditures in 2008.

The NANA Regional Corporation, a Regional Alaska Native corporation with 12,500 Iñupiat shareholders, spent $380,993 to craft an independent campaign against Primary Measure 4. That measure, which failed, sought to place water quality standards on new metal mining operations; the NANA Regional Corporation feared its Red Dog Mine would be adversely affected. The NANA Corp did not contribute to Alaskans Against the Mining Shutdown, the ballot measure committee formed to oppose the measure. Independent spending, however, paled in comparison to the money raised directly by the committees. Committees in favor of the measure raised $2.9 million; the committee opposed to it raised $8.9 million.

2007 ELECTIONS IN ALASKA

Two entities made just $166 in independent expenditures in 2007.

Special Advisory Vote in April, which prompted the legislature to seek a constitutional amendment to prohibit the state from offering benefits to same-sex partners of employees, garnered only $354 in independent spending. The Juneau National Organization for Women spent $166 in opposition to the measure, and Focus on the Family spent $188 in support of it. The measure narrowly passed with 53 percent of the vote, though proponent committees raised significantly less than opponent committees in direct contributions.

2006 ELECTIONS IN ALASKA

Twenty-one entities made a total of $1.9 million in independent expenditures in 2006.

Two ballot measures garnered 98 percent of the independent expenditures in 2006; all of that money was spent opposing the measures.

TABLE 4: INDEPENDENT EXPENDITURES TARGETING BALLOT MEASURES IN ALASKA, 2006

TARGETED MEASURE	SUBJECT	INDEPENDENT SPENDING TOTAL
General Measure 2	Gasoline Tax	$1,742,670
Primary Measure 2	Cruise Ship Tax	$151,135
	TOTAL	**$1,893,805**

General Measure 2, vetted by former Governor Wally Hickel and other state politicians as a means of forcing gas companies to build a gas pipeline to transport natural gas to market, was the target of the lion's share of the money, $1.7 million. The measure, soundly rejected by 65 percent of the voters, sought to "levy a new state tax on certain oil and gas leases overlying large deposits of natural gas."[3] The tax would have been repealed once the pipeline was built and would have provided for a partial tax credit for any taxes paid while the measure was in effect.Oil companies spent nearly as much money in independent expenditures opposing the measure—$1.6 million—as they contributed to committees running campaigns against it—$1.7 million. ConocoPhillips Alaska spent $1.5 million of the oil industry's total independent expenditures, or 85 percent of the overall total spent opposing Measure 2. ConocoPhillips gave $252,000 to two committees in addition to the money it spent itself. BP Alaska gave $457,000 to three ballot measure committees in addition to the $58,219 it spent itself.There were three ballot measure committees opposing Measure 2, and one supporting it. That committee took in a total of $500. Measure 2 failed by a two-thirds margin.The North West & Canada Cruise Association spent $151,135 in opposition to Primary Measure 2, which sought to impose a tax on cruise ships. The association's independent expenditures were in addition to providing all but $13,700 of the $1.4 million raised by Alaskans Protecting Our Economy, which formed to oppose the measure. The measure passed.

CONCLUSION

Although the amount of reported independent spending did not appreciably increase in Alaska after the *Citizens United* ruling, both the spenders and the targets changed. In 2010, the majority of independent expenditure money was spent on candidates, rather than on ballot measures as in the past.

The spenders changed from mostly corporations to mostly policy organizations. Corporations reported no independent expenditures themselves, though it is unknown if they gave to policy organizations that do not have to publicly disclose their donors. Labor organizations,[4] however, began spending directly for the first time in 2010, ponying up $279,068, which is 23 percent of the total spent.

1. Alaska Public Offices Commission, "Form 15-6, Statement of Independent Expenditures," p. 5.
2. The North West & Canada Cruise Association was formerly known as the Northwest Cruiseship Association.
3. "Ballot Measure Summary, Measure 2: Natural Gas Taxation," *National Institute on Money in State Politics*, available from: http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=1, accessed August 11, 2011.
4. Labor coalition groups such as Putting Alaska First are not included in this total.

—END—

HJR

40

<TARGET><BILL>HJR 40</BILL><SUBJECT>HJR 40</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG

STATE CAPITOL BUILDING, RM 120
JUNEAU, AK 99801-1182
PHONE: 907-465-4990
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HOUSE_JUDICIARY@LEGIS.STATE.AK.US

JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

DATE: April 3, 2012

TO: Suzie Lowell, Chief Clerk
Alaska House of Representatives

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

RE: House Judiciary Committee Hearing Notice

****

Monday, April 9, 2012 at 1:00 p.m. in Room 120

HJR 40 RS 2477 RIGHTS-OF-WAY

Bills Previously Heard

House Judiciary ~ Monday, April 9th, 2012

(GAVEL IN) Let's call this meeting of the House Judiciary Committee to order.

It is ____ p.m. Monday, April 9th, 2012.

Present are:

Dec: CACFA
long-range transp. plan

___ Representative Lynn

___ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

___ Representative Holmes

___ Representative Gatto is excused

And Myself Representative Thompson

First things first: Housekeeping: Please disable your electronic devices, if they're left on - even on vibrate - they may interfere with the recording system. Thank you.

We have one new Resolution to hear today:

HJR 40 RS 2477 Rights of Way

CS FOR HOUSE JOINT RESOLUTION NO. 40(RES)

Commending the governor and the administration for aggressively working to enforce the rights of the state in R.S. 2477 rights-of-way; urging the governor and the attorney general to develop a working alliance with other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and the attorney general to support the State of Utah and the southern counties of Utah in a lawsuit against the federal government concerning R.S. 2477 rights-of-way, including filing an amicus brief in support of Utah; urging the

governor to dedicate state resources to establish, protect, and enforce the state's interests in R.S. 2477 rights-of-way and to preserve state rights-of-way against encroachment by the federal government; urging the governor to reestablish a federalism section in the Department of Law and sections in the Department of Natural Resources and the Department of Fish and Game to support the preservation of the state's rights and powers in compact cases; and urging the governor to prepare an appropriation request to fund an aggressive effort by the state to resolve issues relating to R.S. 2477 rights-of-way, including possible litigation, and to continue to work to preserve the rights of the state in regard to R.S. 2477 rights-of-way.

Here to present HJR 40 is Jim Pound, Aide to Rep. Wes Keller. Mr. Pound, please put your name on the record and provide your overview on HJR 40

BILL PRESENTATION

Thank you Mr. Pound.

Are there any further questions for Mr. Pound or the sponsor?

Is there anyone online or in the room who would like to provide public testimony? t/c Rod Arno ✓

Public testimony:

- Malcolm Roberts, Assistant AG, Dept. of Law
- Kent Sullivan, Assistant AG, Dept. of Law

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Is there anyone else who would like to provide public testimony on HJR 40?

Public comment is now closed.

Can I have a motion to move CS for HJR 40 (RES) (27-LS1407/I (eye), with individual recommendations, and with attached fiscal note?

*Rep. Thompson: I move to report CS for HJR 40 (RES) (27-LS1407/I (eye), with com*mittee recommendations, and with attached fiscal note from committee.

Any objection, have Susan call the roll. If not, HJR 40 moves from committee.

Having concluded our scheduled business for today... At _____ p.m., I adjourn today's meeting of the House Judiciary Committee (GAVEL OUT).

ALASKA STATE LEGISLATURE

Interim:
600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
Fax: (907) 373-4729

Session:
State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-2186
Fax: (907) 465-3818

REPRESENTATIVE WES KELLER
DISTRICT 14

SPONSOR STATEMENT
HJR 40
"RS 2477 RIGHTS-OF-WAY"

House Joint Resolution 40 is the next step in moving transportation corridors forward in Alaska. All across the state there are hundreds of traditional trails and routes that have been used for centuries. Theses corridors are a critical part of how we will transport goods and services in the future.

Even Congress recognized that when it enacted and repealed Revised Statute 2477's that these trails have the tradition and need to be continued and even expanded to improve commerce. In several states across the west, including Alaska the repeal included language allowing the identification of existing potential RS 2477's as they have become to be called.

So far Alaska has identified 670 right-of ways that clearly qualify. These are part of the more than 20,000 R.S. 2477s already identified in the West. The problem now is convincing the federal government to release these to the states.

This resistance by Federal departments has resulted in the state's having to take the issue to court. Presently the lead suit is Utah and Alaska needs to join in that effort with a minimum of an amicus brief.

This resolution commends the administration for its efforts so far and also directs it to continue its efforts by supporting Utah's lawsuit. It also raises the current Alaska bar by asking the Governor to provide a request to the next legislature for specific funding to continue the RS 2477 efforts.

Without this effort commerce in Alaska will continue to be expensive and nearly impossible. RS 2477s are a critical key that cannot be ignored.

E-Mail: Representative_Wes_Keller@legis.state.ak.us
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

Rep Keller
M
Vers. I
as amd.
O.K.

CS FOR HOUSE JOINT RESOLUTION NO. 40(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 4/3/12
Referred: Judiciary

Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz, Peggy Wilson, Feige

A RESOLUTION

Commending the governor and the administration for aggressively working to protect the interests of the state in rights-of-way under R.S. 2477; urging the governor and the attorney general to develop a working alliance with the governors, attorneys general, and legislatures in other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and the attorney general to support the interests of the State of Utah and southern counties of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through various means, including initiating litigation in this state; urging the governor and the attorney general to develop a strategy for resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in the state, including the possibility of bringing lawsuits against the federal government to preserve the state's interest in rights-of-way; urging the governor to further strengthen the resources of the state for protecting the state's rights by continuing to focus the efforts of the Department

of Law, the Department of Natural Resources, the Department of Fish and Game, and other departments on defending the state's rights and powers with regard to access and federalism issues; and urging the United States Congress to enact legislation requiring federal agencies with land management authority to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute those claims in court and to participate in good faith in the process.

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

WHEREAS, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal land to encourage the development of western land; and

WHEREAS R.S. 2477 rights-of-way were perfected by simple use or development; and

WHEREAS R.S. 2477 rights-of-way were established in the state through use or development until virtually all federal land in the state was withdrawn in 1969; and

WHEREAS, when R.S. 2477 was repealed in 1976 under the Federal Land Policy Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly protected; and

WHEREAS the Alaska State Legislature has recognized 602 rights-of-way in statute, and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477 rights-of-way; and

WHEREAS historic R.S. 2477 rights-of-way represent a key component of the mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the settlement of the state's land and the development of the state's land and resources; and

WHEREAS the United States Department of the Interior and the United States Forest Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a decision by a court of competent jurisdiction; and

WHEREAS unilateral resistance by the federal government to the existence of the state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

state resources by making them accessible and available for maximum use consistent with the public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

WHEREAS the State of Utah recently filed notices of intent to sue to enforce its interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

WHEREAS the State of Alaska and the State of Utah share similar objections to the large withdrawals of Federal Conservation Units that are managed by the United States Department of the Interior and the United States Forest Service, agencies that both unilaterally deny the existence of valid state easements; ~~and~~

WHEREAS virtually all of the state's natural resource development projects are unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the Clean Water Act, and myriad arbitrary federal regulators and policies implementing and enforcing those and other federal laws;

BE IT RESOLVED that the Alaska State Legislature commends the governor and the administration for aggressively working to protect the interests of the state in rights-of-way under R.S. 2477 and urges the governor and the attorney general to develop a working alliance with the governors, attorneys general, and legislatures in other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor and the attorney general to support the interests of the State of Utah and southern counties of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through various means, including initiating litigation in this state; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor and the attorney general to develop a strategy for resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in the state, including the possibility of bringing lawsuits against the federal government to preserve the state's interest in rights-of-way; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor further to strengthen the resources of the state for protecting the state's rights by continuing to focus the efforts of the Department of Law, the Department of Natural Resources, the Department of Fish and Game, and other departments on defending the state's rights and powers with

regard to access and federalism issues; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the United States Congress to enact legislation requiring federal agencies with land management authority to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute those claims in court and to participate in good faith in the process.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Ken Salazar, United States Secretary of the Interior; the Honorable John Boehner, Speaker of the U.S. House of Representatives; the Honorable Nancy Pelosi, Minority Leader of the U.S. House of Representatives; the Honorable Harry Reid, Majority Leader of the U.S. Senate; the Honorable Mitch McConnell, Minority Leader of the U.S. Senate; the Honorable Jeff Bingaman, Chair of the Energy and Natural Resources Committee of the U.S. Senate; the Honorable Gary R. Herbert, Governor of Utah; Kathy Davis, Assistant Attorney General, State of Utah, Office of the Attorney General, Division of Public Lands; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; and all other members of the 112th United States Congress.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHJR 40(RES)**
Fiscal Note Number: **1**
(H) Publish Date: **4/3/12**

Identifier (file name): CSHJR40-LEG-SESS-04-02-12
Title: "Commending the Governor and the administration for aggressively working to protect the interests..re: RS 2477'
Sponsor: Reps Keller, Wilson, Pruitt, Thompson, Millett, Costello...
Requester: House Resources

Dept. Affected: Legislature
Appropriation: Legislative Council
Allocation: Session Expenses
OMB Component Number: 782

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)								
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Jessica Geary, Finance Manager — Phone: 465-6626
Division: Legislative Affairs Agency — Date/Time: 4/2/12 3:41 PM
Approved by: Pamela Varni, Executive Director — Date: 4/2/2012
Legislative Affairs Agency

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHJR 40(RES)

Analysis

This Legislation has zero fiscal impact on the Legislative Affairs Agency.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

1031 W. 4th Ave., Ste. 200
Anchorage, AK 99501
PHONE: (907)269-5100
FAX: (907)269-5110

March 28, 2012

The Honorable Paul Seaton
Co-Chairman, House Resources Committee
State Capitol, Room 102
Juneau, Alaska 99801-1182

The Honorable Eric Feige
Co-Chairman, House Resources Committee
State Capitol, Room 126
Juneau, Alaska 99801-1182

Re: HJR 40

Dear Representatives Seaton and Feige:

On Monday the House Resources Committee heard HJR 40, addressing RS 2477 rights-of-way and other matters. Included in the resolution is language encouraging the Governor to re-establish federalism sections within the Departments of Law, Natural Resources, and Fish and Game. I am informed that the Committee would like to know whether the Department of Law supports creation of a federalism sub-section.

While the Department welcomes the Legislature's strong support and encouragement to defend State title to RS 2477 rights-of-way and to pursue other challenges to federal overreach, creation of a federalism section is unnecessary.

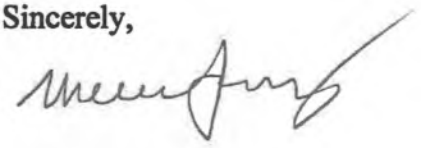
The Department established a statehood defense subunit within its Natural Resources Section during the Hickel administration to initiate several state's rights cases against the federal government. Although the functions of this subunit were later integrated into other sections, the focus of the former subunit has continued. The Department emphasizes federalism issues, which pervade many of the areas in which our sections work, including Natural Resources, Environmental, and Oil, Gas & Mining Sections. The attorneys in these sections have the specialized backgrounds necessary to address the issues that arise from state/federal jurisdictional disputes. Maintaining the Department's existing administrative structure gives the flexibility to assign federalism matters to the attorneys with the most expertise in the particular contexts in which they

arise. It is a priority of mine to continually coordinate Law's staff so that each of the issues raised in our cases are addressed by the most capable and experienced attorneys.

Under the Parnell administration, Law and all State agencies are closely monitoring federal actions that could impact the State. Law is working with other agencies to pointedly comment on federal land management plans, environmental impact statements, and regulatory proposals; to assure the State is proactively conducting scientific studies; and to litigate where necessary to enforce the State's right to access and develop natural resources. We also actively team with other Western states to oppose unnecessary federal action. For example, nine other states joined an amicus brief that Alaska drafted for the recent *Sackett v. EPA* case in U.S. Supreme Court, to urge the Court to overturn an EPA action that threatened the property rights of an Idaho couple. We have dedicated an attorney to RS 2477 cases and assigned others to assert the State's navigability claims, challenge the application of the Forest Service 2001 Roadless Area Conservation Rule to the Tongass and Chugach National Forests, resist unwarranted listings under the Endangered Species Act, oppose the EPA's extraordinary assertions of federal jurisdiction under the Clean Water Act, and pursue the development of oil and gas resources on the Outer Continental Shelf.

I assure you that the Department's focus on defending Alaska's statehood rights will continue under my leadership.

Sincerely,



Michael C. Geraghty
Attorney General

39TH CONGRESS, 1ST SESSION.

H. R. 365.

IN THE SENATE OF THE UNITED STATES.

JULY 19, 1866.

Ordered to be printed.

AMENDMENT

Reported by Mr. STEWART, from the Committee on Public Lands, to the act (H. R. 365) granting the right of way to ditch and canal owners over the public lands in the States of California, Oregon, and Nevada, viz: Strike out all after the enacting clause, and insert as follows:

That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local custom or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted,* That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same

according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3. *And be it further enacted*, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the loca-

tion, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the General Land Office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

SEC. 4. *And be it further enacted*, That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together

with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

SEC. 5. *And be it further enacted*, That as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 6. *And be it further enacted*, That whenever any adverse claimants to any mine located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.

SEC. 7. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to establish additional land districts and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

SEC. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

SEC. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights, shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 10. *And be it further enacted*, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar

or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty-acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

SEC. 11. *And be it further enacted*, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

Fact Sheet

Title: R.S. 2477 Rights-of-Way

Alaska Department of NATURAL RESOURCES
Division of Mining, Land & Water
September 2001

This fact sheet explains the origin of a century-old mining law that has broad implications for Alaska's future. It is intended to illustrate the potential this law has in helping preserve Alaska's public access options for the future.

What is R.S. 2477?
Revised Statute 2477 is found in section 8 of the Mining Law of 1866. It granted states and territories unrestricted rights-of-way over federal lands that had no existing reservations or private entries. The law remained in effect until Congress repealed it in 1976. In Alaska, the opportunity to establish new R.S. 2477 rights-of-way generally ended December 14, 1968, when the federal government issued PLO 4582—the "land freeze"—to prepare for settlement of Alaska Native land claims. Though no new rights-of-way could be established after federal land was reserved or appropriated, or after the law was repealed in 1976, these actions did not extinguish pre-existing rights.

Revised Statute 2477 states: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

What did Congress mean by "highways"?
It's important to distinguish the historical meaning of "highways" from the modern. The word "highway" was historically used to refer to foot trails, pack trails, sled dog trails, crudely built wagon roads, and other corridors for transportation. R.S. 2477 was included in the first comprehensive mining law and was used initially by miners and homesteaders on federal land. The broad wording of the law does not limit the type of right-of-way to which it applies.

Alaska Statute 19.45.001(9) defines a highway to include "a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof...."

What does this mean for Alaskans?
R.S. 2477 rights-of-way could be established in Alaska from 1884 (the Organic Act, which extended general land laws to the new territory), to 1968 (PLO 4582). From its territorial origins to today, Alaska has consisted mainly of federally owned land. During its 84 years of application in this state, many rural mail routes, mining trails, and other transportation routes became R.S. 2477's through construction and/or use. The State of Alaska, Department of Natural Resources has documented hundreds of historic routes that qualify as R.S. 2477 rights-of-way. Surface transportation between Alaska's hundreds of rural communities and other resource destinations still relies heavily on our cross-country trails, primarily used in the winter by snowmachines, dogsled teams, and four-wheel all-terrain vehicles.

What are some examples of R.S. 2477's?
Some examples include DeBarr Road in Anchorage and Farmer's Loop Road in Fairbanks. Other routes that the State believes to qualify as R.S. 2477's include the Stampede Trail in Denali National Park and Preserve, the Nabesna-Chisana Trail in Wrangell-St. Elias National Park, the Dalton Trail in the vicinity of Haines, the Eureka-Rampart Trail in the Interior, and the Chilkoot Trail near Skagway.

How many R.S. 2477 rights-of-way have been asserted?
While hundreds of R.S. 2477's have been validated within the western states, only a handful of routes have been cooperatively validated in Alaska with BLM. During 1993-1995, the Department of Natural Resources' R.S. 2477 Project researched more than one thousand trails. The project found that some 600 of these qualified as R.S. 2477 rights-of-way under state standards. In 1998 the Legislature listed these trails in AS 19.30.400, stating that they had been accepted as R.S. 2477 rights-of-way. That same legislation requires the department to continue researching trails and to prepare an annual report identifying those found to qualify as R.S. 2477's. Many additional trails have been reported to the Legislature since then.

What if land has been conveyed without specifying that there is a valid R.S. 2477 right-of-way across it?
In Alaska, millions of acres once controlled by the federal government have been transferred to Native corporations or into other private ownership. Land conveyances are always subject to "valid existing rights." Courts have ruled that where an R.S. 2477 right-of-way exists, the new landowner's title is subject

to the right-of-way, which must still be honored. There are many Alaskan land owners who want the assurance that their rights and interests will not be adversely affected in the process of R.S. 2477 identification and platting. The Alaska Legislature instructed in its 1998 law that, while providing for the public's right to use these historic access easements, "every effort should be made to minimize the effect on the affected private property owners."

What is some of the R.S. 2477 case law?

One of the most frequently quoted cases affecting R.S. 2477 is Hamerly v. Denton, decided in 1961. The court clearly explained that R.S. 2477 was one-half of a grant—an offer to dedicate an easement across unreserved, unappropriated federal land. That offer of a right-of-way grant could be accepted by either of two methods:

a) By "some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention" to accept it; or

b) By "public user for such a period of time and under such conditions as to prove that the grant has been accepted."

Additionally, Girves v. Kenai Peninsula Borough, 1975, established that some section-line easements are R.S. 2477's. Shultz v. Army, 1993, concerning a right-of-way claim across Fort Wainwright, established that the public right-of-way between the origin and termini of the route need not be absolutely fixed, and upheld the broad definition of a highway found in state law. On rehearing, the 9th Circuit Court of Appeals reversed its original ruling in the Shultz case. However, the legal reasoning that produced that original decision has been used to support other cases.

What are the rules for using R.S. 2477 rights-of-way?

Some rights-of-way will likely be improved for access to valuable state resources, communities, and land. Others will be used as they have been in the past. Some might not be used at all, or might be developed only as foot trails. If you are not sure whether a trail you want to use is an R.S. 2477 right-of-way, check public land records and consult with each land owner or managing agency before crossing the property. Typically R.S. 2477 rights-of-way are available for public use under DNR's regulations. DNR's management rules can be found in DNR's recently revised chapter of public easement regulations, 11 AAC 51. However, the Department of Transportation and Public Facilities' regulations apply to R.S. 2477 rights-of-way that are part of the Alaska Highway System or that DNR has otherwise transferred to that department. In some cases, the State might transfer management of an R.S. 2477 right-of-way to a city or borough, but without giving it the right to "vacate" or officially erase the right-of-way. That is because municipalities are prohibited by law from vacating R.S. 2477 rights-of-way.

For additional information:

An *R.S. 2477* Atlas is available for purchase at the DNR Public Information Offices in Anchorage, Fairbanks, and Juneau. The Atlas lists approximately 560 routes, identified and located on map inserts. The department has also made documentation on many qualifying R.S. 2477 routes available at the State and University Archives.

Another source is DNR's website on R.S. 2477 rights-of-way, http://www.dnr.state.ak.us/mlw/trails/rs2477/ From that site you can reach a map of Alaska that links to descriptions of many R.S. 2477 trails. In addition, if you know the official "RST" number of any R.S. 2477 right-of-way, you can find its complete casefile documentation and description in DNR's public land records at https://nutmeg.state.ak.us/ixpress/dnr/case/RequestRpt.dml These two websites provide the most up-to-date R.S. 2477 information available. You can find RST numbers of more than 600 routes, cross-referenced by trail name, in AS 19.30.400. For RST numbers of additional routes that DNR has documented since that law was passed in 1998, check DNR's annual reports to the legislature. All of the sources mentioned here are public documents that everyone has a right to see.

For further information or to buy an Atlas, contact:

Dept. of Natural Resources
Public Information Center
550 W. 7th Ave. # 1260
Anchorage, AK 99501-3557
(907) 269-8400

Public Information Center
3700 Airport Way
Fairbanks, AK 99709-4699
(907) 451-2705

Div. of Mining, Land and Water Public Information Office
400 Willoughby Ave., Suite 400
Juneau, AK 99801
(907) 465-3400

American Land Rights Association
30218 N.E. 82nd Ave, PO Box 400
Battle Ground, WA 98604

RS 2477 RESOURCES

ALRA-AK AGENCIES, LAWS, REGS and SOURCES ANILCA NAVIGABILITY TRAIL MAINT FIREWOOD - LOGS FIRE PROTECTION

ACCESS CLOSURE TO PATENTED PRIVATE LAND IN LOWER 48 STATES

Alaska DNR RS 2477

AS 19.30.400. Identification and acceptance of rights-of-way. [includes list of 659 accepted RS2477 routes]
11 AAC 51.055. Identification of R.S. 2477 Rights-of-Way
11 AAC 51.100. Management of Public Easements, Including R.S. 2477 Rights-of-Way
11 AAC 53.110. General survey standards - Class III required for RS 2477, seems excessive!

STATE OF ALASKA COMMENTS ON PROPOSED RULES RS 2477 RIGHTS-OF-WAY

Published at 59 Fed.Reg. 49216 et seq. (August 1, 1994)

ALASKA RS 2477 TRAILS

The State of Alaska has achieved Quiet Title to the Harrison Creek - Portage Creek Trail (RST 8) in the Circle Mining District. Because the original trail has been moved many times to accommodate active mining since 1976, (the deadline for identification of existing rights-of-way), the State has entered into a consent decree accepting a mutually agreeable 60-foot right-of-way to substitute for abandonment of portions of the existing trail. This was one of 11 of the 620 "Qualified" trails that was "Certified" as a test case, and was selected for litigation because it had the broadest potential for setting precedent. The Department of Law and the Division of Mining, Land & Water require funds for this legal effort to file "quiet title" actions in court to determine the validity of the routes.

U.S. v VOGLER

1988 granted permanent injunction prohibiting placer miner from operating off-road vehicles in national preserve without first obtaining access permit and from conducting placer miner operations without submitting and obtaining approval of mining operations plan. Miner appealed. The Court of Appeals, held that: (1) Federal Government had authority to regulate access and mining within Alaska's national parks; (2) regulations did not deprive placer miner of "adequate and feasible" access to his claims and were within power granted under property clause; (3) Federal Government had authority to regulate travel on trail, even assuming it was established right-of-way; and (4) claim alleging unconstitutional taking of property rights was not ripe for judicial resolution.

SHULTZ v DEPARTMENT OF ARMY

Shultz v. Army, 1993, concerning a right-of-way claim across Fort Wainwright, established that the public right-of-way between the origin and termini of the route need not be absolutely fixed, and upheld the broad definition of a highway found in state law. On rehearing, the 9th Circuit Court of Appeals reversed its original ruling in the Shultz case. However, the legal reasoning that produced that original decision has been used to support other cases. Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. S 2409a. Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. S 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time-barred by 28 U.S.C. S 2409a(g).

Exchange with NPCA on RS 2477 in Wrangell St. Elias News 5/04

2/03 FEDERAL RECORDABLE DISCLAIMER REGULATION

11/25/03 - Off-road organizations, San Bernardino County, petition to own areas - DON THOMPSON, Associated Press - The county's claim was the nation's first under the new federal regulation adopted by the Interior Department in February.

OTHER RS 2477 RESOURCES

GOOGLE SEARCH: RS2477 AND SALT LAKE TRIBUNE -- A bonanza of information on the unfolding RS 2477 process in Utah

4/9/02 - MOU U.S. Dept of the Interior and State of Utah - http://www.doi.gov/news/mours2477.htm

7/16/03 - Congress likely to kill roads deal, Christopher Smith, Salt Lake Tribune - WASHINGTON -- Congress is poised to kill Utah's landmark agreement with the Department of Interior to transfer rights to old roadbeds across federal lands to counties as the House begins debate on the Interior appropriations bill today, with a vote expected Thursday.

8/17/03 - History essential to understand road rights, Alan D. Gardner, Salt Lake Tribune - In April the Department of Interior announced that it had signed an MOU Utah resolving the road issue (R.S. 2477). Southern Utah Wilderness Alliance and other extreme environmental groups (including some of the groups that want to drain Lake Powell) are very strongly opposed to this decision, stating that these "aren't roads, but ways." It seems as if their goal is to eliminate public access to public land. To make a fair judgment on this issue, some background history is essential. As each new area of this country developed, the federal government owned all of the land. Gradually land was sold or homesteaded, with almost all land transferring to private ownership. However, in the Western states, this transfer from federal to private ownership in many cases was never completed.

5/20/03 - Greedy Socialists - Salt Lake Tribune - Until wilderness advocates and R.S.2477 opponents tell the truth about socioeconomic impacts on rural communities and the tax base of Utah, I and many other rural citizens will remain angry with greedy, socialistic environmental groups striving to take away our rights to "life, liberty and the pursuit of happiness."

7/29/97 - Letter to GAO about RS2477

Utah County Roads (R.S. 2477) Presentation BE PATIENT! LONG TIME TO LOAD (12 MB Adobe PDF Document)

4/20/03 - Finding Common Ground on County Roads - Op-Ed by Governor Mike Leavitt - Imagine the confusion that would result if the county recorder's office burned down and ownership records for the entire community were lost. Utah finds itself in a somewhat similar situation with respect to county roads. Our mostly rural transportation system used by ranchers, miners, hikers, hunters, federal land managers, county officials, tourists and others is caught in a divisive and costly legal battle over rights of way on potentially thousands of roads.

What is "Revised Statute R.S. 2477"? - National Public Lands News

What is "Jarbidge South Canyon Road" ?

R.S. 2477 - BLM is proposing new rules to process "road claims" on public lands. The subject law, a one-sentence, 21-word statutory provision, known as Revised Statute 2477, was passed on July 26, 1866. Twenty six years after its repeal by FLPMA, the process of asserting claims under the statute is far from consistent and has been the subject of litigation between the Federal government, the states and the counties. 43 CFR Part 1860 [WO-350-1864-24 1A] RIN 1004-AD50 Conveyances, Disclaimers and Correction Documents
AGENCY: Bureau of Land Management, Interior. ACTION: Final rule.

http://www.nplnews.com/fedregister/2003/jan62003-blm-rs2477.htm
SUMMARY: The Bureau of Land Management (BLM) amends its regulations pertaining to recordable disclaimers of interest in land. We are amending the regulation by: removing the 12-year regulatory filing deadline for states; removing the requirement that an applicant be a ``present owner of record'' to be qualified under the Act; allowing any entity claiming title, not just current owners of record, to apply for a disclaimer of interest; defining the term ``state'' as it is used in this rule; clarifying how we will approve disclaimer applications involving another Federal land managing agency.

12/28/02 - Little Wyo interest in old road law - Casper Star Tribune - The state of Wyoming has not taken much interest in an old federal law making it possible for local governments to claim rights-of-way through federal lands.

RS 2477 in California
http://www.death-valley.us/article500.html
http://www.death-valley.us/article499.html
http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=18049

ACCESS CLOSURE TO PATENTED PRIVATE LAND IN LOWER 48 STATES

9/11 - Catron Co, NM - Forest Service Probes Road Grading - There are 4 parcels of unimproved, uninhabited tracts of land located on the San Francisco River that are surrounded by national forest lands. The road servicing these tracts is an old historic road (RS 2477) connecting Glenwood with Reserve. This 17 mile stretch of road has not been maintained by the county for many years. However travelers and landowners have continually gone up the river anyway. The Gila Forest wishes to purchase this property and has had it appraised. Our county land plan calls for no net loss of private land. Private land is our tax base and provides a nucleus for any future economic benefits. One of the landowners would not consent to sell. This land owner received a letter from Gila Forest Supervisor Kelly M. Russell stating that the area had been designated as the Devils Park Road-less area. He was informed that his only access was by foot or horseback. He could be granted a vehicle permit if he consented to pay the forest service to do a full blown NEPA study. Nobody else, to our knowledge was informed of this road-less designation including Catron County. One of the strongest rights in the U.S. is to have full access to ones private land.

For More Information Contact:
American Land Rights Association
Tel: 360-687-3087
FAX: 360-687-2973

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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
2002 Alas. AG LEXIS 13
File No: 665-01-0201
July 17, 2002

Request By:

John F. Bennett, PLS, SR/WA
Right of Way Chief
DOT/PF, Northern Region

Opinion

Opinion by: Paul R. Lyle, Assistant Attorney General

Question

What public uses are authorized within the R.S. 2477 right-of-way for the Klutina Lake Road?1

Ahtna, Inc., the landowner whose lands are traversed by the Klutina Lake road, claims that travelers may use the road only for continuous travel. According to Ahtna, the traveling public may not make rest stops, park for any purpose within the right-of-way except for emergencies, or camp overnight within the right-of-way.

Ahtna also claims that R.S. 2477 easements are of no effect until established by a court judgment. In addition, Ahtna asserts that the state's R.S. 2477 right-of-way for the Klutina Lake road is superceded by an overlapping ANCSA 17(b) easement reserved for the road in the interim conveyances conveying the lands traversed by the road from BLM to Ahtna and Kluti-Kaah Corporation, hereinafter collectively referred to as "Ahtna."

Summary of Advice

In our opinion, the public may make reasonable use of the right-of-way for the activities listed above. Department of Transportation and Public Facilities (DOT&PF) may make improvements to the road reasonably necessary to accommodate the uses made of the road from its establishment circa 1898 through October 21, 1976 (the date R.S. 2477 was repealed) and may take reasonable steps to render the road convenient for those public uses.

A judgment is not necessary to perfect R.S. 2477 easements. The state's R.S. 2477 right-of-way is not superceded by the overlapping ANCSA 17(b) easement contained in Ahtna's conveyances. Rather, the overlapping R.S. 2477 right-of-way is impressed on the land by operation of law and is enforceable even if it is of greater scope than the ANCSA 17(b) easement.

Legal Analysis

We first address the uses to which the right-of-way may be put and then address Ahtna's arguments that the state's R.S. 2477 right-of-way must be perfected by litigation and is supplanted by the ANCSA 17(b) easement for the Klutina Lake road included in Ahtna's conveyances.

1. The uses the public may make of a perfected R.S. 2477 right-of-way are those uses to which the public has traditionally put the road.

The issue of what public uses of a right-of-way are authorized by law is an issue concerning the "scope" of the right-of-way.

The "scope" of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as **the uses to which it has been put.**

Sierra Club v. Hodel, 848 F.2d 1068, 1079 n. 9 (10th Cir. 1988), overruled in part on other grounds, *Village of Los Ranchos de Albuquerque v. Marsh,* 956 F.2d 970, 973 (10th Cir. 1992) (emphasis added).2

Because the Klutina Lake road was established under a federal statute, we must, as a threshold matter, examine whether state or federal law controls the scope issue.

a. The uses to which an R.S. 2477 may be put will probably be controlled by state law.

There is controversy over whether state or federal law controls the perfection of R.S. 2477 rights-of-way. The controversy centers on whether R.S. 2477 required actual road construction in order to perfect a right-of-way, as opposed to establishment by user or an act of a public authority. *See North Dakota Op. Att'y Gen. No. 2000-05,* 2000 WL 146636 (N.D.A.G.

Jan. 26, 2000)(containing a general summary of this controversy and of state and federal cases addressing this issue).

The "actual construction" controversy is irrelevant to your question. The perfection of an R.S. 2477 right-of-way for the Klutina Lake road through actual construction by a public authority is not an issue in this case. The road was constructed and state funds expended on improvements well before R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA) on October 21, 1976, with a savings provision for existing rights-of-way. *See* 701(a), 706(a) Pub.L. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 (note). Nevertheless, we have examined federal and state cases to ascertain whether state or federal law controls the scope of an R.S. 2477.

(i) Decisions of the Ninth Circuit Court of Appeals indicate that the Ninth Circuit would probably apply state law to the issue of the scope of an R.S. 2477 right-of-way unless federal law expressly dictates otherwise.

At least one circuit applies state law to determine the scope of an R.S. 2477 right-of-way. In *Sierra Club v. Hodel,* 848 F.2d at 1080-83, the Tenth Circuit unequivocally held that state law controls the scope of an R.S. 2477 right-of-way, including the uses to which the road may be put.

No Ninth Circuit decision directly holds that the scope of an R.S. 2477 is a matter to be determined under state law where federal law is otherwise silent on the issue of which law controls. However, several Ninth Circuit decisions imply that state law would be applied to determine the uses to which an R.S. 2477 may be put where, as here, the perfection of the R.S. 2477 right-of-way by actual construction is not in doubt. *See Shultz v. Dep't of Army,* 10 F.3d 649, 655 n. 8 (9th Cir. 1993) (holding that both the establishment and scope of an R.S. 2477 right-of-way is a question of state law, citing *Standage Ventures, infra.* and *Hodel, supra.*), *withdrawn,* 96 F.3d 1222 (1996) n3; *Standage Ventures, Inc. v. Arizona,* 499 F.2d 248, 250 (9th Cir. 1974); *Adams v. U.S.,* 687 F.Supp. 1479, 1490 (D.Nev. 1988), *affirmed in part, reversed in part on other grounds,* 3 F.3d 1254 (9th Cir. 1993) ("[A] right of way could be established by public use under terms provided by state law."); *U.S. v. Rogge,* 10 Alaska 130 (D. Alaska Terr. 1941), *affirmed,* 128 F.2d 800 (9th Cir. 1942); *see also,* lower court decisions within the Ninth Circuit, *e.g., U.S. v. 9,947.71 Acres of Land,* 220 F.Supp. 328, 332, 335-36 (D.Nev. 1963); *Berger v. Ohlson,* 9 Alaska 389, 395 (D. Alaska Terr. 1938), *vacated on other grounds,* 9 Alaska 605 (D.Alaska Terr. 1939); *Clark v. Taylor,* 9 Alaska 298, 305 (D. Alaska Terr. 1938).

In *Vieux v. East Bay Regional Park District,* 906 F.2d 1330, 1341 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990), a case concerning a public highway established within a railroad right-of-way under 43 U.S.C. 912, the Ninth Circuit, held that:

State law determines what is a "public highway legally established" for the purposes of federal land grant statues....

(quoting 43 U.S.C. 912, citing *Standage Ventures, supra.*); accord, *King County v. Burlington Northern Railroad Corp.,* 885 F.Supp. 1419, 1422 n. 5 (W.D. Wash. 1994).

While *Vieux* did not address R.S. 2477, its holding is broadly applicable to all "federal land grant statutes" of which R.S. 2477 was a part.4 *Vieux,* 906 F.2d at 1341. Therefore, there is a good argument that the holding in *Vieux* applies to the establishment of R.S. 2477 rights-of-way as well.

Furthermore, in a case that arose out of the Supreme Court of California, the U.S. Supreme Court recognized that R.S. 2477 authorized the creation of highways over the federal public domain in any manner consistent with state law. *Central Pacific Railway Co. v. Alameda* County, 52 S.Ct. 225, 226-27, 229 (1932). The right-of-way at issue in *Central Pacific* was a road first established by public use and subsequently laid out and improved by the county before R.S. 2477 was enacted.5 The Court held that R.S. 2477 applied retroactively to validate pre-existing roads crossing public domain lands. *Id.* at 227. The Court also held that R.S. 2477 rights-of-way are "controlled by the same general principles" applicable to cases concerning appropriation of water from the public domain under section 9 of the Act of July 26, 1866.6 *Id.* at 228. Section 9, in turn, provided that water appropriation issues would be determined under local customs and laws. The Court twice noted that the road was established under state law. *Central Pacific,* 52 S.Ct. at 226, 229. *Central Pacific* thus lends support to the argument that state law controls the scope of an R.S. 2477 right-of-way.

There is one Ninth Circuit decision that indicates the Ninth Circuit may apply federal law to determine the scope of an R.S. 2477 right-of-way. We believe that case is distinguishable. In *U.S. v. Gates of the Mountains Lakeshore Homes, Inc.,* 732 F.2d 1411, 1413 (9th Cir. 1984), the court, construing R.S. 2477, held that the scope of a federal land grant is a question of federal law. The court recognized that federal law sometimes adopts and applies state law to federal land grants, but found that federal statutes passed after R.S. 2477 was enacted dictated a distinctly federal rule applicable to the placement of electric power transmission lines within R.S. 2477 roads. *Id.*

Hodel distinguished the holding of *Gates of the Mountains,* reasoning that it was limited to the issue of placing utilities within R.S. 2477s.7 *Hodel,* 848 F.2d at 1081. Unlike the situation in *Gates of the Mountains,* we can find nothing in federal law that controls **other uses** to which an R.S. 2477 may be put or that specifies a width for R.S. 2477 rights-of-way. Federal law is silent on both of these "scope" issues. Thus, because there is no federal law to apply with

respect to the scope issues related to the Klutina Lake road, we believe it likely that the Ninth Circuit would apply state law to resolve these issues.

Although we believe a strong argument can be made that state law controls both the establishment and scope of R.S. 2477 rights-of-way, you should be aware of a recent Tenth Circuit decision that refused to apply state law to determine the **validity** of an R.S. 2477 crossing federal lands. In *South Utah Wilderness Alliance v. BLM,* 147 F.Supp.2d 1130, 1141-43 (D.Utah 2001), the court upheld the BLM interpretation of R.S. 2477 that requires actual road construction to perfect the easement. The court deferred to BLM's interpretation of R.S. 2477 because federal law requires federal courts to "give some deference to the agency interpretation of the statute" and because the court found BLM's "actual construction" interpretation to be reasonable. *Id.* at 1135, 1143.

The holding in *South Utah* would probably not apply to the Klutina Lake road situation. First, *South Utah* is not controlling precedent in the Ninth Circuit. Second, *South Utah* addresses the perfection of an R.S. 2477, not the allowable uses to be made of an R.S. 2477 after it is perfected. Thus, BLM's statutory interpretation of R.S. 2477 as to what actions are sufficient to perfect an R.S. 2477 easement would likely be irrelevant to the issue of the allowable uses of the Klutina Lake road.

On balance, we believe that the Ninth Circuit would apply state law to determine the allowable uses within an R.S. 2477 because there is no federal law to apply. In such circumstances, the federal courts will most likely look to state law. *Hodel,* 848 F.2d at 1083; *Gates of the Mountains,* 732 F.2d at 1413.

(ii) Cases from Alaska and other state courts.

The Alaska Supreme Court has long held that R.S. 2477 grants are to be interpreted in accordance with Alaska law. *Fitzgerald v. Puddicombe,* 918 P.2d 1017, 1019 (Alaska 1996); *Girves v. Kenai Peninsula Borough,* 536 P.2d 1221, 1226 (Alaska 1975); *Hamerly v. Denton,* 359 P.2d 121 (Alaska 1961). Other states also hold that state law controls the scope of an R.S. 2477 right-of-way. *See, e.g.,* cases cited in *Hodel,* 848 F.2d at 1082 & n. 13 ("We are not aware of any state that even considered the possibility of a federal rule."); *North Dakota Op. Att'y Gen. 2000-05,* 2000 WL 146636 at *10 ("All state court decisions look to state law.")

b. The uses authorized within an R.S. 2477.

In *Hodel,* the court, applying Utah law, held that the uses authorized within an R.S. 2477 right-of-way are those that are "reasonable and necessary" as measured "in light of traditional uses to which the right-of-way was put." *Hodel,* 848 F.2d at 1083. Moreover,

because the grantor, the federal government, was never required to ratify a use on an R.S. 2477 right-of-way, each new use of the [right-of-way] automatically vested as an incident of the easement. Thus, all uses before October 21, 1976, not terminated or surrendered, are part of an R.S. 2477 right-of-way.

Hodel, 848 F.2d at 1084. The court ruled that the county had authority to improve the road at issue in *Hodel* to the extent reasonably necessary to ensure safe use of the right-of-way consistent with its historical uses. 848 F.2d at 1083. We believe the same conclusion would be reached under Alaska law.

In *Simon v. State,* 996 P.2d 1211 (Alaska 2000), the court was asked to address the scope of an easement set out in a Department of Interior public land order. The court applied the common law of easements and held that, "where the terms of the easement are ambiguous, then the holder of the easement is only entitled to use the property within reason." 996 P.2d at 1214. The court found that a public land order granting an easement "over and across" a parcel of property was ambiguous as to its scope. 996 P.2d at 1215. The language of R.S. 2477 granting a "right of way for the construction of highways ... for public uses" is no less ambiguous than the easement language at issue in *Simon.*

Where the language of an easement is ambiguous, the "easement gives the holder the right to use the land to the extent necessary to serve the purpose of the easement." *Simon,* 996 P.2d at 1215. While *Simon* did not involve an R.S. 2477 right-of-way, it did involve a public right-of-way granted under federal law. Therefore, it is likely that Alaska courts will apply the *Simon* standard to determine the uses to which the Klutina Lake road may be put under R.S. 2477.

The historical uses of the Klutina Lake road include vehicular and pedestrian travel, rest stops, parking for recreational uses of the Klutina River, and overnight camping. The law authorizes the reasonable use of the right-of-way for these purposes.

However, in assisting the public in making these uses convenient, the department should bear the following in mind:

BLM Administrative Determinations on R.S. 2477 Rights-of-Way

Section 8 of the Mining Act of 1866 provided: "and be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The statute was self enacting; rights being established by "construction" of a "highway" on unreserved public lands, without any form of acknowledgement or action by the Federal government. This section of the statute was later re-codified as Revised Statute 2477. R.S. 2477 was repealed by FLPMA on October 21, 1976, with a savings provision for rights established prior.

The BLM does not have the authority to make binding determinations on the validity of R.S. 2477 right-of-way claims. The BLM may, however, make informal, non-binding, administrative determinations for its own land use planning and management purposes. Such determinations must be based in the particular laws of each state in which a claimed right-of-way is situated. In Utah, applicable State code provided for the acceptance of a right-of-way pursuant to R.S. 2477 across public lands not reserved for public purposes when a right-of-way had been used by the public for a continuous 10 year period.

As of February 2009, the BLM has been directed not to process or review any claims under R.S. 2477 pending further review and direction from the Secretary of the Interior.

Revised Statute 2477 (commonly known as "RS 2477") was enacted by the United States Congress in 1866 to encourage the settlement of the Western United States by the development of a system of highways. Its entire text is one sentence: "the right-of-way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted."

The original grant did not require being recorded, meaning it was self enacting, and in 1866 constructing a road often meant using a trail many times and perhaps filling low places, moving rocks and placing signs.

It granted to counties and states a right-of-way across federal land when a highway was built.

RS 2477 was repealed in 1976 under the Federal Land Policy and Management Act (FLPMA). The repeal was subject to "valid existing rights." The relevant text (Sec. 701. 43 U.S.C. 1701) reads (a) "Nothing

in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act" [1].

Controversy

Shared-access advocates claim that neither the BLM, Forest Service nor other federal agencies, nor even private landowners have the authority to close RS 2477 roads. Their interpretation of the statute has brought them into conflict with wilderness advocates, the federal government and private landowners.

Conflicts on Federal Lands

RS 2477 has become an issue for wilderness advocacy groups because of language in the Wilderness Act of 1964. According to Section 2 (c) 3, any area to be considered for wilderness status must contain "a least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition." Section 4 (c) further specifies, "Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act" [2]. Thus an RS 2477 "highway" which qualifies as a "road" could disqualify the land it traverses from being recognized by the federal government as a "wilderness" if it reduced the area under consideration beneath the 5,000 acre limit.

Access advocates have sometimes organized to reopen or maintain what they consider to be legitimate RS 2477 roads [3]. The Jarbidge Shovel Brigade is the best-known group that was formed for this purpose.

Landowners, environmental organizations, government organizations (federal, state and county) and recreational-use advocates have very different understandings of the law. Conflicts among these groups came to a head when President Bill Clinton declared the Grand Staircase-Escalante, in southern Utah, to be a National Monument. Several Utah counties have been fighting in court to assert RS 2477 claims to roads that cross federal and private property (see SUWA v BLM), including across the Grand Staircase-Escalante National Monument.

Interior Secretary Ken Salazar recently authorized interior representatives to negotiate federal recognition of RS 2477 roads for

which there is a clear historical record [4]. In August 2010, quiet title of the Skutumpah Road, within the Grand Staircase-Escalante National Monument, (see Kane County, Utah v United States) was granted to Kane County, Utah [5].

Conflicts on Private Lands

As western lands become developed into residential subdivisions, motorized recreationists and sportsmen are continuing to claim access rights on privately-constructed, -owned, and -maintained roads that cross private land and gated communities. Because some disputed roads were never recorded by counties, shared-access groups claim that private landowners hold property with an unrecorded public right-of-way. Property rights advocates say that failure to record a right-of-way means that there was no intention to create a public right.

Shared-access groups argue that lack of formal action by counties does not diminish the public's easement/usufruct rights through private lands. hey have engaged in threats, trespassing, and vandalism [6] to vigorously assert those rights.

Private property activists claim that nobody has access rights without a recorded easement. Shared-access activists claim that virtually all private land that used to be public can legally be traversed by the public. There is little common ground between these interpretation, so lawsuits are being fought in the western United States, and it has fallen to the courts to determine which routes are public and which are not.

Courts have applied state laws, federal laws, and federal land court rulings to resolve RS 2477 claims. Recent examples of failed attempts to assert RS 2477 rights on private property are Galli v. Idaho County (Case Number CV 36692, Second Judicial District of Idaho, 2006) and Ramey v. Boslough (Case Number 02-CV-582, Boulder County District Court, 20th Judicial District of Colorado, 2007).

HOUSE COMMITTEE REPO

(7)

Date Referred to Committee: April 3, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 4/9/12

The JUDICIARY Committee considered: **HJR 40**

HOUSE JOINT RESOLUTION NO. 40

Commending the governor and the administration for aggressively working to enforce the rights of the state in R.S. 2477 rights-of-way; urging the governor and the attorney general to develop a working alliance with other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and the attorney general to support the State of Utah and the southern counties of Utah in a lawsuit against the federal government concerning R.S. 2477 rights-of-way, including filing an amicus brief in support of Utah; urging the governor to dedicate state resources to establish, protect, and enforce the state's interests in R.S. 2477 rights-of-way and to preserve state rights-of-way against encroachment by the federal government; urging the governor to reestablish a federalism section in the Department of Law and sections in the Department of Natural Resources and the Department of Fish and Game to support the preservation of the state's rights and powers in compact cases; and urging the governor to prepare an appropriation request to fund an aggressive effort by the state to resolve issues relating to R.S. 2477 rights-of-way, including possible litigation, and to continue to work to preserve the rights of the state in regard to R.S. 2477 rights-of-way.

HJR 40-RS 2477 RIGHTS-OF-WAY

Recommends it be replaced with [ ] HCS *or* [X] CS for HJR 40 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ ; [ ] Same Title [X] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	LEG			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Bob Lynn	LYNN	X			
Greenley	Greenley	–			
Keller	Keller	X			
	Holmes	X			
Vice Chair: Stan M Thompson	THOMPSON	X			
Chair:					

CS FOR HOUSE JOINT RESOLUTION NO. 40(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 4/3/12
Referred: Judiciary

Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz, Peggy Wilson, Feige

A RESOLUTION

Commending the governor and the administration for aggressively working to protect the interests of the state in rights-of-way under R.S. 2477; urging the governor and the attorney general to develop a working alliance with the governors, attorneys general, and legislatures in other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and the attorney general to support the interests of the State of Utah and southern counties of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through various means, including initiating litigation in this state; urging the governor and the attorney general to develop a strategy for resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in the state, including the possibility of bringing lawsuits against the federal government to preserve the state's interest in rights-of-way; urging the governor to further strengthen the resources of the state for protecting the state's rights by continuing to focus the efforts of the Department

of Law, the Department of Natural Resources, the Department of Fish and Game, and other departments on defending the state's rights and powers with regard to access and federalism issues; and urging the United States Congress to enact legislation requiring federal agencies with land management authority to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute those claims in court and to participate in good faith in the process.

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

WHEREAS, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal land to encourage the development of western land; and

WHEREAS R.S. 2477 rights-of-way were perfected by simple use or development; and

WHEREAS R.S. 2477 rights-of-way were established in the state through use or development until virtually all federal land in the state was withdrawn in 1969; and

WHEREAS, when R.S. 2477 was repealed in 1976 under the Federal Land Policy Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly protected; and

WHEREAS the Alaska State Legislature has recognized 602 rights-of-way in statute, and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477 rights-of-way; and

WHEREAS historic R.S. 2477 rights-of-way represent a key component of the mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the settlement of the state's land and the development of the state's land and resources; and

WHEREAS the United States Department of the Interior and the United States Forest Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a decision by a court of competent jurisdiction; and

WHEREAS unilateral resistance by the federal government to the existence of the state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

max: + private interests ?

state resources by making them accessible and available for maximum use consistent with the public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

WHEREAS the State of Utah recently filed notices of intent to sue to enforce its interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

WHEREAS the State of Alaska and the State of Utah share similar objections to the large withdrawals of Federal Conservation Units that are managed by the United States Department of the Interior and the United States Forest Service, agencies that both unilaterally deny the existence of valid state easements; and

WHEREAS virtually all of the state's natural resource development projects are unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the Clean Water Act, and myriad arbitrary federal regulators and policies implementing and enforcing those and other federal laws;

BE IT RESOLVED that the Alaska State Legislature commends the governor and the administration for aggressively working to protect the interests of the state in rights-of-way under R.S. 2477 and urges the governor and the attorney general to develop a working alliance with the governors, attorneys general, and legislatures in other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor and the attorney general to support the interests of the State of Utah and southern counties of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through various means, including initiating litigation in this state; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor and the attorney general to develop a strategy for resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in the state, including the possibility of bringing lawsuits against the federal government to preserve the state's interest in rights-of-way; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor further to strengthen the resources of the state for protecting the state's rights by continuing to focus the efforts of the Department of Law, the Department of Natural Resources, the Department of Fish and Game, and other departments on defending the state's rights and powers with

regard to access and federalism issues; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the United States Congress to enact legislation requiring federal agencies with land management authority to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute those claims in court and to participate in good faith in the process.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Ken Salazar, United States Secretary of the Interior; the Honorable John Boehner, Speaker of the U.S. House of Representatives; the Honorable Nancy Pelosi, Minority Leader of the U.S. House of Representatives; the Honorable Harry Reid, Majority Leader of the U.S. Senate; the Honorable Mitch McConnell, Minority Leader of the U.S. Senate; the Honorable Jeff Bingaman, Chair of the Energy and Natural Resources Committee of the U.S. Senate; the Honorable Gary R. Herbert, Governor of Utah; Kathy Davis, Assistant Attorney General, State of Utah, Office of the Attorney General, Division of Public Lands; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; and all other members of the 112th United States Congress.

27-LS1407\M
Bullock
3/29/12

CS FOR HOUSE JOINT RESOLUTION NO. 40( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz

A RESOLUTION

Commending the governor and the administration for aggressively working to protect the interests of the state in rights-of-way under R.S. 2477; urging the governor and the attorney general to develop a working alliance with the governors, attorneys general, and legislatures in other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and the attorney general to support the State of Utah and southern counties of Utah in a lawsuit to enforce Utah's interests in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through various means, including initiating litigation; urging the governor and the attorney general to develop a strategy for resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in the state, including the possibility of bringing lawsuits against the federal government to preserve the state's interest in rights-of-way; urging the governor to further strengthen the resources of the state for protecting the state's rights by continuing to focus the

efforts of the Department of Law, the Department of Natural Resources, the Department of Fish and Game, and other departments on defending the state's rights and powers with regard to access and federalism issues; urging the United States Congress to enact legislation requiring federal agencies with land management authority to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute those claims in court and to participate in good faith in the process.

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

WHEREAS, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal land to encourage the development of western land; and

WHEREAS R.S. 2477 rights-of-way were perfected by simple use or development; and

WHEREAS R.S. 2477 rights-of-way were established in the state through use or development until virtually all federal land in the state was withdrawn in 1969; and

WHEREAS, when R.S. 2477 was repealed in 1976 under the Federal Land Policy Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly protected; and

WHEREAS the Alaska State Legislature has recognized 602 rights-of-way in statute, and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477 rights-of-way; and

WHEREAS historic R.S. 2477 rights-of-way represent a key component of the mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the settlement of the state's land and the development of the state's land and resources; and

WHEREAS the United States Department of the Interior and the United States Forest Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a decision by a court of competent jurisdiction; and

WHEREAS unilateral resistance by the federal government to the existence of the state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

state resources by making them accessible and available for maximum use consistent with the public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

WHEREAS the State of Utah recently filed notices of intent to sue to enforce its interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

WHEREAS the State of Alaska and the State of Utah share similar objections to the large withdrawals of Federal Conservation Units that are managed by the United States Department of the Interior and the United States Forest Service, agencies that both unilaterally deny the existence of valid state easements; and

WHEREAS virtually all of the state's natural resource development projects are unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the Clean Water Act, and myriad arbitrary federal regulators and policies implementing and enforcing those and other federal laws;

BE IT RESOLVED that the Alaska State Legislature commends the governor and the administration for aggressively working to protect the interests of the state in rights-of-way under R.S. 2477 and urges the governor and the attorney general to develop a working alliance with the governors, attorneys general, and legislatures in other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor and the attorney general to support the State of Utah and southern counties of Utah in a lawsuit to enforce Utah's interests in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through various means, including initiating litigation; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor and the attorney general to develop a strategy for resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in the state, including the possibility of bringing lawsuits against the federal government to preserve the state's interest in rights-of-way; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the governor further to strengthen the resources of the state for protecting the state's rights by continuing to focus the efforts of the Department of Law, the Department of Natural Resources, the Department of Fish and Game, and other departments on defending the state's rights and powers with

regard to access and federalism issues; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the United States Congress to enact legislation requiring federal agencies with land management authority to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute those claims in court and to participate in good faith in the process.

Melanie Lesh

From: Jim Pound
Sent: Monday, April 02, 2012 2:12 PM
To: Rep. Carl Gatto; Melanie Lesh
Subject: Request for hearing CSHJR 40
Attachments: CSHJR 40 1866 mine bill.pdf; CSHJR 40 AG opin (No Print).pdf; CSHJR 40 BLM determination.pdf; CSHJR 40 DNR Background.pdf; CSHJR 40 GAO Report.pdf; CSHJR 40 Request Jud.pdf; CSHJR 40 RS2477 Resources.pdf; CSHJR 40 Sponsor.pdf; CSHJR 40-B 3-30.pdf; CSHJR 40-M.pdf; HJR040A.PDF

Please consider this as a request, pending referral for you to schedule CSHJR 40 "RS 2477 Right-of-Ways" currently attached as a blank CS Version B for consideration by the House Judiciary Committee. Included with the formal request please find a packet of information and documents in a .pdf format.

CSHJR 40 is an in-house request from the legislature to restart our assertion that Alaska is entitled to seek access to our resources and to commerce opportunities by using transportation corridors. To date there are 670 identified RS 2477s that are being denied by federal government departments that don't want to commit.

Similar problems are being faced in other states and this resolution asks our administration to join with them to resolve the access problems facing many western states.

If you have any questions please feel free to contact my office.

Thanks

Jim Pound

I should pass along two things. The fiscal note has not been published but I am assured it is zero. Second there is a document in the list that says AG Opin (no print). It is 59 pages and will be just as easy for anyone to read electronically if they so choose.

Thanks

SB

15

<TARGET><BILL>SB 15</BILL><SUBJECT>SB
15</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue
Anchorage, Alaska 99501-2133
Phone: (907) 269-0199
Fax (907) 269-0197
Senator_Kevin_Meyer@legis.state.ak.us

Session:
Alaska State Capitol
Juneau, Alaska 99801-1182
Phone: (907) 465-4945
Fax: (907) 465-3476
Toll Free: (866) 465-4945

SENATOR KEVIN MEYER
MAJORITY LEADER

TO: Representative Carl Gatto, Chair
House Judiciary Committee

FROM: Senator Kevin Meyer

DATE: April 8, 2011

RE: CSSB 15 Request for Hearing

I respectfully request the House Judiciary Committee to schedule a hearing for CSSB 15, "An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper" pending referral.

The following documents are attached and will be sent electronically:

- Memo Requesting Hearing
- Sponsor Statement
- SB 15, CSSB 15
- Memo of changes
- Fiscal Notes
- Back up information
- Letters of support
- Witness/Testimony:
  - Kate Burkhart, Executive Director of the Advisory Board on Alcoholism and Drug Abuse
- Staff member assigned to the bill: Christine R. Marasigan, 465-6876

This bill would provide aggravated penalties for sex offenders and child kidnappers who provide alcohol to people under 21 years of age.

Please contact Christine if you have any questions regarding this legislation.

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer

Senate District O

SPONSOR STATEMENT FOR CSSB 15 (JUD)

"An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or a child kidnapper."

Senate Bill 15 makes providing alcohol for those who are under 21 years of age by a person who is required to register as a sex offender or child kidnapper.

If SB 15 is enacted, penalties will increase as follows:

- A Violation to a Class B Misdemeanor
- A Class A Misdemeanor to a Class C Felony
- A Class C Felony to a Class B Felony

According to the Anchorage Police Department, alcohol is involved in over 51.2% of sexual assaults reported in Anchorage between 2006 and 2007. Almost a fourth of those sexual assaults were perpetrated against victims between the ages of 15 and 19. Law enforcement and social service agencies all recognize a strong pattern in the use of drugs and alcohol as a "grooming" tool in an attempt to lure young people into sexual activity.

CHANGES TO SB 15:

CSSB 15 SHSS: 27-LS0119\D
Two substantive changes:
Lines 5 and 6 on page 1:
Aggravated penalties applies to:

- AS 04.16.51
  Furnishing or delivery of alcoholic beverages to persons under the age of 21.
- AS 04.16.055
  Room rental for purposes of consuming alcoholic beverages.
- AS 04.16.057
  Permitting a person under 21 years of age to possess liquor in dwelling.

Lines 6 and 7 on page 2:
The addition of AS 12.63.100 -- the definition of sex offender child kidnapper.

Changes make the bill more accurately reflect the situations where a young person may be lured into providing sexual favors for alcohol.

Fiscal Note from Department of Corrections:
From GF: $469.2 for FY 2012-2013, $821.1 for FY 2014, $1,173.0 for FY 2014-2015, $1,524.9 for FY 2016, $1,876.8 for FY 2017

CSSB 15 SJUD: 27-LS0119\E
One main change:
Line 10 on page 1:

- "who is required to register as a sex offender or child kidnapper under AS 12.63"

Change was recommended by the Department of Law.

Revised Fiscal Note from Department of Corrections:
From GF: $182.4 for FY 2012, $232.2 for FY 2013-2017.

CSSB 15 SFIN
Fiscal Note from Department of Corrections: Indeterminate

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSB 15(HSS)
(S) Publish Date: 3/18/11

Identifier (file name) SB015-DOC-OC-03-14-11
Title: "An Act relating to penalties for certain alcohol offenses involving
Sponsor: Senator Kevin Meyer
Requester: Senate Health and Social Services

Dept. Affected: DOC
Appropriation: Administration & Support
Allocation: Office of the Commissioner
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities	469.2	469.2	821.1	1,173.0	1,173.0	1,524.9	1,876.8
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**469.2**	**469.2**	**821.1**	**1,173.0**	**1,173.0**	**1,524.9**	**1,876.8**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	469.2	469.2	821.1	1,173.0	1,173.0	1,524.9	1,876.8
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**469.2**	**469.2**	**821.1**	**1,173.0**	**1,173.0**	**1,524.9**	**1,876.8**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version; not applicable

Prepared by: Leslie Houston, Director
Division: Dept. of Corrections - Administrative Services
Approved by: Joseph D. Schmidt, Commissioner
Dept. of Corrections

Phone: 465-3339
Date/Time: 3/15/11 11:00 AM
Date: 3/15/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO CSSB 15(HSS)

Analysis

This bill would elevate the offenses of furnishing alcohol to persons under the age of 21 (under AS 04.16.051 - AS 04.16.057) if the offense is committed by a sex offender or child kidnapper. For example, if the offense committed under AS 04.16.051 - AS 04.16.057 is a class C felony, the offense would be elevated to a class B felony.

Should this legislation pass, the Department of Corrections has data to support an average of 3.5 convictions per year under the following sections:

Section 1(2): if the underlying offense is a class A misemeanor, a sex offender or child kidnapper committing the offense is guilty of a class C felony and shall be punished as provided in AS 12.55;

3.5 convictions per year represents an increase of 860 mandays per year @ $136.44/da = $117.3/yr

Section 1(3) : if the underlying offense is a class C felony, a sex offender or child kidnapper committing the offense is guilty of a class B felony and shall be punished as provided in AS 12.55.

3.5 convictions per year represents an increase of 2,579 mandays per year @ $136.44/day = $351.9/yr

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSSB 15(HSS)
(S) Publish Date: 3/18/11

Identifier (file name): SB015-LAW-CRIM-03-11-11
Title: An Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper.
Sponsor: SENATOR(S) MEYER
Requester: (S) HEALTH & SOCIAL SERVICES

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager
Division: Administrative Services
Approved by: John J. Burns, Attorney General
Department of Law

Phone: 465-5427
Date/Time: 3/11/11 4:30 PM
Date: 3/11/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSSB 15(HSS)

Analysis

SB 15 raises one level the severity of offenses for providing alcohol to persons under 21 years of age if the offender is a sex offender or child kidnapper. For example, a nonlicensee who furnishes alcohol to a person under 21 years of age commits a class A misdemeanor for a first offense. SB 15 would make this offense a class C felony if the offender was a sex offender or child kidnapper.

This would have an indeterminate fiscal impact on the Department of Law. Any time an offense is raised from a misdemeanor to a felony there is an impact. Felony prosecutions require more time – for example, a felony requires a grand jury indictment and a jury of 12 persons.

APOA
ALASKA PEACE OFFICERS ASSOCIATION

ALASKA ASSOCIATION OF CHIEFS OF POLICE

Women Police of Alaska

February 14, 2011

Senator Kevin Meyer
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator Meyer:

On behalf of our respective organizations, we would like to thank you for introducing SB 15, an Act relating to penalties for certain alcohol offenses involving persons under 21 years of age committed by a sex offender or child kidnapper.

We met recently to review proposed legislation and decided to unanimously support this bill.

Again, thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organizations can do to assist in the passage of this bill.

Sincerely,

John Lucking Jr., President
Alaska Peace Officers Association
PO Box 240106
Anchorage AK 99524

Tom Clemons, President
Alaska Association of Chiefs of Police
183 Nelson Ave
Wasilla AK 99654

Michele Logan, President
Women Police of Alaska
PO Box 233306
Anchorage AK 99523

Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

March 29, 2011

Senator Kevin Meyer
Alaska State Legislature
Capitol Building, Room 103
Juneau, Alaska 99801

Re: SB 15 – Alcohol Offenses Committed by Sex Offenders, Child Kidnappers

Dear Senator Meyer,

On behalf of the Advisory Board on Alcoholism and Drug Abuse, I would like to express our support for your efforts to protect children and youth from falling victim to sexual exploitation, trafficking, and kidnapping. While there is no specific data reflecting how often a young person gains access to alcohol through a convicted sex offender or child kidnapper, there is data that shows that young people gain access to alcohol at least one third of the time from adults or friends.

The Center for Behavioral Health Statistics and Quality reported in February 2011 that, between 2006 and 2009, 93.4% of the 709,000 adolescents aged 12-14 who reported drinking alcohol gained access to the alcohol — for free — from other people. Of those, 13.5% were given the alcohol by an unrelated adult. In Alaska, 34.7% of traditional high schools students participating in the 2009 Youth Risk Behavior Survey reported that they had used alcohol in the past thirty days and that they got that alcohol from someone else. While we don't know who provided that alcohol, or whether they were a convicted sex offender or child kidnapper, we do know there is connection between providing alcohol to minors and victimization.

Recent new coverage of sexual exploitation of young Alaskan women by Channel 2, KTUU news highlighted the role of drugs and alcohol in this form of victimization. Young people are often ensnared in human trafficking and sexual exploitation through the provision of drugs and alcohol, among other "grooming" efforts. By creating an aggravating factor to target individuals who use alcohol to coerce, induce, or otherwise attempt to engage a young person in sexual activity will help to address this problem.

Given the traumatic and potentially lifelong harm that can result from situations in when predators use alcohol (and other drugs) to prey upon young people, SB 15 provides a balanced approach to increasing the penalty for individuals who engage in this sort of victimization and exploitation. We appreciate your efforts on behalf our most vulnerable youth.

Sincerely,

J. Kate Burkhart
Executive Director

system. These violations can be enforced by traditional criminal procedures, including the use of search warrants. State v. Euteneier, 31 P.3d 111 (Alaska Ct. App. 2001).

The trial court erred in granting a defendant's motion to suppress evidence discovered pursuant to a search warrant in a prosecution for consuming alcohol as a minor, because while consuming alcohol as a minor was classified as a violation rather than a misdemeanor, search warrants could validly be issued to investigate violations. State v. Euteneier, 31 P.3d 111 (Alaska Ct. App. 2001).

Stated in Shamberg v. State, 762 P.2d 488 (Alaska Ct. App. 1988); Alex v. State, 127 P.3d 847 (Alaska Ct. App. 2006).

Cited in M.O.W. v. State, 645 P.2d 1229 (Alaska Ct. App. 1982); Alfred v. State, 758 P.2d 130 (Alaska Ct. App. 1988); State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997); Johnson v. State, 88 P.3d 1137 (Alaska Ct. App. 2004); Estate of Logusak v. City of Togiak, 185 P.3d 103 (Alaska 2008); Brown v. State, 221 P.3d 20 (Alaska Ct. App. 2009).

Sec. 04.16.051. Furnishing or delivery of alcoholic beverages to persons under the age of 21. (a) A person may not furnish or deliver an alcoholic beverage to a person under the age of 21 years. This subsection does not apply to a licensee or an agent or employee of a licensee while working on licensed premises.

(b) This section does not prohibit the furnishing or delivery of an alcoholic beverage

(1) by a parent to the parent's child, by a guardian to the guardian's ward, or by a person to the legal spouse of that person if the furnishing or delivery occurs off licensed premises; or

(2) by a licensed physician or nurse to a patient in the course of administering medical treatment.

(c) Acts unlawful under AS 11.51.130 are not made legal by (b) of this section.

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section;

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury" has the meaning given in AS 11.81.900; or

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.491 and has not opted out of applying a class C felony to violations of this section under AS 04.11.491(g). (§ 3 ch 131 SLA 1980; am § 9 ch 109 SLA 1983; am §§ 7, 8 ch 156 SLA 1988; am § 1 ch 50 SLA 1989; am § 1 ch 46 SLA 1994; am § 4 ch 90 SLA 2002; am § 7 ch 124 SLA 2004; am § 6 ch 75 SLA 2008)

Effect of amendments. — The 2002 amendment, effective September 25, 2002, in subsection (d) added paragraph (2) and the paragraph (1) designation, and in paragraph (1) redesignated former paragraphs (1) and (2) as subparagraphs (A) and (B).

The 2004 amendment, effective July 1, 2004, added paragraph (d)(3) and made related stylistic changes.

The 2008 amendment, effective July 1, 2008, added the last sentence of subsection (a).

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (d) of this section applies "to offenses committed on or after July 1, 2004."

Section 43(a), ch. 75, SLA 2008 provides that the 2008 amendment of (a) of this section "[applies] to an offense occurring on or after July 1, 2008."

Section 44, ch. 75, SLA 2008, explicitly declares that § 6, ch. 75, SLA 2008, amending (a) of this section, is subject to severability as authorized by AS 01.10.030.

NOTES TO DECISIONS

Contributory negligence. — Fact that injured party violated this section by providing liquor to minor causing accident does not mitigate liability of seller of liquor in violation of AS 04.16.052. Morris v. Farley Enters., Inc., 661 P.2d 167 (Alaska 1983).

Comparative negligence. — A licensee who violates this section is not entitled to assert the comparative fault of the minor/consumer, in an action for

damages resulting from the unlawful sale of intoxicating liquor. Loeb v. Rasmussen, 822 P.2d 914 (Alaska 1991).

Double jeopardy violation. — Trial court violated defendant's double jeopardy rights by sentencing him for both contributing to the delinquency of a minor and for furnishing alcohol to a minor for the single act of furnishing alcohol to the minor, where defendant engaged in only a single criminal act which violated two separate statutes and the two counts should have merged. Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989).

Exceptions as affirmative defenses. — At a minimum, the exceptions specified under subsection (b) are "defenses" to criminal liability; that is, if a defendant wishes to invoke one of these exceptions, then at the very least the defendant must affirmatively raise the exception and point to some evidence from which a reasonable jury could decide that issue in his or her favor. Accordingly, where defendant presented no evidence that he had received his alcoholic beverages from a parent, guardian, or spouse, his conviction was affirmed. Trout v. State, 866 P.2d 1323 (Alaska Ct. App. 1994).

Cited in Powell v. State, — P.3d — (Alaska Ct. App. July 23, 2008), (memorandum opinion).

Collateral references. — Serving liquor to minor in home as unlawful sale or gift. 14 ALR3d 1186.

Sec. 04.16.052. Furnishing of alcoholic beverages to persons under the age of 21 by licensees. A licensee or an agent or employee of the licensee may not with criminal negligence

(1) allow another person to sell, barter, or give an alcoholic beverage to a person under the age of 21 years within licensed premises;

(2) allow a person under the age of 21 years to enter and remain within licensed premises except as provided in AS 04.16.049;

(3) allow a person under the age of 21 years to consume an alcoholic beverage within licensed premises;

(4) allow a person under the age of 21 years to sell or serve alcoholic beverages;

(5) while working on licensed premises, furnish or deliver alcoholic beverages to a person under the age of 21 years. (§ 3 ch 131 SLA 1980; am § 10 ch 109 SLA 1983; am § 7 ch 75 SLA 2008)

Effect of amendments. — The 2008 amendment, effective July 1, 2008, added paragraph (5).

Editor's notes. — Section 43(a), ch. 75, SLA 2008 provides that the 2008 amendment of this section "[applies] to an offense occurring on or after July 1, 2008."

Section 44, ch. 75, SLA 2008, explicitly declares that § 7, ch. 75, SLA 2008, amending this section, is subject to severability as authorized by AS 01.10.030.

NOTES TO DECISIONS

Negligence per se. — Violation of this section by sale of alcoholic beverages to a person under 19 by a licensee is negligence per se in a case involving resulting injuries to the customer or to others. Morris v. Farley Enters., Inc., 661 P.2d 167 (Alaska 1983) (decided under AS 04.15.020 repealed).

Proximate cause. — It was neither unforseeable nor extraordinary that the sale of liquor in violation of this section would result in the sharing of the liquor with companions and that an accident caused by companion's intoxication would result. Morris v. Farley Enters., Inc., 661 P.2d 167 (Alaska 1983) (decided under former AS 04.15.020).

Contributory negligence. — Fact that injured party violated law by providing liquor to minor causing accident does not mitigate liability of seller of liquor in violation of this section. Morris v. Farley Enters., Inc., 661 P.2d 167 (Alaska 1983) (decided under former AS 04.15.020).

Proof of patron's age. — It was reversible error for the trial court to allow the prosecution to prove a liquor establishment's patron's age, a material element of the crime for which defendant was charged (former AS 04.15.020), by admitting the patron's conviction for being a minor on a liquor premises in evidence. Wike v. State, 623 P.2d 356 (Alaska Ct. App. 1981).

Collateral references. — 45 Am. Jur. 2d, Intoxicating Liquors, §§ 253-258.

48 C.J.S., Intoxicating Liquors, §§ 341, 345-350.

Criminal offense of selling liquor to a minor or permitting him to stay on licensed premises as affected by ignorance or mistake regarding his age. 12 ALR3d 991.

Sec. 04.16.055. Room rental for purposes of consuming alcoholic beverages. A

SB

30

<TARGET><BILL>SB 30</BILL><SUBJECT>SB
30</SUBJECT><COMM>HJUD27</COMM></TARGET>

SENATOR FRED DYSON

SPONSOR STATEMENT

SB 30

An Act providing for the release of property in the custody of a law enforcement agency to the owner under certain conditions

SB 30 introduces within the Alaska Code of Criminal Procedure a process for victims of property crime to petition the court for relief in recovering their property held as evidence.

All too often victims of theft and robbery are victimized a second time by bureaucracy. This is particularly true in cases of property crimes where demonstrable loss occurs to the victim's person or business as a result of property being held for a protracted period of time by a law enforcement agency, usually at the direction of prosecution, defense counsel and/or other interested parties.

The law as currently written, provides discretionary authority to the prosecution for release of property, but does not clearly provide a right of hearing for a property owner to directly petition the court in those circumstances when property owners, prosecution and defense cannot come to agreement on return of property to the owner.

Victims of property theft often face the added burden of replacing stolen property. Small business owners who suffer property loss may face bankruptcy if the theft of property results in the inability to consummate a sale, continue their business operations, or the stolen property is uninsured or underinsured.

Property recovered by a law enforcement agency may be held as evidence for months or years. Property owners deserve protections in the law to ensure their property is held as evidence only as long as necessary for the prosecution and defense to physically retain the item, without jeopardizing the case.

SB 30 will provide property owners in the Alaska Code of Criminal Procedure, a clearly identifiable process to petition the court for the recovery of their property in those circumstances where they are otherwise not able to reach agreement with interested parties on the return of the property.

Contact: Chuck Kopp, Staff to Senator Dyson (907)465-6580

During Session (January - May): Alaska State Capitol • Juneau, Alaska 99801 • (800) 342-2199 • (907) 465-2199 • (907) 465-4587 (fax)
During Interim (June-December): 10928 Eagle River Road, Suite 238 • Eagle River, Alaska 99577 • (907) 694-6683 • (907) 694-1015 (fax)
senator.fred.dyson@legis.state.ak.us • www.akrepublicans.org

Alaska State Legislature
House of Representatives
Representative Tammie Wilson

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SPONSOR STATEMENT

CS SB 30 (2d JUD)

An Act providing for the release of certain property in the custody of a law enforcement agency to a crime victim under certain conditions and relating to requests for that release by the Office of Victims' Rights

CS SB 30 (2d JUD) introduces within the Alaska Code of Criminal Procedure a process for victims of property crime to petition the court for relief in recovering their property held as evidence.

Too often victims of theft and robbery are victimized a second time by bureaucracy. This is particularly true in cases of property crimes where demonstrable loss occurs to the victim's person or business as a result of property being held for a protracted period of time by a law enforcement agency, usually at the direction of prosecution, defense counsel and/or other interested parties.

The law as currently written, provides discretionary authority to the prosecution for release of property, but does not clearly provide a right of hearing for a property owner to directly petition the court in those circumstances when crime victims, prosecution and defense cannot come to agreement on return of property to the crime victim.

Victims of property theft often face the added burden of replacing stolen property. Small business owners who suffer property loss may face bankruptcy if the loss results in the inability to consummate a sale, continue their business operations, or the stolen property is uninsured or underinsured.

Property recovered by a law enforcement agency may be held as evidence for a protracted period of time. Property owners deserve protections in the law to ensure their property is held as evidence only as long as necessary for the prosecution and defense to physically retain the item, without jeopardizing the case.

CS SB 30 (2d JUD) will provide property owners in the Alaska Code of Criminal Procedure, a clearly identifiable process to petition the court through the Office of Victims' Rights for the recovery of their property in those circumstances where they are otherwise not able to reach agreement with interested parties on the return of property.

Alaska State Legislature
House of Representatives
Representative Tammie Wilson

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SECTION ANALYSIS – CS SB30 (2d JUD)

Section 1

1. Provides that a crime victim who is the owner of property in the custody of a law enforcement agency may request the agency for the return of their property through the Office of Victims' Rights (OVR).

2. OVR will file the request with the agency after conducting an investigation into the request to make an initial determination if the crime victim is entitled to return of the property being claimed under the requirements of proposed 12.36.070(c): the crime victim provides satisfactory proof of ownership, and the party that objects to the return of the property fails to prove that the property must be retained by the agency for evidentiary purposes.

3. Once OVR makes such a determination, they will request on behalf of the crime victim that the agency return the property.

4. Within 10 days after receipt of request and following reasonable notice to prosecution, defense and other interested parties, the agency will request a hearing before the court to determine if the property shall be released to the crime victim.

5. The court of jurisdiction is identified in cases involving a pending criminal case and in situations where no criminal case is pending.

6. Establishes the burden of proof to be a preponderance of the evidence, for both the crime victim showing ownership and the objecting party proving the property must be retained by the agency.

7. Establishes that if the court orders the return of the property to the crime victim, the court may impose reasonable conditions on the return to maintain the evidentiary integrity of the property.

8. Identifies the term crime victim as having the meaning given to victim in AS 12.55.185, the Code of Criminal Procedure.

Section 2

1. Establishes within Title 24, Chapter 65 Office of Victims' Rights the authority of OVR to request a law enforcement agency for return of property on behalf of a crime victim claiming property after conducting an investigation as proscribed in AS 12.36.070(c).

2. Provides that the victims' advocate may use any of the powers granted to the advocate under Title 24, Chapter 65.

CS FOR SENATE BILL NO. 30(2d JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 4/7/11
Referred: Finance

Sponsor(s): SENATORS DYSON, Kookesh, Menard, Meyer, Giessel, McGuire, French, Coghill, Huggins, Wagoner, Wielechowski, Olson, Paskvan, Ellis, Egan, Thomas, Stedman, Hoffman

REPRESENTATIVE Tammie Wilson

A BILL

FOR AN ACT ENTITLED

"An Act providing for the release of certain property in the custody of a law enforcement agency to a crime victim under certain conditions and relating to requests for that release by the office of victims' rights."

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

*** Section 1.** AS 12.36 is amended by adding a new section to read:

Sec. 12.36.070. Return of property by hearing. (a) A crime victim who is the owner of property not belonging to a law enforcement agency that is in the custody of the agency under this chapter may request that the office of victims' rights request that the agency return the property to the crime victim. The request under this subsection shall be filed by the office of victims' rights on behalf of the crime victim after the office has conducted an investigation and has concluded that the crime victim is entitled to the return of the property under the factors listed in (c) of this section.

(b) Within 10 days after receipt of a request under (a) of this section and following reasonable notice to the prosecution, defense, and other interested parties,

the agency shall request a hearing before the court to determine if the property shall be released to the crime victim. If the property is being held in connection with a criminal case, the hearing shall be before the court with jurisdiction of the criminal case. If no criminal case is pending regarding the property, the hearing shall be before a district or superior court where the property is located.

(c) At the hearing, a party that objects to the return of the property shall state the reason on the record. After a hearing, the court may order the return of the property in the custody of a law enforcement agency to the crime victim if

(1) the crime victim by a preponderance of the evidence provides satisfactory proof of ownership; and

(2) the party that objects to the return of the property fails to prove by a preponderance of the evidence that the property must be retained by the agency for evidentiary purposes under the provisions of this chapter or another law.

(d) If the court orders the return of the property to the crime victim, the court may impose reasonable conditions on the return. Those conditions may include an order that the crime victim retain and store the property so that the property is available for future court hearings, requiring photographs of the property to be taken, or any other condition the court considers necessary to maintain the evidentiary integrity of the property.

(e) In this section, "crime victim" has the meaning given to "victim" in AS 12.55.185.

*** Sec. 2.** AS 24.65 is amended by adding a new section to read:

Sec. 24.65.115. Authority to request return of property on behalf of certain persons. Notwithstanding another provision of this chapter, the victims' advocate may file a request under AS 12.36.070 with a law enforcement agency for the return of property to a crime victim after having conducted an investigation and determining that the crime victim is entitled to the return of the property under the factors listed in AS 12.36.070(c). In fulfilling the requirements of this section, the victims' advocate may use any of the powers granted to the advocate under this chapter.

Alaska State Legislature
House of Representatives
Representative Tammie Wilson

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CS SB30(2d JUD) - EXPLANATION OF CHANGES

The substantive changes to SB 30 since introduction on 01/19/11 are as follows:

1. The use of the term owner was changed to crime victim out of a concern that bill language would allow for defendants to misuse the return of property hearing process, and detract from the intention of the bill, to promote victims' rights by returning property to crime victims.
2. The introduction of the Office of Victims' Rights to the return of property process was done to alleviate a concern that bill language may inadvertently open the door to a significant number of requests for return of property hearings from crime victims, and that a required intermediary step be considered to vet the requests to make a pre-determination concerning eligibility of crime victims to have their property returned to them.
3. Original bill language permitted property owners to directly request from a law enforcement agency the return of their property. For reasons mentioned in #2, the current version provides that the Office of Victims' Rights files a request with the law enforcement agency on behalf of the crime victim for return of property.
4. Original bill language required the law enforcement agency to prove that the agency or another interested party is authorized to retain possession of the property. Judiciary committee members and the Office of Public Defender recommended that the party that objects to the return of the property should be the entity with the burden of proof that the property should be retained and not returned to the crime victim.
5. Department of Law requested the following changes in cooperation with the bill sponsor –
    a. Clarification of court jurisdiction when the property in question is part of a criminal case, and when it is not part of a criminal case.
    b. An evidentiary standard of proof be established to guide the Court with decisions of whether the burden of proof is met by the parties. The standard is a preponderance of the evidence.
    c. The party who objects to the return of property to a crime victim shall state the reason on the record.
    d. Clarifies the reasonable conditions the court may impose on the return of property to crime victims to maintain the evidentiary integrity of the property.
6. The term crime victim is defined as the meaning given to victim in AS 12.55.185, Alaska Code of Criminal Procedure.
7. Consistent with the changes identified in #2, the current version of SB 30 establishes within Title 24, Chapter 65 – Office of Victims' Rights, the authority of OVR to request a law enforcement agency for return of property on behalf of a crime victim.

NFIB

The Voice of Small Business®

ALASKA

March 1, 2011

Senator Fred Dyson
Alaska State Senator
State Capitol Building
Juneau, Alaska 99801-1182

RE Senate Bill 30

Dear Senator Dyson,

On behalf of the National Federation of Independent Business/Alaska, I wish to express our support for Senate Bill 30. The National Federation of Independent Business is the largest small-business advocacy group in Alaska.

SB 30 would provide a mechanism for businesses that have had property stolen to gain assistance in recovering the items that are often critical to the continuation of a person's business.

While often there is not a problem retrieving property from authorities that are prosecuting a case, there are times when small businesses find that they are not considered as important as other issues. SB 30 provides the person assistance from the office of victims' rights to help recover stolen property being held by a law enforcement agency.

While the problem of retrieving stolen property is not always a problem, small businesses have found themselves fighting the government who has bottomless resources. The legal cost and loss of business are a very heavy burden to small businesses.

We believe that CSSB 30 is a reasonable solution to a potentially devastating problem for small businesses.

Sincerely yours,

Dennis L. DeWitt
Alaska State Director

National Federation of Independent Business – ALASKA
P. O. Box 34761•Juneau, AK 99803-4761•907 723 6667•www.NFIB.com

January 5, 2011 one of our employees was involved in a traffic accident on the Sterling Highway. Another driver lost control of her vehicle, crossed the road and ran into our vehicle. She was not wearing a seatbelt, was thrown from her vehicle, and consequently died on scene. The State Troopers confiscated our vehicle and trailer and have kept it in their impound yard in Soldotna since that time.

It has been 13 months since that accident with no police report or indication that we will be able to get our equipment back any time soon, nor are we able to make a settlement with the insurance company. If we were a smaller business than we are, we would be out of business by not having access to our equipment to continue to operate. Renting equipment to replace what is in impound until the case is settled would be a financial burden we would have to incur until the troopers complete their paperwork.

We would like to see this process improved with a timelier turnaround for the parties involved so that life and business can continue. It is just as hard on the deceased family to have to go through this again a year or more later with an insurance claim as it is for the injured parties.

If this is due to the legal system then it needs to change. If it is the political system this needs to change. We need decisions made right away when everything is fresh in people's minds, not six months or one to two years after and the file has sat on someone's desk.

Submitted by:

Hal Ingalls
CEO
Denali Drilling, Inc.
8240 Petersburg Street
Anchorage, AK 99507
907-562-2312

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 30 (2nd JUD)**
Fiscal Note Number:
() Publish Date:

Identifier (file name): CSSB030(2nd JUD)-LEG-COU-02-14-12
Title: "An Act providing for the release of certain property"
Sponsor: Senator Dyson
Requester: (S) FIN

Dept. Affected: Alaska Legislature
Appropriation: Legislative Council
Allocation: Alaska Office of Victims' Rights
OMB Component Number: 2769

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs N/A *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs N/A *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by: Dana Murphy-Hoffman — Phone: (907) 272-2620
Division: Alaska Office of Victims' Rights — Date/Time: 2/14/12 3:20 p.m.
Approved by: D. Victor Kester, Executive Director — Date: 2/14/2012
Aalska Office of Victims' Rights

(Revised 11/18/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 30 (2nd JUD)

Analysis

In the last four years, the OVR has received only a few requests from crime victims regarding the return of property held by a criminal justice agency during the course of a criminal prosecution. It is anticipated that current OVR staff and resources exist to process requests associated with SB 30. If more OVR resources are needed to fulfill the mandate of SB 30, it is believed additional funding and/or resources may be obtained in the future to satisfy the requirements of SB 30.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 30(2d JUD)**
Fiscal Note Number: 3
(S) Publish Date: 1/27/12

Identifier (file name): SB030CS(2d JUD)-DPS-DET-12-28-11
Title: "An Act providing for the release of certain property."
Sponsor: Senator Dyson
Requester: (S) FIN

Dept. Affected: Public Safety
Appropriation: Alaska State Troopers
Allocation: AST Detachments
OMB Component Number: 2325

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated on new fiscal note form.

Prepared by: Kelly Howell — Phone: (907) 269-5591
Division: Office of the Commissioner — Date/Time: 12/28/11 8:01 AM
Approved by: Joe Masters, Commissioner — Date: 12/15/2011
Department of Public Safety

(Revised 11/28/2011 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 30(2d JUD)

Analysis

This bill amends AS 12.36 by adding a new section regarding the return of property in the custody of a law enforcement agency. This legislation specifies that the owner of property in the custody of a law enforcement agency may request that the agency return the property. Further, that within 10 days of the request and following reasonable notice to all involved parties, a request for a court hearing shall be made.

Currently it is the standard practice of the department to return seized personal property as soon as possible. This legislation will not have a significant impact on the workload of the department.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 30(2d JUD)**
Fiscal Note Number: 4
(S) Publish Date: 1/27/12

Identifier (file name): SB030CS(2d JUD) LAW-CRIM-12-13-11
Title: An Act providing for the release of property in the custody of a law enforcement agency to the owner.
Sponsor: SENATORS DYSON
Requester: (S) FINANCE

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 12/13/11 4:45PM
Approved by: John J. Burns, Attorney General — Date 12/13/2011
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 30(2d JUD)

Analysis

SB 30 would adopt a procedure for the owner of property to request the Office of Victims' Rights to investigate whether property in the custody of law enforcement should be returned to them. The Victims' Advocate may, after an investigation, request that a hearing about the property be held. This note is indeterminate because the department may be required to represent law enforcement agencies at the hearings proposed in the bill. At this time we are not sure how many of these proceedings will occur. The issues raised may be complex, particularly if defense counsel opposes the return.

OUSE COMMITTEE REPOR

(7)
Date Referred to Committee: February 3, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 2/15/12

The JUDICIARY Committee considered: **CSSB 30(2d JUD)**

CS FOR SENATE BILL NO. 30(2d JUD)
"An Act providing for the release of certain property in the custody of a law enforcement agency to a crime victim under certain conditions and relating to requests for that release by the office of victims' rights."
SB 30-RETURN OF SEIZED PROPERTY

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ ( )
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LEG/OVR			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
3	DPS			X
4	LAW		X	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Bohy Lynn	LYNN	X			
Kelly Keller	Keller	X			
Steve M. Thompson	Thompson	X			
Chair: Carl Gatto	GATTO	X			
Chair:					

27-LS0344\X.1
Luckhaupt
2/13/12

AMENDMENT by Gruenberg

OFFERED IN THE HOUSE

TO: CSSB 30(2d JUD)

Page 2, following line 13:

Insert a new subsection to read:

"(d) Notwithstanding (c) of this section, if the court finds that ownership of the property is disputed, the court may

(1) order the law enforcement agency to retain the property until the ownership dispute is resolved in an appropriate proceeding;

(2) order the property returned to the crime victim or to another claimant;

(3) order the property released to the custody of the court; or

(4) make any other orders related to the property that the court determines to be appropriate."

Reletter the following subsections accordingly.

Alaska State Legislature
House of Representatives
Representative Tammie Wilson

Interim
301 Santa Clause Lane
North Pole, AK 99705
Phone - (907) 451-2806
Fax - (907) 451-2332

Session
State Capitol
Juneau, AK 99801
Phone - (907) 465-4797
Fax - (907) 465-3884

Rep.Tammie.Wilson@legis.state.ak.us

Date: 2-6-2012
To: Representative Gatto
Attn: Melanie Lesh
From: Representative Tammie Wilson
Re: CSSB 30 (2dJUD) Hearing Request

Dear Representative Gatto,

Attached is CSSB 30 (2d JUD) and the supporting documentation. CSSB 30 (2dJUD) will create a process for victims of property crime to petition the court for relief in recovering their property held as evidence. Please consider a hearing in your House Judiciary Committee at your earliest convenience.

Senator Dyson is the prime sponsor of CSSB 30 (2d JUD) which passed unanimously in the Senate.

Brandon Brefczynski of my office has been assigned to CSSB 30 (2d JUD) and can be reached at 465-4916.

Witnesses/Testifiers are as follows:

- Victor Kester, Director, Office of Victims Rights – (907)272-2620
- Les Syren, Attorney, Syren Law Offices, Anchorage – (907)903-1022
- Eric Derleth, Trial Attorney, Soldotna – (907)262-9164
- Dennis DeWitt, Alaska State Home Builders Association – (907)586-2565

I appreciate your consideration. If you have any questions or concerns, please feel free to contact my office.

Sincerely,

Tammie

Representative Tammie Wilson

SB

31

<TARGET><BILL>SB 31</BILL><SUBJECT>SB
31</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

SENATOR JOE THOMAS

Senate Bill 31:
An Act relating to the counting of write-in votes.

Sponsor Statement

"We start with the bedrock principle that the right of the citizens to cast their ballot and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship."
- Alaska Supreme Court, (*Miller v. Treadwell)*

Last fall, Alaskans reelected Lisa Murkowski to the United States Senate as a write-in candidate with nearly 100,000 votes statewide, something not witnessed by our nation in over fifty years. Because of the unique nature of write-in votes and confusion in state statute there was substantial debate over the validity of nearly 12,000 ballots. In the suit that followed, (*Miller v. Treadwell)*, Joe Miller argued that these ballots should not be counted because the name written was not *identical* to the way Senator Murkowski's name appeared on her declaration of candidacy. **Superior Court Judge William Carey and the Alaska Supreme Court both ruled against this argument, finding that judging the validity of a ballot based on the intent of the voter is paramount.**

Much of this case centered on the interpretation of state statute regarding the counting of ballots. Each court, in their findings, including Federal District Judge Ralph Bieistline, found that AS 15.15.360 was badly worded and left open for legitimate debate. **Senate Bill 31 looks to address this language by inserting a section that would place the intention of the voter above minor variations, mismarks or abbreviations.**

Senate Bill 31 follows on over fifty years of consistent precedent in support of a voter's intent and enfranchisement. In strengthening this statute by inserting federally recognized language from the Uniformed and Overseas Citizens Absentee Voting Act, **SB 31 will reduce potential future litigation while strengthening the public's perception of Alaska's democratic process.**

I urge you to join me in supporting Senate Bill 31.

January – May: State Capitol – Juneau, Alaska 99801 – (907) 465-2327 – 1 (800) 336-7383 – Fax (907) 46[illegible]
June – December: 1292 Sadler Way Ste 203 – Fairbanks, Alaska 99701 – (907) 456-8161 – Fax (907) 45[illegible]
Senator.Joe.Thomas@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSB 31(STA)
(S) Publish Date: 1/28/11

Identifier (file name) SB031-OOG-DOE-1-23-11
Title: "An Act relating to the counting of write-in votes"
Sponsor: Senators Thomas, French, Menard, Wielechowski
Requester: (S) STA

Dept. Affected: Office of the Governor
Appropriation: Elections
Allocation: Elections
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 1/23/11, 10:18pm
Approved by: Linda J. Perez, Administrative Director — Date: 1/23/2011
Office of the Governor

(Revised 12/29/2010 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSSB 31(STA)

Analysis

This legislation has no fiscal impact on the Office of the Governor, Division of Elections.

LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature
Division of Legal and Research Services
State Capitol, Juneau, AK 99801

(907) 465-3991 phone
(907) 465-3908 fax
research@legis.state.ak.us

Memorandum

TO: Senator Joe Thomas
FROM: Susan Warner, Legislative Analyst
DATE: January 21, 2011
RE: Legal History of Counting Write-in Votes in Alaska
LRS Report 11.113

You asked about the history in Alaska of write-in vote counting. You were particularly interested in legal precedents, and you asked for copies of pertinent decisions.

Within certain parameters defined by the U.S. Constitution, states have the authority to make their own election laws, and most states allow voters to write in the name of a candidate who is not listed on the ballot. Legal challenges occur most often in close races; courts then attempt to balance the constitutional right of citizens to elect the person of their choice against state laws that are designed to ensure efficient and orderly elections, among other things. The Alaska Supreme Court has consistently held that the right of citizens to select their government representatives is a fundamental prerogative of citizenship and should not be impaired or destroyed by "strained" statutory constructions.[1] As such, the Court in the most recent case (*Miller v. Treadwell*, 2010) held as follows:

> Voter intent is paramount, and any misspelling, abbreviation, or other minor variation in the form of the candidate's name on a write-in ballot does not invalidate a ballot so long as the intention of the voter can be ascertained.[2]

Alaska Voting Law

As you know, Alaska law does not allow write-in voting during primary elections, but provisions must be made for write-in voting on general election ballots. Alaska's rules for counting write-in ballots specify that a vote for a write-in candidate "shall be counted" if the oval is filled in and if the candidate's last name, or the candidate's name as it appears on the declaration of candidacy, is written in the space provided.[3] The law further specifies that the rules on counting ballots are, without exception, mandatory.

Miller v. Treadwell

Voter intent prevailed in litigation over the counting of write-in ballots in Alaska's 2010 U.S. Senate race. Joe Miller, the Republican senate candidate on the general ballot, argued that write-in votes for his opponent should not have been counted unless the candidate's name was spelled flawlessly. The Alaska Supreme Court ruled against Mr. Miller in *Miller v. Treadwell,* and the Court opinion begins with powerful language in support of voter enfranchisement. The Court proclaims that a citizen's right to vote is *of profound importance; key to participatory democracy;* and a *polar, cardinal,* and *bedrock principle*. The Court also notes that such longstanding principles have been consistently applied to election issues in Alaska over the past 50 years.

---

[1] *Carr v. Thomas,* 586 P.2d 622, 627(1978). We provide this document as Attachment A.

[2] *Miller v. Treadwell,* Alaska Supreme Court No. S-14112, December 22, 2010. Please note the recitation of pertinent case history entitled "Longstanding Alaska Election Principles" on page 2 of that decision (Attachment B).

[3] AS 15.15.360(a)(11).

Mr. Miller had argued that Alaska statutory language excludes any vote that is not spelled perfectly. The Superior Court held that if the legislature intended a candidate's name to be spelled perfectly, legislators would have used words like *exactly*, *precisely*, or *perfectly*.[4] The Supreme Court agreed and held that Alaska's statutory language is meant to be *inclusive* rather than *exclusive*:

> It is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: to ascertain the public will. . . . Voter intent is paramount, and any misspelling, abbreviation, or other minor variation in the form of the candidate's name on a write-in ballot does not invalidate a ballot so long as the intention of the voter can be ascertained.

Additionally, the Court noted that Alaskan voters arrive at their polling places with a variety of backgrounds and capabilities, including some being raised without English as their first language, and such issues should not take away a person's right to decide which candidate to elect:

> We must construe the statute's language in light of the purpose of preserving a voter's choice rather than ignoring it.

Legal Precedents

The decision reached in *Miller v. Treadwell* reflects the tendency for all U.S. courts to favor voter intent over ambiguous statutory language, but election scholar Richard Hasen asserts that the Alaska Supreme Court—even before *Miller*—appears to have gone the furthest in giving emphasis to voter intent.[5] Alaska's 1978 precedent-setting case, *Carr v. Thomas,* involved the question of counting certain ballots, and Alaska's highest court declared that the state would need "clear and unmistakable" statutory language to take away a citizen's right to have his or her voted counted.

Alaska courts have consistently emphasized the importance of voter intent. The decisions for the following Alaska cases are attached to this document:

- *Willis v. Thomas*, 600 P.2d 1079 (1979). The Alaska Supreme Court depended on a determination of voter intent in ruling on the results of a recount of ballots in Senate District F (Attachment D).
- *Fischer v. Stout*, 741 P.2d 217 (1987). The Alaska Supreme Court ruled on whether certain votes or classes of votes were properly counted or rejected in the 1986 race for Senate District H. The Court held that ballots marked with a pen rather than punched still showed clear voter intent and should be counted (Attachment E).
- *Finkelstein v. Stout*, 774 P.2d 786 (1989). The Alaska Supreme Court ruled on a ballot recount for Seat A in House District 13. The Court considered voter intent with regard to questioned signatures on absentee ballots (Attachment F).
- *Edgmon v. Moses*, 152 P.3d 1154 (2007). The Alaska Supreme Court ruled on the results of a recount in the District 37 Democratic primary. Considering ballot markings, the Court found that marks clearly intended as votes should be counted (Attachment G).

[4] *Joe Miller v. Lieutenant Governor Craig Campbell*, Case No. IJU-10-1007CI, Memorandum of Decision and Order on Motion for Summary Judgment and Cross Motions, December 10, 2010. We provide this document as Attachment C.

[5] Richard L. Hasen, "The Democracy Canon," *Stanford Law Review*, Vol. 62, 2009, p. 87.

Addressing Irregular Write-in Votes in Other States

Although Alaska statute does not address the inevitable misspellings and illegibility of written-in names, many states attempt to clarify how such votes will be counted, and these rules always give primacy to voter intent. There are variations among states, but this directive, by its very nature, is subjective and gives vote-counters the authority to determine who a voter intended to elect. Here are examples from four states:

- California accepts a "reasonable facsimile" of a write-in candidate's name (Cal. Elec. Code § 15342).
- Nebraska will count a write-in vote without the first name of the candidate, and the write-in name must be "reasonably close to the proper spelling" (Neb. Rev. Stat. § 32-615).
- Delaware allows for a "misspelled or minor variation" of a write-in candidate (Del. Code Ann. Title 15, § 4972 (b)(8)).
- Washington election officials are required to "exercise all reasonable efforts to determine the voter's intent (WAC 434-262-160).

Some states provide further guidance on counting irregular write-in votes. Washington State has an extensive, pictorial booklet on how election officials are expected to count nearly every deviation from what might be considered a standard marking, including samples of acceptable and unacceptable write-in votes. Attachment H is the portion of the booklet that deals with write-in votes, and the entire document can be viewed at *http://www.sos.wa.gov/_assets/elections/2009StatewideStandardsonWhatisaVote.pdf*.

We hope this is helpful. If you have questions or need additional information, please let us know.

adn.com
Anchorage Daily News

Print Page Close Window

Our view: No doubt

State smart to review election, need for any changes in law

(01/03/11 19:17:26)

When federal Judge Ralph Beistline tossed Joe Miller's challenge to Alaska's U.S. Senate election, he granted that Alaska's law could be clearer about the primacy of voter intent.

He was right.

The requirement that a write-in candidate's name be written as it appears in its state-qualified form led to the arguments over spelling and how close voters had to be.

In addition, the state's decision to provide, at voters' request, lists of qualified write-in candidates prompted unsuccessful suits by both the Republican and Democratic parties.

While we disagreed with the Division of Elections on the latter point, state courts upheld their call. And the division ran a straight, fair election.

Lawmakers, however, should revisit the law to make clear that voter intent, not spelling, is the key test in deciding which write-in votes count, and to decide whether write-in lists either will or won't be provided at polling places in the future.

The division did well by Alaskans. But clarity in the law may help keep future elections out of court.

BOTTOM LINE: Election law should leave no room for doubt.

Print Page Close Window

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Politics

Print

No 'spelling bee' election in Alaska

Ruth Walker | Christian Science Monitor | Dec 7, 2010

The 2010 elections, the gift that keeps on giving, have imparted new meaning to the phrase "all over but the shouting."

At this writing, Lisa Murkowski looks likely to be headed back to Washington as Alaska's senior senator and into the history books as the first candidate since Strom Thurmond in 1954 to win election to the Senate as a write-in. Her victory, if confirmed, as is now expected, will turn in part on a decision to honor ballots from voters who merely approximated the correct spelling of her name.

How should we feel about that? Are standards slipping irretrievably in the republic?

Her Democratic opponent has conceded defeat. But her Republican opponent, Joe Miller, whose own name was easier to spell and was, moreover, actually on the ballot, has had other ideas.

His campaign has challenged all ballots that fall short orthographically. State authorities, on the other hand, have been counting as valid all those who came close to spelling "Murkowski" right.

Alaskan law requires electoral officials to take into account "voter intent" when counting write-in votes. This standard is common across the country, it turns out. The Los Angeles Times quoted Richard Winger, editor of the election law journal Ballot Access News: "I am not aware of any state that says write-ins can't be counted unless the spelling is perfect."

As a copy editor, I'm with Mr. Miller. What kind of democracy can't spell its leaders' names right? As a student of language, though, I understand that spoken language came first, and that the written form of any word is an approximation of the spoken form; it's not the other way around. After all, there's a reason we call it "language" - from the Latin word for "tongue" - and not "scribblage," or something like that.

The case for a more generous interpretation of what counts as a valid vote for a write-in candidate starts with this primacy of spoken language.

Much of what we recognize as democracy began with spoken language, conversations, and debates in halls of assembly and the public square. Democracy was then furthered by written communication, especially after the development of the printing press.

More recently, speech has gained a boost from new forms of communication - from FDR's fireside chats to YouTube - that have let us hear, and hear repeatedly, what we otherwise might only have read.

Of course we need both modes: Writing - "print" - allows for rereading, for reflection and the consideration of nuance. Speech, especially live, in-person speech, provides immediacy and the expression of feelings.

print

Fix the law: Write-in ballot statute needs repair by Legislature

12.30.10 - 11:53 pm
Editorial

Federal Judge Ralph Beistline wrote in his Tuesday ruling dismissing Joe Miller's amended federal lawsuit in the U.S. Senate race that he can understand Mr. Miller's viewpoint regarding the wording of state election law.

Judge Beistline also said he can easily see the state's view when it comes to the law governing how a write-in candidate's name must appear on the ballot in order to be considered a valid vote.

The judge ultimately deferred to the Alaska Supreme Court, which ruled in Mr. Miller's state lawsuit that the name of Sen. Lisa Murkowski didn't have to be spelled correctly. Mr. Miller argued, in both state and federal court, that Alaska law required a precise spelling.

But Judge Beistline found the Alaska Supreme Court "did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the state's past practice of making voter intent a priority."

But the judge, in his ruling, pointedly noted a problem:

"This is not to say that Miller's technical arguments are frivolous, for it is easy to understand his view ...

"What we have before us is a poorly drafted state statute. Wisdom would suggest the Alaska Legislature act to clarify it to avoid similar disputes in the future. For now we have to work with what we have and that is what the Alaska Supreme Court has done."

Judge Beistline's message is clear and sound: The Legislature should clarify the law. It should do so this coming session while the subject is fresh.

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Supreme Court takes reasonable approach in election challenge

by Dermot Cole / cole@newsminer.com

Dec 22 2010 | 757 views | 0 | | 5 | | |

FAIRBANKS — The Alaska Supreme Court said it relied on principles applied consistently during the past 50 years to reject Joe Miller's court case and approve the state's approach to counting ballots.

The decision Wednesday helps clear the way for Sen. Lisa Murkowski's re-election to be certified before the next Congress. Miller may pursue a federal court fight, however.

This unanimous ruling is not surprising, given the numerous decisions the court has made in contested elections over the years. The ruling also is reasonable.

The court declared that Miller is dead wrong in claiming state law requires the names of write-in candidates be spelled correctly.

"Our prior decisions clearly hold that a voter's intention is paramount," the four justices said. "In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained."

The court rejected Miller's argument that anything less than his point of view, supporting correct spelling, would threaten the integrity of the election process.

"But it is Miller's interpretation of the statute that would erode the integrity of the election system, because it would result in disenfranchisement of some voters and ultimately rejection of election results that constitute the will of the people," the judges said. "We have consistently construed election statutes in favor of voter enfranchisement."

The court also found its interpretation of state law is consistent with federal and state rules allowing misspellings on the federal write-in absentee ballot for military voters and civilians overseas.

"Miller's proposed construction of the statute would require us to impose a different, and more rigorous, voting standard on domestic Alaskans than on those who are serving in the military or living abroad," the court said.

Other states use the same approach as Alaska in counting ballots and "we see no basis for Miller to argue that the application of the standard in this election violates equal protection under either the state or federal constitution."

The portion of state law Miller said requires perfect spelling really applies to pseudonyms, the court said.

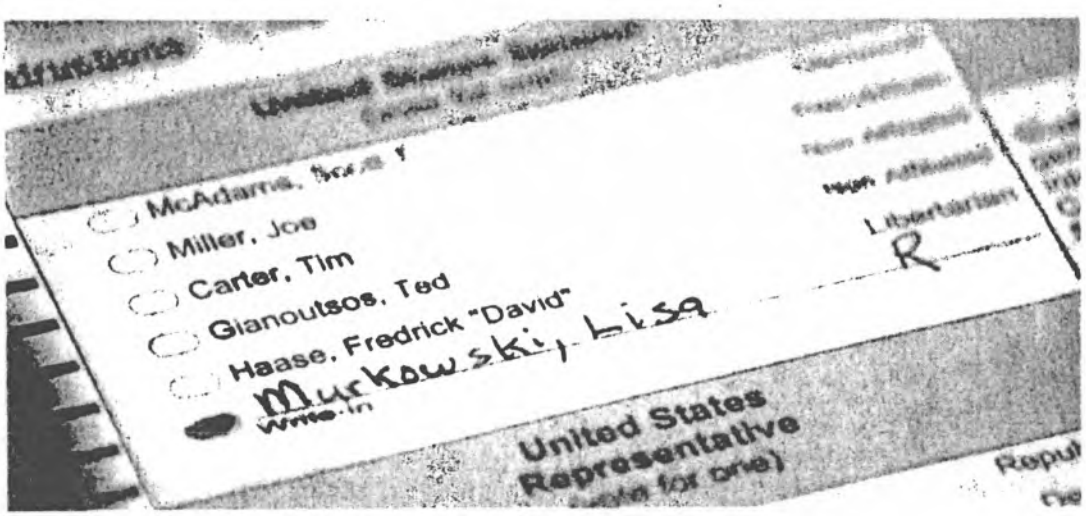
"The 'nickname' field allows a candidate to ensure that his or her pseudonym 'appears on the write-in declaration of candidacy' so that the write-in votes listing that pseudonym will count. Thus, the word 'appears' relates to a pseudonym's possible presence on the ballot, not the particular form of the vote and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes."

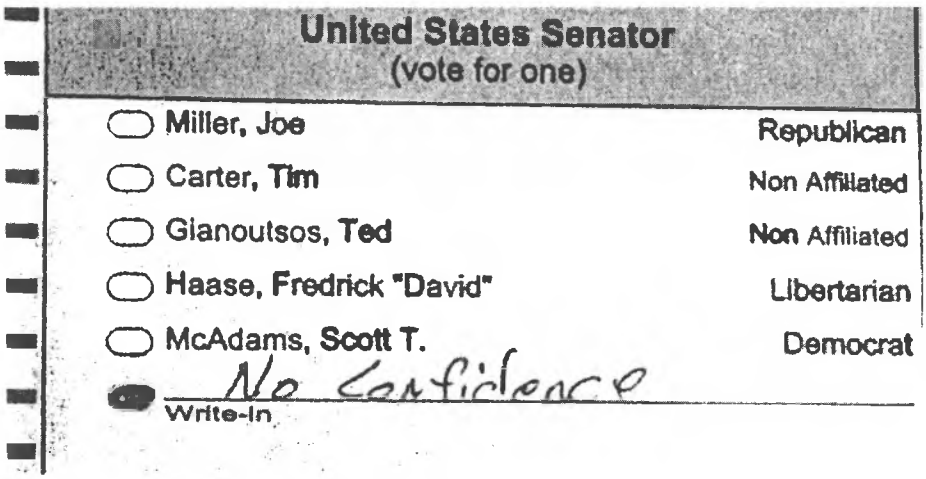
***

GIVING THANKS: The Maniutto family wants to pass along thanks to the people of Fairbanks for prayers and support for Sabrina, the Monroe High School student who has been stricken with cancer.

Fabio Maniutto, her father, said he is grateful for the more than $17,000 raised at a spaghetti feed fundraiser Dec. 12 and for the daily notes, cards, prayers and "all the other little but important things necessary for life."

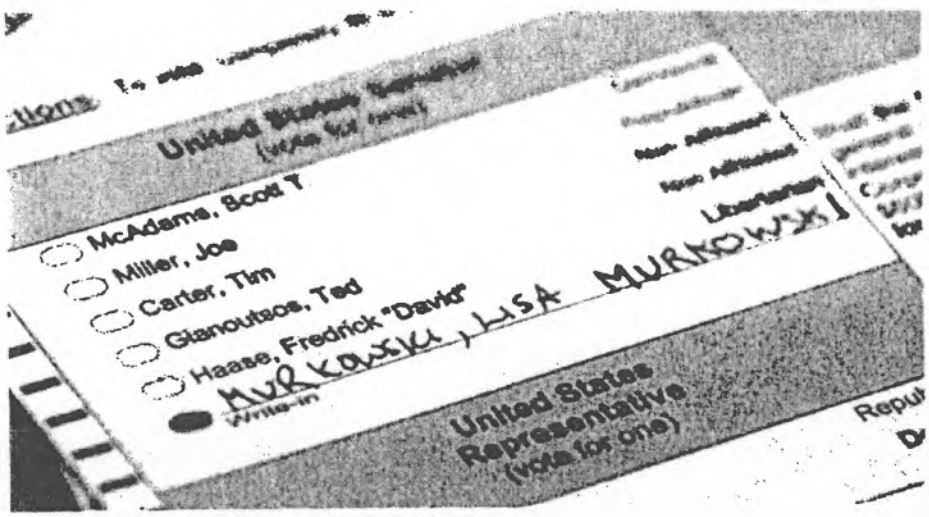
"For Sabrina's friends, thank you for being there for her despite the distance of thousands of

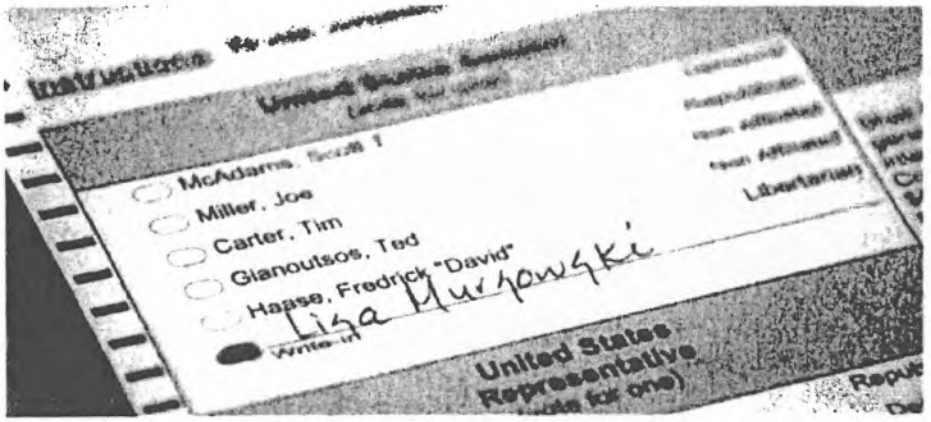

McAdams, Scott
Miller, Joe
Carter, Tim
Gianoutsos, Ted
Haase, Fredrick "David"
Murkowski, Lisa
Write-in
Libertarian
R
United States
Representative

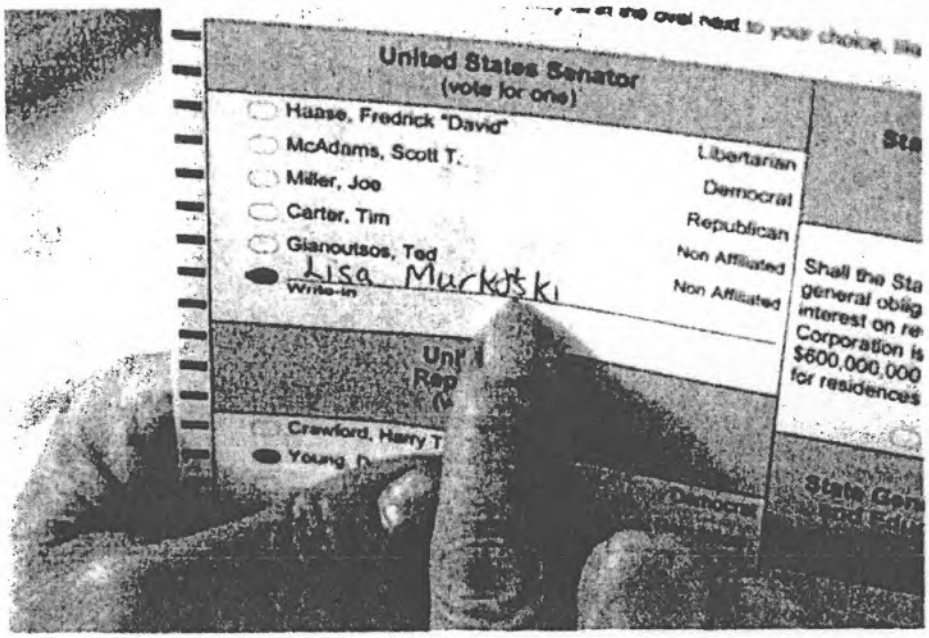


United States Senator
(vote for one)

○ Miller, Joe	Republican
○ Carter, Tim	Non Affiliated
○ Gianoutsos, Ted	Non Affiliated
○ Haase, Fredrick "David"	Libertarian
○ McAdams, Scott T.	Democrat
● No Confidence Write-In	


United States Representative
(vote for one)
McAdams, Scott T
Miller, Joe
Carter, Tim
Glanoutsos, Ted
Haase, Fredrick "Davis"
MURKOWSKI, LISA MURKOWSKI
Write-in
United States Representative
(vote for one)


McAdams
Miller, Joe
Carter, Tim
Gianoutsos, Ted
Haase, Fredrick "David"
Lisa Murkowski
United States
Representative


United States Senator
(vote for one)
Haase, Fredrick "David"
McAdams, Scott T.
Miller, Joe
Carter, Tim
Gianoutsos, Ted
Lisa Murkowski
Write-in
Libertarian
Democrat
Republican
Non Affiliated
Non Affiliated
Crawford, Harry T
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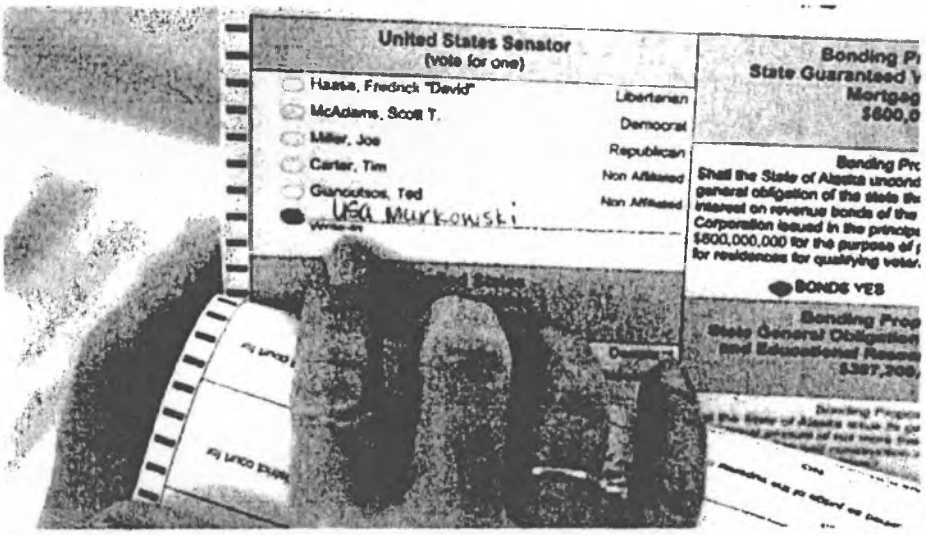
United States Senator
(vote for one)
Haase, Fredrick "David"
McAdams, Scott T.
Miller, Joe
Carter, Tim
Gianoutsos, Ted
Libertarian
Democrat
Republican
Non Affiliated
Non Affiliated
BONDS YES

Quotes of significance to Senate Bill 31 from the 2010 United States Senate Race Court Findings

"AS 15.15.360(a)(11) may not be well written, and it is clearly subject to different interpretations...AS 15.15.360, in general, is terse and somewhat unclear in comparison to the other state statutues. The statute, as Miller reveals, does lack the express language that most states have adopted which permits minor misspellings and errors." - Miller v. Campbell, pg. 15 Superior Court Judge William Carey

"While the issue may be moot, the public interest exception applies...this scenario is certainly susceptible to repetition any time a major write in effort for election to a public office in Alaska occurs." - Miller v. Campbell, pg. 8 Superior Court Judge William Carey

"We start with the bedrock principle that "the right of the citizens to cast their ballot and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship." - Alaska Supreme Court Miller v. Treadwell pg. 3

"In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained." - Alaska Supreme Court Miller v. Treadwell pg. 6

"Our interpretation of AS 15.15.360...is also consistent with the federally mandated standard for counting write in votes for those voters living or serving in uniform overseas. The Uniformed and Overseas citizens Absentee Voting Act provides that in counting the ballot of a uniformed voter or other voter who is overseas "any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or political party shall be disregarded in determining the validity of the ballot if the intention of the voter can be ascertained." - Alaska Supreme Court Miller v. Treadwell pg. 7

"The Alaska Supreme Court did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the State's past practices of making voter intent a priority. This is not to say that Miller's technical arguments are frivolous, for it is easy to understand his view as to the proper interpretation of AS 15.15.360 (a)(11). But it is just as easy to accept the interpretation given by the Alaska Supreme Court. What we have before us is a poorly drafted state statute. Wisdom would suggest that the Alaska Legislature act to clarify it to avoid similar disputes in the future." – Federal District Court Judge Ralph Beistline pg. 7

Divining Votes: Which Intent, Whose Discretion?
By Matt Johnson (Scribe) on April 8th, 2011

Senate Bill 31 is being offered by its sponsors as a remedy for Alaska's "flawed" write-in statute. It seems the Legislature is understandably rather anxious to put the 2010 election in its rear view mirror. The bill took less than a month to clear two Senate committees, the Senate Floor, and be read across the House Floor before State Affairs Committee Chairman Bob Lynn put a hold on it, pending the Lt. Governor's 2010 Election Review report.

Now that the report is on the table, the torrid pace is back. SB 31 passed out of the House State Affairs Committee yesterday and is on the docket in the House Judiciary Committee for today pending referral by the Speaker's office.

At the risk of sounding pedantic, I would humbly suggest further deliberation might be in order before we rush to judgment on misguided change that fails to address the sponsor's intent, or improve Alaska's election laws.

The sponsor has stated two objectives in proffering the statutory changes: "to clarify state statute and ensure that in future election(s) as many Alaskans as possible are enfranchised," and "to tighten statutory language and strengthen the public perception of Alaska's democratic process."

Clarifying the situation might be more difficult than one might expect at first glance. Adding voter intent language is well and good, if it is invested with concrete legal content. However, SB 31 offers an amorphous standard that does no such thing. Proponents of the bill would have you believe that inserting "voter intent" language *simpliciter,* and punting to the director's discretion makes all the controversy of 2010 just go away. But if voter intent only means whatever the latest DOE director wants it to mean, we have only further muddied the waters.

Take, for example, what happened during the write-in count last fall. The non-statutory voter intent "law" deployed by the Director wound up looking a whole lot more like arbitrary and capricious, than the "reasonable, common sense" standard it was purported to be. Despite the Dept. of Law's testimony that a "common sense phonetic standard" was used, the reality on the ground was quite different. In fact, none of us who were actually there knew for sure what exactly the standard was, and it didn't help that DOE was not forthcoming with information.

In addition to the phonetic standard, I was told by DOE personnel working the floor that they thought the standard was two letters misspelled, and three would disqualify a ballot. I also heard it was two syllables. "Even [the Murkowski team] seemed unsure of the exact standard Ms. Fenumiai was applying," said New York Times reporter Bill Yardley in a Nov. 10, 2010 article. He went on to quote Murkowski spokesman John Tracy as saying, "it appears to me that there's about a three letter standard." Anyone now suggesting that there was a defined standard is engaged in some very creative revisionist history.

Whatever the "standard" actually was, it is difficult in the extreme to figure out by any definition of "phonetic," or its cognates, how the Director arrived at the decision to count the following ballots for Lisa Murkowski: "Muskisk," "Moukoky," "Murcosaga," "Mulkalkie," etc. Then there

were a number of rather vulgar mutations and permutations not fit for polite company that the director mysteriously divined to be intended for Murkowski.

This was a similar scenario to Bush v. Gore in 2000, with the exception that, by analogy, in Florida the hanging chads were not counted, and in Alaska they were. And while the courts ruled that there was a consistent standard applied throughout on account of one person reviewing all of the challenged ballots, it was manifestly a specious argument. The courts did not shut down the case against DOE for lack of evidence, but for want of courage. Discovery would have revealed, essentially, no standard at all. If voter intent is not clearly defined, we can expect more litigation in the future. And it just might be that a judge will summon the moral fortitude to grant discovery next time. If so, this will not end well.

What could happen in the future if we continue to embrace the "standard" deployed in 2010, and make them statutory? Suppose we used any, or a combination, of the aforementioned rules to define our "voter intent" standard. Then suppose Tim Smith runs as the Democratic candidate for US House, and Tim Smythe runs for the same as a write-in candidate. Suppose also that SB 31 is now statutory. If there were enough write-in votes to cast the election in doubt, under her/his broad discretionary powers, the Director of DOE could unilaterally decide who won the election. Because under the aforementioned standards both of the candidates could qualify to receive all of the write-in votes cast for any variation of Tim Smith/Smythe.

I'm reminded of a famous quote attributed to Joseph Stalin: "Those who cast the votes decide nothing; those who count the votes decide everything." No one person should be granted the power to exercise that kind of discretion, especially an unelected bureaucrat. Under such a regime, enfranchisement would be the franchise of the director.

Granted, that's a worst case scenario, but such a law should do nothing to inspire public confidence in the system. So on all counts laid out by the sponsor, the bill fails. It doesn't tighten up the statute or provide clarity; it doesn't ultimately enfranchise, and it doesn't inspire public confidence. The only thing it really does is affirm the director's decisions and provide a rubber stamp for the courts. It appears to be more about justifying the past than securing the future. Not a good way to go about public policy.

While I am not sanguine about the prospects of this or future DOE directors divining voter intent, I do see more controversy in store for Alaska's future if SB 31 is allowed to masquerade as a solution to our problems.

###

HOUSE CS FOR CS FOR SENATE BILL NO. 31(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

A BILL

FOR AN ACT ENTITLED

"An Act relating to the counting of write-in votes."

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

*** Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

(d) Write-in votes shall be counted according to the following rules:

(1) writing in the name of a candidate whose name is printed on the ballot does not invalidate a write-in vote unless the director determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot;

(2) in order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (a)(1) of this section;

(3) a vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name of the candidate, as it appears on the write-in declaration of candidacy, or the last name of the candidate is written in the space provided;

(4) if the write-in vote is for governor and lieutenant governor, the vote

shall be counted if the oval is filled in and the names of the candidates for governor and lieutenant governor, as they appear on the write-in declaration of candidacy, or the last names of the candidates for governor and lieutenant governor, or the name of the candidate for governor, as it appears on the write-in declaration of candidacy, or the last name of the candidate for governor is written in the space provided;

(5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

Sec. 15.15.365. Counting of write-in votes in general election. (a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

(c) If the director determines that the requirements of (a) of this section have been met, the director shall establish the date for counting those write-in votes, and the director, or a designee of the director, shall count all write-in ballots under AS 15.15.360(d).

(d) This section does not apply to the counting of federal write-in absentee ballots submitted under 42 U.S.C. 1973ff.

(e) Write-in ballots shall be counted by the director, or a designee of the director, in a public place at the location where write-in ballots are sent for counting following an election.

* **Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are

repealed.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 7, 2011

SUBJECT: Conceptual amendment to CSSB 31(STA) adopted into HCS CSSB 31(STA) (Work Order No. 27-LS0350\X)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Nancy Manly

FROM: Alpheus Bullard
Legislative Counsel

This memorandum accompanies the bill described above. I have one comment.

The House State Affairs Committee adopted a conceptual amendment to the bill's sec. 15.15.365(c).

That subsection provides:

> (c) If the director determines that the requirements of (a) of this section have been met, the director shall establish the place and date for counting those write-in votes, and the director, or a designee of the director, shall count all write-in ballots under AS 15.15.360(d).

As conceptually amended, it would provide:

> (c) If the director determines that the requirements of (a) of this section have been met, the director shall establish the ~~place and~~ date for counting those write-in votes *which shall occur at the public place where the ballots are physically shipped following the elections*, and the director, or a designee of the director, shall count all write-in ballots under AS 15.15.360(d).

I understand this conceptual amendment to require that write-in ballots be counted in a public place. Other intended effects of the conceptual amendment are less clear to me. It seems that write-in ballots are necessarily going to be counted at a location where the ballots are. Under this CS, can the ballots be sent to the division and then transferred to a public place that will better accommodate the counting of the ballots?

After listening to the minutes of the committee hearing, I've drafted the conceptual amendment as an additional subsection that reads:

> (e) Write-in ballots shall be counted by the director, or a designee of the director, in a public place at the location where write-in ballots are sent for counting following an election.

Please let me know if my change is faithful to the intentions of the committee.

TLAB:plm
11-232.plm

Enclosure

State of Alaska

Office of Lieutenant Governor Mead Treadwell

2010 General Election Review

April 1, 2011

2010 General Election Review
Office of Lieutenant Governor Mead Treadwell
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2010 General Election Review
Executive Summary
Office of Lieutenant Governor Mead Treadwell

In December 2010, after Governor Sean Parnell and Lieutenant Governor Mead Treadwell signed final paperwork to certify the 2010 United States Senate election, the Lt. Governor announced he would conduct a review of the state's election procedures and statutes. The historic write-in campaign by Senator Lisa Murkowski revealed sections of election law and procedures that were yet untested, and many Alaskans became more aware of election procedures.

The following 2010 Election Review report by the Office of the Lieutenant Governor, the Division of Elections and the Department of Law, includes an analysis of election law and procedures as well as feedback from stakeholders, political parties, and most importantly, Alaska's voters. The report responds to observations and concerns made by Alaskans, and offers a recommendation for change or retraction of current procedures, Alaska State Statute and or regulation for each issue.

A key change recommended as a result of this review is intended to make it easier for Alaskans serving in the military to vote. Those recommendations include changing the date of the primary to make sure ballots for a general election can be in the mail in time for service members overseas, allowing other electronic forms of transmission – besides faxes – of ballots back to Alaska, and working with the Redistricting Board and the Department of Defense to facilitate reopening of polling places on Alaska's military bases.

Other key recommendations include changes to state law to clarify procedures for counting write-in ballots and making the declaration of candidacy for a write-in candidate voluntary. Perhaps the single most important finding in the review is that no change in procedure or state law recommended would have changed the outcome of the 2010 General Election.

Our heartfelt thanks goes out to those who worked so tirelessly on the 2010 General Election, including former Lieutenant Governor Craig Campbell, division personnel, attorneys from the Department of Law, candidates, and especially the volunteers who so selflessly gave their time and energy to bring the election to a conclusion. And thanks are due to Alaskans for taking their time to submit comments, to stakeholders for meeting with the Lieutenant Governor, and to the Division of Elections, with special thanks to Director Gail Fenumiai, and Department of Law for their assistance in this review.

The following is a summary of the recommendations detailed in the full report:

Recommended amendments to Alaska State Statute:

- Amend Alaska State Statute to allow a U.S. citizen, 18 years or older, who has never been a resident of another state, to register to vote in Alaska so long as the child's parent is eligible to register and vote in Alaska.

- Amend Alaska State Statute to add a new subsection clarifying the rules for counting write-in votes, and allowing the director of elections to disregard misspellings or other minor

variations in the form of a candidate's name if the intention of the voter can be ascertained. This change would have Alaska law conform to recent Supreme Court rulings on voter intent.

- Amend Alaska State Statute to add a new section setting out the process for counting write-in votes. This information is currently set out in regulation.

- Amend Alaska State Statute to extend the time a voter may apply to an election supervisor for an absentee ballot to the 22nd day before the election rather than the 15th day.

- Amend Alaska State Statute to extend the time for early voting to 22 days before an election, rather than 15 days.

- Amend Alaska State Statute to allow an absent uniformed services voter or an overseas voter to apply to vote by electronic transmission any time during the calendar year, and to return the ballot in a manner established by the director in regulation.

- Amend Alaska State Statute to allow the director to establish in regulation the method of electronic transmission for delivery of an absentee ballot by electronic transmission. This would allow receipt of ballots by electronic means other than fax.

- Amend Alaska State Statute to reference the federally-mandated exception for absent uniformed services voters and overseas voters being sent their ballots no later than 45 days before election day.

- Amend Alaska State Statute to clarify that those voters who are traveling or working outside of the United States at the time of the election would receive special absentee ballots.

- Amend Alaska State Statute to move up the date of the primary election to the second Tuesday in August of every even-numbered year, rather than the fourth Tuesday in August of every even-numbered year.

- Amend Alaska State Statute to change the deadline for candidate withdrawal from the primary election to "before June 22 of the election year" rather than "at least 48 days before the date of the primary election."

- Amend Alaska State Statute to remove the prohibition that votes for a write-in candidate not be counted unless that candidate has filed a letter of intent with the director.

- Amend Alaska State Statute to change the deadline for filing a letter of intent to run as a write-in candidate to 21 days before the General Election, so the division can more effectively provide assistance to voters.

- Amend Alaska State Statute on filling candidate vacancies by party petition to extend the deadline to before September 3 of the election year, rather than 48 days or more before the general election.

Recommended changes in election procedure:

- Provide multiple notices to the political parties to ensure the parties are aware of their ability to nominate election workers. After the nomination deadline, the division will, if necessary, request assistance from the political parties in locating workers to keep the election board balanced.

- As more Alaskans are taking advantage of early and absentee voting, the division will examine how and whether it can report all results by precinct in future modifications of ballot counting and reporting software.

- Improve training and written instructions to election workers about the need to mark the type of identification presented by the voter on the polling place register.

- Add instructions to the voted ballot envelopes to remind workers to sign across the seal and improve election worker training relating to ballot security.

- To improve election management, the division will replace the voter registration and election management database system with a more technologically advanced system.

- The division will also implement additional security measures of using tamper-proof seals on archive boxes and numbering envelopes sent out prior to transporting ballots to a counting center.

- To improve how unvoted ballots are handled and accounted for, the division will make changes to the ballot statement to specifically include the number of ballots received, used and destroyed. The division will also report the return of the ballot stubs from unvoted ballots that would prevent any use of ballots for fraudulent activity.

- To address concerns that more write-in votes were counted than initially reported on the election results. In the future, the division will ensure that blank ballots that get challenged but that are not counted are not included in the overall results.

- The division will work to research systems to provide "real-time" or electronic updates identifying which voters have voted.

- The division will also post information to the website that indicates the date when absentee ballots are being mailed, filing deadlines, withdrawal deadlines, state review board dates.

- To ensure ineligible felons do not vote, the division will complete the data match between the Department of Corrections and the state voter registration file immediately prior to each election.

- In the case of an election which may be contested the division will re-brief election officials on the need to maintain objectivity and non-partisanship.

- To make it easier for military members to vote, we recommend changing the date of the primary to make sure ballots for a general election can be in the mail in time for service members overseas, allowing other electronic forms of transmissions of ballots back to Alaska (the law currently limits electronic transmission to faxes). The division suggests the under the new redistricting plan, the precinct boundaries be changed so that only installation boundaries are included in the precinct. When precincts are wholly contained within the installation, the division can once again work with the military to establish polling places on the bases. This report recommends this change to the Redistricting Board.

Recommendations to other parties:

- Suggest that the Redistricting Board redraw precinct boundaries specific to military installation in order to move the polling places back to the bases.

- The report discusses a proposal Alaska is considering to further exchange information on Alaska state voters with several data sources in other states in a bonded, confidential manner, in order to identify the names of voters who may be registered in more than one state.

Recommendations for third party review:

- Review of division's audit procedures and hand count verification of election results
- Audit to ensure non-U.S. citizens are not voting
- Audit to ensure that felons are not voting.
- Explore system or methods that can provide for real-time voter history.

2010 General Election Review
Office of Lieutenant Governor Mead Treadwell

The 2010 General Election in Alaska was historic. Only on two other occasions has a significant statewide write-in campaign been conducted. The election revealed sections of election law and procedures that were yet untested, and many Alaskans became more aware of election procedures. Alaska's write-in process was widely publicized, and the state was pleased to see that process upheld by the state and federal courts.

After Governor Sean Parnell and I signed the final paperwork to certify the 2010 General Election, I announced we would conduct an election review to examine lessons learned in the way the election was conducted. A review could also help fully explain the election process to Alaskans. This review, by the Office of the Lieutenant Governor, the Division of Elections and the Department of Law, includes an analysis of election laws and procedures as well as feedback from stakeholders, political parties, and most importantly, Alaska's voters. The resulting report responds to observations and concerns made by Alaskans, and offers a recommendation for change or retraction of current procedures, Alaska State Statute, and/or regulation for each issue.

A key recommendation as a result of this review is intended to make it easier for Alaskans serving in the military to vote. Those recommendations include changing the date of the primary to ensure ballots for a general election can be in the mail in time for service members overseas; allowing other electronic forms of transmissions of ballots back to Alaska (the law currently limits electronic transmission to faxes); and working with the Redistricting Board and the Department of Defense to facilitate reopening of polling places on Alaska's military bases.

Other key recommendations include changes to state law to clarify procedures for counting write-in ballots and making the declaration of candidacy for a write-in candidate voluntary. Perhaps the single most important finding in the review is that no change in procedure or state law recommended would have changed the outcome of the 2010 General Election.

To maintain objectivity in the examination of certain questions aimed at the Division of Elections, the report recommends third party review on specific issues.

Our heartfelt thanks goes out to those who worked so tirelessly on the 2010 General Election, including former Lieutenant Governor Craig Campbell, division personnel, attorneys from the Department of Law, candidates, and especially the volunteers who so selflessly gave their time and energy to bring the election to a conclusion. And thanks are due to Alaskans for taking their time to submit comments, to stakeholders for meeting with the Lieutenant Governor, and to the Division of Elections, with special thanks to Director Gail Fenumiai, and Department of Law for their assistance in this review.

Mead Treadwell
Lieutenant Governor

I. Overview of Processes

I. (A) Polling Place Procedures and Election Worker Training

1. Election Worker Recruitment

Election worker recruitment is one of the more time consuming tasks in conducting a successful election. Recruitment begins around March of an election year and continues, in some cases, right up to election day. As part of the recruitment process, the division notifies the political parties that they are eligible to nominate election workers as outlined in AS 15.10.120. By law, political party nominations are due by April 15th of the election year.

Depending on the size of the precinct, each polling place has approximately three to six election workers. In an effort to maintain consistency within the polling places, the division requests workers to work both the primary and general elections and to work the entire time the polls are open, 13 hours. Whenever possible, the division attempts to find workers who are registered voters of the precinct. If the division is unable to locate voters within the precinct who are willing to serve, the division will recruit any qualified voter.

The first worker recruited for each precinct is the chairperson. The chairperson is then requested to assist the division in locating the remaining workers for the precinct. Public comments were received suggesting that allowing the chairperson to recruit other board members is conducive to partisanship or fraud. Others suggest that there should always be a representative from each political party on the election board. The division has not found any evidence of fraud on the part of election workers. Having the chairperson assist with the recruitment of other election board workers helps to create a positive experience for the workers which in turn allows for a positive voting experience for the public. It also allows a wider pool of potential workers to be contacted. The division has also found that when workers enjoy those whom they are working with, they are more likely to continue to be election workers from one election to another, which creates a more experienced election worker pool.

When recruiting the election board workers, the division and the chairperson attempt to ensure the election board is politically balanced and that there is political party representation on the election board. Although the division sends political parties a notice of the deadline for them to nominate election board members, comments were received that the division does not provide sufficient notice. For future elections, the division will provide multiple notices to the political parties to ensure the parties are aware of their ability to nominate workers. After the nomination deadline, the division will, if necessary, request assistance from political parties in locating workers to keep the election board balanced.

The chairperson is paid $10 per hour for their time at the polls and the other election workers are paid $9.50 per hour. Workers are compensated for their time spent in training if the trainee works in the election. The division has received comments from

workers that it would be easier to find election workers if the pay was increased.

The last increase for election workers of $2/hour was in 2004.

Any increase to election worker pay would require a budget increase to the division in an election year. There is no provision for an increase in FY12 budget as any change for the 2012 Primary or General Elections would be appropriated in the 2013 fiscal year beginning July 1, 2012.

The division has approximately 2500 precinct election workers (those that work at polling places on election day). They work 15 hours per election.

$9.50x15=$142.50

If they were to get a raise to $15/hour:

$15x15 = $225

For a difference of $82.50 per election worker per election.

$82.50x2500x2 elections = **$412,500** budget increment

An increase to $12/hour would result in a budget increment of **$187,500.**

This report makes no recommendation on salary increases; however, recommendations will be made in time for the Governor's 2013 fiscal year budget proposal.

2. Election Worker Training

The division's four regional offices are responsible for training precinct election board workers in their respective regions. In-person training is conducted prior to each primary election for the election board workers across the state. It is the division's goal to train workers as close to the election as possible. However, with the large number of rural precincts, some regions have to begin their worker training in early June and continue until early August.

Concerns and comments were received about the division not using standardized training materials throughout the state. Although there are differences between urban and rural, hand-count and optical scan count precincts, the division does in fact use a standardized set of training materials and handbooks to train all precinct election workers depending on the type of precinct they work in (optical scan or hand-count). There is a standardized set of instructions and handbooks for all optical scan precincts and there is a standardized set of instructions and handbooks for all hand-count precincts. In addition, there is a standardized set of instructions and materials developed for the touch screen equipment that is provided to all precincts.

In-person training sessions are approximately four to six hours in length and are broken

into two modules: election procedures and equipment procedures. The election procedures module covers areas such as opening the polls, providing voter assistance, disability awareness, language assistance, processing voters, issuing ballots, questioned voting, special needs voting, closing the polls, completing the ballot statement and returning election materials.

For precincts that hand-count their ballots, this module also includes instructions on how to count ballots and report election results. The equipment module covers functions necessary to set up the equipment (optical scan and touch screen) and prepare it for voting. The training also covers the process for how to maintain security of the equipment, functionality and operation of the equipment, and the process for transmitting results. The equipment procedures module gives workers hands-on experience and practice setting-up, voting, printing election results and disassembling the equipment.

The division conducts training for workers in rural areas of the state in several "hub" cities. Election workers from selected rural precincts travel to a larger, more "central" community to receive training as a group. Since Alaska has a very large number of precincts that are not on a road system, utilizing hub training enables the division to train rural workers closer to election day and reduces the amount of travel time needed by division staff. Urban-based training is generally conducted closer to election day and is conducted with workers from multiple election boards present.

Although in-person training is conducted before the primary election, the division offices in Anchorage, Fairbanks, Juneau, Mat-Su and Nome review election procedures with precinct chairpersons when they pick up their materials from the regional offices. A written review is sent to all other precincts.

The division faces many challenges with information retention between the time of the training and the election, especially in rural areas of the state where training is usually conducted more than a month before the primary. In addition, workers quit and are replaced after the training takes place. The division's standardized set of instructions and handbooks is critical to the workers' ability to perform their duties correctly. In 2010 the division created a training video to send with election supplies that covers the same topics as the in-person training sessions.

Although the division provides a comprehensive training program for workers and uses a standardized set of instructions and training materials across the state, there will inevitably be times when election board workers simply forget to perform an outlined process or procedure. When the division becomes aware of those situations, its managers will take steps to address the issue.

3. Polling Place Procedures

On election day, election board workers have a standardized set of instructions to follow when opening the polls, processing voters, and closing the polls. When the division receives comments, concerns or complaints about problems in a polling place on election day, the division makes contact with the workers to address or correct those issues.

a) **Voter Identification**

Under AS 15.15.225, election workers are required to request identification from voters. However, workers can waive the identification requirement if the voter is personally known, unless the words "Must Show ID" appear in the signature box on the precinct register. Workers are also instructed to check the box on the register indicating the type of identification presented. If a voter does not have identification and does not meet the waiver requirements, the voter must vote a questioned ballot.

After the 2010 General Election, there were concerns that election workers allowed voters to vote without requiring identification because boxes were not checked to indicate the type of identification shown.

The division contacted 24 precincts where the "Identification Presented" box was not checked either for 100% of the voters or for some portion of the voters, to determine if the workers allowed voters to vote without requiring identification. Each precinct confirmed that they did require voters to show identification unless the voter was personally known. If the voter didn't have ID, they had the voter vote a questioned ballot. When asked why they did not check the "Identification Presented" box, the workers responded with comments such as:

i. We simply forgot.
ii. We were unaware this was necessary.
iii. We were too busy and must have overlooked the box.
iv. We were asked to highlight signatures and this caused extra time and work, and we must have just gotten too busy with the extra requirement.
v. We don't have to mark the box for municipal elections so we didn't think we needed to for state elections.

In contacting the precincts the division found no indication of misconduct on the part of the workers and concludes that blank "Identification Presented" boxes were simply an oversight. The division is committed to improved training and written instructions about the need to mark on the register the type of identification presented.

b) **Ballot Security**

When the polls close, election workers seal the voted ballots in special tyvek envelopes. After the tyvek envelope is sealed, an opened envelope becomes evident because the seal is broken. As an added security measure, after sealing the envelope(s), workers are instructed to sign across the seal before returning the ballots to the Division of Elections.

After the 2010 General Election, the division received voted ballot envelopes that were sealed but that did not have election worker signatures across the seal. After working a 13+ hour day, workers are ready to go home and sometimes overlook signing across the seal.

In no case had the initial seal on the envelopes been broken, but the division recognizes the absence of signatures caused the perception of compromised ballot security during the tabulation of the write-in votes.

Public comments were received related to the improvement of ballot security. Although ballots are sealed in tyvek envelopes, improvements are needed to ensure that workers sign across the seal. The division takes ballot security seriously, and will add instructions to the voted ballot envelopes to remind workers to sign across the seal. The division will also make improvements to election worker training relating to ballot security.

c) **Unvoted Ballots**

When the polls close, election workers in precincts outside of Anchorage, Fairbanks, Juneau, Mat-Su and Nome are instructed to destroy their unvoted ballots. Precincts in Anchorage, Fairbanks, Juneau, Mat-Su and Nome bring their unvoted ballots back to the division's regional offices to be destroyed.

Public comments were received relating to the handling of unvoted ballots. One suggestion was that election workers should be required to sign documentation indicating the ballots were destroyed. The division instructs the election workers to complete a ballot statement indicating how many ballots were used after the polls close. This statement, along with the signatures in the precinct registers, allows the division to account for all ballots and to ensure that the election results do not include extra ballots. In an effort to improve how unvoted ballots are handled and accounted for, the division will make changes to the ballot statement to specifically include the number of ballots received, used and destroyed. The division will also investigate whether it is possible logistically for the return of ballot stubs from unvoted ballots to further prevent any use of ballots for fraudulent activity.

I. (B) Impacts on Process Relating to Distribution of Write-In List

There have been two major write-in campaigns for a statewide election in the past two decades. In 1998, Robin Taylor ran as a write-in candidate for governor. In 2010, Lisa Murkowski ran as a write-in candidate for United States Senate. The difference between the two elections was that in 1998 Alaska Statutes did not require write-in candidates to file any form of declaration with the Division of Elections. After the 1998 election, the statutes were changed to require write-in candidates to file a letter of intent with the division at least five days prior to the election.

The division consulted with the Department of Law to determine what assistance by an election worker was allowable to those voting for a write-in candidate. The division and Department of Law concluded that a list of declared write-in candidates should be distributed to election workers in order to ensure that workers provide consistent, standardized assistance to voters on write-in questions. The division also believed that providing a list would help minimize disruption in the polling place that might result from conversations between poll workers and voters regarding write-in candidates. Election workers were instructed not to post the list, but to have it available for reference upon request of the voter.

Since providing a list of write-in candidates to the election workers was a new procedure, the division submitted the change in practice to the United States Department of Justice (DOJ) for preclearance as required by Section 5 of the Voting Rights Act. DOJ precleared the change prior to the distribution of the list.

1. Impacts on Public Perception

The implementation of a write-in list triggered a lawsuit filed against the division, and the Alaska Supreme Court ruled in favor of the division's use of the list. As a protest to the Supreme Court's order allowing the write-in list, a radio talk-show host went on air and encouraged listeners to file paperwork with the division to become declared write-in candidates so that poll workers would have a difficult time finding Lisa Murkowski's name on the list.

Prior to the radio broadcast, there were only a few declared write-in candidates for the U.S. Senate race. The broadcast resulted in 168 write-in candidates for U.S. Senate.

Several public comments were received both prior to and after the election indicating that the division should not have distributed a write-in list. Some members of the public also made comments to the division that they believed the division provided the list as a way to help one candidate over another. The division implemented the list as a way to ensure that effective voter assistance could be provided, and this decision was affirmed by the Alaska Supreme Court.

The requirement for a write-in candidate to file a letter of intent restricts a time-honored tradition voters have in most states. The right to cast a write-in vote exists as a "release valve" in the event a voter is not happy with the choices available on the ballot. The Division of Election's job is to empower voters. Therefore, the recommendation is to change Alaska State Statute to make it voluntary for write-in candidates to file a letter of intent. At the same time, we recommend making the voluntary write-in letter of intent dealing 21 days prior to the general election day.

I. (C) Processes and Procedures for Counting Write-In Votes

1. Internal Preparation and Procedures

a) Establish date/time for counting of write-in votes

6 AAC 25.085 establishes the criteria used to determine when the counting of individual write-in votes must be performed. This regulation further outlines that the director will establish the place and date for counting write-in votes.

For 2010, the director initially established that if the number of write-in votes cast in the election was sufficient to trigger counting, the counting would take place in Juneau beginning the 16th day following the election. The date was selected based on the fact that the last count of absentee ballots is performed on the 15th day following the election, and the division might not know if the threshold requirement for conducting the count of individual write-in votes would be met until all ballots were counted. It was initially reported to candidates and the public that the date would be the 16th day following the election.

After results were posted on election night, it was clear that the division would be required to separate and count the individual write-in votes. Lieutenant Governor Campbell indicated it would be in the best interest of the state and public if the write-in votes were individually counted sooner than initially planned. It was determined that the division would begin counting the write-in votes on November 10th, and candidates were notified. The Department of Law advised that the lieutenant governor's decision was legal and appropriate, and the court backed this up.

b) Establish location and secure workers

AS 15.15.370 requires all ballots to be sent to the director. The division also relied on 6 AAC 25.200, which requires all recounts to be conducted in Juneau, because a recount is a similar procedure to counting write-in votes. Since all ballots are sent to Juneau following an election, the separation and counting of write-in votes was conducted in Juneau.

The division secured a counting facility that could accommodate 15 teams of counters consisting of two people using two 3' x 5' tables, press, public viewing and observers. In addition, a vendor was secured to transport the tables and chairs necessary for the workers.

The location established allowed for a secure counting area and ballot storage area with limited access. There was also a designated area set up for press and a designated area for the public to observe the counting process without being in the immediate counting area.

c) **Recruit and train workers**

It was determined that 15 teams of two workers would be used to perform the separation of the write-in ballots. In addition, alternate workers were identified in the event that an appointed worker was unavailable during counting times.

The division required all workers to attend a pre-counting training session. The training covered the processes and procedures that would be used when separating ballots.

Each day of the counting, the workers had to sign in and out and were given badges to gain access to the immediate counting area. The workers' political party affiliation was taken into consideration when pairing the teams so that there would not be a team consisting of two workers of the same party affiliation. Each team was assigned a table number, and the division maintained a list of table assignments.

d) **Ballot security**

Counted ballots are sealed in tyvek envelopes by the precinct election board or counting boards before being transported to Juneau for storage and archiving. The outside of the ballot envelopes indicate the district/precinct of the ballots. Election workers are instructed to sign across the seal on each ballot envelope.

When ballots arrived in Juneau, division staff recorded the ballots received, and indicated the number of ballot envelopes for each district/precinct. After the ballots are recorded, the sealed envelopes are placed in archive boxes by district and secured in an alarmed ballot room.

The division contacted several security contractors and ultimately, secured the services of the only company that had transportation available and could meet the division's request. The security contractor was hired to transport the sealed ballot envelopes contained within archive boxes to the counting center. Each time the ballots were transported, the security contractor and the division recorded each ballot envelope on a transport log. The log was completed and signed when the ballot envelopes left the alarmed ballot room, when they arrived at the counting center, when they left the counting center, and again when they were received back in the ballot room.

While in the counting center, the ballots were stored in an open, cordoned-off area that allowed access only by division personnel and the security contractor. Before taking ballots from this area to a counting table, they were checked-out and recorded on a table assignment list, and they were checked back in upon their return.

Comments were received from the public regarding the transportation of ballots to/from the counting center in archive boxes. Comments were also received about division personnel and the security contractor having sole access to the ballots. Since the ballots in the archive boxes are sealed inside ballot envelopes, they are secure during transportation. And to further ensure security, the division already numbers the envelopes. The division will implement additional security measures of using tamper-proof seals on archive boxes sent out prior to transporting ballots to a counting center.

e) **Recording write-in vote results**

In order to record the write-in results for the large number of declared write-in candidates, the division created an election database using the GEMS ballot tabulation system software. The write-in database included the names of each write-in candidate. The division believed there would be a large number of challenged ballots, so it also decided to create a category in the database to record the number of "challenged counted" and "challenged – not counted" ballots. The "challenged – not counted" category was created because the division felt there would be ballots that could not be counted for a write-in candidate but that would be challenged. In addition, the database included a category to record the names of write-ins for candidates who did not file a letter of intent. The division also included in the database write-in votes for names appearing on the ballot, because it is not uncommon for a voter to write in the name of a candidate appearing on the ballot.

Many ballots were discovered during the write-in count process in which the voter failed to mark the write-in oval, but wrote in the name of candidate Lisa Murkowski. When sorting and counting the individual write-in votes, the division followed Alaska State Statute, which indicates that if the oval was not marked, the write-in vote cannot be counted. These are considered blank ballots and were not included in the initial write-in vote totals.

Prior to separating and counting the individual write-in votes, the election results did not include write-in ballots in which the oval was unmarked though a name was written in. These are considered blank votes for that race. After challenges by the Murkowski campaign, these ballots were recorded with the "challenged – not counted" ballots, because there was no category specifically for recording write-in ballots with unmarked ovals. This category, however, included other ballots where the write-in oval was marked but were recorded as "challenged – not counted" for other reasons.

Since the write-in results for the US Senate Race included these blank ballots which were challenged by the Murkowski campaign, the results appeared to have more write-in votes than originally reported. However, the additional ballots were never valid votes, but were later recorded with other uncounted ballots when the Murkowski campaign challenged them.

In the future, the division will ensure that blank ballots that get challenged but that are not counted are not included in the overall results.

f) Access to counting area

The division established a sign-in/sign-out process to control access into the immediate counting area. In order to gain access to the counting area, each counting worker and observer had to sign-in and each was given a badge.

The division allowed one observer from each campaign to be present at each table in the counting area. In addition, each campaign was allowed to have a lead observer present in the counting area.

In addition to the workers and observers, the division required press members to sign in and wear a press badge. Press members had their own area with full viewing access of the counting. As requested, the division allowed a limited number of press members in the immediate counting area for short periods of time to take pictures or film footage. When press members were in the immediate counting area, they were accompanied by division personnel.

Division personnel and Department of Law personnel also wore badges.

Although the public was not allowed in the immediate counting area, the division did establish an area for the public that allowed full viewing access.

Comments were received that the division politicized the write-in count process by roping off areas after challenges to ballots began. The division provided equal access to the counting area for both the Murkowski and Miller campaigns. Access was established on the very first day and remained consistent throughout the counting process.

Access to the cordoned-off area where the ballots were being held, which was visible to all parties, was limited to division personnel, Department of Law personnel and the security contractor. At no time did observers for either candidate have access to this area.

2. Counting Individual Write-In Votes – U.S. Senate Race

When separating ballots to count the individual write-in votes, the ballots were first sorted. After the initial sort, the director, with the assistance of the Department of Law, made a determination on voter intent. Once voter intent was determined, the ballots were counted and the individual write-in results recorded.

Below is an outline of the process:

a) Initial Ballot Sort

There were five boxes used to sort ballots. The boxes were used to initially sort the ballots as follows:

i. All ballots where the oval is marked next to a candidate's name that is printed

on the ballot (those other than the "Write-In" category) were placed in box #1.

ii. All ballots where the U.S. Senate Race is left blank (no oval marked) or more than one oval is marked were placed in box #2.

iii. All ballots where the oval is marked for the "Write-In" category and the name is written as "Lisa Murkowski" or "Murkowski" and spelled correctly that were not challenged were placed in box #3.

iv. All ballots where the oval is marked for the "Write-In" category and the name written in is "Lisa," "Lisa M" or other variations that demonstrated the voter is casting a ballot for Lisa Murkowski were placed in box #4. This box was also used for workers to place any ballot voted for Lisa Murkowski that an observer challenged so that the director could make a determination on voter intent.

v. All ballots where the oval is marked for "Write-In" category and the name written in is for a candidate other than Lisa Murkowski or variation of Lisa Murkowski were placed in box #5.

During the first day of sorting, some teams sorted the ballots into the five boxes so that the candidate names were facing the sorting team, and some sorted so that the candidate names were facing the observers. The division received comments from the observers that they would like all sorting teams to sort the ballots so that the candidate names printed on the ballot faced the observers. The division implemented this change on the second day of sorting. Although comments were received that ballots were sorted upside down, this only happened on the first day and was corrected by the division at the request of observers and had no effect on the result of the election.

b) Director Determination

i. Each ballot in box #2 (blank and overvoted ballots) was reviewed to verify the ballot is truly blank or overvoted.

ii. Each ballot in box #4 was reviewed to determine voter intent. When reviewing these ballots, they were sorted into three categories as follows:

1) Determination made to count as vote for write-in candidate Lisa Murkowski and determination is not challenged. (These ballots were placed in box #3 for counting.)

2) Determination made to count as vote for write-in candidate Lisa Murkowski and determination is challenged. These ballots were segregated and placed into an envelope labeled "Challenged – Counted for Murkowski." The total number of votes from these ballots was recorded on the results sheet as votes for "Murkowski – Counted Challenged."

3) Determination made to not count the vote for write-in candidate Lisa Murkowski and determination is challenged. These ballots were segregated and placed into an envelope labeled "Challenged – Not Counted for Murkowski." The total number of votes from these ballots were added to the results sheet as "Murkowski – Not Counted Challenged."

c) Recording Results

i. The ballots from box #3 (votes for Murkowski) were hand counted and the total number of votes was recorded on the results sheet for "Lisa Murkowski."
ii. The number of ballots in the "Challenged – Counted for Murkowski" envelope was hand-counted and recorded on the results sheet line "Lisa Murkowski – Counted Challenged." After counting, these ballots were returned to the envelope.
iii. The number of ballots in the "Challenged – Not Counted for Murkowski" envelope was hand-counted and recorded on the results sheet line for "Murkowski – Not Counted Challenged. After counting, these ballots were returned to the envelope.
iv. For the ballots in box #5 (write-in votes for candidates other than Murkowski), the workers sorted the by name. Once the ballots were sorted, the workers counted and recorded the individual results for candidates appearing on the write-in candidate list. If the name written in did not appear on the certified write-in candidate list, workers recorded the votes on the line for "Other Write-In."
v. After the workers recorded the write-in votes on their results sheet, division personnel compared the total number of individual write-in votes to the write-in category on the initial statement of votes cast. This was done to make sure counting workers did not accidentally place write-in votes in box #1.
vi. Once the total number of write-in votes was verified, the workers sealed the ballots in the original voted ballot envelope(s) and the results sheet used to record the individual write-in votes was given to division personnel to enter into the GEMS database.

3. Timeline

The division began the individual counting of write-in votes on Wednesday, November 10th. Initially, the division thought that it would take three to four days to conduct the count. However, due to the large volume of challenged ballots, the division did not complete the counting of write-in votes until November 17th. This fact alone confirmed Lieutenant Governor Campbell's decision to begin the count earlier.

Each day, the counting began at 9am and went to approximately 4-5pm. On Sunday, November 14th, the division did not begin the counting until noon.

On November 19th, the division counted the write-in votes from special advance and overseas ballots. The initial count of these ballots took place in the regional offices on the 15th day following the election, and the ballots were shipped to Juneau. The division notified the campaigns and press that the write-in separation from these ballots would take place in the Division of Elections director's office on November 19th.

4. Cost

The total cost to individually count the write-in votes was $60,440.

I. (D) Successes

Alaska faces logistical challenges to ensure that all 438 precinct polling places across the state are open and staffed, and receive their ballots, supplies and equipment. Accomplishing this is a success in its own. There were other notable successes relating to the 2010 General Election:

1. Litigation

During the 2010 General Election, there were several lawsuits filed against the division in both state and federal courts.

The main issue in the litigation was related to the division's decision to provide a list of write-in candidates to the poll workers and the division's process to count write-in votes, including determining voter intent.

The state and federal courts ruling in the division's favor was the most notable success of the 2010 General Election.

2. Implementation of the MOVE Act

Under the new requirements of the MOVE Act, the division was required to mail ballots to military and overseas voters at least 45 days prior to the general election and late candidate withdrawal deadline. Due to the short time frame between the primary and general elections, the division initially applied for a waiver to this requirement. The division was notified the waiver was denied and the division was required to develop a process that would allow ballots to be mailed 45 days before the general election.

The statutory candidate withdrawal deadline of 48 days prior to the general election made it impossible to have official ballots printed in time to meet the MOVE Act 45-day ballot mailing requirement. The division developed a process to produce an in-house paper ballot which was mailed to over 8,000 UOCAVA voters by the deadline.

To count the ballots using the division's optical scanners, the absentee ballot review boards had to produce a facsimile of the ballot using an official ballot printed on ballot stock. Although this caused extra work for the review boards, the division was able to meet the statutory deadline for reviewing and counting ballots.

3. Election Worker Training Video

In an effort to supplement in-person training, the division created an election worker training video that covered the same components as the in-person training sessions. The video provided workers with an opportunity to be trained even if they were unable to attend the in-person training. The division received positive feedback from election workers who found the video valuable.

4. Federal Observers in Bethel

The division was notified approximately one week before the general election that the Department of Justice would be sending federal observers to Bethel. In order to prepare for the observers, the division worked with Lori Strickler, Bethel City Clerk, to set up a training session for the poll workers the weekend before the election to go over election procedures and to inform the workers about the observers. The division's Yup'ik Language Assistance Coordinator was on-site in Bethel for election day.

Although it was intimidating for poll workers to have federal observers watching them, the division and poll workers were prepared and successfully conducted the election in Bethel. There is, however, no after action report available from the Department of Justice.

5. Counting Write-In Votes

In addition to the normal post-election processes, in 2010 the division had to prepare for and count the individual write-in votes for United States Senate. The counting was high-profile, with both national news media and campaign observers present.

The division created a process to separate and count write-in votes from 258,746 ballots cast in the 2010 General Election. Throughout the process, the division was able to maintain security and organization of a very large volume of ballots and election materials.

The division updated the press, campaigns and the public each day with ballot counts and results.

I. (E) Issues for Improvement

1. Implementation of MOVE Act Requirements

The division was successfully able to meet the 45-day deadline to mail absentee ballots to military and overseas voters by preparing a paper copy of the ballot. Although this allowed the division to meet the requirement, it impacted the amount of time to count absentee ballots and resulted in a large number of facsimile ballots. Statutory changes should be pursued that will allow for the official ballot, rather than a facsimile, to be sent by the 45-day deadline.

Currently, absentee ballots must be mailed or faxed to voters. The division received numerous comments from military and overseas voters that they do not have ready access to fax machines and requested their ballots be sent via email. Statutory changes should be pursued to allow blank ballots to be transmitted via email.

It is recommended that legislation be introduced to change the date of the primary election; change the candidate withdrawal deadlines for the primary and general elections and change the party replacement deadlines for the primary and general elections.

2. Voter Registration Database

The division's voter registration and election management database was developed in 1985 and is a mainframe-based system. Because the technology is antiquated, there are a limited number of programmers available that have experience in this programming language. In addition, it is costly to maintain at an annual fee of over $100,000 per year. The division needs to replace this system with a more technologically advanced, PC-based system.

3. Election Worker Pay

Each election, the division struggles to recruit poll workers. These workers are required to work a 13+ hour day with a great deal of responsibility. A pay increase could result in more people willing to serve as poll workers and result in more participation from political parties.

This report makes no appropriation recommendations.

4. Hand Counting Ballots

There are 133 precincts in Alaska that hand count their ballots after the polls close and call the regional offices with their election results. Once received, the regional offices enter the results into the regional tabulation server which is then uploaded to the host server in Juneau. If the election board calls in the wrong number of voters, or wrong results, the regional offices enter incorrect information which then has to be corrected by the State Ballot Counting Review Board. Although improvements have been made to training methods, the division will need to continue to improve materials to address hand counting of ballots.

5. Voter History

Prior to opening and counting absentee and questioned ballots, the division conducts a duplicate analysis to verify that the voter did not vote more than once. This duplicate analysis cannot be performed until all voter history is completed from the precinct registers used in the polling places. Until the duplicate analysis is complete, absentee ballots cannot be opened and counted. This causes a delay in opening and counting the absentee ballots.

To enhance the voter history process, the division will research the feasibility of implementing the use of electronic poll books. Electronic poll books could potentially expedite the counting of absentee and questioned ballots by more quickly recording voter history and conducting duplicate voter analysis.

An online real-time voter history system would have several advantages:

a) It would expedite the counting of absentee and questioned ballots
b) It would identify individuals attempting to vote more than once in any given election, avoiding potential fraud
c) It could allow observers, candidates and parties to focus their get-out-the-vote efforts more effectively, and perhaps increase turnout altogether.

I. (F) Statistics and Analysis

There are 438 precincts in Alaska. In order to conduct an election, the Division of Elections ensures each precinct has a polling location, workers to run the polling place and that each location has the ballots, supplies and equipment needed for the election.

There are 305 precinct polling places that use an optical scan machine to count ballots. There are 133 precinct polling places, located in rural areas of the state, that hand-count their ballots when the polls close. During the primary and general elections, there is also a touch screen voting unit in each precinct polling place that is intended for use by voters who have visual impairments, disabilities or have difficulty reading.

1. How many people voted

260,976 voters voted in the 2010 General Election, of which, 258,746 ballots were counted and 2,230 ballots were rejected.

Following is a breakdown of the ballots cast:

192,940 cast ballots on Election Day and counted at the polls
11,698 counted questioned ballots
1,297 rejected questioned ballots
40,843 counted absentee ballots
933 rejected absentee ballots
13,265 counted early ballots

There were 494,876 registered voters qualified to vote in the election. Overall percentage turnout based on the counted ballots was 52.29%. The percentage turnout in the 2010 election is slightly higher than in previous gubernatorial election years.

2. How many people cast write-in votes

Out of the 258,746 cast ballots, there were 102,234 votes cast for write-in for the U.S. Senate race.

Although there were write-in votes for each race on the ballot, only the write-in votes cast in the U.S. Senate race met the required threshold to count the individual write-in votes.

3. Cost and length of time to count write-in votes

It cost the division $60,440 to conduct the counting of the write-in votes for the U.S. Senate race.

The counting of the write-in votes started on November 10th and concluded on November 17th with a small number of ballots being counted on November 19th.

4. Reporting absentee and early vote results by precinct

Comments were received indicating that results from absentee and early voting should be reported by precinct. Unlike precinct polling place ballots, absentee and early ballots are issued at the house district level, not at the precinct level. Alaska State Statute 15.20.201 requires the district absentee ballot counting board to review and count absentee ballots. The division's existing voter registration and election management database is programmed and designed to track absentee and early ballots by house district.

Having both systems designed to manage absentee and early ballots by house district allows for the public and candidates to get a list of all absentee and early voters and to see election results by house district. This also allows the division to verify that the number of ballots accepted for counting matches the number of actual ballots reported in the election results which is critical to the ballot accountability process.

As more Alaskans are taking advantage of early and absentee voting, the recommendation is for the division to examine how and whether it can report all results by precinct in future modifications of ballot counting and reporting software.

5. Providing information on absentee voters

Comments were received that it is difficult to get information from the division about voters who requested absentee ballots and that the division mailed ballots to voters earlier than the announced date.

The division's absentee office produces an updated absentee voter report following each mailing. If an organization has purchased the initial absentee list, their name is kept and they are automatically sent subsequent lists. The division's absentee office consistently provides lists to candidates and parties.

The division believes that mailing absentee ballots to voters as soon as they are available is critical to the voter's ability to receive a ballot in time to vote. Once ballots are sent, the updated absentee voter report provided to the candidate and parties includes the date the ballot was mailed. In an effort to ensure this information is more readily available, the division will post information to the website that indicates the date when ballots are being mailed, or mesh this system with a planned online real-time voter history system.

2010 Election Review
II. Answering Alaskans' Questions

II. (A) Voter Intent

Question: Should voter intent be included as part of the rules for counting write-in votes?

This report recommends yes.

There is legislation pending in the 2011 legislative session that considers this question. Senate Bill 31 has passed the State Senate and is awaiting hearings in the State House. This legislation codifies the decision of the Alaska Supreme Court that voter intent must be considered when counting ballots.

There were public comments received that voter intent should not be included in determining whether or not a ballot should be counted. The Alaska Supreme Court has historically and repeatedly encouraged the division to implement and honor voter intent in counting ballots. This was again the case with their order in December 2010.

II. (B) Letter of Intent for Write-In Candidacy

Question: Should there be continued requirements for individuals to file their intent to be a write-in candidate and if so, what is realistic time requirement for filing such intention?

Today, Alaska State Statute requires a write-in candidate to file a letter of intent to run for public office within five days of a general election. The requirement is relatively new in Alaska law and had never been tested before the 2010 General Election, when the list of write-in candidates itself and its use in voting locations was challenged in State courts.

As a result of this review, it is recommended that the requirement for filing a write-in letter of intent be voluntary, not mandatory. This would maintain the voters' freedom to use the write-in process to vote for whomever they choose. However, if a candidate desires to file a write-in letter of intent, the division could more effectively provide assistance to voters if the requirement is changed so that the letter of intent must be received by the division no later than 21 days before the general election. If appropriate thresholds are met to require the individual counting of write-in votes, nothing should preclude a candidate who has not filed a write-in letter of intent to have his or her votes counted.

With the understanding that the circumstance for a write-in candidate to run and not file a letter of intent is rare, yet may be necessary to ensure each party has a candidate in the election, the division will continue to encourage write-in candidates to file a letter of intent for election for the following reasons:

1. Filing a letter of intent verifies that the individual running for office meets the constitutional and state requirements for the office.

2. The letter of intent provides the division with the framework for how the candidate's name should be written.

3. Without knowing in advance, the names of write-in candidates, voters who wish to vote for a write-in candidate could be disenfranchised if they needed assistance in voting for a candidate.

4. The candidate filing requirement is helpful for the division's preparation of the write-in candidate list for use in the polling places on Election Day. This list helps with voter assistance, which is required by both Alaska Statute and by federal law.

5. The write-in candidate list was precleared by the U.S. Department of Justice (DOJ) last year. To discontinue using the list would require preclearance.

6. Registration also allows the state to enforce financial disclosure laws and electioneering laws against all candidates equally.

II. (C) Felons Voting

Question: What additional precautions, if any, are necessary to prevent felons from voting?

The division has a process in place to remove voters that have been convicted of a felony involving moral turpitude for the voter rolls.

The division receives a list from the Department of Corrections and processes the names on the list. Prior to removing a voter, the division must verify the conviction is for a felony involving moral turpitude. This process is conducted, at minimum, on a bi-weekly basis.

The division seeks the assistance of the Department of Law to determine if a crime meets the legal definition of "moral turpitude" if the crime listed is not found in AS 15.80.010(9).

There were allegations made in court documents that the division allowed felons to vote. This was a direct result of a data match performed using the Sex Offender Registration Central Registry and the statewide voter registration list by a third party. Names that appeared to be a match, based on criteria unknown, identified that there were registered voters whose names were on the Sex Offender Registration Central Registry and that some of these individuals voted in the 2010 general election. The division did not receive any names of potential felon voters from a third party.

An individual who has been convicted of a crime that requires registration with the Sex Offender Registration Central Registry may remain on the registry for an extended period of time, up to life. Being named on the list doesn't preclude those individuals from registering to vote, as long as they have been unconditionally discharged from their conviction.

When an individual has been unconditionally discharged from incarceration, parole and probation, they are eligible to register to vote.

As of March 31, 2011, there are 6,107 voters inactive due to felony conviction and 1,271 voters inactive who have been unconditionally discharged but have not re-registered to vote.

To ensure that felons who are ineligible to vote, do not vote, the division will ensure that a data match between the Department of Corrections and the state voter registration file is conducted immediately prior to each election.

II. (D) MOVE Act Compliance

1. Election Dispute

Question: Does the interval between Alaska's primary and general election allow compliance with the MOVE Act in case of an election dispute, when primary results can be delayed by law, and general election ballots must be mailed 45 days before an election?

Federal law (MOVE Act) requires that ballots for the 2012 primary and general election must be mailed to Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters no later than 45 days prior to a federal election.

The difficulty with meeting this mailing deadline for the primary election revolves around the candidate withdrawal deadline. Currently, a candidate may withdraw up to 48 days prior to the election. This allows the division only three days to print and mail ballots for the primary election.

The division was able to meet the 45-day ballots mailing time for UOCAVA voters during the 2010 General Election. However, it was extremely difficult and could have been derailed by factors outside the division's control.

It is recommended that legislation change the date of the primary election; change the candidate withdrawal deadlines for the primary and general elections; change the party replacement deadlines for the primary and general elections.

These changes will allow the state to more reliably meet the 45-day ballots mailing requirement for UOCAVA voters.

2. Electronic Voting

Question: With the passage of the MOVE Act, should Alaska eliminate the 60-day special advance ballot and expand electronic voting to allow the division to transmit blank ballots to voters?

The division should eliminate the 60-day special advance ballot for UOCAVA voters but continue to send to those voters residing in remote areas of the state and those traveling and working outside the United States.

The MOVE Act requires the division to send ballots electronically to voters, if requested by the voter.

Currently, the regulatory definition of electronically transmitted ballots is by facsimile machine. However, this is an antiquated method of electronic voting. In a review of the

legislative committee history for HB42, which implemented electronic transmission of ballots, it is clear that the intention of the statute's use of the term "electronic transmission" was meant to allow the division to use whatever means is modern and available. The bill was intended to make use of modern technology to encourage people to vote.

The use of fax machines is no longer considered modern technology. There are effective and secure ways to electronically transmit a ballot to voters. Many states implemented these types of procedures during the 2010 general election.

The division is continuously being asked by voters (both UOCAVA and non-UOCAVA) if they can receive their ballot by email.

The division is researching secure electronic ballot transmission methods. The recommendation is to amend state law to allow for this opportunity.

II. (F) Requirement to Show ID and Citizenship

Question: Should voters be required by law to show their ID, and what proof of citizenship should be necessary to register?

State law currently requires voters to present ID prior to voting. If the voter is personally known to an election worker, ID does not need to be shown.

Some Alaskans have urged a proof of citizenship requirement to register to vote. Today, Alaska requires a prospective voter to sign an affidavit attesting to his or her citizenship in the United States and in the State of Alaska.

If information is received that a voter is not qualified because they are not a U.S. citizen, the division requests verification of U.S. citizenship through the voter and/or the Immigration and Naturalization Service. If it is found that the voter is not a U.S. citizen, the division will inactivate the voter registration record.

Proof of citizenship is a sensitive area. In October 2010, Ninth Circuit Court of Appeals (*Gonzales v. Arizona, 624 F.3d 1162, 9th cir. 2010*) ruled that the Arizona Division of Elections could not require documents proving citizenship for new voter registrations. The court ruled that this violates federal law. The National Voter Registration Act (NVRA) allows voters to register without documentation but stipulates that lying about citizenship is perjury. The case is not resolved by the courts, but could have implications in Alaska. The division and the Department of Law will continue to monitor proceedings carefully.

When a voter registers to vote before a registrar, they must show identification. If no identification is provided, the registrar notes on the registration form that no ID was presented. When the division processes this form, the voter's identity is verified through the Division of Motor Vehicles (DMV) database and/or through a direct application between DMV and the Social Security Administration (SSA).

When a voter registers to vote by mail, their identity is verified through the DMV database and/or the SSA database.

If the identity of a voter who registered by mail or through a registrar without presenting ID cannot be verified through DMV or SSA, there is a notation made next to the voter's name on the precinct register that the voter must show identification. A voter who is personally known by an election worker cannot have the identification requirement waived if this notation is next to the voter's name on the precinct register.

II. (G) Election Contest – Certification

Question: Should the ground rules for defining an election contest be revised, since we've learned in 2010 that an election can be challenged before certification takes place?

Under Alaska State Statute, any defeated candidate or ten qualified voters may request a recount. The recount application must be received within five days following the completion of the state review board. The deadline for a recount involving a gubernatorial race is three days.

Currently, the statute regarding the timeline for bringing an election contest action says: "The action may be brought in the superior court within 10 days after the completion of the state review" (AS 15.20.550). Technically, an election contest action may be brought before certification now, so long as it is brought after state review. AS 15.15.440 sets out the process for state ballot review, and then AS 15.15.450 sets out the process for certification of the election after ballot review.

Election contest actions are entirely delineated in statute, so a change could be made, but the question remains whether it makes sense to make a change. The division needs to have the state review of an election complete so there is an official election result for the plaintiff to challenge in an election contest action.

Joe Miller challenged a state election in federal court. The federal court delayed state certification and neither the State of Alaska nor the state courts had control to lift the stay. The federal court did not "toll" or delay Mr. Miller's right to seek a recount, and he missed the opportunity to do so.

The situation that arose with the 2010 U.S. Senate litigation could have cost the state representation in the U.S. Senate. Changing the recount, recount appeal and election contest timeline can be detrimental to ensuring that the state has representation at the state and federal level.

Question: Why weren't all ballots counted by hand?

There were public comments received regarding the request by Joe Miller to have a hand-count of ballots for the U.S. Senate race. The process that took place regarding the write-in votes was solely for the purpose of determining how many votes were received by each write-in candidate from the total number of write-in votes cast. If Mr. Miller had requested a recount of the U.S. Senate election, it would have been granted; however the division never received such a request and therefore never conducted a recount.

As a matter of course, when a recount is requested, it is conducted by using the optical scan ballot tabulation equipment. The equipment is programmed to reject any ballot that is overvoted (more than one oval filled in) or undervoted (either entirely blank for the race being recounted or a mark that is too light for the tabulator to read). When a ballot is rejected it is placed in a box to be reviewed by the director. The director makes a decision whether or not to count the ballot and either party involved may challenge the decision. The challenged ballot is then sealed in an envelope to be preserved if it needs to be reviewed by the courts.

Each ballot is reviewed by observers and all ballots are subject to challenge.

During a recount, one precinct from each house district is randomly drawn for a hand-count verification.

To avoid confusion in the future, the division will post on their website the date the state review board has completed their review, which will indicate to candidates and voters that a recount request must be made within five days of that date.

There were also public comments received regarding the hand count verification process. This is a process in which one randomly drawn precinct that accounts for at least five percent of the total votes cast for the district is hand counted. If there is a discrepancy of greater than one percent, the entire district is recounted by hand. In the four years this requirement has been in statute, there has never been a need to recount the ballots for an entire district. Following the hand count verification from the 2010 General Election, copies of the paperwork were provided to observers from the Miller campaign.

II. (H) Voter Assistance

Question: What voter assistance is allowable?

Both state and federal law require that a voter be provided assistance at any time throughout the registration process and voting process. There are no limitations as to what level of assistance may be provided if requested by the voter.

Language assistance is specifically required by federal law.

The division provided, at voters' request, a list of qualified write-in candidates. Initially, an absentee voting site erroneously posted the list. Once the division learned about it, the list was immediately removed. Seventeen voters voted during the period the list was posted. These ballots were kept segregated, counted, and returned to their envelope in case of any future challenge. There were no challenges made to these ballots

The Alaska Democratic Party and the Alaska Republican Party filed a lawsuit against the division to prohibit the use of the write-in list. The Alaska Supreme Court upheld the use of the list ruling that it was consistent with Alaska's voter assistance statutes and did not violate state election regulations.

Public comments were received which stated that numerous ballots appeared to have the name of a write-in candidate written by the same person. Nothing in state law prohibits an election worker from assisting a voter with the writing of a candidate's name. This is an allowable form of voter assistance.

A number of write-in ballots were challenged due to similar handwriting. No evidence was presented to indicate this was the result of anything other than voter assistance or common penmanship among voters. This issue is also part of the complaint in current, active litigation in Perry et al. v. LG, SOA, 4FA-11-973 CI. Due to the past and current litigation, this report makes no recommendation on this issue.

Question: Is voter assistance documented?

The division does not instruct poll workers to document when a voter receives assistance, with the exception of language assistance. The division instructs poll workers, when requested, to provide any necessary voter assistance. The only type of assistance that is documented is the number of language assistance requests and the type of language. Poll workers are instructed to maintain a language assistance log. Voter names are not maintained on the log. The language assistance log is a method used by the division to determine where language assistance, especially Alaska Native language assistance, is needed to ensure there are bilingual poll workers in those areas.

II. (I) Public Information to Update Voter Lists

Question: What information on voters may be used to update voter lists?

Changes to a voter's residence address must be provided in writing by the voter.

Mailing address changes (not residence addresses) can be made based on information received from the USPS or based on information provided by the voter to the Permanent Fund Dividend program.

A voter's record may be inactivated when information is received from another state indicating that the voter is now registered in their state.

A voter's record may also be inactivated as a result of information received from the Division of Vital Statistics and the Department of Corrections.

The division has been following the "Upgrading Democracy Project," by PEW Center on the States. We have been invited, through this project, to compare voter registration lists with a wider array of data sources to broaden the base of information used to update and verify voter rolls. To participate, the State would need to share data Alaskans provide to the Division of Motor Vehicles. We have also been asked to share data from Permanent Fund Dividend records because voters have every reason to keep address records with the PFD division current. The division currently has access to PFD information but does not have complete access to DMV information that would further help verify our registration records, or further reach out to eligible citizens who are not registered to vote. The Division is considering the possibility of joining the "Upgrading Democracy Project," but it will not do so unless the privacy of Alaskans' personal data can be assured.

II. (J) Information on Who Has Voted

Question: Can we offer "real-time" updates on which voters have voted?

At this time the division does not offer a "real-time" or electronic update identifying which voters have voted. Nor does the division offer an hourly "carbon copy" of voters signing in to vote, as some other states do.

Poll watchers typically track this information on paper lists which match the list of voters for a specific precinct. They check off the names of voters as they vote and provide that information to campaigns and/or political parties. However, poll watchers are not allowed to see the registration rolls and can only glean voter information by listening.

The division will consult with a third party to research a "real-time" voter history system and a cost/benefit analysis of such a system.

II. (K) Party Participation and Access

Question: How do we ensure that political parties have full participation in and access to the election process?

The election process is open to all political parties, candidates, and the public. They have access to voter lists, absentee lists, and a presence at the review of absentee and questioned ballots, as well as the counting of these ballots.

The political parties are asked for names of individuals to serve as workers at polling places and as members of the state review board.

There are a large number of non-partisan and undeclared voters in the state. The division ensures that a board is not composed of only one party or another, but strives to ensure there is a combination. There are some precincts that may not have a worker that is registered as Republican or Democrat, but there are never boards that are entirely composed of only one party. There were occasions in 2010 when a board was composed of entirely non-affiliated workers.

Public comments were made stating that the division does not provide parties adequate notice regarding election worker and board appointments. The division will improve communication with the parties regarding election worker recruitment deadlines by providing multiple notices to them.

2010 Election Review
III. Department of Justice Review

Alaska, and all political subunits (boroughs, cities, school districts), are subject to the provisions of Section 5 of the Voting Rights Act. This section requires the state to obtain preclearance from the U.S. Department of Justice (DOJ) for any change affecting the voting process before the change is implemented.

Routine preclearance submissions requested by the division include changes to polling locations, precinct boundaries, regulation changes, legislative changes and changes to forms used by the division such as the voter registration application, absentee ballot application, voting instructions and posters.

DOJ has 60 days after receiving a preclearance submission to make any objection to the voting change.

III. (A) Examples of Changes Needing Preclearance

Changes affecting voting include, but are not limited to, the following examples:

1. Any change in qualifications or eligibility for voting.

2. Any change concerning registration, balloting and the counting of votes, and any change concerning publicity for or assistance in registration or voting.

3. Any change with respect to the use of a language other than English in any aspect of the electoral process.

4. Any change in the boundaries of voting precincts or in the location of polling places.

5. Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

6. Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

7. Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

8. Any change in the eligibility and qualification procedures for independent candidates.

9. Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

10. Any change effecting the necessity of or methods for offering issues and propositions for approval by referendum.

11. Any change affecting the right or ability of persons to participate in political campaigns which is affected by a jurisdiction subject to the requirement of Section 5.

III. (B) Pending Changes Needing DOJ Review

1. As a result of the creation of a new political group, the Alaska Constitution Party, and the removal of the political group, the Moderate Republican Party, the division is in the process of updating the procedures relating to the voter registration application, absentee ballot application, primary ballot choice poster and the voter identification card to reflect the political group changes. Once these forms are updated, they will have to be submitted to DOJ for preclearance.

2. Any change to Alaska Statutes or regulations relating to counting write-in votes or the rules of counting write-in votes, including voter intent will, need to be precleared by DOJ after passage and prior to implementation.

3. Any change to Alaska Statutes, regulations or forms relating to candidacy declaration requirements, including write-in candidates, will have to be precleared by DOJ after passage and prior to implementation.

4. Any change to Alaska Statutes relating to the date of the primary election will have to be precleared by DOJ after passage and prior to implementation.

5. Any changes to Alaska Statute and/or regulation for compliance with the MOVE Act will have to be precleared by DOJ after passage and prior to implementation.

6. Any changes to Alaska Statute and/or regulation relating to requirements for voter identification or for proof of citizenship to register will have to be precleared by DOJ after passage and prior to implementation.

7. Redistricting changes, including changes to precinct boundaries, must be precleared by DOJ after adoption and prior to implementation.

III. (C) Meeting with DOJ Personnel

Lieutenant Governor Treadwell and the Director of the Division of Elections met with staff from the Department of Justice in Washington, D.C. on February 10, 2011 to discuss various Voters' Rights Act issues applicable to Alaska.

1. **Preclearance**

The Alaska delegation expressed appreciation for DOJ's cooperation in quickly preclearing the write-in list process for the 2010 General Election.

2. **The MOVE Act**

Alaska had initially thought it would not be able to meet the 45-day deadline for ballot distribution set out in the MOVE Act. The state had applied for a waiver from this requirement of the Act, and that waiver was denied. Division staff then worked with DOJ to find a way to comply with the MOVE Act, and DOJ's guidance was greatly appreciated in finding a solution to allow Alaska to meet the ballot distribution deadline.

3. **Bail Out**

The term "bail out" refers to the process by which covered jurisdictions may seek exemption from Section 5 coverage. In order to bail out, a covered jurisdiction needs to obtain a declaratory judgment from the District Court for the District of Columbia.

The bail out standard requires that a covered jurisdiction demonstrate nondiscriminatory behavior during the ten years prior to filing, and while the action is pending that it has taken affirmative steps to improve minority voting opportunities.

Discussion took place regarding the bail out process. DOJ clarified that the state may not apply for a bail out from the Voting Rights Act for ten years after the date that federal election observers are no longer in the state. The state received confirmation that it is not entitled to receive copies of the federal observer reports, as these reports are not subject to the Freedom of Information Act. On October 1, 2009, the Bethel Census Area was certified for federal observers, and to date observers have been present for state elections only in Bethel.

4. **Pending State Legislation**

DOJ was informed that there is legislation pending relating to elections and that the state, as always, would be submitting the legislation for preclearance prior to implementation. Clarification was received that if DOJ does not grant preclearance to a change in statute, the existing statute would remain in force.

5. **Minority Language Assistance**

DOJ is interested in seeing the state expand language assistance into more areas of the state and work towards strengthening the Inupiaq language assistance program.

2010 Election Review
IV. Issues for Third Party Review

Status of election security study recommendations

In 2007, then Lieutenant Governor Sean Parnell and the Division of Elections requested the UAA to conduct a study of Alaska's election security. Phase I of the study included a review of security studies conducted by other states and provided for a preliminary assessment of Alaska's election system. Phase II of the study provided for a detailed evaluation of Alaska's election system to provide recommendations that would strengthen both the technology and election procedures to mitigate any known security risks.

In evaluating Alaska's election system, the University reported that Alaska's election system is among the most secure in the country and is in good shape. In Phase II, the University provided several recommendations to further improve the security of Alaska's election system. The recommended changes were broken into two categories: changes recommended prior to the 2008 elections and changes recommended after the 2008 election.

Below is the status of each recommendation included in Phase II of the report:

IV. (A) Pre-election Recommendations

1. **Verify the accuracy of voting technology before and after the election, by comparing code in voting machines with correct, registered code**

   The division implemented the use of a hash code validation for all GEMS computers. This validation ensures that all GEMS computers are using the correct, registered code associated with the current software version. In addition, the GEMS computers are not connected to a network or internet and access to these computers is restricted to authorized personnel only.

2. **Install new software that allows election officials to create a more secure password authentication system for touch-screen machines**

   The division purchased and implemented the use of Key Card Tool which allowed the division to create their own authentication password and encryption keys for the touch screen units.

3. **Change passwords on all voting technology throughout the system**

   The division implemented procedures to change passwords on all hardware and software, including the BIOS, Windows and GEMS election database login passwords. The documented passwords for all systems are stored in a key safe in the director's office.

4. **Use tamper-evident seals on shipping cases and envelopes**

Prior to 2008, the memory cards used in the touch screen units were installed in the units prior to shipping. In 2008, the division implemented a policy that memory cards would be shipped separately from the unit in tamper evident envelopes. The division determined that since the units were not shipped with the memory cards installed, the division deemed that tamper-evident seals on shipping cases were not necessary.

In addition to tamper-evident seals on memory card envelopes, tamper-evident seals were placed on all voting equipment. One seal was placed on the optical scan unit that covered either the front or back seam and pre-drilled hole. One seal was placed on the touch screen unit that covered the seam and pre-drilled hole on the back of the machine. Division staff recorded the seal number used on each piece of voting equipment.

5. **Add election security material to poll workers' training manuals.**

Additional instructions were provided to election workers on equipment security that included a check list and procedures for seal inspection and what to do if the seal was broken. In addition, the division implemented the use of a security log for each piece of equipment. The log listed the tamper-evident seal number, instructions for inspection and a sign-off area for the election workers to sign and return to verify the seal number matched the number provided and that the seal was unbroken.

6. **Increase security procedures in absentee polling locations**

The division does not use voting equipment in absentee polling locations. The touch screen voting units used in the regional offices early voting stations were handled with the same security measures as the equipment used in the polling places. Absentee voting officials were provided with instructions on maintaining the security of their ballots and voting materials.

7. **Purchase state-owned voting machines for use in North Slope Borough, rather than borrowing borough-owned machines**

The division purchased optical scan units for the precincts in the North Slope Borough and initiated use of the units in the 2008 elections.

IV. (B) Post-election Recommendations

1. **Upgrade voting machines and other technology to improved platform: Assure 1.2**

   Assure 1.2 was federally certified by the United States Election Assistance Commission in August 2009. The division chose not to upgrade to Assure 1.2 for the 2010 General Election because the system provider, Premier Election Systems, was in the process of being acquired by Election Systems & Software (ES&S) which triggered an anti-trust violation investigation. This acquisition led to another vendor, Dominion Voting, obtaining the rights to the Assure 1.2 platform. Working with Dominion Voting, the division has begun the process to upgrade their ballot tabulation system to the Assure 1.2 platform. The upgrade will be completed in 2011.

2. **Establish long-term security goals and a method for measuring progress**

   The long-term security goals established by the division relate to the recommendations provided in the study. It is the policy of the division that the recommendations and improvements made for the 2008 election cycle will be maintained for all future elections unless other security issues are identified and addressed.

3. **Improve testing processes to ensure that all voting technology is functioning properly and recording votes accurately**

   The division adopted the University's increased scope of recommended logic and accuracy testing for the 2008 and 2010 election cycles. Memory cards used in the touch screen units were tested using a combination of an automatic and manual testing function. Memory cards used in the optical scan units were also tested following recommended test procedures. The State Ballot Review Board and the Regional Accu-Vote Boards and/or Accu-Vote Coordinators tested the memory cards. In addition to the memory card testing, a functionality test was conducted on all voting equipment used in the election to ensure the equipment was functioning properly prior to use during the election. The improved functionality, logic and accuracy testing performed by the division will be maintained for future elections.

4. **Develop and implement a standard plan for tracking and changing passwords**

   The division has implemented a standard to change all applicable passwords prior to the start of a statewide election cycle. Documentation of the passwords is maintained in a safe in the director's office.

5. **Improve system for tracking the number and location of voting machines, through barcodes or other inventory control measures**

   The division implemented a consistent inventory management system statewide. All offices are tracking voting equipment in a uniform manner.

6. **Strengthen storage facilities for voting machines and other system components with dead-bolt locks, alarms, ceiling grids, self-locking doors, and other features to prevent forced entry**

   A separate locked key safe in the director's office is used to store keys and password codes. The other division offices where equipment and keys are stored maintain physical security features such as alarms and dead-bolts.

7. **Buy more secure shipping containers for optical-scanners**

   The division increased the number of secure shipping containers for optical scan units during the 2008 election cycle, compared to previous elections. If additional containers are needed, the division will ensure an adequate supply is on hand for in the future.

8. **Recruit and train more poll workers**

   The division consistently strives to train all poll workers prior to each election cycle. The division had tremendous success during the 2008 and 2010 elections by having an adequate number of poll workers at each precinct. New security procedures were added as a component to the division's training for the 2008 and 2010 elections.

9. **Consider partnerships with other institutions to conduct ongoing evaluation and implementation of improvements in election security technology**

   The division believes that the implementation of the recommendations from Phase II of the UAA Study significantly increased the public's confidence in the integrity and accuracy of the election process and voting technology. The UAA Study is discussed fully in section IV of this report.

   As part of the election certification process, the division performs a hand-count verification of 5% of the ballots cast at the polls in each of the state's 40 house districts. The hand-count of the 2008 and 2010 election results verified that the state's ballot tabulation system accurately counted and reported election results.

10. **Third Party Review**

    In addition to the election security study, the division partnered with UAA Institute of Social and Economic Research to assist with outreach and improvements to the division's Yup'ik language assistance program. The division has benefited from these partnerships and will continue to pursue further partnerships.

    One specific area needing further research and partnership is a review of the division's post-election processes, including a review of the division's audit procedures and hand-count verification of election results. Public comments were received relating to audit standards. In addition, comments continue to be received relating to the accuracy and security of the division's ballot tabulation system.

Although the UAA election security study concluded that Alaska's election system is among the most secure in the country and has a number of safeguards, the study did not include a thorough review of post-election processes used by the division and used in other jurisdictions across the country.

Alaska is known for close elections and recounts. A thorough review of the post-election processes, including any recommended changes, will enhance the public's trust in Alaska's election system.

Other areas to be included for third party review are:

a) New review of ballot security issues
b) Audit to ensure that non-U.S. citizens are not voting
c) Audit to ensure that felons are not voting
d) Explore systems or methods that can provide for real-time voter history

2010 Election Review
V. Miscellaneous Public Comments

During the 2010 General Election review, Lieutenant Governor Treadwell solicited comments and input from the public, political parties and candidates. Information relating to the types of comments received were included throughout the election review in appropriate areas.

There were additional comments received that do not relate to a specific subject addressed in the report. A summary and response to those comments follows:

V. (A) Create a better environment for the military to vote

In 2000, the Department of Defense (DOD) issued a directive that polling places could not be established on military bases. At that time, the Division of Elections had established polling places on both Eielson Air Force Base and Fort Wainwright. Working through the late Senator Ted Steven's office, the division was able to maintain polling places on the military installations for the 2000 election cycle but was informed they would have to be moved for the 2001 municipal elections. The polling places for both installations were moved to off-base locations in 2001.

In 2003, the division was notified that DOD issued new election guidance indicating that if an installation facility had been designated as a polling place as of January 1, 1996 through December 31, 2000, the installation commanders could not deny the use of that facility as a polling place.

For the 2004 elections, the division investigated moving the polling places back onto both installations. Because the precinct boundaries for both installations include non-military voters, the division decided not to move the polling place back to the installations because non-military voters would have difficulty accessing the polling places.

The division suggests that under the new redistricting plan, the precinct boundaries be changed so that only installation boundaries are included in the precinct. When a precinct is wholly contained within the installations, the division can once again work with the military to establish polling places on the bases. This report recommends this change to the Redistricting Board.

V. (B) Provide notice of any change in practice or procedure

If the division decides to change a practice or process, ample notification of that change will be given.

The division follows the Administrative Procedures Act to adopt new regulations. Statutory changes can only be achieved through the legislative process. All changes that affect voting are sent to the U.S. Department of Justice for preclearance.

There are some internal policies that require emergency action and preclude prior public notice.

In order to improve public notification, the division will add a notice section to its website and post notices of public interest, such as filing deadline dates, withdrawal deadlines, and state review board dates. The election year events are captured on the public election calendar which is available on the division's website: http://www.elections.alaska.gov/doc/forms/H11.pdf.

V. (C) Open primary

The division does not have the authority to change the primary election structure. Only the legislature has that authority. The current primary election structure is a result of many years of litigation. Title 15 Of Alaska State Statute affirms that political parties have the right of freedom of association and can determine which candidates will appear on their ballots and which registered voters will have access to their party's ballot. These determinations are documented and codified in the political party by-laws. Party members who meet candidate qualifications are allowed to appear on the party primary ballot.

The history of Alaska's primary election has been influenced by litigation over primary elections, some of which reached the United States Supreme Court. On June 26, 2000, in California Democratic Party v. Jones, the U.S. Supreme Court ruled that California's Blanket Primary violated political parties' First Amendment right of freedom of association. The court said political parties have the right to offer voting to self-identified members and not to the general electorate. At the time, Alaska's primary election was similar to California's primary election and thus the Jones case ruling also invalidated parts of Alaska's primary election law.

To comply with the Jones case ruling, the State of Alaska adopted emergency regulations that allowed the 2000 Primary Election to be conducted as a Party-Rule Ballot Primary.

During 2001 legislative session the Alaska State Legislature passed legislation that specified a primary election ballot was required for each political party in SCS CSHB 193(FIN).

Shortly after the 2002 General Election, the Green Party and Republican Moderate Party filed suit, challenging the requirement of separate party primary ballots. In 2005, the Alaska Supreme Court, in Green Party et. al. v. State of Alaska et. al. prevented the state from enforcing the provision in election law requiring separate party primary ballots. This ruling affirmed the earlier superior court ruling which allowed parties to decide if they wanted to appear on a Combined Party ballot. Parties were required to provide information to the state if they wanted to appear on the Combined Party ballot and indicate which voters would have access to their ballot.

In response to the Green Party case ruling, the Republican Party chose to include only Republican candidates on its primary ballot and provide ballot access to only those voters registered as republican, nonpartisan or undeclared.

As an initial response to the Green Party case ruling, the Alaska Libertarian Party, Alaskan Independence Party, Republican Moderate Party, and the Green Party of Alaska agreed to be on a combined ballot that would be available to all registered voters. (Both the Green Party

and the Republican Moderate Party lost recognized political party status as a result of the 2005 ruling allowing the Combined Party Primary ballot.)

Currently, the Alaska Democratic Party appears on a ballot with the Alaskan Independence Party, and the Alaska Libertarian Party. Any registered voter may have access to this ballot.

V. (D) Ballot counting machines can be hacked

As previously mentioned in Section IV of the report, UAA conducted a study of Alaska's election system and found that the state's election system is among the most secure in the nation. Unlike other studies conducted, the UAA study examined not only voting technologies but also policies and procedures that add to the security of the system. UAA found that there are multiple steps, procedures and security features that make the system safe and provided recommendations to further improve the security of Alaska's election system.

To date, the division has implemented all but one of UAA's recommendations and will have the recommendations fully implemented in 2011. The final recommendation for implementation is for the division to upgrade the ballot tabulation system to the Assure 1.2 platform, which will address many of the security risks identified with the state's ballot tabulation system software (GEMS). The security recommendations provided by UAA and adopted by the division, along with the Assure 1.2 upgrade, will continue to ensure that Alaska's election system is secure. In addition, performing the hand-count verification of election results will continue to ensure the system is accurate.

V. (E) Faxed ballots are transcribed – precautions to prevent fraud

Under both state and federal law, the division must provide for electronic voting. Blank ballots are transmitted to voters via fax machine. Once voted, the ballot can be returned by mail or fax.

An electronically transmitted ballot, whether mailed or faxed, cannot be counted by the division's optical scan counting equipment because it is on plain paper, not on official ballot stock.

6AAC 25.065 allows the bi-partisan absentee ballot review board members to produce a facsimile ballot that exactly indicated the candidates chosen by the voter using ballot stock that can then be read by the optical scan tabulator.

When producing facsimile ballots, one person marks the ballot while another person, of a different political party, verifies the ballot was marked correctly. This ensures that the facsimile ballot is marked for the same candidates as the original ballot. Any observer present during the review is allowed to review the ballot.

If a facsimile was not produced for faxed ballots, the ballots would have to be hand-counted. The division believes this would impact the amount of time it takes to count and report election results. The division will monitor new methods to allow machine counting of ballots received by electronic means.

V. (F) Special Advance Ballots

State law requires the division to send a special advance ballot to any registered voter who notifies the division they are living, working or traveling outside the United States at the time of the election, or in a remote area of the state where distance, terrain, or other natural conditions deny the voter reasonable access to a polling place at the time of the election.

This ballot must be sent starting 60 days prior to each state primary, general or special election.

Because the candidate withdrawal deadline has not yet occurred (48 days prior to an election), the ballot is printed with only race headings and a blank line for the voter to write the name of the candidate they wish to vote for. Each voter is sent a list of certified candidates and instructions on how to vote their ballot.

For a general election, the special advance ballots are sent prior to the election being certified. Therefore, a candidate list is sent containing the names of all candidates that appeared on the primary election ballot. The voter is given information regarding the candidate list, that the election has not yet been certified, therefore not all candidates appearing on the list will have advanced to the general election ballot. They are given the option of voting by political party as well as by candidate name.

As prescribed in state election law, Lisa Murkowski remained an official candidate and her name remained on the special advance candidate list until the election was certified.

All voters receiving a special advance ballot are also sent the official ballot once it is available. Voters are instructed to vote and return both ballots. The division will count the official ballot if received timely. If the official ballot is not received in time by the division, but the special advance ballot is, the division will count the special advance ballot.

To comply with the MOVE Act, the recommendation is for a change in state statute to allow the division to mail special advance ballots 45 days prior to each election to all UOCAVA voters and voters working or traveling outside the U.S. and those in remote Alaska.

V. (G) Use of stickers on ballots

Since the division implemented the current ballot tabulation system, the use of stickers has been prohibited by state law.

The division has recently spoken with representatives from the division's ballot tabulation equipment provider. There is presently no voting equipment manufactured or certified that accommodates the use of stickers. Vendors do not recommend their use because of potential damage to equipment and the potential for miscalculations of votes for not only the write-in candidates but other candidates as well.

2010 Election Review
VI. Conclusion

Once again, thank you to all Alaskans for their contributions to this report.

SB

46

<TARGET><BILL>SB 46</BILL><SUBJECT>SB
46</SUBJECT><COMM>HJUD27</COMM></TARGET>

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF LAW

TO: Mike Nizich
Chief of Staff
Office of Governor

DATE: April 26, 2011

TEL. NO.: (907) 465-3600

FILE NO.: JU2010201740

FROM: John J. Burns
Attorney General

SUBJECT: Sections 4, 36 and 37, CSSB 46(FIN) Contingency, Non-severability, and Legislative Intent Language

Introduction

As you requested, we have reviewed the contingency language in section 36, CSSB 46(FIN),[1] the non-severability provisions in section 37, and the legislative intent in section 4.[2] As set forth more fully below, our advice to you is as follows:

(1) The Alaska Constitution establishes an appropriations process in which (a) the Governor is required to submit a budget for the legislature's consideration; (b) the legislature has the power to pass appropriation bills; (c) the Governor has line item veto authority of appropriations; and (d) the legislature has authority to override the Governor's veto.

(2) Section 36 of CSSB46(FIN) links together all of the appropriation items contained in section 4 of the bill and requires enactment of all or none, without reduction.

(3) This condition is unconstitutional and unenforceable because it deprives the Governor of his constitutionally authority to review and reduce or strike individual appropriation items that do not serve the State's best interests.

(4) Section 37 provides that if the condition in section 36 is invalid, all of the appropriation items that have been linked together in section 4 of the bill become invalid as well.

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[1] Work Draft 27-GS1740\T, ("CSSB 46(FIN)").

[2] Legislative intent language in section 4 expresses that "the package of appropriations and projects listed [in section 4] are all necessary to achieve a statewide balance in addressing the state's diverse energy needs."

(5) Because enforcement of this provision by a reviewing court would usurp the Governor's constitutionally assigned power to line item individual appropriation items, it is void and severable from the legislation.

Analysis

If enacted, the contingency language in section 36 of CSSB 46(FIN), the non-severability provisions in section 37, and the legislative intent in section 4 each would violate the Alaska Constitution in two ways: (1) by improperly impairing the Governor's line item veto power (art. II, section 15), and (2) by violating the confinement clause (art. II, section 13).

Governor's Constitutional Veto Power

Alaska's constitutional convention delegates intended to "create a strong executive branch with 'a strong control on the purse strings' of the state." *Thomas v. Rosen,* 569 P.2d 793, 795 (Alaska 1977). The Constitution gives the Governor this strong control in part by granting the Governor the power "by veto, [to] strike or reduce items in appropriation bills," commonly known as line item veto authority.[3]

The Alaska Constitution establishes an appropriations process in which (a) the Governor is required to submit a budget for the legislature's consideration (art. IX, section 12); (b) the legislature has the power to pass appropriation bills (art. II, secs. 1 and 13); (c) the Governor has line item veto authority of appropriations (art. II, sec 15); and (d) the legislature has authority to override the Governor's veto (art. II, sec. 16). *Simpson v. Murkowski,* 129 P.3d 435, 446 (Alaska 2006). Sections 36 and 37 of CSSB 46(FIN) would violate this process by negating the Governor's constitutional power to strike or reduce the individual energy project appropriation items in section 4.

Section 36 violates the Governor's constitutional powers by linking the appropriation for each energy project item to the passage and enactment of every other appropriation made in section 4, without reduction. This would usurp the Governor's line item veto power, thus upsetting the checks and balances between the executive and legislative branches. If

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[3] Alaska Const. art. II, § 15; *see also Simpson v. Murkowski,* 129 P.3d at 446 (the Governor may not only veto entire bills, he may by veto, strike or reduce items in appropriation bills).

the legislature could link one appropriation to another (or to 50 other appropriations), the legislature would eliminate the Governor's power to strike or reduce individual line items. The Governor would have only two choices — to accept or to veto every appropriation as a group. Allowing the linking of appropriations with such a contingency would too easily permit the legislature to circumvent the Governor's constitutional veto authority. *See Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984).[4]

Section 37 exacerbates this constitutional violation by doubling the unconstitutional linkage of appropriations for energy projects. If a court finds the contingency in section 36 to be invalid, the legislature attempts to achieve the same result through different means—by making that contingency provision non-severable from the energy project appropriations. Thus, even if section 36 does not survive court challenge,, the legislature would still circumvent the Governor's line item veto power if a court upholds section 37. The bill effects an "all or nothing" approach to energy project appropriations either through application of either the contingency provision of section 36 or, if that does not work, through the non-severability provision of section 37.

A non-severability clause that would enable a legislature to overstep its constitutional authority would itself be unconstitutional and severable from legislation. *See Legislative Research Comm'n v. Brown,* 664 S.W.2d 907, 919 (Ky. 1984) (applying statutory severability clause to void and sever a non-severability clause used as part of a legislative attempt to usurp the Governor's constitutional authority). Upholding section 37 of CSSB 46(FIN) would promote the legislature's desire to unconstitutionally logroll the appropriations for multiple energy projects. These improper purposes underlying section 37 should lead a court to invalidate and, under AS 01.10.030, sever the non-severability clause from CSSB 46(FIN).

These contingency and non-severability provisions create inherent harm to Alaska's appropriation process. Even if the Governor were to choose not to line item veto any appropriation made in section 4, each appropriation would still be subject to legal challenge. Section 37's non-severability clause would invalidate every appropriation in section 4 if the legislature's attempt to usurp the Governor's constitutional veto powers

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[4] This would lead to uncontrolled "logrolling," — "the practice of adding together in a single bill provisions supported by various legislators in order to create a legislative majority" — and would significantly limit the Governor's strong control on the purse strings. Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L.Rev. 1171, 1177 (1993), *quoted in Alaska Legislative Council v. Knowles*, 21 P.3d 267, 373 n.33 (Alaska 2001).

with the section 36 contingencies is held to be unlawful. Any litigant opposed to even a single energy project contained in section 4 could effectively invalidate every section 4 appropriation by successfully challenging section 36.

This litigation risk would place a cloud over each appropriation that could impair the development of important energy projects. Sections 36 and 37 will potentially jeopardize the funding for energy projects until a court rules on the validity and severability of both sections. Until that time, no project proponent could rely on the availability of funds for an energy project from the section 4 appropriation. This uncertainty would make it difficult for project proponents to obtain necessary contracts to develop energy projects, and they may be exposed to contract damages if a project must be stopped because an expected appropriation is invalidated. It would also be difficult or impossible for a project proponent to finance additional project costs if funding from an appropriation is uncertain. Any lender or bond financing will require that all project funding be secured before additional financing will be made available on reasonable financial terms.

These legal risks would arise solely in the context of the legislature's attempt to usurp the Governor's constitutional power to exercise line item vetoes. A court should invalidate and sever sections 36 and 37 to avoid the harm done to the constitutional appropriation process. Severing those provisions would still leave the legislature with ultimate control over funding for the energy projects. If the Governor were to line item veto any of the appropriation items in section 4, the legislature has constitutional power to override that veto. Alaska Const. art. II, § 16. This legislative power makes the legislature's attempt in sections 36 and 37 to negate the Governor's constitutional veto power even more suspect.

In sum, the invasion of executive power functions make the contingency language in section 36 and the non-severability clause in section 37 unconstitutional under Article II, section 15, invalid, and severable from the legislation under AS 01.10.030.

Confinement Clause

The confinement clause (art. II, sec. 13) of the Alaska Constitution provides that "[b]ills for appropriations shall be confined to appropriations." In *State Legislature v. Hammond*, Judge (now Chief Justice) Carpeneti adopted a five-factor test to determine whether language added to an appropriations bill violates the confinement clause:

> (1) The qualifying language must not administer the program of expenditures;

(2) It must not enact law or amend existing law;

(3) It must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent;

(4) The language must be germane, that is, appropriate, to an appropriations bill; and,

(5) It must not extend beyond the life of the appropriation.[5]

The Alaska Supreme Court adopted Judge Carpeneti's test on a "nonexclusive" basis in *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).[6]

The contingency, non-severability, and legislative intent language in secs. 4, 36 and 37 violate the *Hammond* test in several ways. The legislature in these sections of the bill links multiple appropriations the legislature believes are necessary to implement a state energy policy based upon AS 44.99.115. But, AS 44.99.115 does not mandate that energy policy must be implemented by linking energy projects or appropriations. The relevant statutory energy policy language underlying the lintent expressed in section 4 is:

> "Therefore, it is the policy of the state to . . . (2) encourage economic development by . . . (C) working to identify and assist with development of the most cost-effective, long-term sources of energy for each community."

AS 44.99.115(2)(C). This portion of the state energy policy encourages state agencies to work with individual communities to identify and develop cost effective sources of energy. Nothing in AS 44.99.115(2)(C), nor the remainder of that AS 44.99.115, makes state assistance to individual communities for the types of energy projects listed in section 4 dependent upon state assistance being provided "to achieve a statewide balance in addressing the state's diverse energy needs." *Quoting* section 4, CSSB 46(FIN). To the contrary, placing at risk the funding for any (and every) of the important energy projects listed in section 4 undercuts the statutory state energy policy by impairing the assistance which otherwise would be provided to develop "the most cost-effective, long-

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[5] Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983).
[6] The court described that it approaches confinement clause disputes with an assumption that an act of the legislature is constitutional.

term sources of energy for each community." AS 44.99.115(2)(C). The legislature's attempt to link "the package" of appropriations and energy projects for a statewide balance does not implement AS 44.99.115. Rather, the linkage exhibits improper logrolling as legislators attempt to ensure funding for the listed projects.

To the extent that the linkage of projects is intended to be connected to a state energy policy or program, the linkage would both create and control a new state energy policy or program, violating the confinement clause under the Hammond test. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). The legislative attempts to control how monies are spent on energy projects violates several parts of the *Hammond* test, as well as violating the separation of powers doctrine, which grants the power to administer the energy policy and program to the executive branch. The attempt to control expenditures violates part one of the Hammond test related to legislative attempts to administer programs of expenditure. The attempt to change and control the scope of the state energy policy also demonstrates a legislative attempt to modify the existing law related to energy policy, violating part two of the *Hammond* test.

The contingency, non-severability and intent language also violates the *Hammond* requirement that legislative appropriation language be limited to the "minimum necessary" to explain the appropriation. The Alaska Supreme Court has explained that this "minimum necessary" factor limits the legislature's ability to include substantive law in an appropriation bill by cloaking it as a "description." *Alaska Legislative Council v. Knowles*, 21 P.3d at 377-78. The attempt by the legislature to control the scope of the energy policy program by linking many appropriations and projects cloaks into the appropriation bill those substantive law results that the legislature desires to implement. This violates the "minimum necessary" component of the *Hammond* test.

The contingency, non-severability, and intent language also violate the germaneness test. Under the germaneness test, the Alaska Supreme Court observed in *Alaska Legislative Council v. Knowles*, 21 P.3d at 379, courts generally will uphold conditions expressed as purposes for the appropriation. Thus, courts will generally uphold appropriation language identifying the facilities, employee positions, buildings or types of buildings on which the money could be spent. And courts will uphold contingencies on appropriations that relate to the receipt or nonreceipt of specific funds, or relate to the occurrence or nonoccurrence of something that would make the expenditure desirable. However, contingencies that relate to things other than the need for or use of the money or the need for the activity, may be found insufficiently "connected" to the appropriation.' *Id.*

The contingency, non-severability, and intent language in secs. 4, 36, and 37 of CSSB 46(FIN) likewise violate the germaneness test. Each appropriation for each energy project in section 4 stands on its own. Each appropriation will fund a separate and distinct energy project that promotes The attempt in sections 36 and 37 of CSSB 46(FIN) to link the appropriation for each energy project in section 4 to the multiple appropriations for multiple other energy projects goes beyond what is germane to an appropriation bill.

In sum, the contingency and intent language, if enacted, would specifically violate multiple parts of the *Hammond* test, and would be unconstitutional under the Article II, section 13, of the Alaska Constitution.

Conclusion

Because the contingency language in section 36, the non-severability clause in section 37, and the legislative intent language in section 4 of CSSB 46(FIN), usurps the Governor's line item veto power (art. II, section 15) and violates the containment clause (art. II, section 13), a reviewing court will likely find these provisions unenforceable.

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Finance Subcommittees:
Corrections
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The Constitutionality of Sections 48(a) and 49 of CSSB 46 (FIN) (S) Version of Bill

I. Relevant Provisions of the Bill

A. Section 48(a) [1]

"*Sec. 48. CONTINGENCIES. (a) Each of the appropriations made in sec. 4 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature and enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act."

B. Section 49 [2]

"*Sec. 49. NONSEVERABLILITY. Notwithstanding AS 01.10.030, in the event that a court of competent jurisdiction finds the contingency in sec. 48(a) of this Act is invalid, then the contingency in sec. 48(a) of this Act is not severable from the appropriations made in sec. 4 of this Act if

[1] p 145 lns 19-22
[2] p 145 ln 29 – p 146 ln 6

(1) the governor has vetoed, whether by striking or reducing, any appropriation in sec. 4 of this Act; and

(2) the legislature, by action or inaction, has failed to override all vetoes of, including reductions to, appropriations made in sec. 4 of this Act in the time and manner allowed under art. II, sec. 16, Constitution of the State of Alaska."

C. Section 4 [3]

Contains 105 appropriations from around the state, ranging from $20,000[4] to $65,700,000[5], covering 12 pages of the bill.

II. Relevant Constitutional Provisions

A. Article II, Section 15

"15. Veto ~ The Governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin."

B. Article II, Section 16 provides in relevant part:

"16. Action Upon Veto ~ Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items,

[3] p 98 ln 1 - p 110 ln 13
[4] Sitka – Wastewater Treatment Plant Renewable Energy Feasibility Study (HD 2) p 109 lns 17-20
[5] Alaska Energy Authority - Susitna Hydroelectric Energy Plan (HD 12-35) p 98 ln 31 – p 99 ln 4

although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature...."

III. Constitutional Arguments

A. Article II, Section 15

This provision provides that the governor has the right to "veto, strike or reduce items in appropriation bills." Because, as discussed in the other memoranda, sections 48(a) and 49 would deny him this right, they are unconstitutional. Each appropriation in section 4 is a separate item, being independent from all others. Merely relating to "energy" does not make them so interdependent that they would be considered separate items, any more than separate roads would be, though they were interconnected. Even if it could be argued that some projects depend upon others or are related to them, by tying so many items together under section 36, the legislation is fatally overbroad.

I also note that section 48(a) says, "each of the appropriations made in sec. 4 of this Act is contingent on...enactment into law of every appropriation, without reduction of any appropriation, made in sec. 4 of this Act."[6] Similarly, section 49 refers to "the appropriations made in sec. 4 of this Act"[7], "any appropriation in sec. 4 of this Act"[8], and "all vetoes of, including reductions to, appropriations made in sec. 4 of this Act."[9] This

[6] p 145 lns 19-22
[7] p 145 ln 31 – p 146 ln 1
[8] p 146 lns 2-3
[9] p 146 lns 4-5

language shows that the legislators, themselves, considered each appropriation a separate line item.

The primary purpose of the sentences in Article II Section 15 permitting the line item veto or reduction is to give the governor the flexibility to veto or reduce individual appropriations and, secondarily, to prevent logrolling by the legislature. Operating together, sections 48(a) and 49 frustrate these purposes.

At the same time, Article II Sections 14[10], 15, and 16 set forth the procedure to pass bills (including appropriations), veto legislation and line item veto or reduce appropriation items[11], and override vetoes[12]. Taken together, they operate to limit the legislature's authority vis à vis the governor to the procedure specified.

Though advocates of section 48(a) and 49 argue that the legislature may specify that certain provisions of law are non-severable, that argument cannot prevail when the result would be unconstitutional. For example, if an appropriation item provided that it could only be spent on an unconstitutional purpose (for example to aid in discrimination or the promotion of a particular religion), and if it were made the subject of a non-severability clause that would cause the entire budget bill or a large part of it to fall, undoubtedly courts would refuse to enforce the non-severability clause, because enforcing it would lead to an unconstitutional result.

In State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), the Alaska Supreme Court held that the legislature could not annul regulations by concurrent regulation, because that would circumvent the constitutional legislative process, including the governor's right to veto the annulling legislation.

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[10] Article II, Section 14 sets forth the procedure by which the legislature enacts bills into law.
[11] Article II, Section 15, supra.
[12] Article II, Section 16, supra.

In Legislative Research Commission v. Brown, 664 S.W. 2d 907, 925, 927-28 (Ky. 1984), the Kentucky Supreme Court applied similar reasoning to hold unconstitutional a statute requiring "the budget to be introduced as a resolution, rather than a bill." 664 S.W. 2d at 925 (emphasis in original). The language of that case is, in my opinion, both instructive and persuasive. Kentucky Constitution Section 88, like Article II, Section 15, giving the governor line item veto power, refers to appropriation "bills" not resolutions. Both constitutional provisions provide the method by which bills must be sent to the governor "for either approval or disapproval (veto). See 644 S.W. 2d at 928, Alaska Constitution Article II, Section 15. They both also specifically allow line item veto by the governor.

No case has been cited containing sections like sections 48(a) and 49. The closest analogy is Brown. However, because the effect of the two sections is the same as the resolution in Brown -- to deprive the governor of the ability to "veto, strike or reduce items in appropriation bills" -- I believe Brown would be followed by Alaskan courts.

This conclusion is supported by the Alaska Supreme Court's decision in A.L.I.V.E. There, as stated above, the court struck down a statute authorizing the annulment of regulations by resolution, because it deprived the governor of the right to veto legislation that would annul regulations. Applying the same reasoning to the two sections at issue here, I believe Alaska courts would be likely to follow Brown, and declare the two sections unconstitutional and allow line item vetoes to stand.

B. Article II, Section 16

This section sets forth the procedure to override a gubernatorial veto. The legislature must meet in joint session with each legislator getting an equal vote, having received the governor's veto message "with a statement of his objections"[13], to reconsider passage "of the vetoed bill or item". "Appropriation bills or items"[14] will still become law, despite the veto, if "three fourths of the membership of the legislature" vote to override the veto.

The entire process, in Article II, Section 16 is unconstitutionally thwarted by sections 48(a) and 49. Because sections 48(a) and 49 eliminate the entire line item veto process, the procedure in Article II, Section 16 is unconstitutionally denied.

Both the governor and the legislature are denied the right to have the legislature consider the governor's veto message on an item-by-item basis.

By passing sections 48(a) and 49 as part of one capital appropriation bill, requiring only 11 senate votes (as opposed to 21 house votes), all legislators votes are not considered equally as they must be under Article II, Section 16, which states that "the legislature shall meet… in joint session…. [A]ppropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature…."

Not only does this violation have the effect of (1) giving senators more power than they are allowed and representatives less power than they are entitled to, but it also (2) denies the minority on the issue (those who vote to sustain the vetoes) the weight to which they are entitled under Article II, Section 16. Constitutionally three fourths of the members (45 legislators) must vote to override. Only 16 members (1/4 plus one) need vote

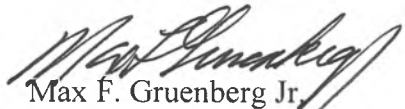
[13] See Article II, Section 15
[14] Emphasis added

to sustain vetoes. However, in passing sections 48(a) and 49 as part of a budget bill, only 32 votes (21 plus 11) are required. Conversely, under Article II, Section 16, only 16 members need vote to sustain vetoes, while under Article II, Section 14[15], 29 are required to block passage of the appropriation bill. These are additional constitutional rights of legislators, both individually and collectively, that are protected under the constitution.

Though no case has been found directly on point, for these reasons I conclude that sections 48(a) and 49 also violate Article II, Section 16 of the Alaska Constitution.

I believe it is important to consider Article II, Section 16 for another reason as well. All the reported cases that have been cited involve the balance of power between the executive and legislative branches. Article II Section 16 involves the balance of power within the legislature – both (1) between the houses (legislating together with each member getting an equal vote as opposed to legislating separately, with each senator having twice the voting power of each representative), and (2) between the majority and minority on the issue of veto-override (only 32 votes are needed to pass the bill, while 45 votes are need to override the vetoes under the constitution).

Finally, these arguments on Article II, Section 16 give each legislator a direct and individual interest in any resulting litigation. First, these issues give legislators individually and collectively legal standing to enforce their constitutional rights and the right to intervene, individually or collectively, in any litigation as a matter of right.[16]



Max F. Gruenberg Jr.
Alaska State Representative
May 10, 2011

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[15] Article II, Section 14 provides in relevant part, "No bill may become law without an affirmative vote of a majority of the membership of each house."

[16] See Alaska R. Civ. P. 24(a)

LEGAL SERVICES

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MEMORANDUM May 3, 2011

SUBJECT: Outline of Contingency and Nonseverability Discussion

TO: Representative Max Gruenberg

FROM: Doug Gardner
Director

You asked for a *sui generis* discussion of the contingency and nonseverability clauses after receiving my last memorandum. I agreed to put ideas down on paper that are a departure from the opinions previously issued based on current case law. Below are the ideas that are a product of our conversations, and other ways of looking at these two issues. I am also attaching a case I believe you may wish to read in detail, as I believe it addresses the discussion you are focusing on. This case was cited in my last memo to you.

I. OVERVIEW -- CROSS-CONTINGENCIES

A. The purpose of the line item veto is reduction of the total budget; not allowing the governor to decide the object of expenditure. *Constitutional Convention,* and *Knowles*.

B. Contingencies, including cross-contingencies, if triggered, also reduce expenditures.

C. The danger of cross-contingencies is that they may reduce the governor's incentive to exercise the line item veto, thereby having the effect of allowing expenditures to be too high (i.e., line item veto won't be used to reduce the budget). A counter argument is that the governor can still "strike or reduce," but the consequences are significant.

D. To balance the governor's "strike or reduce" function with the legislature's allocation function is to allow cross-contingencies, but only if there is a very close nexus between them.

E. Nexus: In descending order of likelihood that a court would uphold:

1. Physical -- dam and transmission lines;
2. Financial -- bonding, etc.;
3. Functional -- salary for director of group and other funding for group;

4. Equitable distribution (distributing related dollars -- schools, energy projects -- across the state).

F. Legal Basis

1. Ask the court to expand the definition of "item" in *Knowles* to include tied appropriations that meet an appropriate nexus requirement. The definition of "item" in *Knowles* is quite clear, but *Knowles* was not addressing a contingency that involved other appropriations, but confinement. This approach is problematic given the well-settled case law and definition of "item."

2. Simply uphold contingency, so long as an appropriate nexus is present. See attached case; *Brault v. Holleman*, 230 S.E.2d 238 (VA 1976). This would be more consistent with the *Knowles* analysis. The argument would be that there are limits with a nexus test on cross-contingencies in appropriations, and that given the established nexus, the asserted infringement on the governor's "strike or reduce" line item veto power would be reduced. There is no log rolling in this approach.

II. OTHER APPROACHES AVOIDING CROSS CONTINGENCIES

A. Two appropriation bills. Send out the endangered appropriations, wait for the governor's vetoes, then send out the governor's favorites. This approach is simple, but doesn't deal with really linked appropriations, and is more useful when the "linkage" is political.

B. Lump sum appropriation (X dollars for projects A, B, and C to a public corporation (AEA)). The governor cannot line out A, B, or C, but, the executive does have the power to allocate dollars to projects, but AEA may, which might have the affect of eliminating or reducing some projects.

C. Substantive Law.

1. Create an executive branch program and let the executive branch produce a list, then appropriate for "items 1 - whatever is on the list."

2. Establish a list of projects in statute, with either dollar amounts or a percentage attached to each project. *See* AS 29.60.700 for dollar approach and AS 23.15.835 for percentage approach. The governor may veto the entire substantive bill, but cannot delete projects.

III. SEVERABILITY

Severability gives the legislature the ability to decide that, if its contingency (of whatever type) won't work, it doesn't want to make the appropriation at all. The court will assume nonseverability -- the *Knowles* court explicitly did -- but the severability clause preserves the legislature's final decision. One argument is that nonseverability discourages use of the line item veto, or challenges to the contingency, but it also means that the legislature has to be willing to lose all the appropriations if the contingency fails. Perhaps this symmetry is the sign that the constitution has perfect checks and balances,

where both the legislature and the executive go back to zero if there is a veto and an enforceable nonseverability clause. Not giving effect to a severability clause will diminish the legislature's power to appropriate in the first place. The legislature would be reluctant to put in contingencies or perhaps unwilling to appropriate at all, if it believed its nonseverability clause would not be honored.

DDG:plm

Attachment

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MEMORANDUM April 29, 2011

SUBJECT: Line Item Veto, Nonseverability Clause, and Contingency Language in CSSB 46(FIN)

TO: Representative Max Gruenberg

FROM: Brian Kane BJK
Legislative Counsel
and
Doug Gardner
Director

1. Does the art. II, sec. 15, line item veto power of the governor "trump" a non-severability clause included in an appropriations bill by the legislature? Is an appropriations bill an appropriate bill in which to have a nonseverability clause?

It is unlikely that a governor's line item veto power would trump a nonseverability clause like the one in CSSB 46(FIN). Essentially, the nonseverability clause is an expression of the legislature's intent regarding certain portions of a bill. In the current scenario, the nonseverability clause directly relates to the legislature's not wanting to expend the funds in sec. 4 of the bill if the contingency is held invalid by a court. The legislature is stating to a court that, had it known the contingency would not be upheld, it would not have appropriated those funds in sec. 4 of the bill at all -- or at the very least would have appropriated them differently. The argument that the line item veto would trump the nonseverability clause in this instance would come awfully close to giving the governor the power to actually expend money himself. If the legislature's intent was for all of sec. 4 to be deleted if the contingency was held invalid, then allowing some projects to remain in that section that were not line item vetoed is having money appropriated for projects against the will of the legislature.

While art. II, sec. 15 of the state constitution gives the governor the power by veto to "strike or reduce items in an appropriations bill," this is clearly a situation of the governor being given some part of what is generally a legislative function (controlling the expenditure of state funds). It does not seem likely that a specifically carved out power like the line item veto would trump the legislature's intent in performing its legislative duty of making -- or not making -- appropriations.

In the memo released on April 26th, the attorney general cited *Legislative Research Comm'n v. Brown,* 664 S.W.2d 907, 919 (Ky. 1984), arguing that this case supports the

proposition that the nonseverability language in sec. 37, constitutes a similar separation of powers violation. In *Brown*, there were two nonseverability provisions that the court addressed. The first nonseverability provision that the court addressed, involved legislation that placed a restriction on the executive, effectively eliminating the executive's ability to pass regulations that were not approved by a legislative body called the LRC. The legislation also provided for a nonseverability clause that provided if the LRC could not review regulations with the authority to "veto proposed regulations," that the executive could not issue any further regulations. *Id.* at 919. The court found that the nonseverability clause so interfered with and reallocated the constitutional powers of the executive to the legislative branch, that it refused to enforce the nonseverability clause. This is the portion of *Brown* that the attorney general cited to in his memorandum.

Reading further in *Brown,* there was a second nonseverability clause that the court addressed. This second nonseverability clause involved legislation that provided that the LRC had the power to modify any application by the executive branch or overrule the executive branch's decision to apply for a federal block grant. *Id.* at 928. As previously discussed, the *Brown* court found that the LRC's usurping of the executive branch's power was a separation of powers violation. So the question for the court was whether to enforce a separate nonseverability clause, that provided, "if any section of K[entucky] R[evised] S[tatute] 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent. . . ." *Id.* (emphasis in original) The Supreme Court of Kentucky held since the "adoption of the state budget" is within the purview of the legislature, the nonseverability clause related to the budget would be upheld. Accordingly, the *Brown* decision does not necessarily stand for the proposition that all nonseverability clauses are unenforceable; clearly in the context of appropriations, the *Brown* case stands for the proposition that a nonseverability clause in the context of an appropriation is enforceable. *Brown* is perhaps more supportive of the legislature's prerogative to appropriate in the manner it chooses, and include a nonseverability clause in an appropriations bill if it is not permitted to appropriate in the manner it chooses.

The best guidance on how a court might approach a nonseverability clause comes from the U.S. Supreme Court's reasoning in *Alaska Airlines v. Brock*, 480 U.S. 678, 680 (1987), where the Court held:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

Id. at 684-85.

In summary, based on the reasoning in *Alaska Airlines v. Brock*, and the *Brown* court's upholding the nonseverability clause in the context of block grant appropriations, the

presence of a nonseverability clause would likely be seen by a reviewing court as strong, if not irrefutable, evidence of the legislature's intent that the legislature did not intend to enact the legislation if it could not do so in the manner that it originally chose.

As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the non-severability clause, in *Knowles v. Legislative Council*, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

> [T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Putting the nonseverability clause in the bill is necessary to unequivocally state what the legislature intends in relation to the expenditure of money in sec. 4 of the bill. The nonseverability clause does not administer a program, nor does it amend existing law or extend beyond the life of the appropriation. Finally, the nonseverability clause is germane, as it directly speaks to the legislative intent regarding whether or not certain funds in the bill should be expended.

2. Please discuss the separation of powers issue as it relates to the arguments the attorney general made in his April 26th memo.

I have discussed above one of the two main cases the attorney general referenced in his memo, so I will not address the *Brown* case again here. In *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), the New Jersey Legislature passed an appropriations bill, that provided for road construction projects totaling $12 million. Of the total $12 million, $7 million was state matching funds for federally aided interstate highway projects, and $5 million was for non-federally funded highway projects. *Karcher*, 479 A.2d at 411. The governor of New Jersey vetoed a line item appropriation for a highway project, but did not veto the legislature's estimated expenditure of $3 million for that project, or the $7 million total for state matching funds for federal highway projects. In addition, the governor used his line item veto to eliminate a highway reconstruction project, and the legislature's estimate for the cost of that project, but did not reduce the lump sum of $5 million for non-federally funded projects, or the total of $12 million total appropriation for the projects identified by the legislature.

In summary, the governor vetoed parts of the legislature's appropriations eliminating projects, but not the total appropriation amounts. *Id.* The *Karcher* court concluded that the governor appropriately exercised his veto authority, based on the fact that the New Jersey Constitution allows the governor to use line item veto authority to veto "whole or

in part any such item or items while approving other portions of the bill." *Id.* at 489 citing art. V, sec. 1, para. 15 of the New Jersey Constitution.

Such a practice in Alaska would be unauthorized by art. II, sec. 15 of the Alaska Constitution, and contrary to the reasoning in *Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001), where veto may be applied to an "item," which is defined as "a sum of money dedicated to a particular purpose." *Id.* In addition, vetoing parts of an appropriation (i.e. specific projects), without reducing the total appropriation, would have the effect of increasing appropriations for non-vetoed projects by reducing total projects, but allowing surviving items, or projects, to receive additional funding, in violation of art. II, sec. 15, which limits the governor's veto power to "strike or reduce" an item. Based on the contrary provisions in the Alaska and New Jersey Constitutions, and the definition of what constitutes an "item" in *Knowles*, citation to *Karcher* does not support the proposition that the contingency language in sec. 36 creates a separation of powers violation.

There are also a few cases outside of the state that may have some bearing on the issue at hand. Please note, however, that the law in this area varies from jurisdiction to jurisdiction so that cases from other states may or may not be convincing to Alaska's Supreme Court.

In *Commonwealth of Virginia v. Dodson*, 11 S.E.2d 120, 130 (Va. 1940), cited in *Knowles*, in footnotes 19 and 38, the court held that an item veto was invalid because the appropriation was integrally tied to other unvetoed budget provisions, even though it would have been subject to the item veto if it had not been tied to the other provisions. In *In Re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla. 1970), the court was asked its opinion of a contingency that made numerous appropriations for education contingent on the passage of a substantive bill that was related to some but not all of those appropriations. The substantive law bill passed and the court did not find that contingency was unconstitutional, stating that "[a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events." *Id.* 239 So. 2d at 22. In *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985), the governor was empowered to transfer funds under certain circumstances, but the legislature passed an appropriation with the condition attached that the governor's power to transfer did not apply to that appropriation. The governor maintained that the condition was an unconstitutional restriction on his power. The court disagreed:

> [The provision allowing the transfer] is a limited and qualified delegation of a legislative power. An impingement on that authority, restricting its exercise against qualifications to appropriations, cannot be construed as a violation of an executive power. It did not invade or prevent the governor's exercise of his constitutional veto power. As we have

> discussed, the matters vetoed were qualifications rather than items. . . . Thus the executive power was not invaded.

Rush v. Ray, 362 N.W. 2d 479, 483.

Perhaps the most interesting case in this area is *Brault v. Holleman*, 230 S.E.2d 238 (Va. 1976). The legislature had passed appropriations for the integrated transportation system, but had done so by assigning separate dollar amounts for administration, buses, adjacent parking lots, and capital costs of the actual rail system. The governor vetoed the costs of the actual rail system, but left the others. Members of the legislature sued, alleging that the appropriations were linked in purpose and therefore could not be vetoed separately. The court recognized that the appropriations were logically linked and that "the various appropriations for the Metro system are 'tied up' one with the other." *Brault v. Holleman*, 230 S.E.2d at 243. However, the court held that the linkage between appropriations must be stated in the appropriations bill itself, and not be established by extrinsic evidence. Because the "singularity of purpose . . . does not appear from the terms of the appropriation bill," the court upheld the item veto. *Id.* 230 S.E.2d at 244. It appears from the discussion, however, that the court might have upheld a contingency linking all the appropriations had one been written into the bill.

3. Review *Sutherland's Statutes and Statutory Construction*, as it relates to the nonseverability clause in CSSB 46(FIN).

The attached article from Norman J. Singer, Sutherland's Statutes and Statutory Construction, §44A:15 (7th ed. 2009 ed.), provides two passages that take the position that the current trend for courts interpreting nonseverability or inseverability clauses, is to find the clauses enforceable. Two passages from Sutherland's underscore this trend:

> In spite of the courts' tendency to analyze inseverability clauses in the same way as severability clauses, there are some indications that inseverability clauses may carry more dispositive weight than severability clauses and may be applicable without exploring legislative intent or history. In *Zobel v. Williams*, the Supreme Court, after holding a portion of an Alaska statute unconstitutional, considered whether the provision could be severed from the remainder of the statute. Rather than look to legislative history or the statute's structure to discern legislative intent, the Supreme Court noted that it "need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid." Although the Court ultimately remanded the inseverability determination of the statute to the Alaska courts, the Court's language is more deferential to the inseverability clause than its attitude towards severability clauses in *Alaska Airlines* and *Jackson*.
>
> . . .

Inseverability clauses, on the other hand, are anything but boilerplate. They are infrequently included in legislation, which should alleviate any assumptions by courts that they are inadequately considered before being passed. In addition, when inseverability clauses are proposed, they are strategically designed to ensure that the legislation does not exist without its most fundamental provisions. Consequently, the inclusion of an inseverability clause is usually accompanied by extensive debate. For example, in the Senate floor debate referred to in the previous paragraph, Senator Helms opposed Senators Mitchell and Hatch and introduced an inseverability clause because he anticipated a constitutional challenge to a provision providing benefits for religious day care. Helms wanted to ensure that day-care benefits would not exist unless religious day-care programs could share in the benefit. If the religious day-care provision were held unconstitutional, Helms preferred that Congress revisit the entire child-care issue rather than have the tax code include a child-care benefit that failed to include religious child care. The inseverability clause was submitted, not as boilerplate language, but in a deliberate attempt to preserve a provision Helms felt was integral to the bill.

A similar debate surrounded the proposed inclusion of an inseverability clause in the proposed Balanced Budget and Emergency Deficit Control Act of 1985. Among the many controversial elements in the bill, which sought to achieve a balanced budget, was a provision that gave budget supervisory powers to a merged entity of the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB"). In light of the partisan dynamic between the President and Congress at the time, the joint participation of congressional and executive agencies was a central feature of the bill. Anticipating a potential constitutional challenge to CBO participation on separation of powers grounds, the House passed a version of the bill that included an inseverability clause. As Congressman Panetta pointed out at the time:

> If you allow severability and the CBO role is found to be unconstitutional, then it leaves it up to the OMB, and it, in essence turns our power entirely over to the President and his agency. That is the issue at stake in terms of why we built inseverability in . . . .

For Congressman Panetta, maintaining a congressional role in the deficit reduction process was a key feature of the legislation. The Act, without the CBO, would include an inadequate check on the executive powers, and the Panetta camp refused to support it. Those opposed to the inseverability clause, however, did not see CBO involvement as a crucial factor and were willing to have the remainder of the Act stand as law even if the CBO's role were held unconstitutional: "[W]e do not want the whole

> process that we have labored on so hard now to collapse because one provision is held to be unconstitutional."

Based on the above passages of Sutherland's, and on the cases cited in sections 2 and 3 of this memorandum, there is a strong argument that the nonseverability clause in sec. 37 of CSSB 46(FIN) (27-GS1740\T) would be found enforceable by the Alaska Supreme Court, based on a clear expression of legislative intent and a well documented legislative history that the legislature did not have a desire to fund any of the "energy projects" if the legislature couldn't fund all of the projects. In our discussion, you queried whether the Alaska Supreme Court, in the narrow context of an appropriations bill, might decline to enforce a nonseverability clause based on the principle that such a clause would nullify the governor's line item veto authority to "strike or reduce" as provided in art. II, sec. 15 of the state constitution. If the court chose to so limit the enforceability of a nonseverability clause in an appropriations bill, the court would be creating new law, that would be a break from the nonseverability case law and commentary that I have been able to locate so far in my search.

The considerations a court would have in taking such a significant step of finding a nonseverability clause unenforceable in an appropriations bill would be: (1) disregarding clear legislative intent of nonseverability; (2) essentially forcing the legislature to appropriate in ways that the legislature did not choose; (3) giving the item veto power in art. II, sec. 15 priority over the legislature's appropriation power in art. II, sec. 13; and (4) finding that the nonseverability clause actually violates the governor's veto power (the counter argument to the governor's is that while a contingency triggering a nonseverability clause makes a veto decision harder, the governor may still exercise the veto albeit with significant consequences).

As a final note, it is clear that if the governor does exercise his veto power, the legislature does have a remedy in art. II, sec. 16, because by a three-fourths vote of both bodies in joint session, the legislature can override a veto. If the court chose not to enforce a nonseverability clause in an appropriations bill, reasoning that the legislature's remedy was limited to article II, sec. 16, the court would in essence be concluding that while a majority of the house and senate chose to include a nonseverability clause in a bill, that it would take a three-fourths vote of both bodies to carry out their original intent of providing for nonseverability. In conclusion, all that I can say is that based on current case law in Alaska, and other jurisdictions, and the Sutherland commentary, it appears that the court would enforce a nonseverability clause in an appropriations bill; but that if the court chose to do so, based on a separation of power analysis, it could always carve out an exception to enforcement of a nonseverability clause in the very narrow area of an appropriations bill. The likelihood of this outcome is not possible to predict.

If you need further information, please advise.

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Enclosure

preferred to B's, has to be determined, of course, on the relative importance of the expectations, or on other grounds that may turn the scale. However, the particular decision goes and whatever the rule that is formulated, the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather, it is the method of intelligently balancing and discriminating between reasons for and against. When lawyers have a precedent to follow it is proper that they follow the precedent. When they have no precedent, they decide questions as other people decide them. Their logic is properly the logic of comparative values and not the mere mechanical logic of deduction from major and minor premises.

IV. INSEVERABILITY CLAUSES IN STATUTES[1]

§ 44A:15 Inseverability in statutes

When holding a statutory provision unconstitutional, a court must determine whether to sever the defective provision or to invalidate the entire statute. In order to guide courts, lawmakers often include a severability clause in legislation. The clause instructs a court that has held portions of a statute invalid to sever the invalid statutory provisions from the rest of the statute and to allow the statute's valid sections to remain operative. Less frequently, a statute will include an inseverability clause that invalidates an entire statute (or section of a statute) should a provision be held invalid. In part because severability clauses have become boilerplate, these clauses have had little effect on courts making severability determinations.

Despite the explicit statutory language in severability and inseverability clauses, courts all but ignore the clauses and apply their own tests and presumptions to determine severability. These tests generally begin with a presumption that all statutes are either severable or inseverable, usually followed by an examination of the particular statute's structure and legislative history in order to determine whether the remainder of the statute would be consistent with the legislative intent. Courts will also consider whether the statute can reasonably function as an autonomous whole without the invalid provision.

This approach provides scant guidance to courts faced with a severability question, often leaving them to speculate about what the legislature intended to accomplish in passing the statute and whether that purpose is frustrated by the provisions invalidated. This is remarkable in light of the clear instructions provided by

[1]By Israel E. Friedman. Copyright 1997 University of Chicago; Israel E. Friedman. Reprinted by permission of University of Chicago Law Review from 64 U. Chi. L. Rev. 903 (1997). Footnotes omitted.

inseverability (and severability) clauses that would appear to resolve this very issue.

This Comment argues that inseverability clauses are fundamentally different from severability clauses and should be shown greater deference than their sister severability clauses. Part I discusses the courts' approach to severability and inseverability clauses. Part II examines the assumptions behind the courts' treatment of severability clauses and criticizes the application of those principles to inseverability clauses. Part III argues that, with some exceptions, courts should defer to the plain language of inseverability clauses. It also attempts to place the proposed rule within the current debate over statutory interpretation.

I. Deciding Whether to Sever Invalid Statutory Provisions

A. Severability Clauses: A Mere Presumption

The Supreme Court established the general standard for determining whether an invalid provision is severable from the rest of a statute in *Champlin Refining Co v. Corporation Commission of Oklahoma*. Faced with a state oil drilling statute containing potentially unconstitutional price controls, the Court had to consider whether the overall statutory scheme could survive a challenge to the pricing provisions. The *Champlin* Court refused to defer to the statute's severability clause and required instead that a court look at the structure of a statute to determine severability. The Court held that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." In effect, this established a presumption of severability that could be rebutted if a court determined that the legislature did not intend for the statute to exist without the invalid provision. This required courts to speculate as to what the legislative intent behind the statute was at the time of its passage and what it would be after the provision was held invalid. Although a statute's severability clause would seem to provide evidence of legislative intent, the Court in *United States v. Jackson* stated that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." Thus, by including a severability clause, a legislature does little more than spill ink since the clause has a minimal bearing on the severability determination.

Similarly, in *INS v. Chadha*, the Court, after holding that the legislative veto provision of the Immigration and Nationality Act was unconstitutional, considered whether the provision was severable from the rest of the statute. Although the Act contained a severability clause, the Court again was unwilling simply to rely on the statute's own provision to determine severability. The Court chose instead to examine the legislative history of the Act, and

severed the unconstitutional provision only after concluding that the congressional intent in the legislative record supported such a holding.

The Court, in *Alaska Airlines, Inc v. Brock*, further explained that, far from being dispositive, a severability clause creates no more than a mere presumption of severability. The presumption can be overcome if legislative history and the statute's structure indicate that the statute would not have been passed without the invalid provision.

Similarly, several state courts often begin with a presumption of severability that can be overcome by legislative intent. Many of these courts have second-guessed plain statutory language and have held statutory provisions inseverable despite the presence of s[illegible]ability clauses. One court aptly described the caselaw's indif[illegible]ce to the plain language of severability clauses as "a narrow exception to the general rule that, when a clause is unambiguous, construction is unnecessary." The plain meaning of a severability clause unambiguously instructs a court to uphold the remainder of a statute. However, in the realm of severability, plain meaning does not prescribe the result, and the clause is all but ignored while the court makes an independent determination of legislative intent by construing legislative history and statutory structure.

Acknowledging the ineffectiveness of severability clauses, some states have actually codified rules of construction for interpreting severability questions that arise under their codes. These statutes reflect the caselaw's indifference to severability clauses. Pennsylvania's statute, for example, provides for a presumption that all of the state's statutes are severable, regardless of whether they include a severability clause or not. This presumption can be overcome, however, if a court finds that the legislature would not have passed th[illegible]atute absent the invalid clause or that the remainder of the [illegible]e cannot function properly without the invalid provision.

B. Inseverability Clauses: A Mirror Image?

Research uncovered no reported opinions in which a federal court has interpreted an inseverability clause in a federal statute, perhaps because there are so few of these clauses. When faced with an inseverability clause in a state statute, however, federal courts have applied the same analysis they apply to severability clauses—examining legislative intent, legislative history, and the statute's ability to function without the invalid portion before accepting the plain meaning of the inseverability clause. In *Biszco v. RIHT Financial Corp*, for example, the First Circuit held that the analysis applied to the severability clause in *Chadha* was equally applicable to an inseverability clause in a Rhode Island statute. Thus, inseverability clauses establish no more than a presumption of

inseverability that courts may overcome after an examination of legislative intent.

State courts have also imported the rule for interpreting severability clauses to inseverability clauses. In *Stiens v. Fire and Police Pension Association*, for example, the Supreme Court of Colorado first held that a portion of the Colorado Policemen's and Firemen's Pension Reform Law was an unconstitutional retroactive law because it mandated pension fund contributions to cover liabilities accrued before the statute's passage. Although the law contained an inseverability clause, the court was reluctant to follow it: "The special unseverability clause . . . is not conclusive as to legislative intent. It gives rise only to a presumption that, if the unconstitutional parts of an Act were eliminated, the legislature would not have been satisfied with what remained." After analyzing the legislative history of the statute, the court concluded that the General Assembly's intent to regulate the state's pension liabilities predominated and that this intent would be frustrated by holding the entire act invalid. The court held that, despite the presence of an inseverability clause, the unconstitutional provision was severable from the rest of the statute.

In spite of the courts' tendency to analyze inseverability clauses in the same way as severability clauses, there are some indications that inseverability clauses may carry more dispositive weight than severability clauses and may be applicable without exploring legislative intent or history. In *Zobel v. Williams*, the Supreme Court, after holding a portion of an Alaska statute unconstitutional, considered whether the provision could be severed from the remainder of the statute. Rather than look to legislative history or the statute's structure to discern legislative intent, the Supreme Court noted that it "need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid." Although the Court ultimately remanded the inseverability determination of the statute to the Alaska courts, the Court's language is more deferential to the inseverability clause than its attitude towards severability clauses in *Alaska Airlines* and *Jackson*.

In addition, some states that have codified their severability law have included statutory language implying that, whereas severability clauses raise only a presumption, inseverability clauses may be dispositive of the severability question. The Indiana Code, for example, provides:

> (a) If any provision of this code as now or later amended or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application. (b) Except in the case of a statute containing a non-severability provision, each part and application of every statute is severable. If any provision

or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless: (1) the remainder is so essentially and inseparably connected with, and dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application; or, (2) the remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision or application. Thus, all Indiana statutes are severable unless they contain inseverability clauses or severability would be inconsistent with legislative intent or the severed statute would lack autonomy. The Code does not include a limitation, such as the one in subsection (b)(1), that would require an examination of legislative intent for "non-severability" clauses. This is significant because it implies that, when a statute supplies an inseverability clause, the clause is inseverable and no further examination of legislative intent or purpose is required.

II. Inseverability Clauses: A Recipe for Compromise

The previous Part outlined the courts' practice of analyzing inseverability clauses in the same manner as severability clauses. This Part will outline the differences between severability and inseverability clauses and propose that courts stop analyzing the two clauses in the same way.

A. Boilerplate or Deliberate?

The reason most commonly given for the courts' practice of second-guessing severability clauses is that the clauses are boilerplate provisions inserted into statutes by legislatures without thought or deliberation. Because of the often complex, multi-issue bills passed by legislatures, severability clauses are inserted to address a remote contingency: a court holding a small part of the overall statutory scheme invalid might dismantle far-reaching and elaborate omnibus legislation. Although severability clauses are included in statutes quite frequently, legislative drafters are nonetheless aware that courts do not show these clauses much deference. Legislators themselves acknowledge the perfunctory nature of severability clauses and their inclusion in legislation is generally uncontested. One congresswoman, for example, presumed that no floor debate was necessary to discuss the inclusion of a severability clause because such clauses were so commonplace:

This is a standard "boilerplate" severability clause; similar language has been included in a wide variety of laws including: The Emergency Unemployment Compensation Amendments of 1993, the Americans with Disabilities Act, the Civil Rights Restoration Act, the Fair Labor Standards Act, the Education for Economic Security Act, and the Comprehensive Drug Abuse Prevention and Control Act.

Indeed, as Congressman Frank stated when he introduced a severability clause into a different bill: "This is fairly routine . . . this is I think agreed upon by all the parties, to explicitly put in the kind of severability clause that sometimes is made explicit . . . . This is just boilerplate severability." Congressman Frank acknowledged that severability clauses are not always included in legislation "explicitly" because there is an implicit assumption of severability to start with. As one congressman pointed out when he submitted a bill without a severability clause:

No severability or nonseverability provisions were included in the bill, but it is the intention of the conferees that any judicial determination regarding the constitutionality of the bill be applied severably to the legislation. This is consistent with the current rule of thumb regarding constitutional challenges to any law that is silent on the issue of severability. Thus, the severability clause itself is understood by legislators as an innocuous provision that is not likely to be heeded by courts. As one court pointed out, "[t]he Act in question contains a 'saving clause' which it seems customary nowadays to insert in all legislation with the apparent hope that it may work some not quite understood magic."

Furthermore, while the severability clause is rarely dispositive, it may prove useful to courts in the easy case and, even if it is ignored by courts entirely, it is hard to imagine how such a clause could be harmful. In a 1989 Senate debate over a proposed severability clause in a child-care bill, Senator Hatch, acknowledging that the clause presented a potential benefit with minimal risks, commented that "good draftsmanship, good legislative draftsmanship, smart legislative draftsmanship . . . mandates putting a severability clause in the legislation." This demonstrates that severability clauses are included with little discussion or deliberation. In the same debate, Senator Mitchell pointed out that the clause was so standard that "a severability provision exists in over 63 Federal laws."

Inseverability clauses, on the other hand, are anything but boilerplate. They are infrequently included in legislation, which should alleviate any assumptions by courts that they are inadequately considered before being passed. In addition, when inseverability clauses are proposed, they are strategically designed to ensure that the legislation does not exist without its most fundamental provisions. Consequently, the inclusion of an inseverability clause is usually accompanied by extensive debate. For example, in the Senate floor debate referred to in the previous paragraph, Senator Helms opposed Senators Mitchell and Hatch and introduced an inseverability clause because he anticipated a

constitutional challenge to a provision providing benefits for religious day care. Helms wanted to ensure that day-care benefits would not exist unless religious day-care programs could share in the benefit. If the religious day-care provision were held unconstitutional, Helms preferred that Congress revisit the entire child-care issue rather than have the tax code include a child-care benefit that failed to include religious child care. The inseverability clause was submitted, not as boilerplate language, but in a deliberate attempt to preserve a provision Helms felt was integral to the bill.

A similar debate surrounded the proposed inclusion of an inseverability clause in the proposed Balanced Budget and Emergency Deficit Control Act of 1985. Among the many controversial elements in the bill, which sought to achieve a balanced budget, was a provision that gave budget supervisory powers to a merged entity of the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB"). In light of the partisan dynamic between the President and Congress at the time, the joint participation of congressional and executive agencies was a central feature of the bill. Anticipating a potential constitutional challenge to CBO participation on separation of powers grounds, the House passed a version of the bill that included an inseverability clause. As Congressman Panetta pointed out at the time:

If you allow severability and the CBO role is found to be unconstitutional, then it leaves it up to the OMB, and it, in essence turns our power entirely over to the President and his agency. That is the issue at stake in terms of why we built inseverability in . . . . For Congressman Panetta, maintaining a congressional role in the deficit reduction process was a key feature of the legislation. The Act, without the CBO, would include an inadequate check on the executive powers, and the Panetta camp refused to support it. Those opposed to the inseverability clause, however, did not see CBO involvement as a crucial factor and were willing to have the remainder of the Act stand as law even if the CBO's role were held unconstitutional: "[W]e do not want the whole process that we have labored on so hard now to collapse because one provision is held to be unconstitutional."

B. Limiting Court Powers

By failing to distinguish between severability and inseverability clauses, the courts ignore the differences in the messages that the two clauses communicate. The clauses are not mirror images of each other; they say different things.

A severability clause does not prohibit courts from invalidating the remainder of the statute because judicial review authorizes courts to declare statutes unconstitutional. Since a severability clause cannot permissibly limit the scope of the courts' powers of

judicial review, all the clause can do is instruct courts that when they hold a provision invalid they are not required to invalidate the whole statute. Through a severability clause, the legislature tells courts that it does not consider the various statutory provisions inextricably linked. Ultimately, the court must determine how far the unconstitutional provision extends and whether the remainder constitutes a fully functioning statute.

When applying inseverability clauses, on the other hand, the courts' exercise of the power is restricted insofar as the court is instructed to invalidate the whole statute if it determines it must invalidate some part. Thus, the clause communicates the legislative command that the statute's existence as a law is contingent on its existence as a whole. The court must carry out this legislative command, regardless of its opinion of the relationship between the invalid provision and the remainder of the statute.

Read in this light, the two clauses convey very different messages: one suggests to courts what they should but are not required to do; the other tells the courts what they must do. By applying the same analysis to both, courts fail to acknowledge the fundamental differences in the messages communicated by severability and inseverability clauses.

C. Preserving the Deal

Aside from being deliberately drafted into legislation, inseverability clauses serve a key function of preserving legislative compromise. Much commentary points out that legislation is the articulation of a legislative deal. But a compromise is of no value unless there is a mechanism to ensure the compromise's durability, that is, a way of preventing one party to the compromise from benefiting from the deal without upholding its share of the bargain.

An inseverability clause is a useful enforcement mechanism for legislative compromise because it binds the benefits and concessions that constitute the deal into an interdependent whole. In the debate mentioned above, for example, Senator Helms was unwilling to support the child-care bill unless it provided support for religious day care. If Helms's opponents had agreed to the religious day-care provision, there was a strong possibility that the provision would not have withstood a constitutional challenge. If the provision had been struck down and held severable, the compromise would have been unenforceable. Helms's opponents would have had their child-care benefit, and the religious day-care provision would have been a thing of the past. By making his support for the bill contingent on such an inseverability clause, Helms was entrenching the legislative deal and ensuring that there would be the compromise version of the bill or no version. The inseverability clause thus binds all the elements of the deal together.

Severability clauses, on the other hand, are not tools of legislative compromise. Legislators include them to ensure that the bulk of the legislation passed will remain intact even if some unanticipated contingency arises. As Senator Hatch pointed out:

> Who knows what a future Supreme Court will do? But, in the unlikely event that something in this legislation is unconstitutional, we surely want a severability clause in there so that all of the legislation is not wiped out in a single swoop of the Supreme Court's pen. Because severability and severability clauses are the default rule and the norm, respectively, the inclusion of an inseverability clause is an affirmative act by a legislature to preserve the coexistence of separate provisions. In settlement agreements and other kinds of contracts, for example, the parties determine that certain provisions are so central to the deal that without them there is no contract. The inclusion of inseverability clauses in these contracts is intended to preserve such compromises.

In a similar vein, a legislature may pass a bill that, as a result of a legislative deal, contains a balance of corresponding provisions. If the statute includes an inseverability clause, the legislature is saying that the statute is an organic whole of interdependent parts, no one of which should exist without any other. For example, several statutes codifying settlements of Indian claims in return for some form of reparation contain inseverability clauses for this reason and could not have been passed without them. If court action invalidated the statutory bar on prosecution of their claims, the tribes would have a double benefit: they could receive statutory compensation for their lands and still prosecute claims to recover those same lands. The inseverability clause prevents this outcome.

In *Kennedy v. Pennsylvania*, a state legislature had used an inseverability clause aggressively to gain government-wide support for its actions. The Pennsylvania legislature approved an across-the-board pay increase to state government employees, including legislators and judges. Because the state constitution prohibited legislators from voting themselves a pay increase during their current term, the increase for legislators was effective beginning with the next election. However, in order to gain votes to support the appropriation, the final bill also increased legislators' unvouchered expense accounts for the period prior to the election in the amount of the pay increase. Anticipating a court challenge to the expense account increase, the legislators included an inseverability clause. The clause provided that, were a court to invalidate any provision of the statute, none of the salary increases would be effective, including those for judges. Although the inseverability clause may have been an attempt to pressure judges into holding the expense account increase valid, the Pennsylvania court held the inseverability clause constitutional and valid, even though it affected the judiciary. While the scruples of the Pennsylvania legislature were questionable, their use of the inseverability clause proved an effective tool for preserving their deal.

Similarly, inseverability clauses are often included in budgetary legislation to ensure that the funding scheme developed is viable. If a court determines that an entitlement's eligibility requirement is invalid, then the funding apparatus supplied by the remainder of the entitlement would become inadequate. For example, in *Brookins v. O'Bannon*, the Third Circuit considered an inseverability clause that was included in the 1982 Pennsylvania Welfare Reform Act. The Act divided the class of needy persons eligible under the prior law into "chronically needy" and "transitionally needy" persons and continued to provide full benefits to the "chronically needy." The "transitionally needy," however, were limited under the new act to three months of benefits per year. With the savings generated by reducing benefits to the new "transitionally needy" class, the Act provided for a 5 percent increase in the benefits provided to eligible recipients. The Act included an inseverability clause that eliminated the 5 percent increase should the distinction between "chronically needy" and "transitionally needy" be held invalid. As one legislator pointed out: "We do not want to raid [the] State Treasury. We want to provide an increase in cash assistance allowance to the truly needy as long as those funds are there."

The clause provided an important tool for the legislature to regulate welfare spending by ensuring that the increase in benefits was contingent upon narrowing the scope of eligible welfare recipients. The Third Circuit ultimately did apply the inseverability clause, but only after examining the legislative history of the provision. One can only speculate as to what the court would have done to Pennsylvania's welfare budget had the legislative record lacked any discussion of the Act's inseverability clause.

Thus, by applying the same analysis to inseverability clauses as they apply to severability clauses, courts are denying legislators an effective tool for entrenching a compromise. If courts are only moderately deferential to inseverability clauses, and if the clauses establish no more than a presumption of inseverability, then courts will only apply the clause if there is a clear record in the legislative history. Consequently, legislators will be reluctant to rely on the clause as a tool of compromise for fear that courts will undertake independent determinations of legislative intent despite the statutory mandate of inseverability. This problem will be exacerbated for state legislators because legislative history for state legislation is often difficult to locate and thinly reported. Occasionally, legislation can be made palatable or effective only by tempering it with various limiting factors or requirements, and the inseverability clause is intended to ensure that these elements remain in the statute. By treating the inseverability clause as if it were only a minor indication of legislative intent, courts are usurping the legislature's role in determining what should remain as an enforceable statute.

III. A New Rule for Inseverability Clauses

The previous Part established that inseverability clauses serve a wholly different function from severability clauses. Therefore, the rule that courts apply to inseverability clauses should be distinct from that applied to severability clauses. The correct approach to inseverability clauses is to apply their plain meaning. Rather than embarking on an independent exploration of legislative intent, as the courts do for severability clauses, courts should unequivocally invalidate the remainder of a statute if the unambiguous language of the statute so directs.

A. A Public Choice Approach

The proposed rule can be understood through a theory of statutory interpretation that derives from a contracts approach. Public choice theory tends to view legislation as the product of various interest groups vying for their self-interests. Legislation therefore is a contract of sorts negotiated between the various parties, that is, between the different legislators and the interest groups with whom they sympathize. According to this theory, legislation is often a compromise between conflicting groups where one group agrees to support another group's proposed legislation in return for some modifications in the underlying bill or for support on another issue. Consequently, the legislation may lack a cohesive focus because different portions of the bill are included to placate different groups.

An inseverability clause provides legislators with a tool for enforcing these compromises because one group may be willing to support a piece of legislation only if it can be assured that particular limitations or provisions will be included in the final bill. Senator Helms, for example, could agree to support a child-care entitlement on the condition that religious day-care centers were eligible for the benefit. His insistence on an inseverability clause testifies to the clause's important role in entrenching a compromise.

Similarly, after the *Chadha* decision there were initiatives in Congress to include inseverability clauses in statutes with legislative veto provisions. The inseverability clause would enforce durable legislative deals whereby various federal actions mandated by statute could not be undertaken unless Congress had the power to veto the action. If the Court, as it did in *Chadha*, held such an attempt at legislative veto unconstitutional, then the inseverability clause would cause the entire statute to fall rather than leave the statute to function free from any legislative check on its application.

It is, however, imaginable that in many instances a sparse record will provide an inadequate background as to the negotiation and compromise behind an inseverability clause. Alternatively, because of the conflicting interests that influence the legislation, the legislative history often provides conflicting evidence of legislative intent

or purpose. As such, a rule that failed to defer to the plain meaning of the inseverability clause would, in effect, undermine the clause's function as a legislative tool for enforcing compromise. Courts would be free to speculate as to legislative intent and purpose in the absence of an informative legislative history.

Applying the plain meaning of inseverability clauses without second-guessing legislative intent helps facilitate durable legislative compromises. If courts are able to examine legislative intent and to speculate whether the legislature would have passed the legislation without the invalid provisions, there is a great likelihood that legislative deals will be undermined or short-lived. If courts will sever provisions that were passed as interdependent elements, legislators will be less willing to enter into compromises: they will fear that the issues they concede will outlive the issues they support. That is, the costs of the deal might outlive its benefits. Severability clauses, on the other hand, do not enforce the legislative compromise; they protect the passage of complex omnibus clauses. A strict plain meaning rule of severability clauses, therefore, would not help to preserve a legislative deal. If anything, the severability clause attempts to undo legislative deals by instructing courts to uphold the balance of a statute even when portions of the legislative deal have been struck down.

Nevertheless, courts' deference to the plain meaning of inseverability clauses should not be unlimited. If giving effect to an inseverability clause would result in overstepping the bounds of legislative or judicial authority, then the clause should not be followed. For example, in *Legislative Research Commission v. Brown*, an inseverability clause provided that if a Kentucky legislative veto provision were held invalid, then the state's executive department would not be permitted to issue regulations unless the state's general assembly was in session. The clause was intended to force the courts to uphold the veto in order to avoid crippling the executive branch's powers. The Kentucky Supreme Court wisely refused to apply the inseverability clause and held that the clause "unconstitutionally limit[ed] and interfer[ed] with the governor's mandated duties." Thus, legislatures are free to construct a legislative compromise through inseverability clauses provided they do not attempt to force courts to fashion unconstitutional holdings.

B. An Inseverability Canon

In order to prevent courts from undermining the legislative compromises that are sealed by inseverability clauses, this Comment calls for a new interpretive canon for inseverability clauses.

1. A clear statement rule.

The proposed rule would function like a clear statement rule.

Clear statement rules are generally defined by polarities. On the one hand, there is a presumption that cannot be overcome unless the legislature has provided a clear statement otherwise. On the other hand, a clear statement rule must also define what statutory language would be sufficient to constitute a "clear statement" to overcome the court's presumption. For example, in *Atascadero State Hospital v. Scanalon*, the Court articulated a clear statement rule for congressional abrogation of states' Eleventh Amendment immunity from suit in federal courts. The Court held that, when the statutory language is ambiguous as to abrogation, it will not attempt to divine whether Congress intended to abrogate. The presumption of immunity created a "requirement . . . that Congress unequivocally express its intention to abrogate . . . by making its intention unmistakably clear in the language of the statute."

The codified statutory construction rules in the Indiana Code, for example, illustrate how such a presumption would work. The rule presumes severability regardless of whether a severability clause is included in the statute. However, once the legislature has included an inseverability clause, a clear statement of legislative intent has been provided and the courts must therefore defer to the unambiguous language in the clear statement. Such a rule would prevent courts from second-guessing inseverability clauses. The proposed rule recognizes that the inclusion of an inseverability clause is a deliberate act of the legislature to enforce a legislative compromise and to ensure that the provision and the remainder of the statute operate in tandem.

There is one modification, however, from the clear statement model. Absent a clear statement in an inseverability clause, the default rule is not severability but rather a presumption of severability. The classic clear statement rule contains a default rule that can only be overcome by a clear statement. The default in the proposed rule for inseverability clauses, however, does not limit findings of inseverability to the presence of inseverability clauses. Whether or not the statute contains a severability clause, the presumption of severability can be overcome by legislative history or statutory structure indicating that the legislative intent was for inseverability. An inseverability clause, by contrast, provides a clear statement that unmistakably requires courts to invalidate the statute's remainder.

2. A statutory device.

As with substantive canons, courts often choose to interpret and apply particular statutory devices in a consistent manner. Courts will often apply time limitations and deadlines, for example, according to the statute's strict plain meaning. In *United States v. Locke*, the statutory deadline for a mining rights application was "prior to

December 31," even though similar deadlines generally extended to the end of the year with language such as "on or before December 31." The Supreme Court read the statute literally and held that an application filed on December 31 was too late. This can be read as a rule of strict construction for dates and deadlines included in statutes. As Justice Marshall wrote, "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced."

Thus, while the severability clause canon examines legislative intent in spite of the clause's language, the canon for reading inseverability clauses should read the clauses strictly according to their plain meaning—in short, the inseverability clauses should be dispositive. To paraphrase Justice Marshall, if the inseverability clause is to have any content, its plain meaning must be applied.

This raises the potential, however, of an absurd result where an inseverability clause is activated by a very minor holding of invalidity. In *Rebaldo v. Cuomo*, for example, an amendment to New York's Public Health Law prohibited New York's public hospitals from charging any of the insurance carriers less than a specified rate. The law contained an inseverability clause that invalidated the entire statute if any payor was charged below the specified rate. The clause was intended to restrain the major payors like Medicare, Medicaid, and Blue Cross from obtaining cheaper rates. However, the court noted that "a literal construction of the language would lead to the absurd result that 'a single uninsured patient . . . would invalidate the statute' " if that person paid a hospital bill below the specified rate. Although the *Rebaldo* court decided the case on other grounds, the inexpertly drafted inseverability clause might have led to an absurd result.

However, as the Court in *Locke* noted, it is often necessary to let some seemingly harsh results stand in order to preserve the power of inseverability clauses generally. Although courts are often reluctant to enforce what appear to be absurd results, by generating a rule that strictly applies the plain meaning of inseverability clauses, courts will force legislatures to draft the clauses with greater precision. As Justice Scalia wrote, "we have an obligation to conduct our exegesis in a fashion which fosters [the] democratic process." By applying the plain meaning, courts are not only forcing legislatures to craft inseverability clauses with greater care, they are also providing legislatures with effective tools for passing legislation by creating durable compromises.

Conclusion

Applying the severability clause analysis to inseverability clauses

fails to address the distinct nature of inseverability clauses. This Comment demonstrates that the dynamic in inseverability clauses is different from that of severability clauses and calls on courts to apply the strict plain meaning of inseverability clauses. The presence of an inseverability clause evidences a legislative compromise and a deliberate attempt by the statute's drafters to inseverably link statutory provisions. An exploration by courts of the legislative intent behind an inseverability clause will necessarily undermine the clause's ability to enforce legislative compromise. By deferring to the plain meaning of inseverability clauses, courts will encourage the legislative process by preserving an effective tool for enforcing legislative deals.

VI. SEVERABILITY[1]

§ 44A:16 Severability

When a court holds a provision of a statute unconstitutional, a question remains regarding the validity of the remainder of the statute. The court may find that the unconstitutional provision may be severed from the statute and leave the remainder of the statute in effect. Alternatively, the court may hold that the unconstitutional provision cannot be severed and invalidate the entire statute.

In this Article, attorney John Nagle argues that the jurisprudence surrounding the issue of severability is confusing and inconsistent. After explaining the concept of severability and its ramifications for statutes, Mr. Nagle traces the development of the current judicial test for determining when a statute should be found severable. The effect of severability clauses—statutory provisions directing courts to leave the remainder of the statute in effect in the event a provision is found unconstitutional—is also discussed; Mr. Nagle finds that such clauses do not necessarily cause a court to reach a particular result. Mr. Nagle then examines the question of legislative intent in the context of severability. He concludes that courts have departed from established methods of determining legislative intent, opting instead to attempt to answer the hypothetical question whether the legislature would have chosen to enact the remaining parts of the statute without the unconstitutional provision.

Because the current jurisprudence of severability is unsettled, Mr. Nagle asserts that courts should follow several general principles regarding severability. First, courts should apply a plain meaning rule to severability clauses, so that a statute containing

[1]By John Copeland Nagle, B.A. 1982, Indiana University; J.D. 1986, University of Michigan Law School. Copyright 1993 by the North Carolina Law Review Association. Reprinted with permission from 72 N.C.L. Rev. 203 (1993) Footnotes omitted.

such a clause will automatically be considered severable. Second, when a statute does not contain a severability clause, the courts should look to the history, purpose, and structure of the statute to ascertain legislative intent. Finally, to assist in this inquiry Mr. Nagle advocates the creation of a legislatively-enacted clear statement rule requiring that courts consider a statute severable when a statute is silent on the issue of severability.

I. INTRODUCTION

Severability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of a law is unconstitutional. The question that severability poses is easily stated: If part of a statute is unconstitutional, does the rest of the statute remain in effect? The question is also ubiquitous. It can arise any time part of a statute or a particular application of a statute is held unconstitutional. Moreover, the answer can have profound consequences. Concluding that statutory provisions are severable presents the danger of leaving in effect statutory provisions that the legislature would have never enacted alone. Alternatively, a holding of nonseverability can mean, for example, that an entire appropriations statute or sweeping reform legislation falls because of a single unconstitutional provision.

Yet severability is often overlooked. The severability test currently used by the Supreme Court was first stated in 1932, and the seminal article on severability was written in 1937. Fifty-one years after the test was first enunciated, *Immigration and Naturalization Service v. Chadha* revived interest in severability when the Court held that an unconstitutional legislative veto over executive branch deportation decisions was severable from the deportation power delegated to the executive branch. That decision provoked a number of critical discussions of the test for determining severability and its application to the nearly two hundred other statutes that contained legislative vetoes. Four years later, the Court had an opportunity to answer its critics in *Alaska Airlines v. Brock*, in which the severability of the legislative veto in the Airline Deregulation Act of 1978 was the only issue before the Court. A unanimous Court responded by keeping the same basic test and holding another legislative veto severable.

Criticism of the Court's approach persists. The problem, as one court recently put it, is that "[t]he test for severability has been stated often but rarely explained." Thus, while severability is noncontroversial in many cases because almost any test—including the *Alaska Airlines* test—would produce the same result, hard cases illuminate the doctrinal inadequacy of *Alaska Airlines*. Would unconstitutional restrictions on public funding of art. be severable from the funding itself? Is the unconstitutional legislative veto sev-

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MEMORANDUM April 28, 2011

SUBJECT: Line Item Veto

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Doug Gardner
Director
and
Pamela Finley
Revisor of Statutes

You have asked for a discussion of cases from other jurisdictions on the item veto, including those cited by the attorney general, as well as the meaning of "item" and "strike or reduce" as used in art. II, sec. 15, Constitution of the State of Alaska.

I. The Meaning of "Item".

The second sentence of art. II, sec. 15 of the state constitution reads as follows:

> He [the Governor] may, by veto, strike or reduce items in appropriation bills.

In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001) (hereinafter "*Knowles*"), the court defined "item" as "a sum of money dedicated to a particular purpose":

> Based on the language of our constitution, the historical purposes of the item veto, and the pertinent public policy considerations, we now define "item" as "a sum of money dedicated to a particular purpose."

Knowles, 21 P.3d at 371. The court noted that the "word 'item' conveys a notion of unity between two essential elements of an appropriation: the amount and the purpose." *Knowles*, 21 P.3d at 372. Although the court did not explicitly discuss the issue, footnote 28 in *Knowles* suggests that an item could have several purposes:

> Consider, for example, the [undesirable] effect of striking from an appropriation's descriptive language a negative, a limiting date for expending the money, or one of several purposes. (emphasis added)

However, it appears from the court's discussion that an "item" can only have one amount. The court stated that "an item reduction must have a quantitative effect, implying that reduction must affect the appropriation's amount." *Knowles* at 372. In addition, two of the cases the court cited with approval indicate that an item may only have one amount: *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 195 (Minn. 1991) (defining "item of appropriation" as "a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose") and *Commonwealth v. Dodson*, 11 S.E.2d 120, 127 (Va. 1940) (defining "item" as "an indivisible sum of money dedicated to a stated purpose"). Cited in *Knowles*, 21 P.3d at 371, footnote 19. This is also the definition that governors in Alaska have used in exercising the item veto by vetoing allocations that have dollar amounts attached to them and reducing the appropriation by the amount of the allocation.[1]

Based on the definition in *Knowles*, an item could be any one of the following:

--- "Four million for roads in Anchorage"
--- "Four million for roads X, Y, and Z in Anchorage"
--- "One million for road X in Anchorage"
--- "One million for road Y in Anchorage"
--- "Two million for road Z in Anchorage"

The last three items give the legislature more control over the specific projects, but can be vetoed individually as items. The first two are more general, but the governor's item veto would be limited to striking the entire line, or reducing the four million.

II. The Meaning of "Strike or Reduce."

Knowles makes it clear that "reduce" refers to reducing the amount of the appropriation, not changing the purpose:

> Reduction implies diminution. This suggests that an item reduction must have quantitative effect, implying that reduction must affect the appropriation's amount.

Knowles, 21 P.3d at 372. The court went on to explain that "strike" is just a greater version of reduce:

> Reducing an item appears to be a lesser form of striking an item. This implies that these two forms are qualitatively similar and have equivalent

---

[1] *See also In Re Advisory Opinion to the Governor*, 239 So.2d 1, 6 and 22 - 23 (Fla. 1970) (Governor's constitutional power to veto "any specific appropriation" applied to lines consisting of purpose and amount, even though grouped together.)

> effects, i.e., they diminish the amount appropriated. Reducing an item lessens its amount; striking it lessens its amount to nothing.

Knowles, 21 P.3d at 372 - 373. The court in *Knowles* was quite clear that the power to "strike or reduce" was not the power to edit the purpose or descriptive language of an appropriation:

> The item veto permits the governor only to tighten or close the state's purse strings, not to loosen them or to divert funds for a use the legislature did not approve. . . .
>
> . . . [I]t [the item veto] was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power permitting appropriations the legislature never enacted. . . .
>
> Altering the purpose of the appropriation by striking descriptive words interferes with that unity [between the amount and purpose of the appropriation] because the result is no longer the item the legislature enacted.

Knowles, 21 P.3d at 372.

> These purposes [of the item veto] seem most directed at the amount of an appropriation. Permitting a governor to strike descriptive language would not limit expenditures or help balance a budget.

Knowles, 21 P.3d at 373.

In short, "strike or reduce" means to eliminate the entire item or reduce the dollar amount of the item. Other deletions are not allowed.

III. Case Law from Other Jurisdictions.

A. The Attorney General's Opinion.

Alaska Attorney General John Burns, in a memorandum to Chief of Staff of the Office of Governor Sean Parnell, cited *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), and *Legislative Research Comm'n v. Brown,* 664 S.W.2d 907, 919, (Ky. 1984) respectively, for the proposition that the contingency language in section 36 of CSSB 46(FIN), and the nonseverability clause in section 37 of CSSB 46(FIN), violate the separation of powers in art. II, sec. 13 (legislature has the power of appropriation), and art. II, sec. 15 (governor has line item veto authority). Neither case is fully supportive of the attorney general's position that either the contingency language of sec. 36, or the

nonseverability clause in sec. 37, are separation of powers violations. Both cases require discussion.

In *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), the New Jersey Legislature passed an appropriation bill, that provided for road construction projects totaling $12 million. Of the total $12 million, $7 million was state matching funds for federally aided interstate highway projects, and $5 million was for non-federally funded highway projects. *Karcher,* 479 A.2d at 411. The governor of New Jersey vetoed a line item appropriation for a highway project, but did not veto the legislature's estimated expenditure of $3 million for that project, or the $7 million total for state matching funds for federal highway projects. In addition, the governor used his line item veto to eliminate a highway reconstruction project, and the legislature's estimate for the cost of that project, but did not reduce the lump sum of $5 million for non-federally funded projects, or the total of $12 million total appropriation for the projects identified by the legislature.

In summary, the governor vetoed parts of the legislature's appropriations eliminating projects, but not the total appropriation amounts. *Id.* The *Karcher* court concluded that the governor appropriately exercised his veto authority, based on the fact that the New Jersey Constitution allows the governor to use line item veto authority to veto "whole or in part any such item or items while approving other portions of the bill." *Id* at 489 citing art. V, sec. 1 para. 15 of the New Jersey Constitution.

Such a practice in Alaska would be unauthorized by art. II sec. 15 of the Alaska Constitution, and contrary to the reasoning in *Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001), where veto may be applied to an "item," which is defined as "a sum of money dedicated to a particular purpose." *Id.* In addition, vetoing parts of an appropriation (i.e. specific projects), without reducing the total appropriation, would have the effect of increasing appropriations for non-vetoed projects by reducing total projects, but allowing surviving items, or projects, to receive additional funding, in violation of art. II sec. 15, which limits the governor's veto power to "strike or reduce" an item. Based on the contrary provisions in the Alaska and New Jersey Constitutions, and the definition of what constitutes an "item" in *Knowles*, citation to *Karcher* does not support the proposition that the contingency language in sec. 36 creates a separation of powers violation.

The attorney general also cites *Legislative Research Comm'n v. Brown,* 664 S.W.2d 907, 919, (Ky. 1984), arguing that this case supports the proposition that the nonseverability language in sec. 37, constitutes a similar separation of powers violation. In *Brown*, there were two nonseverability provisions that the court addressed. The first nonseverability provision that the court addressed, involved legislation that placed a restriction on the executive, effectively eliminating the executive's ability to pass regulations that were not approved by a legislative body called the LRC. The legislation also provided for a nonseverability clause that provided if the LRC could not review regulations with the authority to "veto proposed regulations," that the executive could not issue any further

regulations. *Id.* at 919. The court found that the nonseverability clause so interfered and reallocated the constitutional powers of the executive to the legislative branch, that it refused to enforce the nonseverability clause. This is the portion of *Brown*, that the attorney general cited to in his memorandum.

Reading further in *Brown,* there was a second nonseverability clause that the court addressed. This second nonseverability clause involved legislation that provided that the LRC had the power to modify any application by the executive branch or overrule the executive branch's decision to apply for a federal block grant. *Id.* at 928. As previously discussed, the *Brown* court found that the LRC's usurping of the executive branch's power was a separation of powers violation. So the question for the court, was whether to enforce a separate nonseverability clause, that provided, "if any section of K[entucky] R[evised] S[tatute] 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent. . . ." *Id.* The Supreme Court of Kentucky held that since the "adoption of the state budget" is within the purview of the legislature, that the nonseverability clause related to the budget would be upheld. Accordingly, the *Brown* decision does not necessarily stand for the proposition that all nonseverability clauses are unenforceable; clearly in the context of appropriations, the *Brown* case stands for the proposition that a nonseverability clause in the context of an appropriation, is enforceable. *Brown* is perhaps more supportive of the legislature's prerogative to appropriate in the manner it chooses, and include a nonseverability clause in an appropriation bill if it is not permitted to appropriate in the manner it chooses.

The best guidance on how a court might approach a nonseverability clause comes from the U.S. Supreme Court's reasoning in *Alaska Airlines v. Brock,* 480 U.S. 678, 680 (1987), where the Court held:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

Id. at 684-85.

In summary, based on the reasoning in *Alaska Airlines v. Brock,* and the *Brown* court's upholding the nonseverability clause in the context of block grant appropriations, the presence of a nonseverability clause would likely be seen by a reviewing court as strong, if not irrefutable evidence of the legislature's intent, that the legislature did not intend to enact the legislation if it could not do so in the manner that it originally chose.

B. Cases from Other Jurisdictions.

Because *Knowles* establishes both the test for violations of the Confinement Clause and the definition of "item", we have concentrated our research in the limited time available on cases where a veto of one appropriation affected another or affected the governor's power. Please note, however, that the law in this area varies from jurisdiction to jurisdiction so that cases from other states may or may not be convincing to Alaska's Supreme Court.

In *Commonwealth of Virginia v. Dodson*, 11 S.E.2d 120, 130 (Va. 1940), cited in *Knowles*, in footnotes 19 and 38, the court held that an item veto was invalid because the appropriation was integrally tied to other unvetoed budget provisions, even though it would have been subject to the item veto if it had not been tied to the other provisions. In *In Re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla. 1970), the court was asked its opinion of a contingency that made numerous appropriations for education contingent on the passage of a substantive bill that was related to some but not all of those appropriations. The substantive law bill passed and the court did not find that contingency was unconstitutional, stating that "[a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events." *Id.* 239 So. 2d at 22. In *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985), the governor was empowered to transfer funds under certain circumstances, but the legislature passed an appropriation with the condition attached that the governor's power to transfer did not apply to that appropriation. The governor maintained that the condition was an unconstitutional restriction on his power. The court disagreed:

> [The provision allowing the transfer] is a limited and qualified delegation of a legislative power. An impingement on that authority, restricting its exercise against qualifications to appropriations, cannot be construed as a violation of an executive power. It did not invade or prevent the governor's exercise of his constitutional veto power. As we have discussed, the matters vetoed were qualifications rather than items. . . . Thus the executive power was not invaded.

Rush v. Ray, 362 N.W. 2d 479, 483.

Perhaps the most interesting case in this area is *Brault v. Holleman*, 230 S.E.2d 238 (Va. 1976). The legislature had passed appropriations for the integrated transportation system, but had done so by assigning separate dollar amounts for administration, buses, adjacent parking lots, and capital costs of the actual rail system. The governor vetoed the costs of the actual rail system, but left the others. Members of the legislature sued, alleging that the appropriations were linked in purpose and therefore could not be vetoed separately. The court recognized that the appropriations were logically linked and that "the various appropriations for the Metro system are 'tied up' one with the other." *Brault v. Holleman*, 230 S.E.2d at 243. However, the court held that the linkage between appropriations must

be stated in the appropriation bill itself, and not be established by extrinsic evidence. Because the "singularity of purpose . . . does not appear from the terms of the appropriation bill," the court upheld the item veto. *Id.* 230 S.E.2d at 244. It appears from the discussion, however, that the court might have upheld a contingency linking all the appropriations had one been written into the bill.

If you have any questions about the above, please contact us.

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MEMORANDUM April 22, 2011

SUBJECT: Contingency Language in CSSB 46(FIN)
(Work Order No. 27-GS1740\X)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Doug Gardner
Director

You have asked for: (1) a brief analysis of the function of secs. 39 and 40 of CSSB 46(FIN), and (2) the constitutionality of the contingency language found in sec. 39[1] of the draft CSSB 46(FIN).

1. The Function of Secs. 39 and 40 of CSSB 46 (FIN); What These Sections Do.

Section 39 of the draft CSSB 46(FIN) (27-GS1740\X) provides two contingencies. The first, in subsection (a), makes each of the appropriations in sec. 7 of the Act contingent on enactment of every appropriation in sec. 7, without reduction. In other words, if the governor were to veto all or a portion of any line item in sec. 7, the contingency would not be met, and none of the appropriations in the section would take effect.

The contingency in sec. 39(b) makes the appropriations in sec. 4 dependent on the FY 2012 year-to-date average price of Alaska North Slope crude oil exceeding $150 a barrel on October 1, 2011. If the price does not exceed that measure, the appropriations in sec. 4 would not take effect.

Section 40 of the draft CS relates to severability of the contingency provisions in sec. 39. Sec. 40(a) provides that if the contingency in sec. 39(a) is held invalid, the contingency is not severable from the appropriations made in sec. 7 of the Act. The function of this provision is to indicate the legislature's intent that if sec. 39(a) is invalidated, the appropriations made in sec. 7 not stand. In other words, if the contingency fails on

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[1] In full, sec. 39 reads:

> **Sec. 39.** CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular Session and enactment into law of every appropriation made in sec. 7 of this Act.
>
> (b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012 year-to-date average price of Alaska North Slope crude oil exceeding $150 a barrel on October 1, 2011.

constitutional grounds, it is the intent of the legislature that the appropriation fail as well. The severability provision in sec. 40(b) has the same effect on secs. 39(b) and sec. 4.

2. The Constitutionality of Governor's Veto Power Relating to Secs. 39 and 40.

a. Sec. 39(a) Contingency Language and Confinement Clause.

The contingency language found in sec. 39(a) of the capital budget bill does not prohibit the governor from vetoing items in sec. 7 of the bill. Instead, it provides that a veto by the governor of an item in sec. 7 of the bill will have the secondary result of deleting all projects found in sec. 7 from the bill. The governor is still free to exercise his veto regarding sec. 7.

Whether a court would uphold the validity of the contingency language found in sec. 39(a) is a question I cannot answer, as this is a scenario that has not arisen in the past. The contingency found in sec. 39(a) could be held unconstitutional because of a separation of powers issue related to the governor's veto powers, but I am not completely convinced that a court would rule the contingency language invalid. In fact, the veto power of the governor can be characterized as a legislative power (appropriating the state's money) that was conferred upon the governor in the state constitution. Likewise, the legislature, in art. III, secs. 25 and 26 of the state constitution, was bestowed an executive power in having the power to confirm certain appointees by the governor. Regarding the ability to confirm appointees, the Alaska Supreme Court held in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), that the legislature's power to confirm should be limited to the specific instances listed in the constitution and not broadly construed because the legislature was exercising what was essentially an executive power. Bradner, 553 P.2d at 7 - 8. One could look at the Bradner case in light of the governor's line item veto power and argue that the line item veto power -- a legislative function in that it relates to appropriations -- should not be broadly construed, but viewed in more limited terms. Thus, the contingency of sec. 39(a) could be viewed as the legislature taking full advantage of its power of appropriation in choosing a statewide approach to funding energy projects, and that the governor still retains his strictly construed power to veto all of sec. 7 of the bill.

Of course, a court may hold that the contingency language found in sec. 39(a) of the bill does violate the governor's power of line item veto, but I do not believe that it is an open-and-shut case. There are certainly arguments to be made on both sides. In essence, a court's decision may come down to whether or not the projects in sec. 7 are sufficiently tied to each other that the contingency is reasonable.

As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the intent language found in sec. 7 of the bill and the contingency in sec. 39(a), in Knowles v. Legislative Council, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

> [T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law

> or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Based on the statutory energy policy found in AS 44.99.115, the legislature intends that its interpretation of the policy be followed in funding projects in all areas of the state. The intent language does not administer a program, as each project may still be carried out in accordance with existing law. For example, the Alaska Energy Authority is not being given any further guidelines on how to use the potential $5,000,000 for "bulk fuel upgrades." I would certainly say that this intent language does not amend existing law or extend beyond the life of the appropriation. Finally, the intent language is likely germane, as it is tying all of the projects in sec. 7 of the bill to a state energy policy that it is attempting to follow.

b. Contingency Language in Sec. 39(b).

As for the contingency language found in sec. 39(b) of the bill, I feel strongly that this is a valid contingency. As recently as 2006, the legislature has passed a capital budget bill containing contingency language that tied certain appropriations to the price of petroleum. Found at sec. 64(c), ch. 82, SLA 2006, the contingency stated:

> The appropriation made by sec. 20(j) of this Act is contingent on an increase in petroleum tax revenue, as estimated by the Department of Revenue, due to the state for the months of April, May, and June 2006 in an amount equal to or greater than the appropriation made by sec. 20(j) of this Act.

While this contingency did not name an exact price, it is quite similar to the contingency found in sec. 39(b). The legislature has simply set aside a certain list of projects that it does not believe should be funded unless the state generates a certain amount of revenue in the first three months of fiscal year 2012. If the price of Alaska North Slope crude oil reaches a certain level, then the legislature believes that money may be spent on the projects listed in sec. 4. This appears to me to be a fiscal policy decision -- that money should only be spent on certain projects if the state receives sufficient funds based on the price of oil.

c. Nonseverability Clause in Sec. 40.[2]

Like the contingency language in sec. 39, the nonseverability clause in sec. 40 of the bill is not an "item" subject to the governor's line item veto power in art. II, sec. 15. See

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[2] You requested an analysis of the non-severability clause in sec. 40 of a version of the bill that was produced for another client. Since you had a copy of it by permission of the other client as I understand it, and faxed us the two pages with sec. 39 and sec. 40 from the other client's version on 4-21-11, we will provide an opinion for you regarding sec. 40 of the bill on that basis.

generally, Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001). So the governor, in my view, may not veto the nonseverability language itself in sec. 40 of CSSB 46(FIN). The question then becomes, if the governor ignores the contingency language in sec. 39(a), which is the section of the bill that is your focus, and vetoes any of the selected energy projects or "items" in sec. 39(a), or if the court declares that contingency language invalid, will a court give effect to the legislature's "all or nothing" intent by upholding the non-severability clause in sec. 40 of the bill.

The general rule is that provisions of a bill are presumed to be severable in the event that a portion of the bill is found to be unconstitutional. The legislature has provided by statute that all bills are to be construed as if they contained a severability clause. AS 01.10.030. The Alaska Supreme Court has found that this statute expresses legislative intent in favor of severability. See generally, Williams v. Zobel, 619 P.2d 422 (Alaska 1980). The inclusion of a specific severability clause in a bill creates an even stronger, but not conclusive, presumption of severability. Conversely, the inclusion of a nonseverability clause demonstrates the legislature's intent that if the nonseverable section of the bill identified by the legislature is found unconstitutional or otherwise invalid, the legislature's intent was for the remainder not to stand. The ultimate factor in determining whether an invalid provision of a bill is severable is the intent of the legislature. If it is clear that the legislature intended a bill or a portion of a bill to take effect as passed by the legislature or not at all, then that bill or provision would be found to be nonseverable. See, Lynden Trans., Inc v. State, 532 P.2d 700 (Alaska 1975).

It is always hard to predict how a court would interpret the non-severability clause in sec. 40. However, there is a good argument a court would view the nonseverability language in sec. 40 as a strong message of intent from the legislature that, if the legislature was constitutionally unable to use the contingency language in sec. 39(a) to fund "all or none" of the identified energy projects, the legislature did not want any of the appropriations to be effective.

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expenses for the fiscal year ending June 30, 2012.

(c) The unexpended and unobligated balance, not to exceed $450,000, of the appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 33 (Legislative Council - $36,425,700) is reappropriated to the Legislative Council to conduct for the legislature an independent third-party scientific and multidisciplinary study of statutory and permitting requirements and processes related to large mine development in the state for the fiscal years ending June 30, 2011, June 30, 2012, June 30, 2013, and June 30, 2014.

(d) The unexpended and unobligated balance, after the appropriation made in (c) of this section, estimated to be $2,230,000, of the appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 33 (Legislative Council - $36,425,700) is reappropriated to the Legislative Council to begin scoping, planning, and implementing a system-wide redesign of the Bill Action Status and Inquiry System (BASIS), an integrated document management system, and a consolidation of the legislature's internal and external websites.

(e) The unexpended and unobligated balance, estimated to be $8,275,000, of the appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 27 (Budget and Audit Committee - $18,911,100) is reappropriated to the Legislative Budget and Audit Committee to begin scoping, planning, and implementing an enhanced content management platform to integrate appropriation data, tracking, and reporting with the legislature's Bill Action Status and Inquiry System (BASIS) and for other purposes of the committee.

* Sec. 38. STATUTORY BUDGET RESERVE FUND. (a) The sum of $300,000,000 is appropriated from the general fund to the statutory budget reserve fund (AS 37.05.540).

(b) The sum of $200,000,000 is appropriated from the general fund to the statutory budget reserve fund (AS 37.05.540).

* Sec. 39. CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular Session and enactment into law of every appropriation, without reduction of any appropriation, made in sec. 7 of this Act.

(b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012 year-to-date average price of Alaska North Slope crude oil exceeding $150 a barrel on October 1, 2011.

* Sec. 40. NONSEVERABILITY. (a) Notwithstanding AS 01.10.030, if the contingency

found in sec. 39(a) of this Act is held to be invalid, then the contingency is not severable from the appropriations made in sec. 7 of this Act.

(b) Notwithstanding AS 01.10.030, if the contingency found in sec. 39(b) of this Act is held to be invalid, then the contingency is not severable from the appropriations made in sec. 4 of this Act.

* Sec. 41. LAPSE. (a) The appropriations made in secs. 17, 18, 19(1), and 38 of this Act are for the capitalization of funds and do not lapse.

(b) The appropriations made in secs. 20, 22, 25(a), 26(c), 26(e), 26(g), 27, 29, 30(c), 31(b), 31(c), 32(c), 32(d), 37(d), and 37(e) of this Act are for capital projects and lapse under AS 37.25.020.

(c) A grant awarded in this Act to a named recipient under AS 37.05.316 is for a capital project, unless specifically identified in this Act as an operating grant, and lapses under AS 37.25.020 unless otherwise stated or designated for a fiscal year.

(d) The appropriation made in sec. 21 of this Act lapses June 30, 2015.

* Sec. 42. Sections 22 - 37 and 38(a) of this Act take effect June 30, 2011.

* Sec. 43. Except as provided in sec. 42 of this Act, this Act takes effect July 1, 2011.

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MEMORANDUM April 21, 2011

SUBJECT: Contingency Language in Capital Budget

TO: Representative Les Gara

FROM: Doug Gardner
Director

You have asked for a brief analysis of the constitutionality of the contingency language found in sec. 39[1] of the draft CSSB 46(FIN), especially focusing on the concept that substantive law may not be in an appropriations bill.

1. The Governor's Veto Power Relating to Sec. 39(a). The contingency language found in sec. 39(a) of the capital budget bill does not prohibit the governor from vetoing items in sec. 7 of the bill. Instead, it provides that a veto by the governor of an item in sec. 7 of the bill will have the secondary result of deleting all projects found in sec. 7 from the bill. The governor is still free to exercise his veto regarding sec. 7.

Whether a court would uphold the validity of the contingency language found in sec. 39(a) is a question I cannot answer, as this is a scenario that has not arisen in the past. The contingency found in sec. 39(a) could be held unconstitutional because of a separation of powers issue related to the governor's veto powers, but I am not completely convinced that a court would rule the contingency language invalid. In fact, the veto power of the governor can be characterized as a legislative power (appropriating the state's money) that was conferred upon the governor in the state constitution. Likewise, the legislature, in art. III, secs. 25 and 26 of the state constitution, was bestowed an executive power in having the power to confirm certain appointees by the governor. Regarding the ability to confirm appointees, the Alaska Supreme Court held in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), that the legislature's power to confirm should be

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[1] In full, sec. 39 reads:

> **Sec. 39.** CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular Session and enactment into law of every appropriation made in sec. 7 of this Act.
>
> (b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012 year-to-date average price of Alaska North Slope crude oil exceeding $150 a barrel on October 1, 2011.

limited to the specific instances listed in the constitution and not broadly construed because the legislature was exercising what was essentially an executive power. Bradner, 553 P.2d at 7 - 8. One could look at the Bradner case in light of the governor's line item veto power and argue that the line item veto power -- a legislative function in that it relates to appropriations -- should not be broadly construed, but viewed in more limited terms. Thus, the contingency of sec. 39(a) could be viewed as the legislature taking full advantage of its power of appropriation in choosing a statewide approach to funding energy projects, and that the governor still retains his strictly construed power to veto all of sec. 7 of the bill.

Of course, a court may hold that the contingency language found sec. 39(a) of the bill does violate the governor's power of line item veto, but I do not believe that it is an open-and-shut case. There are certainly arguments to be made on both sides. In essence, a court's decision may come down to whether or not the projects in sec. 7 are sufficiently tied to each other that the contingency is reasonable.

2. The Confinement Clause Relating to Sec. 39(a). As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the intent language found in sec. 7 of the bill and the contingency in sec. 39(a), in Knowles v. Legislative Council, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

> [T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Based on the statutory energy policy found in AS 44.99.115, the legislature intends that its interpretation of the policy be followed in funding projects in all areas of the state. The intent language does not administer a program, as each project may still be carried out in accordance with existing law. For example, the Alaska Energy Authority is not being given any further guidelines on how to use the potential $5,000,000 for "bulk fuel upgrades." I would certainly say that this intent language does not amend existing law or extend beyond the life of the appropriation. Finally, the intent language is likely germane, as it is tying all of the projects in sec. 7 of the bill to a state energy policy that it is attempting to follow.

3. Section 39(b). As for the contingency language found in sec. 39(b) of the bill, I feel strongly that this is a valid contingency. As recently as 2006, the legislature has passed a

capital budget bill containing contingency language that tied certain appropriations to the price of petroleum. Found at sec. 64(c), ch. 82, SLA 2006, the contingency stated:

> The appropriation made by sec. 20(j) of this Act is contingent on an increase in petroleum tax revenue, as estimated by the Department of Revenue, due to the state for the months of April, May, and June 2006 in an amount equal to or greater than the appropriation made by sec. 20(j) of this Act.

While this contingency did not name an exact price, it is quite similar to the contingency found in sec. 39(b). The legislature has simply set aside a certain list of projects that it does not believe should be funded unless the state generates a certain amount of revenue in the first three months of fiscal year 2012. If the price of Alaska North Slope crude oil reaches a certain level, then the legislature believes that money may be spent on the projects listed in sec. 4. This appears to me to be a fiscal policy decision -- that money should only be spent on certain projects if the state receives sufficient funds based on the price of oil.

If I may be of further assistance, please advise.

DDG:plm
11-266.plm

James Sullivan

From: Carolyn Kuckertz
Sent: Thursday, April 28, 2011 1:40 PM
To: pressreleasedistribution
Subject: Transcript and Links from Senator Paskvan's Speech this morning on the Senate Floor

Good Afternoon Everyone!

Following is a transcript of Senator Paskvan's speech this morning on the constitutionality of the contingency language included right now in the proposed Capital Budget-

If you would rather listen or watch: http://gavelalaska.org/media/?media_id=SFLS110428A (go to about 9:20 in)

Here are the links to the Alaska Supreme Court Opinions that Senator Paskvan references during his speech:

2001 Opinion: http://www.touchngo.com/sp/html/sp-5395.htm

2004 Opinion: http://www.touchngo.com/sp/html/sp-5768.htm

Thank you, Mr. President. In the last several days, there's been discussion about the building and I think probably about the state of Alaska as to the constitutionality of the Senate's efforts to advance an energy package. As someone who has worked in the legal system myself for about 30 years and have a tremendous respect for Alaska's constitution, I would hope to be able to offer a few comments about that.

Kind of as an introduction to that- We have three separate branches of government. The Legislative Branch- its function is to adopt policy and appropriate money to advance its policies. The Executive function is to implement that legislative policy and enforce those policies. The Judicial Branch, in this context, may be called upon to determine the constitutional boundaries between the Executive Branch and the Legislative Branch. This is where the independence of the judiciary is absolutely critical when it comes to its constitutional obligation of clarifying the application of the Alaska constitution.

As part of that, the Senate is advancing an energy policy and this plan is a statewide energy policy that brings, I believe, all Alaskans forward. The thought is that the public's highest priority right now is the cost of energy in Alaska and how, across this entire state, the Legislature can address the high of cost of energy. The Senate is advancing in its statewide energy plan, as an item, the generation and distribution of energy all across this state.

Then the question arises and has been discussed, how do we protect all Alaskans? We do not want to leave any region out. We want to protect Alaskans by saying we are all in this together. We want to work towards a solution of the problem of the high cost of energy with the recognition that all Alaskans across the state should be part of that solution. To advance this worthy goal of keeping Alaskans together, there is language which manifests the intent, at least on the Senate side, of keeping all Alaskans together.

Are there constitutional issues which are raised? Unquestionably the answer to that is: yes, there are constitutional issues which are raised. And I say in that regard that Alaska is a very young state. There are not cases. In other words, there's a not case law in Alaska that applies to every circumstance that may apply when there may be tensions between the Executive Branch and the Legislative Branch.

We do not know exactly who shall prevail in a circumstance such as this. But I emphatically state, the question is not about who is right or who is wrong, who should win or who should be the loser, the question is, What is the constitutional answer to these questions? That is what I believe is the goal of what we need to address. What is constitutional answer? Again, the three branches of government are set up exactly for these types of circumstances.

There are standards that can be found in some of our case law that addresses some of the points that the court system may be called upon to analyze when they look at the circumstance of the language that is currently in an appropriation bill. Mr. President, if I could read from select portions of this? (Senate President Stevens: "Without objection, Please Proceed.")

Again, Mr. President, there's a 2001 case that's advanced by, or an opinion of, the Alaska Supreme Court. It sets apart a standard which the courts would look to in determining whether the language within this appropriation bill should prevail or not prevail in the end. And it indicates quote, "The qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent." I do not think we violate that test Mr. President. Next, it says "It must not administer the program of expenditures." Mr. President, the language in this appropriations bill does not administer any of the monies in this program. Next is says, "It must not enact law or amend existing law." This language does neither of those. In other words, it complies with at third component of the test. And, it must not enact or amend existing law. This language does not do that whatsoever. Finally in this five part test, "It must not extend beyond the life of the appropriation and the language must be germane. " That is appropriate to an appropriations bill. I submit that it does satisfy all of this test that is set forth in the 2001 opinion.

So looking to that test, the question is, is what standard will the Alaska Supreme Court apply when looking at the tension between the Executive and the Legislative Branch. In addressing these particular types of cases, the Alaska Supreme Court says, and I again I quote, "We assume that an act of the Legislature is constitutional. The burden of showing unconstitutionality is on the party challenging the enactment. Doubtful cases should be resolved in favor of constitutionality."

The Supreme Court several years after that 2001 opinion issued another opinion and it included in there a very interesting sentence that I would like to read to the body today. In addressing again the tensions between the Executive Branch and the Legislative Branch, the Supreme Court in 2004 looked at the language used by the drafters of the Constitution, looked to the minutes of the discussions as to what was being discussed at that time. This is what in 2004 the Alaska Supreme Court said: "The minutes indicate that the delegates never intended the governor's article 2 appropriations veto power to apply to anything other than monetary appropriations." End quote.

Mr. President, in conclusion, I think that there is a solid foundation for the Senate to advance this language as part of a statewide energy plan. It is part of a cohesive package to not only bring all Alaskans together, but to

keep all Alaskans together. The question is, is the extent of the constitutionality of the governor's veto power? It is not well established. In other words, the governor does have risk of constitutional significance and I believe that it's likely that the veto power will be strictly construed in these circumstances. Second, the Senate as a separate branch of government is legitimately asserting its policy and appropriations power. But it also has risk. Again, because we do not have case law to say precisely what the parameters of the Legislative power of policy making and appropriations is in the precise circumstance. So both the Executive Branch and the Legislative Branch do have some risk in this circumstance. But again we are under the standard that in doubtful cases, the Supreme Court will look at that and say 'even under doubtful cases the presumption shall be constitutionality as to the Legislative activity.'

I think the public should understand that there is no risk to Alaska's constitution itself. There is no changing of the constitution that is sought here whatsoever. I do stand in awe to think of the drafters of the Constitution, now more than 50 years ago, that set up the three branches of government at that time to address exactly the circumstances such as this. I think we have a wonderful system that we work within. As a legislator, one of the 60 that are elected from around this state, I believe it is my constitutional job to advance the policy making and appropriation power that this separate branch of government has and I thank the body for listening.

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Carolyn Kuckertz

From: Carolyn Kuckertz
Sent: Wednesday, April 27, 2011 6:25 PM
To: pressreleasedistribution
Subject: Transcript of Senator Stevens Statement 4-27-2011

Here is a transcript of the statement Senator Stevens made earlier today about where the Senate stands in talks with the House and Governor –
If you would rather watch a video clip: http://www.youtube.com/user/AlaskaSenateMajority#p/u/0/6PBQsAbXLGw
If you would rather listen in: http://aksenate.org/stevens/042711_stevens_statement.wav

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As you know, this has been a contentious time for all of us. I wanted to let you know that myself and Senator Meyer met with the House Majority Caucus earlier today. I just wanted to clear the air. That's an unusual thing for two Senators to go into a room full of angry representatives, but we came out alive. So, that was an interesting experience. We told them where we are and what our concerns are.
As you know, the big problem is the contingency language. That's extremely important to the Senate and,as you know, of less importance to the House. What I think the principle that we have to stand behind and are standing behind, is protecting Legislative priorities, both the House and the Senate, of trying to not leave the Legislature in a weaker position than it was when we arrived and to recognize the importance of the Legislature in the process of Alaskan government and its appropriating power.
One of the major issues that lends to where we are is the governor's oil tax bill, House Bill 110 and the governor's comments. As you know, the governor at one point implied there might be repercussions for those who opposed his oil tax bill. As you know, the Senate has had serious concerns about it and continues to have serious concerns about it. Not really certain that that's the best way for the state to go. We want to have more information. We want to look into it more. We want to get more facts and figures on it before we are ready to agree to a $2 billion reduction in state funding from oil taxes. So that was sort of an issue that poisoned things to start with and hasn't really let up much since.
I did want to let you know that this has been a negotiating process with the House and we have made numerous concessions along the way. In any negotiation, what you expect to do is you make a proposal and if the other side doesn't like it, they make a counter proposal. That has not occurred at all in this process. Every time we have made a concession, the House has said no and with no further suggestions on their part. So, we've continued to make concessions in order to protect that issue of that contingency language. I want to go through those concessions with you so that you understand how we've gotten to where we are. Senator Stedman or Senator Hoffman, leap in here if you have any further issues on any of the concessions I'll mention very briefly, but they may want to expand on a little bit.
The first concession had to do with major school maintenance. We reduced the major school maintenance by $200 million. We wanted to do all of the list that was out there, all of the schools that needed major maintenance and repairs around the state. At the request of the House, we reduced that by $200 million. The second thing we did was reduce debt. We did agree to that. That was a matter of days passing between each and every one of these. The third one was the $150 oil trigger. We took that off and that had to do with $100 million of the governor's capital projects. When we took that off, it freed up that $100 million. The fourth thing that we offered, and again no response, no counteroffer, was to water down the language of the energy proposals. That includes AEA, the Alaska Energy Authority and an agreement to vet all of those energy projects through the AEA and we agreed to go from a 100-percent match down to a 50-percent match. The fifth thing that we did, that just occurred recently here, is an offer to take several projects out of the list and put them in an appropriations bill on their own, so they wouldn't be on that list. The whole thing could be vetoed by the governor. That's the area of weatherization, rebate and alternative energy. We made that proposal- All three come off and be put into one appropriations bill on their own. About $100 million, I believe.
To sort of conclude my comments, I am meeting this evening with the governor at 5:30. I've been calling today wanting to meet with him and talk about the issue and he's agreed to meet with me at 5:30. At that time, my intention is to ask

the governor to come meet with the Senate Majority caucus sometime tomorrow at his convenience. I think it is important for the caucus to hear from the governor, that we've read his press release, from the governor his intentions as to the potential vetoes and he has said in his press release that there will not be repercussions and no one will be held, nobody's budget will be slashed because they happen to be opposed to the oil tax bill. I think folks need to hear that from the governor himself. So, I'm going to ask him, and it's not firm, I'm not sure he's going to accept, I think he should- to come down and meet with the caucus just to confirm to folks that that is in fact his position. Simple request on my part and I don't see any reason the governor would not be willing to do that. So, that's where we are.

Mark Gnadt

From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:44 PM
To: Mark Gnadt
Subject: FW: Transcript of Senator French Speech this morning on the Senate Floor 4-26-2011

Gretchen Staft
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From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 2:11 PM
To: pressreleasedistribution; keymedia
Subject: Transcript of Senator French Speech this morning on the Senate Floor 4-26-2011

Good Afternoon Everyone!

Here is a transcript of the speech Senator French made this morning on the Senate Floor about contingency language:

To listen instead: http://aksenate.org/french/042611_french.wav.

Thank you Mr. President. A lot of us are here in a Special Session making contingency plans. Some folks in the Senate would like to be off to Norway. Others would like to be bear hunting. We have family obligations. They've all been put on hold because we are here trying to sort out a difficult matter of important public policy. This is the ninth day of the special session.

At the heart of it, really what's keeping us here is some contingency language inside the Capital Budget that's causing many people concern. I haven't seen a lot of public debate about it. There's been different remarks made in different press conferences and so forth. But I thought I would go ahead and start one here and see what responses it might provoke and of what thoughts other people may have. At the heart of this matter in my belief is the law and the politics of contingencies. Now the law in this area is about the relevant power between two co-equal branches of government and how we share power between the governor's branch and the legislative branch. It's subtle. I'll discuss that a little more at length in a few minutes.

The politics, on the other hands, are not so subtle. The politics started with the governor's proposed oil tax bill and his threat to veto capital projects if the reduction in oil taxes did not pass. Now let's put aside the inverted logic of this assertion of his power. Once that idea was set loose, what happened? Our Finance Co-

Chair from Sitka began to think about how to react to it. First, he had to ask himself which projects in the Capital Budget are the most important. Two-- and having decided they were energy projects in conjunction with legislation we'd passed last year and in conjunction with our own caucasus' emphasis on certain subjects, fixing the energy problem being the number one problem. Two, how can fund those energy projects around the state fairly if the governor is going to be swinging his veto axe?

The answer is in section seven of the Capital Budget. There are energy projects in that section. $400 million worth of energy projects. Basic infrastructure like power line upgrades. There's $100 million worth of power line upgrades in that Capital Budget. Stuff that AEA has been asking for years. Meat and potato type projects. This is not fancy, it's just what you do to build a strong state. $100 million dollars worth of power line upgrades. There's energy projects for Soldotna, for Kotzebue, for Snettisham, for Lime Village, for Metlakatla, for Homer and for Fairbanks. In Fairbanks, there's $3 million for wood stove conversions there. They've got a serious air problem. This helps fund a fix to that. There's money for the Susitna Hydro Project in there-for folks who are listening at home. There's home weatherization funding. There's energy rebate funding. This is an excellent package designed to move the state forward.

You know there's been some talk that these projects have not been vetted. Let me give you just one example of a project that has been. The Whitman Lake project in Ketchikan has a final project from FERC. I think that is about as vetted as you can get. So the co-chair from Sitka thinks, how do I protect these necessary projects? How do I protect them? And he thought up an excellent response to the problem. You weld all those projects into one, into one statewide energy package that does something for every single region in this state. E Pluribus Unum, Mr. President. Out of many, one. Out of many, one. That's what he did. The nation's motto. It's interesting, isn't it?

And he used contingency language in the Capital Budget that said if one is vetoed, they're all vetoed. It's the first time in the state's history this has been done exactly this way. First time ever in fifty years. The senator from Sitka, I think he thought up a better mousetrap. An interesting twist on an old device. I say a better mousetrap because it's a new and improved twist on something that we've tried to do on occasion in the past. We've tried in the past to use contingencies to constrain executive power.

The most well known instance comes from 1997. That year the Legislature, indeed the Senate Finance Committee, wrote a Capital Budget that had several very interesting contingencies. Then Senator Sean Parnell was a member of that Finance Committee. He voted for the bill. Indeed two years later when he was Co-Chair of the Senate Finance Committee, he said "I would never waive the Legislature's rights to include conditional language in an appropriations bill." He was sitting in the exact same seat that the Senator from Sitka is sitting in today when he said that. Remarkable, isn't it? But I do digress a bit.

The 1997 appropriations wound up in court. They wound up in a case and the case is great reading if you are a lawyer. It's 17 pages long and I have a copy of it here. I've read it three times. It's very subtle. It is subtle. It revolves around two constitutional provisions. They're both in Article 2, Section 13 and Section 15. And I brought my constitution with me today. Section 13 is simple: Every bill should be confined to one subject. We know that's called the Confinement Clause unless it is an appropriations bill or one codifying, revising, or rearranging existing laws. So we have an appropriations bill before us. That's section 13. Section 15

discusses vetoes. It says the governor may veto bills passed by the Legislature. He may, by veto, strike or reduce items in appropriation bills. Strike or reduce items. That's what he does in appropriation bills.

In this case, in the '97 case, there was a bunch of language in there and he tried to veto the language and it turned out that language is not an item. Language is not an item. You cannot veto language in an appropriations bill. It took Justice Eastaugh four pages to define what an item is. It's a subtle decision and it takes a while to get through it. But you can't veto language in the appropriations bill. That's as clear as clear can be.

So what we do now is-- The Department of Law has looked at this I'm sure. I'm sure they've looked at this case. I'm sure they've looked at it carefully. I'm sure they've told the governor he can't veto this language. I'm sure the Department of Law is concerned very deeply about what we're doing here. I'm thinking they know we are on to something.

Now, it's interesting that in these contests with the governor, the kind of contest we are engaged in now, we start out with the presumption of constitutionality. The things we do here on this Floor, the bills we pass are all presumed to be constitutional. It's presumed that we think hard, that we work hard and the acts we do are right and true to the constitution. The courts, when they review what we do in this body, will try to uphold our acts. The governor knows this as well.

Don't get me wrong, there are subtleties in the case from '97. It's titled Leg. Council versus Knowles. Both sides, as they read this case, will seize on little languages and sentences and try to support their own case. And though the budget passed in '97, this '97 case, the case was not decided for four years. It tells you that these things can drag out. And we shouldn't have to go there. We, this now, knowing this, knowing that these can be tangled issues shouldn't go there.

I've always been told that if you invent a better mousetrap, the world will beat a path to your door. The governor should be beating a path up to his old offices in the Senate Finance Committee. He should be talking to the co-chairs about which energy projects he supports and which he doesn't. Because it all comes back to those energy projects. It all comes back to building a statewide solution to the crisis the state is facing with respect to energy. He should be talking to them. We should be talking to the other body and the governor as well. I should parenthetically sort of ask, I'm curious about why some legislators are opposing this approach. Legislators should be looking to strengthen our body and not give up power to the governor. The only ones who should be opposing this are ones who might someday want to be governor. I can't imagine who that would be.

The way out of this, in my view, is through logic and through reason. I think that we, this body, the other body and the governor are all up to the task. Thank you, Mr. President.

Carolyn Kuckertz

Press Secretary

Senate Bipartisan Working Group

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Mark Gnadt

From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:44 PM
To: Mark Gnadt
Subject: FW: Senator French & Senator Stedman Speeches on the Senate Floor This Morning

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From: Mark Gnadt
Sent: Tuesday, April 26, 2011 1:16 PM
To: Bob Miller; Rep. Berta Gardner; Rep. Beth Kerttula; Rep. Bob Miller; Rep. Chris Tuck; Rep. David Guttenberg; Rep. Les Gara; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Mike Doogan; Rep. Pete Petersen; Rep. Scott Kawasaki; Rep. Sharon Cissna
Cc: Aurah Landau; Aurora Hauke; Brodie Anderson; Charles Boyle; David Bremer; David Dunsmore; Eugene White; Frank Ameduri; Gretchen Staft; Hannah McCarty; Jacob Wilson; James Waldo; Jay Hardenbrook; Jos Govaars; Ken Alper; Marie Rozak; Mark Gnadt; Meredith Cameron; Michelle Scannell; Mike Coumbe; Miles Green; Mindy ONeall; Noah Hanson; Peter Stein; Randi Spray; Rose Foley; Ted Madsen; Troy Bouffard
Subject: FW: Senator French & Senator Stedman Speeches on the Senate Floor This Morning

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From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 1:05 PM
To: pressreleasedistribution
Subject: Senator French & Senator Stedman Speeches on the Senate Floor This Morning

Good Afternoon Everyone!

Here is the audio clip of Senator French's speech on the Senate Floor this morning regarding the contingency language included in the proposed Capital Budget. A transcript of this speech will be available shortly. http://aksenate.org/french/042611_french.wav.

Here's a link to the brief of the Alaska Supreme Court case referenced in Senator French's speech – Knowles vs. Legislative Council in 1999.
http://weblinks.westlaw.com/result/default.aspx?cfid=1&cnt=DOC&db=AK%2DCS%2DWEB&eq=search&fmqv=c&fn=%5Ftop&method=TNC&n=3&origin=Search&query=TI%28%28%22KNOWLES%22%29+%26+%28%22COUNCIL%22%29%29&rlt=CLID%5FQRYRLT95824555914264&rltdb=CLID%5FDB23449555914264&rlti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=AKCS1%2E0&service=Search&sp=AKCS%2D1000&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA6449555914264&sv=Split&tempinfo=case&vr=2%2E0

Also, here is an audio clip of the speech Senator Stedman made shortly following Senator French's speech. In it, he clarifies several of the disputed facts surrounding the Senate Finance Committee's Capital Budget. Once again, a transcript of this speech will be sent later this afternoon. http://aksenate.org/stedman/042611_stedman.wav

If you have any questions, please let me know!

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Mark Gnadt

From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:43 PM
To: Mark Gnadt
Subject: FW: Transcript of Attorney General Burns Press Conference on 4/26/2011:

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From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 6:18 PM
To: keymedia
Subject: Transcript of Attorney General Burns Press Conference on 4/26/2011:

Good Evening Everyone!

Here is a transcript of the press conference held by Attorney General John Burns this afternoon:

If you would rather watch or listen: http://gavelalaska.org/media/?media_id=PRAV110426A

First of all, I would like to welcome all of you. I apologize that we are a little bit late, but I wanted to do is also provide you a copy of the memorandum that has been issued by my office so that you have a full copy of it. I am confident it will answer any of the questions you have relative to this.

The principles of our democratic form of government are grounded in the constitution and it is the constitution that governs resolution of the issue on which the capital budget seems to have floundered.- the injection of contingency and non-severability language that is unabashedly aimed at constraining the constitutional power of the Executive Branch. My responsibility as Attorney General, and in fact the responsibility of all public officials whether they be elected or appointed, is to uphold the constitution. Politics must always yield to the constitutional principles that govern the administration of our state.

The irony of what the Senate Finance Committee is proposing by injecting contingency and non-severability language into the appropriation bill is that far from protecting the energy projects that are listed in Section 4 of the Capital Appropriations Bill, the contingency and non-severability language actually jeopardizes those projects and exposes them to potential litigation from third parties.

Even if the governor were to choose not to line item veto any appropriation, the reality is that each appropriation would still be of dubious of legal validity if the non-severability provision were upheld. Any litigant opposed to any single energy project could invalidate every appropriation by successfully challenging the Legislature's unconstitutional attempts through section 36 to usurp the governor's constitutional veto power. The contingency language in Section 36 of Senate Bill 46 and the non-severability provisions of Section 37 each violate the Alaska Constitution by improperly impairing the governor's line item veto as found in Article 3, Section 15. Each of these provisions is invalid and unenforceable.

Section 36, which in layman's terms is considered a poison pill provision, would make each energy project appropriation contingent upon passage and enactment of every other appropriation without reduction in the amount of the appropriation. Section 37, on the other hand, provides that if the contingency language in Section 36 is invalid, then in essence all of the projects must fail. It is an all or nothing package.

The simple reality is that the contingency and non-severability language violates the constitution because it violates the governor's line item veto power by prohibiting the governor from striking or reducing any individual appropriation made in section 4 of the Capital Appropriations bill.

Alaska's Constitutional Convention Delegates intended to create a strong executive branch with a strong control on the purse strings of the state. That's a quote. Article 3, Section 15 of the Alaska Constitution gives the governor strong control by granting the governor the power by veto to strike or reduce items in appropriation bills, a power that is commonly known as the line item veto.

The Alaska Constitution also clearly establishes the parameters by which the Appropriations process must be followed. First, the governor is required to submit a budget to the Legislature for consideration. The Legislature, in turn, has the power to pass appropriation bills. The governor, once that has been done, the governor has line item veto authority of appropriations. Finally, the legislature has the authority to override a governor's veto.

Section 36 and Section 37 would violate this process by negating the governor's constitutional power to strike or reduce any individual energy project appropriation. Section 36 violates the governor's constitutional power by linking, I call it the linkage provision, by linking the appropriations of each energy project item to the passage or enactment of every other appropriation made in Section 4. This usurps the governor's line item veto power, thus upsetting the checks and balances on which our constitution is premised.

Think about it logically- If the Legislature could link one appropriation to another or 50, 60 or 70 different appropriations, the Legislature could effectively eliminate the governor's power to reduce individual line items. The governor would have two choices: either veto them all or accept each and every appropriation. Allowing the linkage of appropriations with such a contingency would too easily permit the Legislature to circumvent the governor's constitutional veto authority.

Section 37, in turn, exacerbates this constitutional violation by doubling the unconstitutional linkage to appropriations for energy projects. If it a contingency in Section 36 is held invalid, the legislature attempts to achieve the same unconstitutional result by making the contingency not severable from the energy project appropriation. If section 37 were found valid, the Legislature would effectively be usurping the governor's line item veto power by painting the all or nothing approach. A non-severability clause which would enable the Legislature to overstep its constitutional authority is itself unconstitutional and severable from the legislation. Upholding the validity of Section 37 would do nothing more than promote the Legislature's desire to usurp the governor's veto power and unconstitutionally logroll the appropriations from multiple energy projects.

From a practical perspective, equally significant in what is being overlooked by the political posturing that is taking place, is the risk that public interest litigation could place a cloud over each appropriation, which in turn would impair the development of important energy projects. Sections 36 and 37 make the funding intended for energy projects uncertain until a court rules on the validity of both sections. Until that time, no project proponent could rely upon on actually receiving the money that is appropriated in Section 4. It would be both difficult and imprudent for project proponents to contract, to develop those energy projects when state funding is uncertain. Contract damages could arise if a project had to be stopped because an expected appropriation was held invalid. It was also be difficult or impossible for a project to obtain financing. Any lender or bond financing would require that all project funding be secured before additional financing would be made available on reasonable financial terms.

In sum, the invasion of the Executive Power functions makes the contingency language in Section 36 and the non-severability clause in Section 37 unconstitutional and invalid under the Alaska Constitution.

I have taken the liberty of providing a copy of the memo to those of you who are here and it will also be set forward under the link. It'll be in the link to our website at the Department of Law.

I'm happy to answer a few questions. I'm confident any questions you will have be answered in the memorandum. But, Becky?

Question: Where do you go from here? The governor yesterday said that if you get the bill with this language, you would have to test the bounds of it which suggests court action of some sort. Where do you take this? Do you let this play out in a court at some point?

Attorney General Burns: It is appropriate that it plays out in the Legislature until such time as the Legislature has finalized the Capital bill, it rightfully belongs with the Legislature to deal with the issues.

Question: Attorney General, let me see if I have your argument in summary that any language in that bill that would serve to limit the governor's line item veto power would be unconstitutional. It doesn't matter the exact sentencing, anything that does that?

Attorney General Burns: Yes.

Question: A senator from Anchorage this morning raised a 10-year-old court opinion. Are you aware of the opinion he raised on the Senate Floor and do you worry at all that your legal advice will conflict with that court decision from 2001.

Attorney General Burns: I believe you are referring to the Knowles, that case. I think the opinion of the Department of Law is very much consistent with the Knowles opinion. And again, I appreciate the press conference on availability and I will again, as I said, it's before you, the memorandum. It's also available by link. This is the Senate's language. At this juncture, it resides with the Senate. It's within the Senate's power to make those modifications before it's forwarded to the House. My intent in holding this press conference is just to unequivocally state the opinion of the Department of Law as it relates to that issue. Because again, I want to emphasize that you have to look at the practical implications of this. The practical implications are that in reality, many of these projects will, notwithstanding the fact that they may have appropriations ,until these issues are resolved, either judicially, which I would hope would never get to that point, or legislatively through the Senate fixing the language, no project could rightfully go forward without being under a cloud.

Question: If you are talking about both legal questions and practical concerns and considerations- when you mention third party litigants and the prospect of third party litigants, do you have someone that you, that the state worries might go after a legal challenge? Who might sue over something like this?

Attorney General Burns: Anybody who feels that the process has been corrupted, that's there been a usurpation of the constitutional powers. Anyone. There are a myriad of potentials. It could be someone opposed to a project, somebody who just feels that, as I clearly do, that the constitution needs to be upheld. It's anyone who's a potential public interest litigant.

Question: Do you feel that the language in Section 37, the non-severability language, could be struck by line-item veto or does that not meet the definition of an item?

Attorney General Burns: It does not meet the definition of an item.

Question: So, it's more that you would potentially raise a court challenge to the language, not that you would recommend vetoing it?

Attorney General Burns: It's the effect of it. You know, the Legislature has the power to legislate, to state the obvious. So, the governor does not have the power to line item language. That's vested with the Legislature. It's the consequence of that language as it relates to the usurpation of the Executive branch's ability to act appropriately within its constitutional rights.

Question: What do you say to some of those of leaders in the Senate who say 'Our role is the appropriator and we just want to make clear that this money and these projects go forward.' As one Senator said yesterday, if the governor wants to veto, he just vetoes a larger chunk. You talked about the governor's authorities, but what about legislature's authorities. They think that they are on solid ground.

Attorney General Burns: The Legislature, it's their prerogative to lay whatever intent language they feel appropriate. But that intent language cannot infringe on the constitutional power that rests in the Executive Branch on the line item veto. Because, remember, in the end the Legislature retains the power to override a veto. That's the checks and balances. You don't allow one branch to usurp the rights of another just because they feel it may be convenient.

Question: Attorney General- You're saying in effect the governor has to veto that language if the Senate's Section 36 and 37 are in the bill. That your advice to him would be to veto those things to uphold the constitutional...

Attorney General Burns: At this juncture I've given no advice as to how to approach it and it would be speculative depending what the ultimate result of the language is. So I am going to reserve comment on that. But certainly he has multiple options. Thank you.

Carolyn Kuckertz

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STATE of Alaska and Department of Revenue, Appellants,

v.

A.L.I.V.E. VOLUNTARY, Appellee.

No. 3670.

Supreme Court of Alaska.

Feb. 19, 1980.

Unincorporated association, which was political action committee for unions, brought suit based on allegation that Department of Revenue's denial of permit allowing association to operate lotteries was wrongful for certain reasons including fact that such denial was based on continuing enforcement of a regulation despite its nullification by legislature. The Superior Court, Third Judicial District, Peter J. Kalamarides, J., granted association partial summary judgment, and State and Department of Revenue appealed. The Supreme Court, Matthews, J., held that statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation.

Reversed and remanded with directions.

Boochever, C. J., dissented and filed opinion in which Connor, J., joined.

1. Statutes ⇐107(1)

Constitutional requirements that every bill be confined to one subject and that there be a descriptive title are intended to prevent inclusion of incongruous and unrelated matters in same bill and to guard against inadvertence, stealth and fraud in legislation. Const. art. 2, § 13.

2. Statutes ⇐15, 19

Purpose of state constitutional provision requiring three readings of a bill on three separate days, requiring that vote of each legislator on final passage of a bill be recorded and requiring that no bill pass without an affirmative vote of the majority of the membership of each house is to ensure deliberation prior to passage, to ensure that requisite majority of each house affirmatively votes to enact a bill into law and to provide a public record of the vote cast by each legislator. Const. art. 2, § 14.

3. Statutes ⇐26

Purpose of state constitutional provisions to effect that no bill shall become law unless governor has opportunity to veto it is to preserve integrity of executive branch of government, and thus maintain equilibrium of governmental powers, and to act as a check on hasty and ill-considered legislation. Const. art. 2, §§ 15, 17.

4. Statutes ⇐255

Purpose of state constitutional provision that laws are not to become effective, unless a two-thirds vote of membership of each house provides otherwise, until 90 days after they are enacted is to provide fair opportunity to those people affected by the legislation to learn of it. Const. art. 2, § 18.

5. Statutes ⇐22

Statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation. Const. art. 2, §§ 1 et seq., 5, 13–18; art. 3, § 23; art. 10, § 12; AS 44.62.320(a).

6. Statutes ⇐22

When legislature wishes to act in an advisory capacity it may act by resolution, but if it wishes to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedure set forth in State Constitution. Const. art. 2, § 1 et seq.

7. Statutes ⇐22

Legislature has no implied general power to veto agency regulations by informal legislative actions. Const. art. 3, § 23; art. 10, § 12.

8. Administrative Law and Procedure ⇐385

Power granted by state constitutional provisions to effect that, unless they are disapproved by legislature within 60 days, changes in the law by executive order shall become effective at a date thereafter to be designated by governor and that recommendations made by a state local boundary commission become effective 45 days after presentation to the legislature unless vetoed is not rule-making power, but, rather, power to change statutes, and, thus, expression of such power in Constitution does not carry any implication that general administrative rule making is meant to be forbidden. Const. art. 3, § 23; art. 10, § 12.

9. Constitutional Law ⇐60

Though legislature can delegate power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by Constitution; fact that legislature can delegate legislative powers to others, who are not bound by constitutional provisions defining the mechanics of legislation, does not mean that legislature can delegate the same power to itself and, in the process, escape from such constitutional constraints under which it must operate. Const. art. 2, § 1 et seq.

10. Constitutional Law ⇐58

Though power to void agency regulations can be exercised by either legislature or agency, if legislature exercises such power it must do so while acting as a legislature; it may not grant itself the power to act as an agency. Const. art. 2, §§ 1 et seq., 5; art. 3, § 26.

Joseph K. Donohue, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellants.

Joe P. Josephson, Josephson & Trickey, Inc., Anchorage, for appellee.

Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for amici curiae Alaska Legislative Council and Administrative Regulation Review Committee.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

AS 44.62.320(a) provides:

> The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

This statute encompasses a variant of what has come to be called the legislative veto.[1] The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

I

Chapter 15 of Title 5 of the Alaska Statutes authorizes games of chance and skill to be operated by permit holders. Only certain kinds of games, ("bingo, raffles and lotteries, ice classics, dog mushers' contests, fish derbies and contests of skill") are allowed,[2] only nonprofit organizations may be issued a permit,[3] and all revenues must be devoted to "the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses."[4] The Commissioner of Revenue has been delegated the authority to adopt rules and regulations "necessary to

1. For excellent histories of the legislative veto, *see* Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?* 41 Cal.L.Rev. 565 (1953); and Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983 (1975).

2. AS 05.15.100.

3. AS 05.15.120, .210(15).

4. AS 05.15.150.

carry out this chapter or protect the best interest of the public." [5]

From 1960 until 1976 one of the Commissioner's regulations prohibited lottery operators from giving prizes exceeding $15,000 in personal property or $30,000 in real property annually.[6] In November of 1976 the regulation was amended by increasing the annual personal property limit to $30,000 and the annual real property limit to $50,000 and by stating that personal property included cash and negotiable instruments.[7]

A.L.I.V.E. Voluntary is an unincorporated association which acts as the political action committee for the Teamster's Union Local No. 959, and affiliated unions. For three years it has operated fund raising lotteries under a permit issued by the Department of Revenue. It applied for a permit for 1977 and reported that during 1976 it had distributed $80,000 in cash prizes. The Department denied A.L.I.V.E. a permit for 1977 on the ground that its prize distribution in 1976 had exceeded the allowable limit.

A.L.I.V.E. then brought suit against the Department alleging that the denial of the permit was wrongful, claiming that under the first version of the regulation which was in effect for most of 1976 cash prizes were not included within the personal property limitation of $15,000. While the case was pending before the superior court, the legislature, acting under AS 44.62.320(a), annulled, by concurrent resolution, 15 AAC 05.410(4).[8]

As a result of the legislative annulment A.L.I.V.E. added another count to its complaint under which it claimed that the denial of its permit was wrongful because it was based on continuing enforcement of the regulation despite its nullification by the legislature. In response, the state claimed that the legislature could not constitutionally annul an administrative regulation by concurrent resolution and therefore the regulation had not been annulled. Both parties moved for summary judgment on this issue. The court granted partial summary judgment in favor of A.L.I.V.E., holding that the legislative annulment power was constitutional and that the regulation in question was void *ab initio*.[9]

5. AS 05.15.060(11).

6. The regulation was designated 15 AAC 05.410(4). It provided:

> In holding, operating, and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of $15,000.00 in any one calendar year and real property in excess of the sum or value of $30,000.00 in any one calendar year.

7. As amended the regulation reads:

> (4) In holding, operating and conducting raffles or lotteries, a permittee may not raffle prizes of personal property, including cash or a negotiable instrument, the aggregate total of which is in excess of the sum or value of $30,000 in any one calendar year and real property in excess of the sum or value of $50,000 in any one calendar year.

8. Legislative Resolve No. 79, in full, states:

> Annulling a regulation of the Department of Revenue pertaining to the value of prizes awarded in raffles and lotteries.
>
> BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:
>
> WHEREAS under AS 44.62.320 the legislature by concurrent resolution adopted by a vote of both houses may annul a regulation of an agency or department; and
>
> WHEREAS 15 AAC 05.410(4), adopted by the Department of Revenue, restricts the value of prizes which may be awarded in a single year by a qualified organization in a raffle or lottery to $30,000 in personal property and $50,000 in real property; and
>
> WHEREAS the prevention of high-stakes gambling sought by this regulation could be achieved more effectively through less restrictive means; specifically, the value of prizes awarded in individual raffles or lotteries could be limited or the prize limit could be related to the amount required to participate in the raffle or lottery; and
>
> WHEREAS this regulation would frustrate the intent of AS 05.15.150, which specifies permissible uses for net proceeds of raffles and lotteries, by preventing qualified organizations from garnering net proceeds in sufficient amounts for uses specifically mentioned in AS 05.15.150, such as erecting or maintaining public buildings or works, or lessening the burden on government;
>
> BE IT RESOLVED by the Alaska State Legislature that administrative regulation 15 AAC 05.410(4) is annulled.

9. That is, since 1960. Legislative Resolve No. 79 purported to annul not merely the 1976 amendments to the regulation, but the regulation in its entirety. *See* note 8, *supra*.

II

The Alaska Constitution defines with specificity the mechanics of legislation.[10] Each provision has a purpose "designed to engender a responsible legislative process worthy of the public trust." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[1] Article II, section 13 requires that every bill be confined to one subject and that there be a descriptive title. These requirements are designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation." *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966). The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires.[11]

[2] Article II, section 14 requires three readings of a bill, on three separate days in order "to ensure that the legislature knows what it is passing," *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 543 n. 11 (Alaska 1978), and to ensure an opportunity for the expression of public opinion and due deliberation.[12] Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[3, 4] In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it.[13] This power is granted " 'to preserve the integrity of . . [the executive] branch of government . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon corrupt or hasty and ill-considered legislation.' " *Thomas v. Rosen*, 569 P.2d 793, 795 n. 5 (Alaska 1977) (citation omitted). Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until ninety days after they are enacted. Art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by.[14]

[5, 6] The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In *Plumley v. Hale*, 594 P.2d 497, 502 (Alaska 1979) we held that the requirements of Art. II § 14 are mandatory, not permissive.[15]

10. Art. II, § 13 provides:

Form of Bills. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska." Art. II, § 14 provides:

Passage of Bills. The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

11. *See* 3 Proceedings of the Alaska Constitutional Convention 1746–48 (January 11, 1956).

12. *See* 3 Proceedings of the Alaska Constitutional Convention 1751–54 (January 11, 1956).

13. Art. II, §§ 15, 16 and 17.

14. *See* 4 Proceedings of the Alaska Constitutional Convention 3110 (January 25, 1956).

15. We also referred to the Art. II, §§ 14 and 15 safeguards in *North Slope Borough v. Sohio*

The minutes of the proceedings of our constitutional convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

> Now, a majority vote in each house of the legislature is not equivalent to passing a law, because it does not require the signature of the governor, and it does not require conformance with the provisions of this constitution and the provisions of such laws as will be passed under it with respect to the procedure in enacting a law. So, when we say in the second sentence, "The state may by law," we are saying that that law must be passed by the legislature in the manner that is required by the constitution and the statutes, and either signed by the governor or passed over his veto or become law without his signature in the manner provided in the constitution, which we felt was the real intention of the body rather than merely requiring that the legislature by a majority in each house and without adhering to any of those other restrictions and without any reference to the governor could contract debt on behalf of the state.

5 Proceedings of the Alaska Constitutional Convention at 3405 (January 28, 1956). Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity.[16]

Thus in *People ex rel. Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N.E. 180 (1887) a joint resolution directed state officials to make a contract for the publication and distribution of certain municipal laws and provided an appropriation for that purpose. The Illinois Supreme Court held that the joint resolution was invalid because the enactment procedures prescribed by the Illinois Constitution had not been followed. Speaking of them, the court stated:

> That these various provisions, giving the form and mode by which, through the concurrent action of the legislative and executive departments, valid and binding laws are enacted, are, in the highest sense, mandatory, cannot be doubted.

11 N.E. at 185. The court went on to note that

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential. [Citation omitted].

Id.

In *Mullan v. State*, 114 Cal. 578, 46 P. 670 (1896) the California legislature had passed a resolution requiring compensation of a private individual. In rejecting the argument that the resolution had the effect of law, the court stated:

> A mere resolution . . . is not a competent method of expressing the legislative will, where that expression is to

Pet. Corp., 585 P.2d 534, 543 n. 11 (Alaska 1978), stating: "Our constitution imposes certain requirements of formality on legislative action. . . . The legislature enacts laws by the passage of bills meeting the foregoing formalities. It may not enact a law or change one by committee report."

16. *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950) is perhaps an exception. At issue there was a statute allowing certain tax proceeds to be pledged as security for bonds to pay for construction of state turnpikes under the condition "that any such pledge shall first be approved by joint resolution of the Senate and House of Representatives." *Id.* 218 P.2d at 502. The court upheld the statute, finding that such a resolution was not legislative in character, but "relat[ed] solely to the transaction of the business of the two houses." *Id.* 218 P.2d at 510. One proponent of the legislative veto has remarked that the reasoning of this case is "so unsatisfactory as to destroy its value as a precedent." Schwartz, *Legislative Control of Administrative Rules & Regulations*, 30 N.Y.U.L.Rev. 1031, 1043 n. 56 (1955).

have the force of law, and bind others than the members of the house or houses adopting it.

46 P. at 672.

Moran v. La Guardia, 270 N.Y. 450, 1 N.E.2d 961 (1936) involved statutory provisions reducing public employees' salaries during an economic emergency "until the legislature shall find their further operation unnecessary." The legislature first attempted to repeal this law by passing a bill, but it was vetoed by the Governor. The same result was then sought by the passage of a joint resolution. In an alternative holding the court held that the legislature could not constitutionally terminate the operation of the statute by resolution: [17]

> A concurrent resolution of the Legislature is not effective to modify or repeal a statutory enactment . . . To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. A concurrent resolution of the two Houses is not a statute . . . A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking, and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days . . . But more important, its adoption is complete without the concurrent action of the Governor, or, lacking this, passage by a two-thirds vote of each House of the Legislature over his veto. Thus a joint resolution may be adopted by a mere majority of the Legislature without action by the Governor or notice to the public, whereas the enactment of a statute requires action by three distinct bodies and at least three days' notice to the public. As has been well said: "In the exercise of this vast power [of the Legislature] according to the fundamental idea and constitution of parliament the concurrence of the three distinct bodies of which it is composed, each acting by itself and independent of the others, is necessary. No two of them acting together, much less alone, can make a law." [Citations omitted].[18]

1 N.E.2d at 962.

[7, 8] The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists. On the subject of the organization of the executive department the governor may propose changes in the law by executive order. Unless they are disapproved by the legislature within sixty days by "resolution concurred in by a majority of the members in joint session . . . .", such changes shall "become effective at a date thereafter

17. The other alternative holding was that the statute had not authorized termination by resolution.

18. To the same effect are: *Becker v. Detroit Sav. Bank*, 269 Mich. 432, 257 N.W. 853 (1934); *Cleveland Terminal & V.R. Co. v. State ex rel. Attorney General*, 85 Ohio St. 251, 97 N.E. 967, 973 (1912) ("[A] joint resolution is not an act of legislation and . . . it cannot be effective for any purpose for which an exercise of legislative power is necessary . . . ."); *Scudder v. Smith*, 331 Pa. 165, 200 A. 601, 604 (1938) ("The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion [and is therefore invalid]"); *State ex rel. Todd v. Yelle*, 7 Wash.2d 443, 110 P.2d 162, 165 (1941) ("It is . . . clear that a house resolution is not a law. A law must be enacted either by popular initiative or by the legislature, and, when by the legislature, must be by bill . . . ."); *Rowley v. City of Medford*, 132 Or. 405, 285 P. 1111, 1114 (1930) ("The power of the Legislature to effectively legislate by resolution is confined within very narrow limits. It may provide for expenses incident to its sessions, such as employing clerks and stenographers and procuring supplies, and other matters incident to the carrying on of its own business, but it cannot go outside and legislate generally on matters involving property or other rights. As to such matters, its resolutions have only the effect of an expression of opinion and no more."); *Hawks v. Bland*, 156 Okl. 48, 9 P.2d 720, 721 (1932) ("[a] resolution is the mere expression of an opinion and not an enactment of law."); *Newport News Fire Fighters Ass'n, Local 794 v. City of Newport News*, 307 F.Supp. 1113, 1115 (E.D.Va.1969) ("[T]he resolution expresses only the opinion of that legislative body.").

to be designated by the governor." [19] On the subject of municipal boundary changes, the state local boundary commission may make recommendations. They become effective forty-five days after presentation to the legislature unless vetoed by a "resolution concurred in by a majority of the members of each house." [20]

There are several noteworthy aspects of these expressed powers. First, they are accompanied by specific time deadlines. Second, the deadlines are different, sixty days in one case and forty-five days in the other. One may question, if there is an implied legislative veto power in the constitution, whether it is accompanied by a time limit, and if so, what the limit is. Third, the expressed legislative vetoes annul proposed executive action, they do not change existing law. They therefore do not have the same potential for the disruption of public expectations and ongoing executive programs that the blanket veto in question has. Fourth, the legislative vote required for the exercise of each of the expressed vetoes is different. Re-organization orders may be blocked by a resolution of disapproval concurred in by a majority of the members of the legislature in joint session,[21] while boundary change vetoes require disapproval by a resolution concurred in by a majority of the members of each house.[22] Since the Senate has twenty members and the House has forty,[23] these differences can be quite important. The votes of thirty legislators are required to forestall a veto taken in joint session, while ten senators can prevent a veto if the vote is to be by a majority of the members of each house. Here, as with the differing time deadlines mentioned above, one may inquire as to which voting method the constitution would impose as part of an implied general legislative veto power. The answer, of course, is that the constitution contains no clue. In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied.

III

We are aware of only three cases which have decided the question whether a legislative veto is constitutional.[24] They are *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950); and *Reith v. South Carolina State Housing Authority*, (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976).[25]

19. Art. III, § 23.

20. Art. X § 12. We do not agree with the dissent's characterization of the power granted in these two provisions as rule-making power, which we see as the power to interpret and implement statutes. Rather, the power contained in these provisions is the power to *change* statutes; therefore, the expression of these extraordinary powers in the constitution cannot be regarded as carrying an implication that general administrative rule making was meant to be forbidden.

21. Art. III, § 23.

22. Art. X, § 12.

23. Art. II, § 1.

24. The dissent suggests that our comment in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960), supports an affirmative answer to this question. We stated that "[the legislature] has the power by resolution to annul any agency or department rule or regulation." However, the *constitutionality* of annulment was not argued in that case, and our statement obviously was not a judgment on this issue.

25. The Amici would add *Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. *See Atkins v. United States*, 556 F.2d at 1060 and n. 21. In *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S.Ct. 612, 692 n. 176, 46 L.Ed.2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284–85, 96 S.Ct. at 757–58, 46 L.Ed.2d at 838–39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, *Clark v. Valeo*, 182 U.S.App.D.C. 21, 559 F.2d 642 (D.C.Cir.) (en banc) *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977), but Circuit Judge MacKinnon reached the merits in a vigorous

The New Hampshire case, *Opinion of the Justices,* 96 N.H. 517, 83 A.2d 738 (1950), involved the question whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the enactment provisions of the New Hampshire Constitution:

> The procedure which [the reorganization statute] provides is in distinct contrast to that contemplated by the Constitution. Consent is to be manifested by silence or adjournment, and disapproval by "concurrent resolution" . . . [T]he contemplated procedure violates the constitutional provisions requiring separate action by each house of the Legislature . . . [T]he act would dispense with the "passage" of any measure, as that word is commonly used, and with the requirement of presentation to the Governor. In a sense the act provides for a reversal of the democratic processes required by the Constitution, for under it the Governor would propose the legislative action, rather than approve or disapprove of action taken. 83 A.2d at 741.

In *Reith v. South Carolina State Housing Authority,* (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds,* 267 S.C. 1, 225 S.E.2d 847, 848 (1976), the South Carolina Court of Common Pleas considered, *inter alia,* the validity of a statutory provision stating that regulations promulgated by the Housing Authority shall be "null and void unless approved by a concurrent resolution of the General Assembly at its session following such promulgation." The court held that this provision violated the constitutional enactment requirements because "the General Assembly may not perform a legislative function by means of a concurrent resolution." [26] The court also concluded that the provision impermissibly infringed on the executive's power to administer and enforce the laws.[27] On appeal, neither ruling was challenged, but the state supreme court reversed on the grounds that the legislative veto provision was not severable and, therefore, the whole act was unconstitutional.[28] The appellate court accepted the lower court's ruling on the veto provision as the law of the case and did not pass on the issue.[29]

Atkins v. United States, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied,* 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978) involved a statute empowering the President to make recommendations for judicial salary increases and transmit them to Congress; the recommendations would become effective after thirty days unless disapproved by either House. It was claimed that this mechanism was unconstitutional because it contravened article I, section 1 of the United States Constitution, which vests the legislative power of the United States in a bi-cameral Congress, article I, section 7, which grants veto power to the President, and the principle of separation of powers. The Court of Claims, *en banc,* in a four-to-three decision, upheld the statute.

Atkins is not strong authority in this case, for the following reasons. First, the majority took pains to confine its opinion to the narrow issue before it, emphasizing that Congress' special role in the establishment of judicial salaries shaped its reasoning and conclusion. *Id.* at 1058–60, 1063, 1065, 1068. Moreover, the United States Constitution does not contain detailed directions for legislative action similar to those set forth in the Alaska Constitution, discussed *supra,* pp. 772, 773. Thus the Court of Claims was able to say, speaking of article I, section 1 of the United States Constitution: [30]

dissent criticizing Justice White's conclusion in *Buckley.* 182 U.S.App.D.C. at 64, 559 F.2d at 685.

26. *Reith v. South Carolina State Housing Authority,* Op. at 9.

27. *Id.* at 10.

28. 225 S.E.2d at 848–49.

29. 225 S.E.2d at 848.

30. U.S.Const. art. I, § 1 provides:

"[T]he clause does not itself, as a textural matter, mechanically direct the manner in which Congress must exercise the legislative power." *Id.* at 1062. Such a statement could not be made with reference to Article II of the Alaska Constitution. Further, the court stressed that no change in the law was accomplished by the one-House veto, because the President's recommendations never had the effect of law. *Id.* at 1063. The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law . . ." *Id.* at 1064. In contrast, the annulment provisions of AS 44.-62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense,[31] and annulling any one of them effects a change in the law.

IV

We turn now to a discussion of the major arguments of Appellee and the Amici.

The first is that since AS 44.62.320(a) was passed by the first state legislature, several members of which had served in the Alaska Constitutional Convention, and was approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied.[32] We need not pause to debate that point. Whatever the strength of the presumption might be, it will be overcome if the statute cannot be squared with a reasonable reading of the constitution. That, in our opinion, is the situation here.

[9] The Amici argue that since the legislature may delegate law-making power to an administrative agency, it follows that it may reserve to itself a part of the delegable power, and that a deligation can be made subject to a condition that the legislature may later change the terms of the delegation by informal action. The answer to this argument, in our opinion, is that while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution. The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.[33]

[10] To illustrate this point we may assume that the legislature has the power to establish an independent agency which would have the power to disapprove of agency regulations. Since the agency would be a part of the executive department the article II constraints on legislative action would not govern its functions. Could the legislature instead convey to its own members the power to act as such an agency free from these constraints? The answer, we think, is clearly no for that would amount to dual officeholding, prohibited by article II, section 5,[34] and would

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

31. 1 Mezines, Stein & Gruff, Administrative Law § 1.02[2] at 1–45 (1977); 2A Sutherland, Statutes and Statutory Construction § 49.05 at 240 (4th ed. Sands 1973), which states:

> An administrative agency may be vested with the power to promulgate legislative interpretive rules which have the force and effect of law. Such powers must be limited by a standard, and, when exercised, the ensuing regulations, if within the standards, have the same efficacy as an original statute enacted by the legislature. [Footnote omitted].

32. The same argument was unsuccessfully made in *Bradner v. Hammond*, 553 P.2d 1, 4 nn. 4 & 5 (Alaska 1976).

33. "A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency." Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983, 1067 n. 430 (1975).

34. Art. II, § 5 provides in relevant part:

> *Disqualifications.* No legislator may hold any other office or position of profit under the United States or the State.

infringe on the executive appointment power set out in article III, section 26.[35] While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.

It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee,[36] or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees.

In *State ex rel. Judge v. Legislative Finance Committee,* 168 Mont. 470, 543 P.2d 1317 (1975), at issue was a statute empowering an interim legislative committee to approve budget amendments. The statute was held invalid. The court pointed out that the power to approve budget amendments could be exercised by the entire legislature in making an appropriation, or by an executive agency acting on a proper delegation from the legislature, but the legislature could not delegate the power to so act to one of its subdivisions. *Id.* 543 P.2d at 1321.[37] The same reasoning was employed in *People v. Tremaine,* 252 N.Y. 27, 168 N.E. 817 (1929), where the Court of Appeals struck down a statute granting certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency. The court acknowledged that the legislature might itself legislate the allocation, or it could delegate the responsibility to an executive agency. It could not, however, delegate the responsibility to one, or more than one, of its members: "The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices. It might by general law confer the power of segregation or approval of segregation upon any one but its own members . . . but the Constitution . . . makes its own members ineligible to such an appointment." *Id.* 168 N.E. at 822. *See also, Stockman v. Leddy,* 55 Colo. 24, 129 P. 220, 223 (1912); *Bramlette v. Stringer,* 186 S.C. 134, 195 S.E. 257, 264 (1938). *Contra, Opinion of the Justices,* 110 N.H. 359, 266 A.2d 823 (1970).

The Appellee also argues that legislative oversight of administrative regulations is desirable and that such oversight cannot take place effectively if it must follow the path of legislation prescribed by article II. There are two answers to this argument. First, and most important, the question of

35. Art. III, § 26 provides:

Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

See, e. g., Buckley v. Valeo, 424 U.S. 1, 118–43, 96 S.Ct. 612, 681–693, 46 L.Ed.2d 659, 744–58 holding that Federal Elections Commission members were necessarily "Officers of the United States" because, among other reasons, of their administrative rule-making power, and therefore could not be appointed by Congress; *People v. Tremaine,* 252 N.Y. 27, 168 N.E. 817 (1929) discussed *infra,* p. 778.

36. In fact, under AS 24.20.445(a), the Administrative Regulation Review Committee, a permanent joint committee of the legislature, is granted the power to suspend the operation of any regulation adopted after adjournment of the legislature until thirty days after the legislature reconvenes.

37. The people of Alaska recently rejected a constitutional amendment which, like the law struck down in Montana, was designed to vest the power to approve budget revisions in an interim legislative committee. *See* Alaska Const. art. II, § 11 (proposed amend. 1978 Supp.).

whether the legislature might perform a task more efficiently if it did not have to follow article II is essentially irrelevant. Since article II applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 Harv.L.Rev. 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. *Id.* at 1409–20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against. See discussion, *supra,* pp. 772, 773.

Appellee also makes an argument based on the doctrine of separation of powers. Rule-making is essentially a legislative rather than executive function and so, the argument goes, broad latitude must be afforded the legislature to act as it sees fit in this, the core area of its duties. This argument is essentially inconsistent with the requirements prescribed in article II of the constitution which must be observed in the process of legislation. The legislature is not free to ignore these requirements. See, discussion *supra,* pp. 772, 773.

Appellee finds it significant that the Alaska Constitution contains no provision like that in section 7, clause 3 of article I of the United States Constitution [38] which authorizes the executive to veto legislative resolutions, and argues that executive involvement in the enactment of resolutions was not deemed necessary by the framers of the state constitution. This point, however, does not advance Appellee's case. Under the United States Constitution joint resolutions are one means by which laws are enacted; [39] they are therefore naturally included among those legislative acts subject to Presidential veto. However, under the state constitution resolutions are not an alternative law enactment process, and therefore there is no need to make them subject to an executive veto.

The Amici contend that since AS 44.62.320(a) was itself passed in accordance with all constitutional mandates and since the governor had the opportunity to veto the statute, constitutional requirements have been satisfied with respect to subsequent acts of the legislature taken pursuant to the statute. In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto.[40] It would also do away with the formal safeguards of article II which are meant to accompany law-making. The requirements of the constitution may not be eliminated in this fashion.

REVERSED AND REMANDED with directions to enter partial summary judgment in favor of the state as to the effect of the concurrent resolution and for further proceedings.

BOOCHEVER, Chief Justice, with whom CONNOR, Justice, joins, dissenting.

I

I believe that the legislative power to annul administrative regulations by concur-

38. This clause provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. [Emphasis added].

39. *United States ex rel. Levey v. Stockslager,* 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 785 (1889).

40. *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Cal. L.Rev. 983 at 1067 (1975).

rent resolution is constitutional. In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations. In fact, the constitution is silent as to the practice of delegating authority by the legislature to the executive or administrative agencies for promulgation of regulations.[1] Regulations may be promulgated without having each regulation confined to one subject, a descriptive title, a specific form of enactment clause, three readings on three separate days, the vote of each member adopting the regulation recorded, a majority vote of each house of the legislature, a public record of the vote cast, being subject to veto by the governor, a 90-day waiting period before becoming effective.[2] Nevertheless, the majority does not question the authority of the legislature to delegate the power to promulgate regulations without these safeguards. It seems to me that if the legislature, in authorizing regulations, cannot condition that authority with a reasonable provision for oversight because the annulment of a regulation is equated with repeal of a statute, then the regulation itself must be considered invalid as not having been passed with the requirements necessary for enacting a bill into law.

This issue was considered by this court shortly after statehood in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960), where we stated:

> The legislative power of the state "is vested in a legislature." It is argued that because of this constitutional provision the power may not be delegated.
>
> But such a strict theory of separation of powers ignores realities and the practical necessities of government. The United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility, and that necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules. [Footnotes omitted.]

One of the bases specified in *Boehl* for upholding this power of the legislature to delegate regulatory authority was the identical right to annul regulations which the majority now finds to be unconstitutional. In *Boehl* we stated:

> It also is not essential, in order to sustain the grant of authority, that the legislature circumscribe administrative discretion by express standards of action in order that the opportunity for capricious exercise of power will not exist. There is slight danger of that. The exercise of the board's powers is hedged about by substantial safeguards. Before the board may act it must conduct a public hearing and afford any interested person the opportunity to be heard, and it must then "consider all relevant matter presented to it." There is ample opportunity for judicial review; for "any interested person may obtain a judicial declaration as to the validity of any regulation * * *". Finally, there is legislative supervision. The legislature, which meets annually, may revise the statute and thus restrict the bounds of administrative action; *it has the power by resolution to annul any agency or department rule or regulation*; and the Legislative Council, an interim legislative committee charged with the duty of making recommendations to the legislature, must annually review all agency regulations to determine if the legislative intent is being correctly followed.

349 P.2d at 590 (emphasis added) (footnotes omitted).

1. The constitution does authorize "[r]egulatory, quasi-judicial and temporary agencies" to be established by law. Art. III, § 22. There are no constitutional requirements for promulgation of regulations.

2. AS 44.62.180 does specify that, with certain exceptions, regulations become effective on the 30th day after filing by the lieutenant governor.

In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in *Boehl* that the legislature has that power.

II

The advent of the industrial revolution vastly increased and complicated the tasks of legislatures. Due to limits of time and specialized expertise, legislatures have found it impossible to prescribe laws adequately covering the tremendously varied and intricate forms of social relationships arising out of the proliferation of business, manufacturing, trade, transportation, communication and commercial enterprises.[3] Of necessity, legislative authority had to be delegated to administrative agencies. Nevertheless, both in England and in the United States, efforts were initiated to maintain some controls over broad delegations of authority.[4]

England has long utilized the laying system, whereby an administrative order or regulation must be laid before Parliament for a specified period of time before becoming effective.

> Parliamentary control over administrative rules and regulations . . . is asserted principally through provisions in enabling statutes that rules made under them shall be laid before Parliament. This is customarily combined with a provision in the statute, either that the rule shall not be operative until it is approved by resolution, either of both Houses or of the House of Commons alone . . ., or that, if within forty days a resolution is passed by either House for annulling the rule, the rule is to be void . . . .[5]

In the United States, the issue of whether a legislature can reserve to itself the power to disapprove administrative regulations has been brewing for more than forty years.[6] The early stages of the dispute involved the Reorganization Acts of the 1930's and 1940's which provided that executive reorganization plans became effective sixty days after transmission to Congress, unless within that period Congress disapproved by resolution.[7] Federal acts incorporating similar provisions have proliferated in recent years.[8] Yet no federal court has squarely evaluated the validity of provisions reserving to Congress the power to disapprove administrative regulations.[9]

III

I agree with the majority that there is scant case authority on the specific issue in

3. *See generally* Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif.L. Rev. 513 (1964).

4. *See* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L.Rev. 638 (1957); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L.Rev. 1039 (1955) (hereinafter cited as Schwartz); Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U. L.Rev. 1045 (1955).

5. Schwartz, *supra* note 4, at 1032–33.

6. *Clark v. Valeo*, 182 U.S.App.D.C. 21, 28–29, 559 F.2d 642, 649–50 (D.C.Cir.) (*en banc*) (*per curiam*), *aff'd mem. sub nom., Clark v. Kimmit*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977).

7. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569, 576–82 (1953). The 1939 and 1945 Reorganization Acts provided for disapproval by a concurrent resolution; the 1949 Act allowed disapproval by either House. *Id.* at 579, 581.

8. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif.L. Rev. 983, 989 (1975). An appendix to this article lists many statutes giving special effect to congressional resolutions. Many have been passed in the 1970's and involve veto power over actions of executive agencies or the President. *See id.* at 1089–92 app. A.

9. Stewart, *Constitutionality of the Legislative Veto*, 13 Harv.J.Legis. 593, 595 (1976).

the United States. Our court, however, has favorably discussed the legislative veto in *Boehl*.

The holding in *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977) (*en banc*) (*per curiam*), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), supports the position taken in this dissent. *Atkins* upheld a statute allowing either House of Congress to veto judicial salary increases recommended by a presidential commission.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the majority of the United States Supreme Court did not reach the issue of whether regulations promulgated by the Federal Election Commission would become effective within thirty days of filing if either House of Congress did not disapprove them. In his concurrence, Justice White did approve the oversight provision, stating:

> I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view *the power of either House to disapprove as equivalent to legislation* or to an order, resolution or vote requiring the concurrence of both Houses.
>
> 424 U.S. at 284–85, 96 S.Ct. at 757, 46 L.Ed.2d at 838–39 (emphasis added) (footnotes omitted).

The majority cites *Reith v. South Carolina State Housing Authority*, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976), but appropriately concedes that the Supreme Court of South Carolina did not reach the issue with which we are concerned.

Also cited is the New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950), an advisory opinion on whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the state constitution. *Id.* 83 A.2d at 741. Three of the five justices felt the procedure violated the principle of bicameralism because each house "has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other." *Id.* 83 A.2d at 741–42.

It is also significant that twenty years later the New Hampshire Supreme Court examined a statute requiring certain salary increases to be approved by a legislative committee prior to submission to the governor for final approval. *Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (1970). The court, without analysis of its earlier opinion, found no violation of separation of powers, reasoning that since the legislature could delegate its power to fix salaries, it could impose conditions upon the exercise of such delegated authority. *Id.* 266 A.2d at 826. In conclusion, it seems to me that what case authority exists is more supportive than not of the concept of legislative annulment.

IV

The legislature's participation in the promulgation of regulations is within the core area of legislative power, formulation of

policy. Accordingly, the legislature's power to select the means of participation should be generously construed.[10]

The delegation of rule-making authority to executive agencies does not alter the basic legislative nature of the function. Conditioning that delegation on the right of the legislature to review and annul regulations does not infringe on the power of the executive, where, as here, the annulling action is taken at the first session of the legislature following promulgation of the regulation.[11]

I believe that a statute can validly condition the delegated power to enact regulations by requiring that the regulations be subject to annulment by resolution, just as it could limit the effective date of the new regulations or the length of time during which they would be in force. I find no material difference between AS 44.62.320 and other statutes, upheld by the United States Supreme Court, that condition the exercise of rule-making authority by approval of private citizens.[12] If private citizens can exercise such power, then certainly the legislature should be able to exercise the same power.

V

As the majority correctly notes, there are two provisions in our constitution which deal specifically with the legislative veto. These are article III, section 23, concerning executive reorganization, which provides that the legislature may veto a reorganization plan by a resolution "in joint session," [13] and article X, section 12, concerning local boundaries, which provides that the legislature may veto by resolution local boundary changes proposed by an executive branch commission.[14]

The majority concludes that these two express provisions creating a legislative veto by resolution exclude the possibility of an implied legislative veto. They state:

> In our view, the specificity with which the constitution deals with the legislative

10. We have held that when the legislature exercises power with reference to an essentially executive function those powers should be construed narrowly. *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976). Conversely, when, as here, a basically legislative function is involved, the powers of the legislature should be construed broadly.

11. A long-term scrutiny of executive action taken pursuant to regulations leading to delayed annulment might involve legislative infringement on the executive power to enforce laws. We are not confronted with such a question and need not pass on it because the regulation here in question was annulled at the first legislative session following its promulgation. We are similarly not confronted with an annulment by a single legislator, a committee of the legislature, or by one house.

12. *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574–78, 59 S.Ct. 993, 1013–15, 83 L.Ed. 1446, 1470–72 (1939) (upholding federal statute delegating to Secretary of Agriculture authority to issue marketing orders for specified commodities, if approval of producers was secured); *Currin v. Wallace*, 306 U.S. 1, 15–18, 59 S.Ct. 379, 387–388, 83 L.Ed. 441, 451–52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of tobacco if two-thirds of growers in a market requested, by referendum, such action).

13. The full text of article III, section 23, provides:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

14. Article X, section 12, provides:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

veto powers it does grant leads logically to the conclusion that no other veto power is implied.

Adopting the majority's logic, however, it might be said with equal force that the delegation of any rule-making powers to the executive by the legislature would also be unconstitutional. It might be argued that where the constitutional drafters intended to create rule-making power in the executive branch they created it expressly, with specificity, as they did in these two provisions, and that other rule-making powers created by statute cannot be implied.

In my view, the expression of some powers in these provisions does not lead to the conclusion that the constitution forbids either an expansion of rule-making powers in the executive or a denial of the legislative veto. The Alaska Constitution is silent on the question of administrative regulations. It does not say what powers may be delegated, how rules may be promulgated, or whether the legislature may retain a veto power by resolution. Presumably, these were questions that the constitutional drafters thought could best be resolved by the legislature.

There is an aspect of these two provisions, however, that is worthy of some notice. It seems significant that in the only two instances where the constitution does make a specific grant of rule-making power directly to the executive, it does so with a power reserved in the legislature to veto the rule by resolution. There seems to be little logic to a position that maintains that the constitutional drafters would have sanctioned the use of the resolution here, yet demanded the higher enactment standard when the legislature delegated power on its own.

Finally, the majority argues that where a veto power by resolution exists, it must also specify time limits, the method of voting and so forth. This argument is unconvincing. Having allocated a specific rule-making power to the executive branch, it was appropriate for the constitutional drafters to define in the constitution a specific legislative check to that power. This would seem to be a virtual necessity, because any statute that the legislature might pass to circumscribe these executive powers otherwise would in all likelihood be unconstitutional. But where the legislature delegates rule-making power by statute, the constitutional drafters might well presume that the legislature could also design an appropriate system of checks and balances by statute law, as they have done here in AS 44.62.320(a).

VI

It is also of significance that the Administrative Procedure Act, chapter 143, SLA 1959, containing an annulment provision, was passed shortly after the drafting of the constitution at the first session of the Alaska State Legislature. Many of the delegates to the Constitutional Convention were among the members of the legislature.[15] In fact, two of the more active delegates, Hellenthal and Taylor, introduced House Bill 13 which was enacted as chapter 143, SLA 1959.[16] The bill was passed by a House vote of 37 to 1,[17] and by a unanimous Senate vote.[18]

At that time, the governor of Alaska was William A. Egan, who had presided as President over the Constitutional Convention. In signing House Bill 13 into law, Governor Egan delivered the following message to the legislature:

> I am signing into law HOUSE BILL NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter 1 thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.

15. Thirteen delegates and Convention Secretary (now Judge) Thomas B. Stewart were legislators in the first session of the Alaska State Legislature.

16. 1959 House Journal 52.

17. 1959 House Journal 427.

18. 1959 Senate Journal 708.

> Because of the bill's separability clause, however, I do not consider this flaw of such seriousness that the bill should not be signed and utilized.[19]

Although the governor saw fit to point out a possible constitutional problem with article VI because it required local governing bodies to hold public hearings, no question was raised about the legislature's power to annul regulations by joint resolution.[20]

What was said by the United States Supreme Court about legislation passed by Congress shortly after the enactment of the United States Constitution is apropos here:

> What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the government in accord with the Constitution which had just then been adopted, and in which there were, as Representatives and Senators, a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification. It was the Congress that launched the government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments, which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument. . . . This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years, fixes the construction to be given its provisions.

Myers v. United States, 272 U.S. 52, 174–75, 47 S.Ct. 21, 45, 71 L.Ed. 160, 189–90 (1926) (citation omitted).

Finally, I note that the policy of authorizing legislative annulment of regulations is becoming increasingly widespread in Alaska, in other states, and in the federal government.[21] Such a practice, affording a

19. 1959 Senate Journal 1092.

20. *See* ch. 143 (ch. I, art. VII, § 1), SLA 1959.

21. Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. *See* AS 46.03.758(c) (regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 39.23.080(c) (regulations relating to salary increases); AS 38.06.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 94 in 1976; motor vehicle inspection regulations, annulled by Senate Concurrent Resolution No. 62 (HCS CSSCR), in 1976; the prize limit regulation, annulled by Legislative Resolve No. 79 (House Concurrent Resolution No. 60) in 1977; school loan regulations, annulled by Legislative Resolve No. 87 (Senate Concurrent Resolution No. 32) in 1977; and certain regulations adopted by the Department of Community and Regional Affairs, annulled by Legislative Resolve No. 95 (Senate Concurrent Resolution No. 12) in 1977.

For a review of laws from other states relating to annulment of regulations, *see* Jackson, Legislative Review of Administrative Rules and Regulations 1 (July 1977) (papers prepared for Southern Legislative Conference). A chart at the end of Professor Jackson's paper indicates that the following states allow regulations to be annulled by means of resolution: Alaska, Connecticut, Idaho, Michigan, Montana, Oklahoma, Tennessee, and Vermont. A New York report gives slightly different figures, stating that fourteen of the twenty-two states with legislative review mechanisms have procedures which can "cause an agency rule to be promulgated, approved, amended, modified, or annulled." Task Force on Critical Problems, Senate Research Service, New York State Legislature, *Administrative Rules . . . What is the Legislature's Role?*, 7 (June 1976). Appellant states that eight states allow nonstatutory legislative annulment—six by concurrent resolution, two by one-House vetoes.

The states which do not allow annulment of the regulation generally provide that a legislative committee may review regulations to determine if they are consistent with legislative intent, hold hearings on questionable regulations, notify the agencies of its doubts, and

practical means of supervision of the broad delegation of legislative powers required by the complexities of modern society, should not be hastily voided.

I conclude that the legislature's annulment of the cash prize regulation, pursuant to AS 44.62.320(a), does not violate the principle of separation of powers, does not provide a means by which the legislature can enact laws without passage of a bill, and does not unconstitutionally encroach on the power of the executive.

sometimes, recommend statutory action by the legislature.

ALASKA CHILDREN'S SERVICES, INC., Appellant,

v.

Francis S. L. WILLIAMSON, Commissioner, Department of Health and Social Services, and State of Alaska, Appellee.

No. 4155.

Supreme Court of Alaska.

Feb. 21, 1980.

Nonprofit corporation owning or operating residential child care facilities brought suit challenging ruling of Department of Administration that Department of Health and Social Services was not required to reimburse corporation for amounts by which actual cost increases in providing child care had exceeded predicted increases. The State of Alaska Superior Court, Third Judicial District, J. Justin Ripley, J., affirmed the ruling below, and corporation appealed. The Supreme Court, Connor, J., held that: (1) under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases, and (2) statute did not deprive corporation of due process or deny it equal protection.

Affirmed.

1. Statutes ⇐223.2(1)

Two statutes enacted at same time and dealing with same subject matter are in pari materia and should be construed so as to be consistent with one another and in such manner as to give maximum effect to each.

2. Infants ⇐19.4

Under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, such nonprofit corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases. AS 47.40.010(a)(3), 47.40.040(a).

3. Constitutional Law ⇐242.3(2), 278.7(1) Infants ⇐12

Statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary

For a discussion of federal laws on the subject, see note 8 *supra*.

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C

Supreme Court of Virginia.
Adelard L. BRAULT et al.
v.
Joseph H. HOLLEMAN, Jr., et al.

Record No. 761016.
Nov. 24, 1976.

In an original proceeding on petition for mandamus, petitioners challenged validity of governor's veto of General Assembly's appropriation of a biennial total of $10,000,000 to Northern Virginia Transportation Commission for 'State aid for capital costs of Metro Rail' which was part of mass transit system under development. The Supreme Court, Carrico, J., held that unvetoed $3,500,000 per year provision to 'be continued' for 'aid to mass transit' for northern Virginia was not a 'condition of' the vetoed appropriation; and that such veto of $5,000,000 per year appropriation was an indivisible sun of money dedicated to a stated purpose, and, thus, such appropriation was an 'item' rather than a part of an item within meaning of state constitutional provision empowering governor to veto any particular item or items of an appropriation bill.

Writ denied.

West Headnotes

[1] **Statutes 361 ⚷33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

An "item of an appropriation bill," within meaning of state constitutional provision empowering governor to veto any particular item or items of an appropriation bill, refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions. Const.1971, art. 5, § 6.

[2] Statutes 361 ⚷33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Though governor is empowered to veto any particular item or items of an appropriation bill, he must, for his veto to be valid, strike down the whole of an item; he cannot reduce the amount of an appropriation which by itself constitutes an item. Const.1971, art. 5, § 6.

[3] Statutes 361 ⚷33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor cannot veto appropriation without also disapproving a condition attached to the appropriation and he cannot veto the condition without also disapproving the appropriation. Const.1971, art. 5, § 6.

[4] Statutes 361 ⚷33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

For purposes of rule that governor cannot veto appropriation without also disapproving a condition attached to appropriation, unvetoed $3,500,000 per year provision to "be continued" for "aid to mass transit" for northern Virginia was not a "condition of" vetoed appropriation of a biennial total of $10,000,000 to Northern Virginia Transportation Commission for "State aid for capital costs of Metro Rail" which was a part of mass transit system under development. Const.1971, art. 5, § 6; Code 1950, §§ 15.1-1342 to 15.1-1372.

[5] Statutes 361 ⚷33

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by E[illegible]ve Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

For several appropriations relating to same subject matter to constitute a single "item," within state constitutional provision empowering governor to veto any particular item or items within appropriation bill, "tying up" of purposes of appropriations must be more than incidental; relationship between purposes must appear intrinsically rather than extrinsically; determinative question is whether, from terms of appropriation bill itself, several appropriations relating to same subject are so legally interdependent that one cannot be eliminated from enactment without affecting its other purposes or provisions. Const.1971, art. 5, § 6.

[6] **Statutes 361 ⚿33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

If it is clear from appropriation bill that, with disapproved provision eliminated by veto, the approved appropriations cannot effectively serve their intended purposes, the attempted elimination is invalid. Const.1971, art. 5, § 6.

[7] **Statutes 361 ⚿33**

361 Statutes

361I Enactment, Requisites, and Validity in General

361k25 Approval or Veto by Executive Authority

361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Five million dollar per year appropriation to Northern Virginia Transportation Commission for "State aid for capital costs of Metro Rail," which was a part of mass transit system under development, was an indivisible sum of money dedicated to a stated purpose; thus, such appropriation was an "item" rather than part of an item within meaning of state constitutional provision empowering governor to veto any particular item or items of an appropriation bill. Const.1971, art. 5, § 6; Code 1950, §§ 15.1-1342 to 15.1-1372.

****239 *441** Jerry K. Emrich, County Atty., Arlington, for applicants.

Andrew P. Miller, Atty. Gen., Anthony F. Troy, Chief Deputy Atty. Gen., Walter A. McFarlane, Deputy Atty. Gen., J. Durwood Felton, III, Valentine W. Southall, Jr., Debra J. Prillaman, Asst. Attys. Gen., for respondents.

Before I'ANSON, C.J., and CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, JJ.

****240 *442** CARRICO, Justice.

At its 1976 session, the General Assembly appropriated to the Northern Virginia Transportation Commission, in addition to other specified amounts, a biennial total of $10,000,000 for 'State aid for capital costs of Metro Rail.' [FN1] On April 12, 1976, the Governor vetoed the Metro Rail appropriation. This original petition for a writ of mandamus challenges the validity of the veto and presents the question whether the Metro Rail appropriation is an 'item' within the meaning of Article V, Section

6[FN2] of the Virginia Constitution as subject to the Governor's power of veto.

FN1. As will be explained Infra, Metro Rail is part of a mass transit system now under development in the Washington, D.C., area, including several northern Virginia localities.

FN2. Article V, Section 6 reads, in pertinent part, as follows:

'The Governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object.'

The petitioners for mandamus are Adelard L. Brault, member of the State Senate from Fairfax County, James M. Thomson, member of the House of Delegates from the City of Alexandria, and the County Board of Arlington County. The respondents are Joseph H. Holleman, Jr., Clerk of the House of Delegates and Keeper of the Rolls of the State, John E. Harwood, Commissioner of the Virginia Department of Highways and Transportation, Charles B. Walker, Comptroller of Virginia, and Robert C. Watts, Jr., Treasurer of Virginia. The respondents are the state officials responsible for ministerially implementing release of the Metro Rail funds if the Governor's veto is held invalid.

The designee of the disputed appropriation, the Northern Virginia Transportation Commission, is the governing body of the Northern Virginia Transportation District,[FN3] composed of the counties of Arlington and Fairfax and the cities of Alexandria, Fairfax, and Falls Church. The Commission coordinates the interests of these localities in the activities of the Washington Metropolitan Area Transit Authority, which was created by a *443 compact [FN4] between Virginia, Maryland, and the District of Columbia to develop a mass transit system for a 'zone' which includes the northern Virginia communities, the Maryland counties of Montgomery and Prince Georges, and the District of Columbia. The Authority is currently developing the Metro system, consisting of both rail and bus service, with the goal of coordinating all methods of mass transportation in the zone.

FN3. Creation of the District was authorized by the Transportation District Act of 1964, Acts 1964, ch. 631, Code ss 15.1-1342 to - 1372.

FN4. See Acts 1966, ch. 2, Amending Acts 1958, ch. 627.

Under development by the Authority, and partially in use, is a combination subway and surface rapid rail system, known as Metro Rail, to serve the Zone. The Authority has also acquired the private bus companies formerly serving the zone and now operates the facilities as Metro Bus. Gradually, bus lines are being modified to serve areas remote from the rail system and to route passengers to Metro trains. In addition, the Authority is constructing parking lots at rail stations to accommodate passengers who drive their automobiles to the terminals before boarding trains.

The capital cost of development of the Metro system is funded by federal appropriations, proceeds of the sale of revenue bonds, and contributions from the local political subdivisions included within the zone. Pursuant to an agreement executed in 1970, the Virginia subdivisions are obligated to contribute a total of $149,900,000 toward the capital cost of Metro Rail, but escalating costs may require 'substantially greater contributions than originally were anticipated.'

Although not a party to the 1970 agreement, the Commonwealth has contributed to the development of the Metro system, and the participating northern Virginia localities have received credit for part of the state aid on their obligations to contribute to the capital costs of Metro Rail. The most recent state effort appears in Acts **241 1976, ch. 779, s 126, Item 826, where a biennial total of $18,000,000 was appropriated for 'State aid to regional transportation commissions or local governments from special revenues, in aid of the administration and capital costs of bus transportation, except as otherwise stated.' Item 826a contains various amounts appropriated to the Northern Virginia Transportation Commission, including the $10,000,000 biennial total for 'State aid for capital costs of Metro Rail,' which was *444 vetoed by the Governor. The entire appropriation to the Commission and the Governor's veto read as follows:

'Item 826

'. . .

'a. Northern Virginia Transportation Commission

State aid for administration _ _ $125,000 the first year, $125,000 the second year.

'This appropriation is conditioned upon provision from local sources of three dollars for each State dollar out of the appropriation.

'State aid for capital costs A05R$A $1,300,000 the first year, $1,300,000 the second year.

(State aid for capital costs of Metro Rail A10R$A $5,000,000 the first year, $5,000,000 the second year.

'Funds for Metro Rail shall be paid by the Northern Virginia Transportation Commission to the Washington Metropolitan Area Transit Authority and be a credit to the Counties of Arlington and Fairfax and the Cities of Alexandria, Fall(s) Church and Fairfax in the same proportion as they are obligated to pay their share of the capital costs of Metro Rail.)

I veto this item

/s/ Mills E. Godwin, Jr.

4/12/76

'It is provided that, in addition to the appropriation designated in this item for Metro Rail capital costs, payments of $3,500,000 each year heretofore made for aid to mass transit for Northern Virginia Transportation Commission from other items in this act shall be continued.'

The appropriation included in Item 826a for 'administration' is self-explanatory. The parties agree that the appropriation of $1,300,000 per year for 'State aid for capital costs' will serve as 'Metro bus capital;' that the $3,500,000 per year required to 'be *445 continued' for 'aid to mass transit' is intended for 'Metro rail capital for parking facilities;' and that the vetoed appropriation of $5,000,000 per year for 'State aid for capital costs of Metro Rail' would have applied to the costs of 'hard rail,' meaning 'the capital costs of constructing the rail system.' And, according to its terms, the $5,000,000 per year appropriation was designed to afford credit to the northern Virginia localities on their obligations for the capital costs of Metro Rail.

As has been indicated, note 2 Supra, Article V. Section 6 of the Virginia Constitution empowers the Governor 'to veto any particular item or items of an appropriation bill.' The petitioners contend, however, that the disputed Metro Rail appropriation is not an 'item' subject to the power of veto under Article V. Section 6. The compact to which Virginia is a party, the petitioners argue, contemplates a 'unified regional transit system,' consisting of bus service, rail service, and related parking facilities. The General Assembly 'thought it well,' the petitioners say, to include in Item 826a funds for each element of the system, thereby 'tying up' the purpose to be promoted by the appropriation for Metro Rail with the purposes to be promoted by the appropriations for Metro Bus and for parking facilities.

Therefore, the petitioners maintain, the various appropriations for the unified transit system constitute a 'single 'item' as that term is used in Article V. Section 6 of the Virginia Constitution.' Accordingly, the petitioners assert, the Governor 'could not veto the $5,000,000 annual appropriation for Metro rail capital costs without also vetoing the $3,500,000 per year appropriation for Metro rail capital (parking lots), the $1,300,000 per year appropriation for Metro bus capital and the $125,000 per year appropriation for . . . administrative costs.'

Furthermore, the petitoners state, the Governor's power of veto does not permit him to reduce the amount of an appropriation or to disapprove an item subject to a condition without also vetoing the condition. Clearly, the petitioners aver, the **242 $5,000,000 per year allotment for Metro Rail capital and the $3,500,000 per year allocation for parking lots are the 'same 'item,'' and the veto of the $5,000,000 per year component had the effect of reducing the amount of this item; also the provision relating to the $3,500,000 appropriation is a condition of the $5,000,000 appropriation, yet the condition was not vetoed.

*446 Thus, the petitioners deduce, because the Governor cannot veto part of an item, reduce the amount of an appropriation, or veto a conditional item without also disapproving the condition, the action of the Governor in this case is invalid. From this, the petitioners conclude, it follows that they are entitled to a writ of mandamus directing disbursement of the disputed appropriation.

In Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940), we construed the veto provision contained in the Constitution of 1902 (Section 76), which provision is duplicated in the present Constitution (note 2 Supra). Dodson concerned seven vetoes involving the 1940 appropriation bill. This court overturned six of the vetoes and upheld the seventh.

Veto No. 2 in Dodson is of interest here. That veto concerned a provision creating and funding the office of Legislative Director in the Division of the Budget. According to the terms of the appropriation bill, the Legislative Director was to cooperate with the Executive Director of the Budget and the State Comptroller in the preparation of the budget and the supervision of expenditures from appropriations made by the General Assembly.

We noted that the 'creation of a n[illegible]ffice, its holder to serve at a stated salary, w[illegible]t more, would be an 'item' which the Governor at his election might veto, but if it be tied up with other budget provisions, then under the terms of the Constitution it can not be eliminated.' 176 Va. at 303, 11 S.E.2d at 130. Because the appropriation for the Legislative Director was so closely 'tied up' with appropriations for the Executive Director and the State Comptroller, we held that the provision for the new office did not constitute an 'item' subject to the veto power of the Governor.

The parties to the present controversy agree that Veto No. 2 in Dodson bears some similarity to the veto involved in this case. Beyond this, however, they depart in their views on the effect of the Dodson decision upon this matter. The petitioners believe that, like the appropriation for the Legislative Director in Dodson, the $5,000,000 per year appropriation for Metro Rail is so 'tied up' with the other appropriations in Item 826a that together they constitute a single item, veto-proof except as a whole. On the other hand, the respondents are of opinion that, unlike the appropriation in Dodson, the $5,000,000 per year *447 appropriation for Metro Rail is a separate, independent item, subject by itself to the power of veto.

[1] Dodson enunciated the principles applicable to resolution of a veto dispute. In the constitutional sense, an item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose; the term refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions.

[2] While the Governor is empowered to veto any particular item or items of an appropriation bill, he must, for his veto to be valid, strike down the whole of an item; he cannot disapprove part of an item and approve the remainder. And this rule prevents the Governor from reducing the amount of an appropriation which by itself constitutes an item.

[3] Where a condition is attached to an appropriation, the condition must be observed. The Governor cannot veto the appropriation without also disapproving the condition; correspondingly, he cannot veto condition; correspondingly, he cannot veto appropriation.

With these principles in mind, we return to the petitioners' contentions of invalidity concerning the veto in this case, Viz., that the veto affected only part of an item, that the veto had the effect of reducing an appropriation, and that the veto struck down **243 a conditional appropriation without also disapproving the condition. We will consider these contentions in inverse order.

[4] First, we reject the notion, advanced by the petitioners, that the unvetoed $3,500,000 per year provision to 'be continued' for 'aid to mass transit' for northern Virginia is a condition of the disapproved appropriation of $5,000,000 per year for 'State aid for capital costs of Metro Rail.' The full $3,500,000 provision reads as follows:

'It is provided that, in addition to the appropriation designated in this item for Metro Rail capital costs, payments of $3,500,000 each year heretofore made for aid to mass transit for Northern Virginia Transportation Commission from other items in this act shall be continued.'

As we understand the petitioners' contention, they claim that the reference in the quoted provision to 'other items' is to the other appropriations contained in Item 826a; that continuance of the $3,500,000 per year allocation is a condition, *448 therefore, of the vetoed $5,000,000 per year appropriation; and that because the condition was not disapproved, the veto is ineffective. But even a casual reading of the quoted provision will disclose that the reference to 'other items' is not to other amounts of expenditure but to the sources in the appropriation bill from which the $3,500,000 allocation shall be paid. The

only condition attached to the vetoed $ 00,000 per year appropriation is that it be pai the Washington Metropolitan Area Transit Authority as a credit for the participating northern Virginia localities on their obligations to contribute to the capital costs of Metro Rail. And this condition also was vetoed.

Second, the petitioners' next contention, that the veto had the effect of reducing an appropriation, assumes an important premise: the correctness of their primary contention that all the 1976 appropriations for the Metro system, or at least the combination of the $5,000,000 and $3,500,000 provisions, constitute a single item, subject to veto only as a whole. If the $5,000,000 per year appropriation is an item itself subject to veto, its elimination would not have the allegedly improper effect of reducing an appropriation. Whether the disputed appropriation is such an item is the serious question in the case and the subject of our third and final inquiry.

To determine whether several appropriations relating to the same subject constitute a single item, the petitioners assert that we must 'compare the purpose of an appropriation amount that was vetoed with the purpose of an appropriation amount which was not vetoed,' and if 'the two things are 'tied up' with each other, the veto must fail.' Therefore, the petitioners say, the real issue in this case is whether there is 'a relationship between bus and rail mass transit in the (northern Virginia) area and between parking facilities at Metro rail stations and Metro rail lines.' These relationships are so 'considerable,' the petitioners state, that elimination of the appropriation for Metro Rail capital would affect seriously the appropriations for bus capital and parking facilities.

We would not question that, in a sense, the purposes to be served by the various appropriations for the Metro system are 'tied up' one with the other. After all, the appropriations relate to the same general subject, and they are grouped within the same numbered item. Indeed, it would be difficult to conceive a situation where it could not be said that several appropriations ***449** relating to the same subject were not, at least incidentally, 'tied up' together.

Neither would we doubt that, from a practical standpoint, the various segments of the Metro system bear close relationships. Certain of the exhibits filed in this case factually demonstrate the integrated relationship of rail and bus service and parking facilities in the development of the system.

[5][6] These considerations, however, are not necessarily conclusive. The 'tying up' of purposes must be more than incidental; the relationship between purposes must appear intrinsically, rather than extrinsically. The real question, therefore, is whether, ****244** from the terms of the appropriation bill itself, several appropriations relating to the same subject are so legally 'tied up,' are made so legally interdependent, that one cannot be eliminated from the enactment without, in the words of Dodson, 'affecting its other purposes or provisions.' If it is clear from the appropriation bill that, with the disapproved provision eliminated, the approved appropriations cannot effectively serve their intended purposes, the attempted elimination is invalid.

[7] The petitioners concede that we should not be concerned 'whether either bus or rail mass transportation in the (northern Virginia) area will grind to a halt without the $5,000,000 per year appropriation which the Governor attempted to veto.' We welcome this candid concession; it typifies the sort of extrinsic practical consideration we believe must be excluded in determining whether several appropriations relating to the same subject are legally interdependent. But, at the same time, we would point out that the petitioners' argument concerning the invalidity of the Governor's veto reduces itself to the same sort of proposition: that the single purpose of the General Assembly in adopting Item 826a was to provide a unitary appropriation for an integrated system of mass transportation in northern Virginia, complete with bus service, rail service, and parking facilities. This singularity of purpose, however, does not appear from the terms of the appropriation bill.

The purpose of the $125,000 per year appropriation for 'State aid for administration' is obvious. Nothing in Item 826a, however, suggests that this appropriation is dependent upon the vetoed $5,000,000 per year appropriation or upon any other appropriation contained in the item. Neither could it be suggested that the appropriation for administrative costs cannot *450 effectively serve its intended purpose after elimination of the $5,000,000 per year provision.

The $1,300,000 per year appropriation, although labeled 'State aid for capital costs,' otherwise is silent as to its purpose. The parties to this controversy represent that this appropriation is intended for 'Metro bus capital.' The provision concerning continuance of the $3,500,000 per year allocation 'for aid to mass transit' likewise is uninformative of its intended purpose. The parties represent that this amount is for 'Metro rail capital for parking facilities.'

With respect to these two matters, we find ourselves in this position: either we are unable to ascribe meaningful purposes to the $1,300,000 and $3,500,000 amounts or we must accept the representations of the parties, in which latter event separate purposes are revealed. Both courses, however, foreclose the conclusion that either of the two provisions is dependent upon the vetoed $5,000,000 per year appropriation or any other appropriation in Item 826a, or that the two provisions cannot serve their intended purposes, expressed or unexpressed, after elimination of the $5,000,000 appropriation.[FN5]

> FN5. In oral argument, but not on brief, the petitioners asserted that the words 'in addition to' in the $3,500,000 per year provision, quoted previously, establish the relationship necessary to 'tie up' this provision with the $5,000,000 per year appropriation. While the words do show some relationship, they are insufficient to establish the legal interdependence necessary to constitute the two provisions a single 'item.'

In sharp contrast, the purpose of the $5,000,000 per year appropriation clearly is revealed by the terms of the appropriation bill. The disputed appropriation is labeled 'State aid for capital costs of Metro Rail,' and its primary and real purpose, as expressed by its terms, is to serve as credit for the participating northern Virginia localities against their contractual undertaking to contribute to 'the capital costs of Metro Rail.' This is a purpose separate and distinct from the purposes of any of the other provisions of Item 826a.

The $5,000,000 per year appropriation is an indivisible sum of money dedicated to a stated purpose. It falls, therefore, within the Dodson definition of an 'item' in the constitutional sense. And, because its stated purpose is so separate and distinct from anything else in Item 826a, it may be eliminated**245 from the appropriation bill without affecting the enactment's other purposes or provisions. The disputed appropriation, therefore, *451 satisfies the Dodson test of separability. Accordingly, we hold that the Metro Rail appropriation is an 'item' within the meaning of Article V, Section 6 of our Constitution, and thus subject to the Governor's power of veto.

For the reasons assigned, the writ of mandamus requested by the petitioners will be denied.

Writ denied.

Va. 1976.
Brault v. Holleman
217 Va. 441, 230 S.E.2d 238

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C

Supreme Court of Alaska.

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

ALASKA LEGISLATIVE COUNCIL, Appellant/Cross-Appellee,

v.

Governor Tony KNOWLES, in his official capacity as Governor for the State of Alaska, and Mark Boyer, in his official capacity as Commissioner of Administration for the State of Alaska, Appellees/Cross-Appellants.

Nos. S-8842, S-8851.
April 20, 2001.

Legislative Council sued Governor and Commissioner of Administration, seeking declaration that Governor's five item vetoes of appropriations bills were invalid. Governor filed counterclaim asserting that vetoed language was unconstitutional. The Superior Court, First Judicial District, Juneau, Thomas M. Jahnke, J., ruled that vetoes were invalid. Parties appealed. The Supreme Court, Eastaugh, J., held that: (1) three appropriations for Alaska Seafood Marketing Institute (ASMI) were not subject to valid exercise of item veto power; (2) those appropriations violated confinement clause; (3) community residential centers appropriation was not subject to item veto; and (4) therapeutic treatment program appropriation was not subject to item veto.

Vacated in part and reversed in part.

Bryner, J., dissented in part and filed opinion in which Carpeneti, J., joined.

Carpeneti, J., dissented in part and filed opinion.

West Headnotes

[1] **Appeal and Error 30 ⇐840(3)**

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k840 Review of Specific Questions and Particular Decisions
30k840(3) k. Review of Constitutional Questions. Most Cited Cases

Supreme Court decides constitutional issues of law by applying its independent judgment; in doing so Court will adopt a reasonable and practical interpretation in accordance with common sense based upon the plain meaning and purpose of the provision and the intent of the framers, and Court will consider precedent, reason, and policy.

[2] **Appeal and Error 30 ⇐781(1)**

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(1) k. In General. Most Cited Cases

Public interest exception to mootness doctrine warranted Supreme Court's consideration of claims that Governor's item vetoes of appropriations bills were invalid, even though fiscal year at issue was over.

[3] **Statutes 361 ⇐33**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

For purposes of Governor's item veto power, an "item" is a sum of money dedicated to a particular purpose. Const. Art. 2. § 15.

[4] **Statutes 361 ⇐25.1**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k25.1 k. In General. Most Cited Cases

A veto that does not delete or reduce the amount of money appropriated is not a valid exercise of the Governor's item veto power. Const. Art. 2, § 15 .

[5] Statutes 361 ⚷33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Language in appropriations bills, which made appropriations for Alaska Seafood Marketing Institute (ASMI) contingent on ASMI having no employees outside of Alaska whose positions were classified at more than Range 21 on state salary schedule, was not an "item" subject to Governor's item veto power; language did not appropriate a sum of money dedicated to a stated purpose. Const. Art. 2, § 15.

[6] Statutes 361 ⚷32

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k32 k. Disapproval and Return with Objections. Most Cited Cases

In exercising his item veto power, Governor sufficiently stated his objections to vetoed items in appropriations bill, by stating that he was following "long-standing gubernatorial tradition of vetoing intent language." Const. Art. 2, § 15.

[7] Statutes 361 ⚷32

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k32 k. Disapproval and Return with Objections. Most Cited Cases

When reviewing Governor's statement of objections when Governor uses item veto, courts apply "minimum of coherence" standard, under which courts look to see whether objection makes comprehensible reference to provision being vetoed. Const. Art. 2, § 15.

[8] States 360 ⚷132

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

To satisfy confinement clause of Alaska Constitution, the qualifying language in appropriations bill must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent; it must not administer the program of expenditures; it must not enact law or amend existing law; it must not extend beyond the life of the appropriation; and the language must be germane, that is appropriate, to an appropriations bill. Const. Art. 2, § 13.

[9] **States 360 ⚿132**

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases
Confinement clause of Alaska Constitution is not violated when the legislature amends a prior appropriation in an appropriation act. Const. Art. 2, § 13.

[10] **States 360 ⚿132**

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases
(Formerly 92k48(1))
In approaching confinement clause disputes, court assumes that an act of the legislature is constitutional. Const. Art. 2, § 13.

[11] **Constitutional Law 92 ⚿1002**

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1002 k. In General. Most Cited Cases
(Formerly 92k48(3))

Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases
(Formerly 92k48(1))
The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality.

[12] **States 360 ⚿132**

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

Language in appropriations bills, which made appropriations for Alaska Seafood Marketing Institute (ASMI) contingent on ASMI having no employees outside of Alaska whose positions were classified at more than Range 21 on state salary schedule, violated confinement clause of Alaska Constitution; language expressed legislature's intent about how other ASMI appropriations were to be spent, language effectively administered ASMI's program, language was not germane to marketing seafood, and language created substantive law. Const. Art. 2, § 13.

[13] Statutes 361 ⚿33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for new community residential centers (CRCs), which provided that appropriation was for new beds to provide space in institutions for violent felons, that all beds would meet Department standards for CRCs, and that contracts would be competitively bid, was not an "item" subject to Governor's item veto authority. Const. Art. 2, § 15.

[14] States 360 ⚿132

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for new community residential centers (CRCs), which provided that appropriation was for new beds to provide space in institutions for violent felons, that all beds would meet Department standards for CRCs, and that contracts would be competitively bid, did not violate confinement clause of Alaska Constitution. Const. Art. 2, § 13.

[15] Constitutional Law 92 ⚿2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In General. Most Cited Cases
(Formerly 92k58)

States 360 ⚿132

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for new community residential centers (CRCs), which provided that appropriation was for new beds to provide space in institutions for violent felons, that all beds would meet Department standards for CRCs, and that contracts would be competitively bid, did not violate constitutional principle of separation of powers; language did not preclude Department from fulfilling its statutory mandate. Const. Art. 3, § 1.

[16] Statutes 361 ⚷33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for therapeutic treatment community program was not an "item" subject to Governor's item veto authority; language did not appropriate any sum of money to a particular purpose. Const. Art. 2, § 15.

[17] States 360 ⚷132

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for therapeutic treatment community program, "where cost per inmate day (exclusive of treatment costs) will not exceed the statewide average cost per inmate day for correctional institutions," did not violate confinement clause; one permissible reading of quoted language was that it was descriptive and non-binding. Const. Art. 2, § 13.

[18] Constitutional Law 92 ⚷2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In General. Most Cited Cases
(Formerly 92k58)

States 360 ⚷132

360 States

360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

Language in bill appropriating funds to Department of Corrections for therapeutic treatment community program, "where cost per inmate day (exclusive of treatment costs) will not exceed the statewide average cost per inmate day for correctional institutions," did not violate constitutional principle of separation of powers; one permissible reading of quoted language was that it did not direct executive branch to take any action. Const. Art. 3, § 1.

[19] States 360 ⇐132

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

Invalidation of entire appropriation item is not necessarily required if it contains language violating confinement clause. Const. Art. 2, § 13.

***369** Pamela Finley, Legislative Affairs Agency, Juneau, for Appellant/Cross-Appellee.

James L. Baldwin and John B. Gaguine, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellees/Cross-Appellants.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

EASTAUGH, Justice.

I. *INTRODUCTION*

Governor Tony Knowles, invoking the governor's constitutionally granted power to veto "items" in appropriation bills, struck descriptive language from five appropriations the Alaska legislature enacted in 1997. Were the vetoes constitutionally invalid, as the superior court declared, either because the vetoed passages were not "items" or because the governor did not adequately explain his vetoes? FN1 And if the vetoes were invalid, were the struck passages nonetheless invalid, as the superior court held, because they violated the constitution's requirement that appropriation bills be confined to appropriations? FN2 Applying our independent judgment to these constitutional issues, we conclude that three of the five passages violated the confinement clause and that the four vetoes which have been challenged on the grounds that the struck passages were not "items" are invalid on that basis.

FN1. *See* Alaska Const. art. II, § 15 ("The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.").

FN2. *See* Alaska Const. art. II, § 13 ("Bills for appropriations shall be confined to appropriations.").

II. *FACTS AND PROCEEDINGS*

Among the appropriation bills the Alaska legislature enacted in 1997 were chapters 98 and 100.[FN3] In July 1997 Governor Tony Knowles signed these two appropriation bills into law, but only after invoking the governor's item veto power and striking out specific parts of them.[FN4] Five of these vetoes, relating to three subjects, are challenged here. Appendix A contains the relevant appropriations and shows the vetoed words in strikeout form.

FN3. *See* chs. 98, 100, SLA 1997.

FN4. *See* Alaska Const. art. II, § 15.

In October 1997 the Alaska Legislative Council sued Governor Knowles and Commissioner of Administration Mark Boyer (collectively "the governor") seeking a declaration that the vetoes were invalid. Counterclaiming, the governor asserted that the vetoed language violated the Alaska Constitution's confinement clause.[FN5] Both parties moved for summary judgment.

FN5. *See* Alaska Const. art. II, § 13. The parties later agreed to treat the governor's counterclaims as defenses, to avoid the question of legislative immunity.

In a well-reasoned opinion, the superior court held that: (1) four of the vetoes were invalid exercises of the item veto power because the vetoed language was not an "item" (the court not reaching the "item" issue as to the fifth appropriation); (2) one veto was invalid because the governor did not sufficiently explain his objections; (3) despite the invalidity of the five vetoes, all five vetoed passages were nonetheless invalid because ***370** they violated the constitution's "confinement clause" requirement that appropriation bills be confined to appropriations; and (4) the invalid passages were severable from the remainder of their bills.[FN6]

FN6. As to other vetoes not at issue in these appeals, the superior court held that the council's challenges were moot, because the appropriated money had already been spent.

Both sides appeal.[FN7]

FN7. We commend all counsel for the quality of their briefs and oral arguments.

III. *DISCUSSION*

A. *Standard of Review*

[1] These appeals raise constitutional issues of law which we decide by applying our independent judgment.[FN8] In doing

so we will adopt " 'a reasonable and practical interpretation in accordance with common sense' based upon 'the plain meaning and purpose of the provision and the intent of the framers.' "[FN9] Moreover, because these are questions of law, we will consider precedent, reason, and policy.[FN10]

FN8. *See* *Cook v. Botelho*, 921 P.2d 1126, 1128 (Alaska 1996).

FN9. *Id.* at 1128-29 (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

FN10. *See* *Langdon v. Champion*, 752 P.2d 999, 1001 (Alaska 1988).

B. *Mootness*

[2] The governor argues that the issues relating to the validity of his vetoes are moot because the fiscal year at issue is now over. But we agree with the council that we should consider these issues under the public interest exception to the mootness doctrine.[FN11] Appropriations are enacted every year and are often spent before any dispute can reach this court.[FN12] Further, the public interest is directly affected by disputes about the constitutional provisions implicated here.[FN13] We therefore reach the merits of these appeals.

FN11. *See* *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995). The public interest exception requires us to consider: (1) the possibility of recurrence or repetition of the issue; (2) the danger that mootness would repeatedly circumvent review of the issue; and (3) the importance of the issue to the public interest. *See* *id.* at 1196.

FN12. *See* *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) ("[A] challenge to an item veto may not come within sufficient time to fully litigate the matter....").

FN13. *Cf.* *Fordice v. Bryan*, 651 So.2d 998, 1001 (Miss.1995) ("[P]ublic policy and the magnitude of the importance of these issues require[ ] this Court to review the Governor's actions with respect to the ... appropriations bills as such actions may continue to be repeated and forever escape review....").

There is a second mootness issue. In Part III.C.3, we hold that the vetoed language in the three Alaska Seafood Marketing Institute (ASMI) appropriations violated the confinement clause. This holding technically moots any question about the validity of those vetoes. And our conclusions in Parts III.C.1 and III.E.1-that four of the struck passages were not "items"-also moot the dispute about the adequacy of the governor's statements of objections for those passages. But again, the public interest exception to the mootness doctrine prompts us to consider these issues.

C. *The Alaska Seafood Marketing Institute Appropriations*

The legislature enacted three appropriations for ASMI.[FN14] Each contained identical language which made the appropriation "[c]ontingent on [ASMI] having no employees who are located outside Alaska whose positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011...." [FN15] The governor struck this language from the three ASMI appropriations.

FN14. *See* ch. 98, § 6, SLA 1997; ch. 100, §§ 47, 70, SLA 1997. Section 70 of chapter 100 amends section 6 of chapter 98.

FN15. Ch. 98, § 6, SLA 1997; ch. 100, §§ 47, 70, SLA 1997. The state salary schedule specifies twenty-six ranges, labeled five to thirty. *See* AS 39.27.011(a). In 1997 a Range 21 Step A employee was to be paid $4,155 monthly, subject to cost-of-living adjustments. *See* AS 39.27.011(a), (e), (f) (1996).

Although it held that the governor adequately explained his objections, the superior ***371** court held that the attempt to veto "the contingency language" in the ASMI appropriations was "illegal and of no effect," reasoning that "the item veto power encompasses only the power to reduce or strike sums of money." It nonetheless struck the disputed language because its inclusion violated the confinement clause.

The council argues that these vetoes are invalid, because the vetoed language was not an "item" within the meaning of the Alaska Constitution, and also because the governor failed to adequately state his objections to the vetoed language, contrary to the constitution. The governor responds that the vetoes were valid and that, in any event, the vetoed language is invalid because its inclusion in appropriation bills violated the confinement clause.

1. *Is the vetoed language an "item"?*

Article II, section 15 of the Alaska Constitution gives the governor power to exercise two different types of vetoes. Its first sentence confers the general power to veto a bill.[FN16] Its second sentence confers the power, "by veto, [to] strike or reduce items in appropriation bills."[FN17] At issue here is this power to "strike or reduce items" by exercising the item veto while approving other parts of the same bill.

FN16. Alaska Const. art. II, § 15 ("The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.").

FN17. *Id.*

The question is whether the item veto power permits the governor to strike from an appropriation bill descriptive language that does not specify the amount appropriated. The superior court held that it does not. It held that "the item veto power encompasses only the power to reduce or strike sums of money."[FN18] We agree.

FN18. The Uniform Rules of the Alaska State Legislature state that "[a]n item in an appropriation bill includes a line item, an allocation, and an appropriation." Uniform Rules Alaska State Legislature R. 42(c) (1998). But this definition does not address what constitutes an "item" in the context of the item veto power.

Our analysis focuses on the meaning of "item." We have never addressed what "item" means in context of the item veto power. Our constitution does not define the term.

[3] Based on the language of our constitution, the historical purposes of the item veto, and the pertinent public policy considerations, we now define "item" as "a sum of money dedicated to a particular purpose." FN19

FN19. *Cf.* *Bengzon v. Secretary of Justice*, 299 U.S. 410, 414-15, 57 S.Ct. 252, 81 L.Ed. 312 (1937) ("An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill."); *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 195 (Minn.1991) (defining "item of appropriation" within context of specific statute as "a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose"); *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120, 127 (1940) (defining an "item in an appropriation bill" as "an indivisible sum of money dedicated to a stated purpose").

Our analysis begins with the Alaska Constitution. It gives the legislature the power to legislate FN20 and appropriate.FN21 It gives the governor the power to influence the state's budget by requiring him or her to submit a proposed budget and general appropriation bill to the legislature FN22 and by striking or reducing items appropriated by the legislature.FN23 The governor's item veto power is thus one of limitation. The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature.

FN20. *See* Alaska Const. art. II, § 1.

FN21. *See* Alaska Const. art. II, § 13. *Cf.* *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987) (implicitly recognizing that appropriation power resides in legislature and cannot be delegated to executive).

FN22. *See* Alaska Const. art. IX, § 12.

FN23. *See* Alaska Const. art. II, § 15.

This approach is consistent with our earlier discussion of the governor's budgetary power. In *Thomas v. Rosen* we noted that ***372** Alaska's constitutional convention delegates intended to "create a strong executive branch with 'a strong control on the purse strings' of the state." FN24 But this control gives the governor no appropriation power. The item veto permits the governor only to tighten or close the state's purse strings, not to loosen them or to divert funds for a use the legislature did not approve. The governor's power to control the purse strings is fully realized by recognizing the governor's constitutionally defined-and limited-role in the appropriations process.

FN24. *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (quoting 3 Proceedings of the Alaska Constitutional Convention (PACC) 1740 (Jan. 11, 1956)).

The council argues that the governor's item veto power is negative.FN25 We agree. True, striking out language might be characterized as an act of positive creation to some extent; in the broadest sense a new bill results. But such characterizations are semantic. Our constitution does not give the governor the power to rewrite appropriation bills except by striking or

reducing items, and if the constitutional delegates had intended to give the governor the power to add or divert, they easily could have done so.[FN26]

FN25. *See, e.g., Caldwell v. Meskill*, 164 Conn. 299, 320 A.2d 788, 791-92 (1973).

FN26. During discussion of the item veto, one delegate cautioned that while the governor should be allowed to veto an item in an appropriation bill, he should not be "entitled to the right to amend." 3 PACC 1758 (Jan. 11, 1956). The minutes do not imply that any delegate intended the item veto to give the governor power to affirmatively amend appropriations.

The council also argues that the item veto power is an executive exercise of legislative power, and therefore should be strictly construed. Professor Briffault reasons that such arguments fail to recognize the difference between the item veto and the traditional veto.[FN27] However the item veto power is characterized, we conclude that it was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power permitting appropriations the legislature never enacted.[FN28]

FN27. Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L.Rev. 1171, 1185 (1993).

FN28. Consider, for example, the effect of striking from an appropriation's descriptive language a negative, a limiting date for expending the money, or one of several purposes.

The definition we adopt here also seems most consistent with the words of our constitution. First, the power expressly applies to "items in appropriation bills." [FN29] The word "item" conveys a notion of unity between two essential elements of an appropriation: the amount and the purpose.[FN30] Altering the purpose of the appropriation by striking descriptive words interferes with that unity because the result is no longer the item the legislature enacted. In comparison, striking the amount is the equivalent of a complete veto of a particular appropriation. And reducing the amount is a result the constitution expressly permits.[FN31]

FN29. Alaska Const. art. II, § 15.

FN30. *Cf.* AS 24.08.030 ("Bills for appropriation ... shall include the amount involved and the purpose....").

FN31. *See* Alaska Const. art. II, § 15.

Second, the governor may either "strike" or "reduce" an item. Reduction implies diminution. This suggests that an item reduction must have a quantitative effect, implying that reduction must affect the appropriation's amount. It seems unlikely that the constitutional drafters intended the word "item" to have two widely divergent meanings, one incorporating the essential element of amount and the other not, depending on whether a governor chooses to reduce or strike.[FN32] We therefore think that "item" was intended to include the element of amount.

FN32. *See* *Cenarrusa v. Andrus*, 99 Idaho 404, 582 P.2d 1082, 1090 (1978) ("Obviously the word item can not be given different meanings within the same sentence.").

[4] Third, the phrase "strike or reduce" also implies a greater/lesser relationship between these two forms of exercising the item veto power. Reducing an item appears to be a lesser form of striking an item. This implies that these two forms are qualitatively *373 similar and have equivalent effects, i.e., they diminish the amount appropriated. Reducing an item lessens its amount; striking it lessens its amount to nothing. This implies that an "item" must include a sum of money. Likewise, a passage that does not include a "sum of money dedicated to a particular purpose" is not an "item" which the governor can strike or reduce. Therefore, a veto that does not delete or reduce the amount of money appropriated is not a valid exercise of the power article II, section 15 grants.

The historical purposes of the item, or partial, veto also support our analysis. It originated as a reform measure to prevent legislators from "logrolling" when they enact appropriation bills which necessarily address many subjects and need not be confined to a single subject, and to give governors some ability to limit state expenditures.[FN33] These purposes seem most directed at the amount of an appropriation. Permitting a governor to strike descriptive language would not limit expenditures or help balance a budget. And, although striking language that is only descriptive might reduce logrolling, doing so would only alter purpose, not amount. For reasons discussed below, this could result in an appropriation at odds with what the legislature passed.

FN33. *See* *Bengzon*, 299 U.S. at 415, 57 S.Ct. 252; *Cenarrusa*, 582 P.2d at 1091; *see also* Briffault, *supra* note 27, at 1177-80; Roger H. Wells, *The Item Veto and State Budget Reform,* 18 Am. Pol. Sci. Rev. 782, 786 (1924). Professor Briffault describes "logrolling" as "the practice of adding together in a single bill provisions supported by various legislators in order to create a legislative majority." Briffault, *supra* note 27, at 1177.

Finally, public policy disfavors a reading of "item" that would permit the executive branch to substantively alter the legislature's appropriation bills, effectively resulting in appropriations passed without the protections our constitution contemplates.[FN34]

FN34. See article II, section 14 of the Alaska Constitution, providing in part:

> No bill may become law unless it has passed three readings in each house on separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house.

Other states with the item veto have announced a range of judicial definitions.[FN35] Professor Richard Briffault considers these definitions to reflect three general approaches, which he describes as (1) favoring the legislature, (2) balancing legislative and executive prerogatives, or (3) favoring the executive.[FN36] The governor urges us to adopt an approach favoring the executive; the council asks us to adopt an approach favoring the legislature. The superior court adopted an approach generally favoring the legislature. As Professor Briffault recognizes, however, item veto decisions "resist easy classification," and his three-approach categorization risks "enormous oversimplification."[FN37] This case does not require us to adopt any of

these approaches.

FN35. *See* Briffault, *supra* note 27, at 1184-85.

FN36. *See id.* at 1184-98.

FN37. *Id.* at 1184.

Many courts have defined "item" in a way that makes the amount of an appropriation an essential part of the item.[FN38] They reason that the item veto power is a "negative" power, limiting the governor's authority to create new legislation through the creative use of item vetoes. As one court held:

FN38. *See, e.g., Dodson,* 11 S.E.2d at 127 (defining an "item in an appropriation bill" as "an indivisible sum of money dedicated to a stated purpose").

> The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items.... Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences.[FN39]

FN39. *State ex rel. Sego v. Kirkpatrick,* 86 N.M. 359, 524 P.2d 975, 981 (1974) (citations omitted); *see also Rush v. Ray,* 362 N.W.2d 479, 482 (Iowa 1985) ("[T]he governor's power is a negative one that does not allow him to legislate by striking qualifications in a manner which distorts legislative intent."); *Welden v. Ray,* 229 N.W.2d 706, 713 (Iowa 1975) (" 'It is obvious that the item veto power does not contemplate striking out conditions and restrictions alone as items, for that would be affirmative legislation, whereas the governor's veto power is a strictly negative power, not a creative power.' ") (quoting Note, *Item Veto Amendment to the Iowa Constitution,* 18 Drake L.Rev. 245, 249-50 (1969)).

***374** A few states define "item" as something less than a coupling of a sum and a purpose. An example is found in *State ex rel. Wisconsin Senate v. Thompson.*[FN40] The Wisconsin Supreme Court there held that "the governor may, in the exercise of his partial veto authority over appropriation bills, veto individual words, letters and digits ... as long as what remains after veto is a complete, entire, and workable law."[FN41] No other state seems to have followed Wisconsin's lead, although the Washington Supreme Court held in *Washington State Legislature v. Lowry* that "[t]he Governor's line item veto should extend to nondollar provisos in appropriations bills."[FN42]

FN40. 144 Wis.2d 429, 424 N.W.2d 385 (1988).

FN41. *Id.* at 388 (citations omitted).

FN42. 131 Wash.2d 309, 931 P.2d 885, 896 (1997).

A few courts prefer to focus on the circumstances of the particular appropriation provision at issue. As in *Colorado General Assembly v. Lamm,* [FN43] these courts determine that whether there is an "item" subject to the item veto power is "best accomplished on a case-by-case basis." [FN44]

FN43. 704 P.2d 1371 (Colo.1985).

FN44. *Id.* at 1381 (citations omitted).

Each general approach has benefits and drawbacks. An approach more favorable to the executive would certainly advance the item veto's historic purposes. But our definition of "item"-"a sum of money dedicated to a particular purpose"-does not prevent the governor from using the item veto for those purposes. We are therefore not persuaded by Professor Briffault's suggestion that this result may erode the item veto's anti-logrolling function.[FN45]

FN45. *See* Briffault, *supra* note 27, at 1185.

Courts upholding gubernatorial item vetoes have sometimes done so by invoking confinement clause policies in defining an "item." [FN46] Doing so seems problematic. First, it allows the governor to exercise the item veto not because the struck passage *is* an item of appropriation, but because it is *not,* [FN47] i.e., because the struck language violates the requirement that appropriation bills "be confined to appropriations." [FN48] Second, allowing the governor to veto language because the governor thinks it violates the confinement clause would confer on the chief executive an amendatory power Alaska's constitution does not grant. We are therefore unpersuaded by cases relying on this rationale. *Lowry,* on which the governor bases much of his argument, is among these cases.[FN49] An assertion that a bill violates the confinement clause should be resolved by debate squarely focusing on that issue, rather than by allowing the confinement clause to be used to enhance a gubernatorial power having different historical origins.

FN46. *See Welsh v. Branstad,* 470 N.W.2d 644, 649-50 (Iowa 1991) (inquiring as to whether provision was related to neighboring appropriation); *Henry v. Edwards,* 346 So.2d 153, 158 (La.1977) (inquiring as to whether provision was general legislation more appropriately dealt with elsewhere).

FN47. *See Lowry,* 931 P.2d at 896.

FN48. Alaska Const. art. II, § 13. *See infra* Part III.C.3.

FN49. *See Lowry,* 931 P.2d at 896.

[5] Applying the "item" definition here, we conclude that the language struck from the ASMI appropriations is not an "item." It does not appropriate a sum of money dedicated to a stated purpose. By striking this language, the governor was not vetoing by striking or reducing, but rather editing the ASMI appropriations. Upholding these vetoes would give the governor the power to spend appropriated monies without observing limitations enacted by the legislature. This would permit a de facto re-appropriation. Granting that power here would not advance the anti-logrolling and budget-balancing purposes*375 underlying the item veto, because these vetoes did not reduce the amount of the ASMI appropriations.

Our conclusion in Part III.C.3-that these passages cannot constitutionally be part of appropriation bills-does not alter our analysis of the "item" issue. Even if these passages did not violate the confinement clause, they would not be "items" subject to the item veto.

We therefore hold that the governor did not validly exercise the item veto power when he struck this language from the three ASMI appropriations.

2. *Did the governor deliver a constitutionally adequate statement of objections to the vetoed ASMI language in chapter 100?*

The governor must return "any vetoed bill, with a statement of his objections, to the house of origin." FN50 We have never decided what the governor must do to satisfy the "statement of objections" requirement.

FN50. Alaska Const. art. II, § 15.

The three ASMI appropriations became parts of chapters 98 FN51 and 100. FN52 The veto message concerning what became chapter 98 stated: "In taking final action on the FY98 operating budget, I followed a long-standing gubernatorial tradition of vetoing intent language because it is not appropriate in an appropriations bill." FN53 That message also stated:

FN51. Ch. 98, § 6, SLA 1997. Chapter 98 also contains the Community Residential Center provisions. *See* ch. 98, § 39, SLA 1997.

FN52. Ch. 100, §§ 47, 70, SLA 1997. Chapter 100 also contains the Valdez Treatment Center provisions. *See* ch. 100, § 74(a), SLA 1997.

FN53. 1997 House Journal 1993.

I also vetoed language which purported to make the appropriation for ASMI conditional on having no upper level employees located outside the state because it violates the constitutional limits placed on appropriation bills. To prevent any unnecessary impediment to marketing efforts Outside during the current salmon crisis, fish processors, fishers, and the ASMI board urged me to veto this as a prudent exception to the general rule of having state jobs located in Alaska.[FN54]

FN54. 1997 House Journal 1994.

The governor's veto message concerning what became the chapter 100 ASMI appropriations contained the same general "intent" objection first quoted above, but did not include a separate explanation of the sort set out in the quotation indented above.[FN55]

FN55. *See* 1997 Senate Journal 2114.

[6] The council argues that although the governor adequately stated his objections to the language he struck from the ASMI appropriation in chapter 98, his objection to the identical language in the two ASMI appropriations in chapter 100 was inadequate, invalidating those vetoes. The superior court held that the legislature had adequate notice of the reasons for the governor's chapter 100 ASMI vetoes because it received both the governor's chapter 100 objection and the more complete chapter 98 objections at "literally the same minute."

The council objects to this "adequate notice" theory. It argues that the governor should be required to give the legislature specific notice of the objections to each bill to avoid constant questions about the sufficiency of notice. The council also argues that a governor might provide unclear objections for purposes of delay and making untimely any attempt to override the veto.[FN56] The governor asserts that the legislature's argument elevates form over substance, because the vetoes in this case were submitted at "the same minute."

FN56. The legislature must meet "immediately" and reconsider passage of a vetoed bill or item if it receives a veto message during a regular session of the legislature. *See* Alaska Const. art. II, § 16. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered no later than the fifth day of the next regular or special session of that legislature, and bills vetoed after adjournment of the second regular session shall be reconsidered no later than the fifth day of a special session of that legislature, if one is called. *See id.*

The requirement that the governor explain the reasons for a veto serves at least two ***376** principal functions. It allows the legislature to determine what it must do to avoid incurring another veto.[FN57] And it forces the governor to reveal his or her reasoning, "so that both the Legislature and the people might know whether or not he was motivated by conscientious convictions in recording his disapproval."[FN58]

FN57. *See Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 40 (1938).

FN58. *Id.*

We need not decide whether receipt of the explanation for the chapter 98 veto gave "adequate notice" of the governor's objections to chapter 100, because we hold that the governor's "intent" objection for chapter 100 was itself sufficient.

We accept for discussion's sake the council's argument that the governor's chapter 100 "intent" objection would have been clearer if it had disclosed whether the governor would also consider language which validly conditioned an appropriation to be invalid intent language.

But in our view such a detailed disclosure is not necessary. And attempting to distinguish between an objection which asserts a facially valid ground for veto, and an identical objection which arguably mischaracterizes the struck appropriation language, would create complex and case-by-case interpretive disputes. Subjecting the substantive adequacy of each objection to judicial scrutiny would be unavoidably time-consuming. Judicial involvement would be unlikely to generate bright-line distinctions that would provide guidance useful in avoiding future disputes and litigation. And ultimately such disputes are inherently political because they implicate the appropriations and budgetary powers of the legislature and the executive, and the political relationship between those branches of government. The judiciary has no special competence to settle these types of inherently political disputes. We also think the purposes underlying the statement-of-objections requirement do not demand case-by-case judicial review. The legislature, through knowledge accumulated in dealing with the governor, is capable of interpreting the sufficiency of an objection, and is thus able to decide whether to enact an amended appropriation or to seek a veto override. It is no less able than the judiciary to compare the governor's words and the struck language to decide for itself whether the governor was motivated by "conscientious convictions." And the ultimate arbiter of that question is the electorate.

[7] The best way to resolve such disputes is to apply the "minimum of coherence" standard when reviewing gubernatorial objections. The Colorado Supreme Court adopted this approach in *Romer v. Colorado General Assembly,* FN59 and we adopt it here for Alaska. Under this approach, courts look to see whether the objection makes comprehensible reference to the provision being vetoed, and do not attempt to evaluate the reasoning underlying the objection.FN60 In the words of the Colorado Supreme Court, "[t]o disallow a veto for the complete absence of reasons is to establish an objective standard-one with which meddlesome courts cannot tamper." FN61

FN59. 840 P.2d 1081 (Colo.1992).

FN60. *See id.* at 1084-85.

FN61. *Id.* at 1085 (quoting *Jones v. Rockefeller,* 172 W.Va. 30, 303 S.E.2d 668, 683 (1983) (Neely, J., dissenting)).

The governor's chapter 100 "intent" objection meets the minimum-of-coherence standard. The language struck from chapter 100 can be fairly characterized as "intent" language, and the objection clearly refers to the vetoed passages. We therefore conclude that the objection is constitutionally adequate.

3. *Does the vetoed language in the ASMI appropriations violate the constitution's confinement clause?*

We next consider the governor's argument that the legislature violated the confinement clause by including the vetoed language in the three ASMI appropriations. Our constitution provides that "[b]ills for appropriations shall be confined to appropriations." FN62 *377 We have never delineated the boundaries of this requirement.

FN62. Alaska Const. art. II, § 13; *see also* AS 24.08.030 ("Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner, and other related conditions of payment.").

The confinement clause prevents the legislature from enacting substantive policy outside the public eye. The process for

enacting substantive bills gives meaningful opportunity for public notice and comment. Article II, section 14 of the Alaska Constitution requires three readings of a substantive bill, on three separate days, " 'to ensure that the legislature knows what it is passing' and to ensure an opportunity for the expression of public opinion and due deliberation." FN63 This opportunity may be stifled if substantive provisions are attached to appropriation bills in the form of conditions. Unlike other legislation, appropriations are not subject to the single-subject requirement of article II, section 13-a requirement meant to avoid logrolling.FN64 Allowing substantive enactments in an appropriation bill may also be problematic because appropriation bills are frequently a product of a free conference committee and, as such, must be voted on in their entirety and cannot be amended on the floor.FN65 Consequently, as the superior court noted, the confinement clause prevents a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure. Strict enforcement of constitutional limits helps ensure that the public will be fully informed of proposed legislation.

FN63. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (quoting *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 543 n. 11 (Alaska 1978) and citing 3 PACC 1751-54 (Jan. 11, 1956)).

FN64. *See Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 557 (Alaska 1966) (noting that this requirement is designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation"). More specifically, the South Dakota Supreme Court has observed that South Dakota's equivalent clause is intended to allow members of the legislature to be free to vote on an appropriation bill " 'knowing that appropriations and nothing else were involved.' " *South Dakota Educ. Ass'n v. Barnett*, 582 N.W.2d 386, 391 (S.D.1998) (quoting *Sellers v. Frohmiller*, 42 Ariz. 239, 24 P.2d 666, 669 (1933)).

FN65. *See* Uniform Rules Alaska State Legislature 42(b)-(d) (1998).

[8] The superior court here applied a confinement clause test first articulated in 1983 by the superior court, Judge Walter L. Carpeneti presiding, in *Alaska State Legislature v. Hammond*.FN66 The superior court there addressed, among other issues, claims that eleven appropriations violated the confinement clause. The superior court wrote that to satisfy the confinement clause,

FN66. No. 1JU-80-1163 CI (Alaska Super., May 25, 1983).

> the qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.[FN67]

FN67. *Id.* at 44-45.

We find the authority the superior court cited in *Hammond* persuasive, FN68 and we approve the five-part *Hammond* formulation as a non-exclusive test for deciding whether an appropriation violates the confinement clause. We further elaborate

on this test before applying it.

FN68. *See* Henry v. Edwards, 346 So.2d 153, 158 (La.1977); *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (1970); *Biles v. Commonwealth Dep't of Pub. Welfare*, 44 Pa.Cmw1th. 274, 403 A.2d 1341, 1343 (1979); *Flanders v. Morris*, 88 Wash.2d 183, 558 P.2d 769, 772 (1977).

The council suggests that the "minimum necessary" language is best understood simply as a requirement that "appropriation language explain how, when, or on what the money is to be spent. Therefore, this part of the test is better expressed as simply requiring the language to explain the legislature's purpose regarding the appropriation." We agree generally with the first of these propositions, but we believe that this factor is better stated in terms of what it permits rather than what it requires. This factor ***378** limits the legislature's ability to include in an appropriation bill legislation cloaked as a "description."

[9] The council suggests that the *Hammond* formulation quoted above is deficient because an appropriation should be able to change existing law on the subject of appropriations. The council argues that the confinement clause is not violated when the legislature amends a prior appropriation in an appropriation act. We believe that this is an accurate statement of law. But the *Hammond* formulation would not seem to preclude this practice in any event, because the new appropriation bill would amend only a prior appropriation, not an "existing law."

The council proposes additional illumination of the prohibition on enacting or amending substantive law. The council characterizes case law from other states as generally dictating that an appropriation for a statutory program may not include provisions changing the requirements of that program, even temporarily for the purposes of that appropriation.[FN69] The council cites three Florida cases in support. *Chiles v. Milligan* considered appropriation language that would have taken money to be awarded under the statutory education funding formula and adjusted it according to the ratio of classroom salaries to total salaries.[FN70] The court struck this language as an enactment of new law.[FN71] In a subsequent but similarly named case, *Chiles v. Milligan,* the court struck down appropriation language that would have allowed education funds to be used for purposes other than those specified by statute.[FN72] But in *Department of Education v. School Board of Collier County,* the court upheld an appropriation provision that increased funds for all schools except those with a millage value per student of more than twenty percent of the statewide average; the court reasoned that the appropriated money was in *addition to* the standard education funding and therefore did not amend existing law.[FN73]

FN69. *See, e.g.*, Moreau v. Lewis, 648 So.2d 124, 126-28 (Fla.1995) (holding that provision in appropriation bill requiring co-payment for pharmacy expenses was invalid); Murray v. Lewis, 576 So.2d 264, 265-67 (Fla.1990) (declaring requirement in appropriation bill that participants in tuition waiver program exhaust other resources invalid).

FN70. 659 So.2d 1055, 1056-59 (Fla.1995).

FN71. *See id.* at 1059.

FN72. *See* 682 So.2d 74, 75-77 (Fla.1996).

FN73. *See* Department of Educ. v. School Bd. of Collier County, 394 So.2d 1010, 1011-13 (Fla.1981); *see also* Biles, 403 A.2d at 1342-43 (upholding provision stating that no part of appropriation could be used to pay assistance to full-time college student who had not participated in federal program for dependent children); *Pannell v. Thompson*, 91 Wash.2d 591, 589 P.2d 1235, 1237, 1239-40 (1979) (upholding limit in appropriation bill on amount that could be spent on entire general relief assistance program, even though statute specified payments of certain amounts).

We agree with the council's assertion that the differences between such cases reflect the tension between a desire to prevent legislatures from using appropriation bills to make programmatic changes (even for a year) and the realization that legislatures do not have to fund or fully fund any program (except, possibly, constitutionally mandated programs), and in fact may choose to fund programs that are subject to conditions or contingencies.

With regard to the germaneness requirement, the council's brief usefully discusses cases from other jurisdictions concerning what their confinement clauses permit and prohibit. The council lists the following conditions and contingencies that state courts have upheld as sufficiently "related" or "germane" to the money appropriated: FN74 (1) limits on amounts that could be spent at an individual facility; FN75 (2) limits on the number of employees for which the money could be spent; FN76 (3) a prohibition against using the ***379** money for new construction; FN77 (4) a requirement related to federal funds; FN78 (5) a provision making an appropriation for driver education contingent on the enactment of a tax on drivers' licenses; FN79 and (6) a requirement that funds for contracted work be spent only if a state laboratory could not perform the work.FN80

FN74. We paraphrase the council's description of these decisions, without necessarily endorsing either its description of the holding or the result in each cited case.

FN75. In support of this proposition the council cites *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975).

FN76. In support of this proposition the council cites *Welden.*

FN77. In support of this proposition the council cites *Welden.*

FN78. In support of this proposition the council cites *Welden* and *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974).

FN79. *See In re Advisory Opinion to the Governor*, 239 So.2d 1, 10 (Fla.1970).

FN80. *See Kirkpatrick*, 524 P.2d at 982-83.

On the other hand, the council notes that courts have struck down these provisions because they were not sufficiently connected with the expenditures: (1) a requirement that the money not be spent for trade delegations unless there was

nonpartisan executive council representation; [FN81] (2) a requirement that the inmate population at a specified facility be reduced; [FN82] (3) a provision conditioning a department of health appropriation on the department relinquishing federal money to a private family planning council; [FN83] (4) a requirement for giving notice of prisoners' escapes and transfers; [FN84] and (5) a prohibition against electioneering by district attorneys in a certain parish.[FN85]

FN81. *See* *Welsh v. Branstad*, 470 N.W.2d 644, 647, 649-50 (Iowa 1991).

FN82. *See* *Brown v. Firestone*, 382 So.2d 654, 657, 669 (Fla.1980).

FN83. *See* *Colton v. Branstad*, 372 N.W.2d 184, 186, 191-92 (Iowa 1985).

FN84. *See* *Henry*, 346 So.2d at 163.

FN85. *See* *id.* at 159-60.

The council characterizes the differences between these cases as follows:

> In general it appears that courts will uphold conditions that could (albeit with some effort) be written as purposes, *e.g.,* which facilities, which employee positions, which buildings or types of buildings, the money could be spent on. This would be true even if the conditions were written in the negative, *e.g.,* "money from this appropriation may not be used to fund employee contracts;" "money from this appropriation may not be used to fund new construction." *See* *Welden v. Ray*, 229 N.W.2d 706, 710 (Iowa 1975). It also appears that contingencies will be upheld if they relate to the receipt or nonreceipt of specific funds, *e.g.,* federal funds, matching funds, the tax intended to fund the expenditure, or relate to the occurrence or nonoccurrence of something that would make the expenditure desirable.... However, contingencies that relate to things other than the need for or use of the money or the need for the activity, seem more vulnerable to being found insufficiently "connected" to the appropriation.

We agree with the council's characterizations of the limits on the legislature's appropriation power. We do so not to predict the outcome of future disputes or to minimize the importance of the *Hammond* factors when analyzing a confinement clause dispute, but because the legislative council, speaking for the legislature, has usefully given examples of appropriation provisions which it regards as unconstitutional.

[10][11] In approaching confinement clause disputes, we assume that an act of the legislature is constitutional.[FN86] The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality.[FN87]

FN86. *See* *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998).

FN87. *See id.*; *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979); *Litchfield Elementary Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 608 P.2d 792, 800 (App.1980); *Barnett*, 582 N.W.2d at 392.

[12] With this background, we now apply the five *Hammond* factors to the vetoed language in the ASMI provisions.

a. *Intent*

The vetoed language required ASMI to move upper level employees to locations in ***380** Alaska in order for ASMI to carry forward monies from appropriations in prior years. These three ASMI appropriations did not themselves appropriate monies for upper level staffing. Rather, they addressed the "marketing [of] Alaska seafood products." FN88 The vetoed language therefore expressed the legislature's intent about how *other* ASMI appropriations were to be spent, not its intent about how *these* appropriations were to be used.FN89

FN88. *See* ch. 98, § 6, SLA 1997; ch. 100, § 70, SLA 1997.

FN89. *See infra* Part III.C.3.c.

b. *Administering the program*

The vetoed language did not specify how these three appropriations were to be used, and instead addressed staffing funded under separate appropriations. This language effectively administered ASMI's program because it limited the executive's exercise of discretion in staffing and locating executive-branch offices whose operations were funded by separate appropriations.

Because this language did not specify how these three appropriations were to be spent, we do not need to decide here whether, as the council argues, the appropriation power gives the legislature authority to decide where executive-branch personnel will be located. Likewise, we need not decide whether, as the governor asserts, the appointment of executive officers is an executive function,FN90 and whether the geographic location of particular levels of state officials is the type of "close supervision" of state government that is essentially executive in character.FN91

FN90. *See Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

FN91. *Cf. Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620, 623-24 (1978) (finding that "the making of specific staffing and resource allocation decisions" are "powers of close supervision that are essentially executive in character").

c. *Germaneness*

The council argues that the vetoed language is germane to marketing seafood. The governor argues that it is not, because employee location does not relate to ASMI's statutory duties. We conclude that the vetoed language is not sufficiently germane because these three appropriations do not fund staffing at any location affected by the struck language. These appropriations were for purchasing contractual services, expenditures unrelated to encouraging "local hire." The superior court correctly observed that separate appropriations funded state employee positions. The vetoed language therefore is not germane to these

three appropriations. Given the absence of any direct relationship, it is insufficient that the language arguably has some general relationship-because it generally concerns ASMI and the performance of ASMI's duties-to the ASMI appropriations in chapters 98 and 100.

d. *New substantive law*

The superior court found the vetoed language objectionable because it addressed an issue of substantive law, local hire, that the legislature has repeatedly addressed with substantive legislation. We agree that this language has the effect of creating a "mini-local hire law." According to the legislature's drafting manual, "an appropriation bill may not contain substantive provisions." FN92 Permitting it to enact substantive policy in one appropriation bill by imposing conditions on another appropriation bill would reduce the public scrutiny and debate which accompany policy making, and could encourage logrolling and free-riders to achieve results not politically attainable in non-appropriation bills.

FN92. *Manual of Legislative Drafting,* 35 (1999). That manual states:

> These limitations have two basic effects on drafting. One effect is that when a requestor wants to establish a new agency or program, there usually must be two bills drafted. One bill sets up the agency or program, the other bill appropriates money for the agency or program. The effective date of the appropriation bill would be tied to the effective date of the related substantive bill.
>
> A second effect of the limitations of art. II, sec. 13, of the state constitution, is that a drafter must avoid including "riders" on appropriation bills. Money should be appropriated for a specific purpose or program, but further limitations on the program itself must be in a separate bill unless they can be drafted as a lawful condition on the appropriation.

***381** The council argues that the legislature could have accomplished the same result with line-item appropriations and that the legislature followed the equivalent of that process. But we think that the process followed here was not equivalent. Line-item appropriations would have been subject to item vetoes, and would have required the legislature to give individualized consideration to each ASMI budget item. The legislature did not follow that course. The vetoed language here substantively affected the use of other appropriations, and cannot be considered merely a condition attached to the chapter 98 and 100 appropriations. In reaching beyond these appropriations, the struck language created new substantive law.

e. *Life of the appropriations*

These appropriations did not state whether the out-of-state staffing limitation expired with the fiscal year. And the vetoed language does not direct how these appropriations were to be spent. It was instead intended to limit other appropriations. It is therefore unclear whether the life of the staffing limitation actually extended beyond the duration of the ASMI appropriations in chapters 98 and 100.

f. *ASMI conclusion*

Regardless of whether the vetoed language was to extend beyond the life of these three ASMI appropriations, it violates the other four *Hammond* factors. We therefore conclude that including the vetoed language in the chapter 98 and 100 ASMI appropriations violated the confinement clause. The superior court correctly reached the same conclusion.

D. *Community Residential Center Appropriation*

The legislature appropriated funds to the Department of Corrections for "new community residential centers" (CRCs).[FN93] This appropriation included the following passage: "This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid." The governor vetoed all three sentences in this passage.

FN93. *See* ch. 98, § 39, SLA 1997. The legislature separately appropriated funds for existing CRCs. This appeal concerns only the veto of language from the appropriation for new CRCs.

1. *Was the struck CRC language an "item"?*

[13] Having decided that the veto of this passage was invalid because the governor's veto explanation was inadequate, the superior court did not decide whether the struck passage was an "item." The council only tangentially suggests that it was not an item. The governor does not appear to address the issue on appeal.

Our discussion of the item veto in Part III.C.1, in context of the ASMI appropriations, clearly indicates that the language struck from the CRC appropriation was not an "item."

2. *Was the governor's statement of objections adequate?*

The governor's veto message for chapter 98 stated: "In taking final action on the FY98 operating budget, I followed a long-standing gubernatorial tradition of vetoing intent language because it is not appropriate in an appropriations bill." [FN94] Does this objection adequately explain this veto?

FN94. 1997 House Journal 1993.

The superior court held that it did not. The court reasoned that the governor's general "intent" objection could not be said to cover the vetoed CRC language because the vetoed passage "clearly was not intent language," and no other explanation arguably applied.

For reasons discussed above in Part III.C.2, this is the type of interpretation that courts should avoid when considering the constitutional sufficiency of a statement of objections. The reviewing court should simply determine whether the objection makes comprehensible reference to the provision being vetoed, and should not attempt to evaluate*382 the reasoning underlying the objection.[FN95]

FN95. *See supra* Part III.C.2; *Romer*, 840 P.2d at 1084-85.

The governor's "intent" objection meets this minimum-of-coherence standard. The struck language can permissibly be characterized as merely expressing the legislature's intent. The governor's explanation for vetoing the CRC language is therefore constitutionally adequate.

3. *Did the language struck from the CRC appropriation violate the confinement clause?*

[14] Applying the *Hammond* factors and the presumption of constitutionality discussed in Part III.C.3, we next determine whether including the struck passage violated the confinement clause.

Some of the factors seem to be in relative balance. The qualifying language in the first sentence is the "minimum necessary to explain the Legislature's intent" about how the money is to be spent. The second sentence also describes how the money is to be spent, but can be read to specify standards; the third specifies procedures and does not describe what the money is for. These two sentences can be read to administer the program or to impose substantive requirements better addressed in a substantive bill. Likewise, the first sentence is clearly germane and appropriate to an appropriation bill, the second may be, and the third is not. None of the vetoed language seems to extend beyond the life of the appropriation. Therefore, the first, second, and fifth *Hammond* factors are in balance and the fourth favors finding no violation.

Further, the struck language does not clearly offend the third *Hammond* factor (no enactment of new law or amendment of existing law). The governor argues that because the words "not owned or controlled by municipalities" FN96 prevented the department from using this appropriation to contract with municipalities to provide CRC space, they substantively changed existing law, which allowed the commissioner to contract with municipalities.FN97 The council responds that AS 33.30.031(a) allows for use of public or private facilities,FN98 and that a decision to fund one type of facility over the other does not enact new law. We agree with the council. Alaska Statute 33.30.031 authorizes the commissioner to contract with municipalities. But it does not *require* the commissioner to put municipalities on footing equal with private enterprise as potential providers of new CRC bed space. The appropriation therefore does not preclude the commissioner from fulfilling the department's statutory mandate. Instead, it specifies the type of CRC space the money covers.FN99

FN96. Ch. 98, § 39, SLA 1997.

FN97. Counsel for the governor asserted at oral argument that the condition here violated AS 33.30.031(a), which gives the commissioner broad power to contract with public agencies. But this statute does not specify municipalities. The governor's argument simply restates why this condition allegedly violates AS 33.30.031(a).

FN98. AS 33.30.031(a) provides, in pertinent part:

> The commissioner shall determine the availability of state correctional facilities suitable for the detention and confinement of persons held under authority of state law or under agreement entered into under (e) of this section. If the commissioner determines that suitable state correctional facilities are not available, *the commissioner may enter into an agreement with a public or private agency to provide necessary facilities.*
>
> (Emphasis added.)

FN99. *Cf. Welden,* 229 N.W.2d at 710 (holding that conditions and restrictions on how money is to be spent are proper in appropriation bills).

We conclude that the CRC appropriation does not violate the confinement clause.

4. *Does the vetoed language in the CRC appropriation violate the principle of separation of powers?*

[15] The Alaska Constitution provides that "[t]he executive power of the State is vested in the governor." FN100 The governor argues that the vetoed language violates this ***383** provision and thus the principle of governmental separation of powers because it eliminates the department's discretion to contract with public agencies to provide CRC space. The council argues that the policy decision to fund privately owned CRCs rather than publicly owned CRCs was a legitimate exercise of legislative power. We agree with the council. We held above that this language does not preclude the department from fulfilling its statutory mandate. Instead, this language embodies a permissible policy decision on how to spend the CRC money. It therefore does not violate the separation-of-powers principle.

FN100. Alaska Const. art. III, § 1. We addressed this provision in *Bradner*, 553 P.2d at 3-8, and the topic of separation of powers generally in *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975).

E. *Valdez Therapeutic Treatment Program Appropriation*

The governor vetoed language in a bill appropriating funds to the Department of Corrections for a therapeutic treatment community program in Valdez. FN101 The vetoed language refers to the efficiency of the program, apparently without legal effect. FN102

FN101. *See* ch. 100, § 74(a), SLA 1997.

FN102. *See id.*

1. *Is the vetoed language an "item"?*

[16] Applying the standard discussed in Part III.C.1, we first consider whether the vetoed language is an "item." The council argues that it is not, because it directed the appropriation's use. Alternatively, we think this language may be read simply to describe the program. Either way, the vetoed language is not an "item" because it does not appropriate any sum of money to a particular purpose. The veto was therefore invalid.

2. *Was the governor's statement of objections adequate?*

The council argues that the governor's veto explanation is inadequate. FN103 This appropriation was part of what became chapter 100. The question is whether the governor's general "intent" objection adequately explained his veto, the same question discussed in Part III.D.2 in context of the CRC appropriation. Applying the minimum-of-coherence standard described there, we conclude that it did. The vetoed passage can be characterized as intent language and the governor's objection coherently refers to the vetoed provision.

FN103. We choose to reach this issue although it is technically mooted by our ruling that the vetoed language was not an "item."

3. *Does the vetoed language in the treatment program appropriation violate the confinement clause?*

[17] This bill appropriated $400,000 for an inmate program in Valdez "where cost per inmate day (exclusive of treatment costs) will not exceed the statewide average cost per inmate day for correctional institutions." FN104 The governor struck the

quoted language. Did including the vetoed language violate the confinement clause? The correct answer is not obvious, primarily because it is not clear what effect, if any, this language has. It is unclear whether it conditions the way the Valdez facility was to be run or simply describes the program. The former reading would violate the confinement clause; the latter would not.

FN104. Ch. 100, § 74(a), SLA 1997.

Despite this ambiguity, we conclude that this language does not violate the confinement clause. Because one permissible reading of the language is constitutional, and because we think it preferable to choose the reading that avoids unconstitutionality,[FN105] we conclude that this language is descriptive and non-binding. We therefore hold that its inclusion did not violate the confinement clause.

FN105. *See Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) (stating that validly enacted statutes enjoy presumption of constitutional validity); *Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965) (stating that if statute may be reasonably construed to avoid unconstitutionality, court must do so); *cf. Parker v. State*, 667 P.2d 1272, 1274 (Alaska App.1983) (noting that ambiguous statutes should be interpreted to avoid conflict with constitution).

4. *Does the vetoed language in the treatment program appropriation violate the principle of separation of powers?*

[18] The governor contends that the vetoed treatment program language impermissibly*384 interferes with the administration's discretion in managing the program and therefore violates article III, section 1 of the Alaska Constitution and the separation-of-powers principle. The council counters that there is "little point" to this language, but that it is a legitimate attempt to minimize costs.

We concluded above that this language did not violate the confinement clause because it could be read as a description of the program. The same reasoning applies here. Because this language can permissibly be read not to direct the executive branch to take any action, it does not interfere with executive discretion. We therefore conclude that this language does not violate the principle of separation of powers.

F. *Other Issues*

[19] The council contends that if an appropriation is unconstitutional because it violates the confinement clause, the violative language is not severable. Accepting that contention would inevitably require us to invalidate an entire appropriation item if we found it contained language violating the confinement clause. If we were to routinely invalidate an entire appropriation whenever a part violates the confinement clause, we would chill potentially meritorious lawsuits seeking to litigate confinement clause issues. We decline to create such a disincentive. We conclude that after the offending language is removed from the ASMI appropriations, the remaining language is independent and complete. We therefore presume that the legislature would have enacted the valid parts without the invalid parts.[FN106]

FN106. *See Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992); *see also* AS 01.10.030 (creating weak presumption in favor of severability).

The parties also dispute whether the vetoed ASMI language violated the principle of separation of powers. Given our conclusion that this language must be struck because it violated the confinement clause, it is unnecessary for us to reach the

separation-of-powers issue as to the ASMI appropriations.

IV. *CONCLUSION*

As to the three ASMI appropriations, the language the governor struck was not subject to a valid exercise of the item veto power. Nonetheless, the disputed language must be struck from these appropriations because its inclusion violated the confinement clause. We therefore agree with the result the superior court reached with respect to these appropriations.

As to the new community residential centers (CRC) appropriation, we hold that including the disputed language did not violate the confinement clause. We also conclude that the governor's statement of objections was constitutionally sufficient. Ordinarily these two conclusions would require a remand to the superior court to resolve the issue which the court left undecided as to this appropriation, namely, whether the disputed language was an item subject to an item veto. But because we have indicated based on the briefing in this case relating to the other appropriations that the disputed language was not an item subject to line-item veto, and because this issue is moot, it is sufficient merely to VACATE the judgment of the superior court insofar as it relates to the CRC appropriation.

As to the Valdez therapeutic treatment program appropriation, we hold that the disputed language was not subject to the item veto and that including the disputed language did not violate the confinement clause. We therefore REVERSE the result reached by the superior court with respect to this appropriation.

BRYNER, Justice, with whom CARPENETI, Justice, joins, dissenting in part.
CARPENETI, Justice, dissenting in part.

BRYNER, Justice, with whom CARPENETI, Justice, joins, dissenting in part.

I join in all parts of the opinion except its conclusion that the confinement clause allowed*385 the legislature to include language in the Valdez Therapeutic Treatment Program appropriation that was merely descriptive. I would hold that the disputed language violates the confinement clause, even though it is merely descriptive. Because this language is wholly superfluous, it violates *Hammond* 's necessity factor; as a superfluous and ineffectual appendage, its presence necessarily prevented the appropriation measure from being confined to an appropriation. Nor should this descriptive appendage be excused on the ground that it is "apparently without legal effect." [FN1] Its presence is almost as damaging as if it were binding. The governor and other executive branch officials have no way of knowing whether gratuitous language like this is mandatory or descriptive. They must choose between guessing that the language means nothing, at the risk of being wrong, or challenging the language in court to find out what it means. Either way, the language creates a problem by constraining executive branch action. By holding that the legislature is free to include superfluous descriptions in appropriation measures without violating the confinement clause, the court's opinion allows it to do so routinely in the hope that the executive branch will mistake the language as directory and follow it.

FN1. Op. at 383.

CARPENETI, Justice, dissenting in part.

I agree with all parts of the court's opinion except two dealing with the confinement clause. Under the same test that the court applies to conclude that the ASMI appropriations violated the confinement clause, I believe that the struck language in the appropriations for both the Valdez Therapeutic Treatment Program and Community Residential Center also violated the confinement clause. I join Justice Bryner's dissent concerning the former. As he persuasively shows, even merely descriptive

language can cause mischief in the balance of powers between the legislature and the executive.

In my view, the struck language concerning the CRC appropriation is at least equally objectionable: In limiting the expenditures to facilities "not owned or controlled by municipalities," the legislature prevented the department from using this appropriation to contract with municipalities to provide CRC space. This language substantively changed the existing law that allowed the commissioner to contract with municipalities.[FN1] The struck language therefore inappropriately interfered with the discretion previously granted to the executive branch by substantive law.

FN1. AS 33.30.031 provides in relevant part:

> (a) The commissioner shall determine the availability of state correctional facilities.... If the commissioner determines that suitable state correctional facilities are not available, the commissioner may enter into an agreement with a public or private agency to provide necessary facilities....
>
> ....
>
> (e) The commissioner may enter into an agreement with ... a municipality of this state ... to provide a correctional facility....

The court says there is no confinement clause violation because, while AS 33.30.031 authorizes the commissioner to contract with municipalities, "it does not *require* the commissioner to put municipalities on footing equal with private enterprise as potential providers of new CRC bed space." (Op. at 382, emphasis in original.) With respect, I do not believe that is the issue. The issue is whether the language amends existing law, and I believe it does: For purposes of this appropriation only, it repeals AS 33.30.031(e), which otherwise gives the commissioner the power to contract with municipalities. The language purports to take away from the commissioner a power she clearly enjoys under AS 33.30.031(e). Thus, it violates the confinement clause. I would affirm the superior court's holding to that effect.

APPENDIX A

The appropriations at issue are as follows with the vetoed language struck out:

A. *ASMI Appropriations*

1. *Chapter 98, Section 6, SLA 1997* (as amended)

~~contingent on the Alaska Seafood Marketing Institute having no employees who are located outside Alaska whose *386 positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011,~~ an amount equal to the unexpended and unobligated balance on June 30, 1997, of the fiscal year 1997 general fund receipts from the salmon marketing tax (AS 43.76.110), from the seafood marketing assessment (AS 16.51.120), and from the fishery resource landing tax (AS 43.77.011) is appropriated from the general fund to the Alaska Seafood Marketing Institute for marketing Alaska seafood products during fiscal year 1998.

2. *Chapter 100, Section 70, SLA 1997*

~~contingent on the Alaska Seafood Marketing Institute having no employees who are located outside Alaska whose positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011.~~ an amount equal to the unexpended and unobligated balance on June 30, 1997, of the fiscal year 1997 general fund receipts from the salmon marketing tax (AS 43.76.110) and from the seafood marketing assessment (AS 16.51.120) is appropriated from the general fund to the Alaska Seafood Marketing Institute for marketing Alaska seafood products during fiscal year 1998.

3. *Chapter 100, Section 47, SLA 1997*

~~contingent on the Alaska Seafood Marketing Institute having no employees who are located outside Alaska whose positions are classified at more than Range 21 on the state salary schedule under AS 39.27.011, and~~ subject to the conditions set out in (b)-(d) of this section, the appropriation made by section 31, ch. 117, SLA 1996, page 58, lines 8-11, lapses into the general fund on June 30, 2000.

B. *CRC Appropriation*
Chapter 98, Section 39, SLA 1997

As one of the appropriations for the Department of Corrections, $310,000 was appropriated for "new community residential centers." The vetoed language at issue in this appeal immediately followed this appropriation:

~~this appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid.~~

C. *Valdez Therapeutic Treatment Program Appropriation*
Chapter 100, Section 74(a) SLA 1997

The sum of $400,000 is appropriated from the federal receipts crime funds to the Department of Corrections for a therapeutic treatment community program of up to 100 beds in Valdez ~~where cost per inmate day (exclusive of treatment costs) will not exceed the state wide average cost per inmate day for correctional institutions.~~

Alaska,2001.
Alaska Legislative Council v. Knowles
21 P.3d 367

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H

Supreme Court of New Jersey.
In the Matter of Alan J. KARCHER, individually and as Speaker of the General Assembly of the State of New Jersey, and Carmen A. Orechio, individually and as President of the Senate of the State of New Jersey, Appellants and Cross-Respondents,
v.
Thomas H. KEAN, Governor of the State of New Jersey, Respondent and Cross-Appellant.

Argued March 20, 1984.
Decided Aug. 6, 1984.

SYNOPSIS

Appeal was taken from a decision of the Superior Court, Appellate Division, 190 N.J.Super. 197, 462 A.2d 1273, which ruled that Governor had properly exercised his line-item veto power with respect to several of the controverted provisions in appropriations act and which overruled government's veto of several appropriations. The Supreme Court, Handler, J., held that: (1) provisions relating to state aid to municipalities were appropriations and therefore subject Governor's line-item veto power; thus, Governor properly employed his line-item veto power when he reduced amount of state aid to the municipalities from utilities franchise and gross receipt taxes; (2) Governor properly employed his line-item veto power in deleting provisions purporting to authorize abolition of vacant positions supported by appropriated funds and provision dealing with particular consequences attendant upon insufficiency of funds appropriated for "any program" since such provisions could be regarded as limitations, restrictions or conditions on expenditure of appropriated monies; and (3) Governor's line-item veto power does not depend for its exercise on a determination that the subject matter violates constitutional provisions or is otherwise unlawful; rather, it depends primarily on whether the subject matter constitutes an appropriation or an item of appropriation or is in any way related to appropriations or the expenditure of appropriated funds.

Affirmed in part and reversed in part.

West Headnotes

[1] States 360 ⇐129.1

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k129.1 k. In General. Most Cited Cases
(Formerly 360k129)

Power and authority to appropriate funds are vested in legislative branch of government. N.J.S.A. Const. Art. 8, § 2, par. 2.

[2] States 360 ⇐129.1

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k129.1 k. In General. Most Cited Cases
(Formerly 360k129)

An "appropriation" is an authorization, statutorily enacted by Legislature for withdrawal of money from State treasury for governmental purposes.

[3] States 360 ⇐129.1

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k129.1 k. In General. Most Cited Cases
(Formerly 360k129)

Inherent in the power to appropriate is the power to specify how the money shall be spent.

[4] Statutes 361 ⇐33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Provisions relating to state aid to municipalities were appropriations and therefore subject to Governor's line-item veto power; thus, Governor properly employed his line-item veto power when he reduced amount of state aid to the municipalities from utilities franchise and gross receipt taxes. N.J.S.A. Const. Art. 5, § 1, par. 15; N.J.S.A. 54:30A-16 et seq., 54:30A-24,

54:30A-24.1, 54:30A-49 et seq., 54:30A-60, 54:30A-61, 54:30A-61.1.

[5] Statutes 361 ⚖33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor properly exercised his line-item veto power to eliminate two appropriations and reduced a third appropriation for particular highway projects consisting of parts of the total appropriation designated for capital construction by the Department of Transportation and Governor lawfully exercised his constitutional authority not to reduce the larger capital construction appropriations or the total appropriation. N.J.S.A. Const. Art. 5, § 1, par. 15.

[6] Statutes 361 ⚖33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Governor properly employed his line-item veto power in deleting provisions purporting to authorize abolition of vacant positions supported by appropriated funds and provision dealing with particular consequences attendant upon insufficiency of funds appropriated for "any program" since such provisions could be regarded as limitations, restrictions or conditions on expenditure of appropriated monies. N.J.S.A. Const. Art. 5, § 1, par. 15.

[7] Statutes 361 ⚖33

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases

Primary standard for determining if line-item veto authority is properly exercised turns on whether the subject matter is included in appropriations act and whether the subject is intended to be covered by the constitutional line-item veto power in terms of its relationship to the appropriations made and expenditures authorized by the act. N.J.S.A. Const. Art. 5, § 1, par. 15.

[8] States 360 ⚖132

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k132 k. Operation and Effect. Most Cited Cases

A condition or limitation on expenditure of appropriated funds may properly be included in an appropriations act.

[9] **Statutes 361 ⚿33**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases
General conditions, limitations, or restrictions found in an appropriations act can be the discrete subject of gubernatorial line-item veto. N.J.S.A. Const. Art. 5, § 1, par. 15.

[10] **Statutes 361 ⚿33**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases
Governor is empowered to make selective reductions or eliminations of appropriations and discrete elements or parts of included appropriations that he deems excessive, unwise, improper, unlawful, or unconstitutional and the selective veto power may be exercised with respect to any subject matter that is included in the appropriations act and is broadly related to state's fiscal affairs as reflected in the act. N.J.S.A. Const. Art. 5, § 1, par. 15.

[11] **Statutes 361 ⚿33**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases
Governor's line-item veto power does not depend for its exercise on a determination that the subject matter violates constitutional provisions or is otherwise unlawful; rather, it depends primarily on whether the subject matter constitutes an appropriation or an item of appropriation or is in any way related to appropriations or the expenditure of appropriated funds. N.J.S.A. Const. Art. 5, § 1, par. 15.

[12] **Statutes 361 ⚿33**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k33 k. Disapproval of Portion of Bill. Most Cited Cases
Provision in appropriations act prohibiting Department of Corrections from placing a new correctional facility in Hunterdon County related to the purpose of the particular appropriation and therefore was subject to Governor's line-item veto power. N.J.S.A. Const. Art. 5, § 1, par. 15.

**404 *486 Albert Burstein, Newark, and Leon J. Sokol, Hackensack, for appellants and **405 cross-respondents (Rosen, Gelman & Weiss, Newark, and Greenstone & Sokol, Hackensack, attorneys; Albert Burstein, Newark, Leon J. Sokol,

Hackensack, and Lawrence T. Marinari, Trenton, of counsel; James H. Laskey, Jill E. Haley, Newark, and Priva H. Simon, Hackensack, on the briefs).

Michael R. Cole, First Asst. Atty. Gen., for respondent and cross-appellant (Irwin I. Kimmelman, Atty. Gen., attorney; William Harla, Deputy Atty. Gen., on the brief).

Albert Burstein and *Leon J. Sokol* argued the cause for appellants and cross-respondents (*Rosen, Gelman & Weiss,* and *Greenstone & Sokol,* attorneys; *Albert Burstein, Leon J. Sokol,* and *Lawrence T. Marinari,* of counsel; *James H. Laskey, Jill E. Haley* and *Priva H. Simon,* on the briefs).*Michael R. Cole,* First Assistant Attorney General, argued the cause for respondent and cross-appellant (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *William Harla,* Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

HANDLER, J.

This appeal requires our consideration of the nature and extent of the Governor's constitutional power to veto line-items ***487** in the state budget that are encompassed in the annual appropriations act. The instant controversy was triggered by the Governor's exercise of this constitutional veto power with respect to matters included in the Appropriations Act for fiscal year 1983.

I

On June 30, 1982, the last day of fiscal year 1982, Governor Thomas H. Kean signed Senate Bill 1600 into law, *L.* 1982, *c.* 49 (generally, Appropriations Act, Act, or Senate Bill 1600). Although the Governor indicated in his message to the Senate that he had "seriously considered vetoing the entire budget," he had "resolved that this course would not be prudent and that the resulting fiscal crisis would severely damage the State." Accordingly, Governor Kean exercised his line-item veto power, pursuant to *N.J. Const.* (1947) art. V, § I, para. 15, appending to the bill a statement in which he deleted and reduced certain items of appropriation, and also deleted several general provisions that he determined to be in violation of constitutional principles.[FN1]

FN1. The Governor certified the availability of revenues sufficient to support the appropriations made in *L.* 1982, *c.* 49, as required by *N.J. Const.* (1947) art. VIII, § II, para. 2.

The Legislature did not exercise its constitutional power, pursuant to *N.J. Const.* (1947), art. V, § I, para. 15, to override any part of the Governor's line-item veto of the Appropriations Act. However, on August 13, 1982, Alan J. Karcher, Speaker of the General Assembly, and Carmen A. Orechio, President of the Senate, filed with the Appellate Division a Notice of Appeal from the final action of the Governor approving the Appropriations Act as modified by the line-item veto, contending generally that the Governor had exceeded the constitutional authority vested in him.

***488** The Appellate Division ruled that the Governor had properly exercised the line-item veto power with respect to several of the controverted provisions. 190 *N.J. Super.* 197, 462 *A.*2d 1273 (1983). It upheld the Governor's veto of part of the appropriation for municipal state aid and the veto of several general provisions in the Appropriations Act that arguably were unconstitutional and were not items of appropriation or sufficiently related to any specific appropriation. The court, however,

overruled the Governor's veto of several appropriations for specific highway projects encompassed in a larger appropriation for highway capital projects. Appellants then filed with this Court a notice of appeal as of right, in response to which the Governor filed a cross-appeal as of right. (We have generally referred to the legislative parties as appellants.). *See R.* 2:2-1(a)(1).

II

Our Constitution mandates that withdrawals of monies from the state treasury can be accomplished only by legislative appropriation, and, further, that there shall be "one general appropriation law covering one and the same fiscal year." Its exact terms in this respect are:

> No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall ****406** be provided for in one general appropriation law covering one and the same fiscal year. * * * [*N.J. Const.* (1947) art. VIII, § II, para. 2.]

The constitutional requirement of a unitary general appropriations law covering but a single fiscal year is the center beam of the state's fiscal structure. It expresses the basic understanding that fiscal soundness and integrity are the foundations for proper governmental operations. The constitutional plan for the expenditure of public revenues for governmental purposes centralizes and simplifies state financial affairs, serving to improve the operations of government, define fiscal commitments, and clarify official responsibility. *City of Camden v. Byrne*, 82 *N.J.* 133, 146, 411 *A.*2d 462 (1980) (citing *Report of the Commission on Revision of the New Jersey Constitution* 26-27 (1942)); ***489** G. Skillman & S. Goldmann, "The Single Budget, Single State Fund and Single Fiscal Year" (Monograph 1951), II *Proceedings of the New Jersey Constitutional Convention of 1947* 1668, 1669, 1680-83 [hereinafter cited as G. Skillman & S. Goldmann, "Single Budget"]; *New Jersey League of Women Voters, New Jersey: Spotlight on Government* 94-98 (3d ed. 1978)).

[1] The power and authority to appropriate funds are vested in the legislative branch of government. *City of East Orange v. Palmer*, 52 *N.J.* 329, 337, 245 *A.*2d 327 (1968); *Fitzgerald v. Palmer*, 47 *N.J.* 106, 108, 219 *A.*2d 512 (1966); *Gallena v. Scott*, 11 *N.J.* 231, 238-39, 94 *A.*2d 312 (1953); *Amantia v. Cantwell*, 89 *N.J. Super.* 7, 12-13, 213 *A.*2d 251 (App.Div.1965). Although this power to appropriate and expend state monies is reserved exclusively to the Legislature, the Governor nonetheless plays a vital constitutional role in the budget process. The ultimate legislative authority over appropriations is subject to checks and balances from the executive. The Governor is statutorily authorized to "examine and consider all requests for appropriations" and to "formulate * * * budget recommendations to be forwarded to the Legislature for its consideration and ultimate approval." *N.J.S.A.* 52:27B-20. Further, and of critical relevance in this case, the Governor is constitutionally empowered to object to any item or items included in an appropriation bill through the exercise of a selective veto. *N.J. Const.* (1947) art. V, § I, para. 15. The enabling constitutional clause states:

> If any bill presented to the Governor shall contain one or more items of appropriation of money, he may object in whole or in part to any such item or items while approving the other portions of the bill * * * and each item or part so objected to shall not take effect.

The Governor's statutory authority to propose the State budget, and his constitutional power to exercise a selective veto over legislative appropriations, constitute significant responsibilities for the State's fiscal affairs, and are essential to an efficient, modern system of government. *See City of Camden v. Byrne, supra*, 82 *N.J.* at 150, 411 *A.*2d 462; G. Skillman & S. Goldmann, ***490** "Single Budget," *supra,* at 1683-84; S. Goldmann & B. Bland, "The Governor's Veto Power" (Monograph

1951), II *Proceedings of the New Jersey Constitutional Convention of 1947* 1418, 1428; *A. Wildavsky, Budgeting: A Comparative Theory of Budgetary Processes* 175 (1975).

Reflecting the ultimate authority of the Legislature over the appropriations function, the Constitution provides that the Governor's veto may be overridden by a two-thirds vote of both the Senate and the General Assembly. The same constitutional provision that authorizes the executive line-item veto of appropriations continues:

> If upon reconsideration * * * one or more of such items or parts thereof [is] approved by two-thirds of all the members of each house, the same shall become a part of the law, notwithstanding the objections of the Governor. [*N.J. Const.* (1947) art. V, § I, para. 15.]

With the ultimate constitutional responsibility for appropriations vested in the Legislature, and with executive responsibilities **407 so clearly involved in the budget process, the judiciary has accepted its own absence of authority to compel either the Legislature to make a specific appropriation or the Governor to recommend or approve one. *See City of Camden v. Byrne, supra*, 82 *N.J.* at 149, 411 *A.*2d 462 (even if amendment to appropriations act were held unconstitutional, no relief would be available through courts in absence of legislative appropriation); *Doe v. Mathews*, 420 *F.Supp.* 865, 870-72 (D.N.J. 1976); Mountain, "The Role of Judicial Activism: Neither Sword Nor Purse?," 10 *Seton Hall L. Rev.* 6, 11 (1979).

The claims made in this appeal focus not so much on the existence of the constitutional budgetary and appropriations authority that is both centered in and shared by the legislative and executive branches, but on the form and manner in which that authority has been exercised. The Governor takes the position that in several aspects the appropriations power of the Legislature has not been exercised correctly or lawfully in the Appropriations Act. The Legislature contends that the Governor has not properly exercised the line-item veto power. Resolution*491 of this controversy requires further examination of the basic features of an appropriations law.

[2] An appropriation is an authorization, statutorily enacted by the Legislature, for the withdrawal of monies from the State treasury for governmental purposes. *City of Camden v. Byrne, supra*, 82 *N.J.* at 149, 411 *A.*2d 462; *Brown v. Honiss*, 74 *N.J.L.* 501, 521, 68 *A.* 150 (E. & A. 1906); *Borough of Glassboro v. Byrne*, 141 *N.J. Super.* 19, 24, 357 *A.*2d 65 (App.Div.), certif. den., 71 *N.J.* 518, 366 *A.*2d 674 (1976). There are, however, no specific constitutional standards or rules for determining the content or format of an appropriations act. Therefore, some inherent flexibility and discretion attend the fiscal-formulation process.

[3] Items of appropriation have, historically and traditionally, been expressed in two different ways: as "budgeted revenue" and "appropriated revenue." An allocation of funds from "budgeted revenue" is a reservation or designation of a specific amount of money for a particular purpose. By contrast, "appropriated revenue" is reflected in the budget not as a specific numerical figure but by means of general language committing funds in an unspecified amount for a particular purpose.[FN2] *See Hopkins v. Ford*, 534 *S.W.*2d 792, 795 (Ky.1976). Appropriated revenue generally includes monies collected by the State and directly utilized by a state agency or paid to a local government in the form of state aid for a specific purpose enumerated by statute. In addition to the specification of monies appropriated for governmental uses, either expressed numerically as "budgeted items" or generally as "appropriated revenues," appropriations enactments have customarily included provisions that establish conditions, restrictions, or limitations on the expenditure,*492 use, or application of appropriated funds. *Welden v. Ray*, 229 *N.W.*2d 706, 710 (Iowa 1975) (all legislative appropriations are qualified to some degree: "[i]nherent in the power to appropriate is the power to specify how the money shall be spent"); *In re Opinion of the*

Justices, 294 *Mass.* 616, 2 *N.E.*2d 789, 791 (1936) (absent restrictive words in state constitution, legislative body can attach conditions to expenditure of money appropriated by it); *see, J. Burkhead, Government Budgeting* 313, 324 (1963).

FN2. "Appropriated revenues" have been defined as:

> Those revenues not previously anticipated or budgeted, which upon receipt increase appropriation balances as authorized in the Appropriations Act, and from which agencies may incur obligations or make expenditures for specific purposes. [*Budget Message of Governor Kean,* March 15, 1982, Glossary, p. 21b.]

An appreciation of these characteristics of appropriations legislation is important to an understanding of the issues implicated by the Governor's exercise of his line-item veto power in this case. In his veto statement, appended to the Appropriations Act **408 and filed with the Legislature, the Governor expressed his general reasons for reducing and deleting specific items of appropriations set forth both as budgeted revenue and appropriated revenue.

> My veto recommendations are predicated on two issues. First, a budget totalling $6.2 billion must have an adequate surplus. Second, I feel it is inappropriate for the Legislature to increase the spending levels I initially recommended, and to fund new programs, in a budget that doesn't provide adequately for essential State services.

The Governor also deleted or vetoed general provisions in the Appropriations Act relating to the terms and conditions for the expenditure or application of appropriated funds. The veto message stated:

> In addition to various specific dollar appropriations in the budget, the Legislature has inserted certain language and provisions into Senate Bill No. 1600 to direct the manner in which the Chief Executive is to execute some of his responsibilities. Some of these legislatively imposed provisos and conditions are integrally and permissibly tied to specific items of appropriation. Other provisions, however, place broad restrictions on the way in which the Executive Branch administers particular areas of the State government on a day-to-day basis and, in some cases, authorize a Legislative Subcommittee to share responsibility with the Executive in matters traditionally and inherently assigned to the Executive Branch.

The challenges raised by the parties relate to the constitutional authority of the Governor's veto in four areas: (1) funds appropriated from the franchise and gross receipts taxes of**493** public utilities as state aid to municipalities; (2) funds appropriated or designated for particular highway projects included in the capital construction appropriations to the Department of Transportation; (3) general provisions relating to salaries, compensation, and the status of various state employee positions; and (4) a general provision restricting the funds appropriated for capital construction by the Department of Corrections. Each of these challenges touches upon a different facet of the Governor's line-item veto power.

III

Two of the challenges raised by appellants concern the propriety of the Governor's veto of the appropriation of monies for specific governmental purposes. One such fiscal grant provides for the appropriation of public utilities' franchise and gross receipts tax revenues for municipal state aid. The other concerns specific appropriations for designated highway projects. As a matter of analysis, these claims concern both appropriated and budgeted revenues.

A

[4] Appellants challenge the Governor's line-item veto of an appropriation of the proceeds from the franchise and gross receipts taxes of public utilities as state aid to particular municipalities. These taxes are authorized by *N.J.S.A.* 54:30A-16 *et seq.* and 54:30A-49 *et seq.* *N.J.S.A.* 54:30A-24, -24.1, -60, -61, and -61.1 provide for the distribution and the apportionment of these revenues as state aid for eligible municipalities. As approved by the Legislature in the Appropriations Act, the appropriation of state aid provided:

> Notwithstanding the provisions of C.54:30A-24.1 and C.54:30A-61.1, public utilities franchise and gross receipts tax payments to those municipalities apportioned pursuant to those sections in an amount in 1982 greater than that received in 1981, shall be limited to an amount equal to that which each such municipality received in 1981 plus an amount equal to 92.221235 percent of the difference between the amount each received in 1981 and the amount each is apportioned in 1982 pursuant to those sections; provided, however, that the ***494** amount not distributed shall be anticipated as revenue for general State purposes.****409** [Senate Bill 1600 at 143, lines 56-65.]

The Appropriations Act as passed also contained the following limitation on the payment of the state aid appropriated by the above language:

> Notwithstanding the provisions of C.54:30A-24.1 and C.54:30A-61.1, the payments to municipalities from the public utilities franchise and gross receipts taxes in June, 1983 shall be limited in the aggregate to $140 million in the manner outlined above and any amount collected in excess of this sum shall be anticipated as revenue for general State purposes. [*Id.* at lines 65A-65F.]

The appropriation at issue basically provides that no more than 92.221235% of the difference between the amount paid in aid in 1981 and the amount to be apportioned in 1982, if the statutory formulas were applied, shall be paid to the local governments. The balance-7.778765%-is not to be paid but instead anticipated by the State as revenue for general state purposes. The Governor used his line-item veto to reduce this percentage (of the difference between the amount paid in 1981 and the amount to be apportioned in 1982) to 67.811935, so as to bring the distribution of gross receipts tax revenue "into conformance with [his] original budget recommendations," according to his message to the Senate. The effect of the Governor's line-item veto in this respect was to reduce the amount of state aid by $27,000,000. The Governor also reduced the aggregate limit on the June 1983 aid payment from $140,000,000 to $125,000,000. Thus, by changing the percentage and lowering the aggregate limit on the aid payment, the Governor effectively reduced the amount of state aid to the covered municipalities by $32,000,000.[FN3] The money obtained from these reductions is retained in the General Fund.

> FN3. As passed by the Legislature, it was estimated that the retention of the 7.778765% difference would yield $8,603,594 for the General Fund. Senate Bill 1600, at 4. In the revenue certification included in his line-item veto statement, the Governor certified that the State could anticipate retaining $35,603,594 in 1982 from retention of the local share of public utility taxes. The $27,000,000 difference between $8,603,594 and $35,603,594 is the result of the Governor's line-item veto.

> However, it should be noted that the reduction of the aggregate state aid limits from $140,000,000 to $125,000,000 does not necessarily result in an increase in General Fund revenues by $15,000,000. The aggregate amount collected depends on the total utilities bill. Revenue estimates made in the spring, at the time the budget is first proposed, do not always prevail at the time a budget becomes law on July 1. In Senate Bill 1600, the Legislature estimated that the revenue that would be obtained by retaining for the state a portion of the 1983 local share would be $39,400,000. To retain that amount, and gain an additional $5 million that the Governor thought should go

toward creating a budget surplus, he reduced the $140 million limit to $125 million. Accordingly, his revenue certification anticipates that the State will retain $44,400,000 in 1983 from the local share. This certification reflects his judgment at the time of signing the budget that, because of the state of the economy, anticipated receipts would decline by $10 million from the amount previously anticipated to make the June 1983 payment.

***495** Appellants claim that the state aid provisions contained in the Appropriations Act constitute only conditions or qualifications upon an appropriation. They contend that the statutes providing for the tax on utilities, N.J.S.A. 54:30A-24, -24.1, -60, -61, -61.1, constitute the operative appropriations and that the language in the Appropriations Act provides merely a distribution formula for the franchise and gross receipts tax revenues and does not itself constitute an appropriation. The provisions in the Appropriations Act, therefore, are not themselves amenable to the Governor's line-item veto.

We disagree. The Appellate Division ruled, as do we, that the Governor properly employed his line-item veto power when he reduced the amount of state aid to the municipalities from the utilities franchise and gross receipt taxes. 190 *N.J. Super.* at 221, 462 *A.*2d 1273.

The two controverted provisions constitute appropriations. They provide the statutory authorization to make expenditures ****410** of state funds for state aid to municipalities. Such an authorization clearly constitutes an appropriation of revenues. *E.g., Borough of Glassboro v. Byrne, supra,* 141 *N.J. Super.* at 23, 357 *A.*2d 65; *see Jessen Assocs., Inc. v. Bullock,* 531 *S.W.*2d 593, 599 (Tex.1976) ("If the language is intended to set aside funds for a specified purpose, it is an 'item of appropriation' and is therefore***496** subject to veto by the Governor."); *see also Hopkins v. Ford, supra,* 534 *S.W.*2d at 795 (appropriation is "not so limited as to require fixing dollar amounts in order to validate allocation of surplus revenue").

It is also obvious that the operative statutes imposing the public utilities franchise and gross receipts taxes and providing for their distribution are not themselves appropriations. In *City of Camden v. Byrne, supra,* 82 *N.J.* at 146, 411 *A.*2d 462, we concluded that separate statutes imposing the sales and use tax, the bus franchise replacement tax, and the transfer-inheritance tax, and providing generally for their distribution

> do not constitute legislative appropriations in and of themselves. Additionally, these separate enactments have not been aggregated or included within a single appropriation law encompassing one fiscal year. They cannot serve, therefore, as valid authority for the withdrawal of monies from the State treasury under the State Constitution. [82 *N.J.* at 146, 411 *A.*2d 462.]

Accordingly, the underlying taxing statutes were not considered "self-executing as current appropriations," *id.* at 147, 411 *A.*2d 462, and "[could not] have the legal effect of appropriation laws," *id.* at 150, 411 *A.*2d 462.

Like the three tax statutes considered in *City of Camden v. Byrne,* the public utilities franchise and gross-receipts tax statutes now before us also provide a formula for the distribution and apportionment of those revenues as state aid to eligible municipalities. N.J.S.A. 54:30A-24, -24.1, -60, -61, -61.1. It is precisely because these statutory apportionment provisions "do not constitute legislative appropriations in and of themselves," *City of Camden v. Byrne, supra,* 82 *N.J.* at 146, 411 *A.*2d 462, that the Appropriations Act included the specific appropriations implementing the existing law. *Id.* at 150, 411 *A.*2d 462.

Appellants, however, further complain that the Governor's action impermissibly resulted in the transfer of monies from municipalities to the state. It is doubtful that such an asserted effect, even if demonstrable, would serve to invalidate the

line-item veto. Moreover, the premise of appellants' argument is dubious. It is difficult to conclude that these revenues are *497 municipal revenues as such. *See* City of Camden v. Byrne, *supra*, 82 *N.J.* at 155-56, 411 *A.*2d 462. At any rate, they most certainly qualify as state revenues. In 1980 the Legislature provided that the franchise tax be imposed, assessed, and collected by the state, with the revenues from that tax thereafter paid into the state's General Fund. *L.* 1980, *c.* 10; *L.* 1980, *c.* 11. Further, that same year the Legislature specifically committed these revenues for state aid in the Appropriations Act for fiscal year 1981. *L.* 1980, *c.* 56. See 1981 *Appropriations Handbook* 439. Plainly, the public utilities franchise and gross receipts taxes are state taxes, and the resultant revenues are state revenues.

Appellants also assert that a governor may not invoke his veto power to strike conditions or restrictions on the use of an appropriation without vetoing the accompanying appropriation as well. This assertion, however, is inapplicable here since the challenged provisions constituted direct appropriations and were not conditions or restrictions governing appropriated funds. See discussion *infra* commencing at 413.

In sum, because the provisions relating to state aid to municipalities are appropriations, they are subject to the Governor's line-item veto power. The Governor exercised this power with respect to these appropriations in the most traditional and long-sanctioned sense. His effectuation of **411 a reduction of the state-aid appropriation to eligible municipalities represents precisely the sort of measure that the line-item veto power was intended to permit. *See* Blanch v. Cordero, 180 *F.*2d 856 (1st Cir.), *cert.* den. 340 *U.S.* 819, 71 *S.Ct.* 49, 95 *L.Ed.* 601 (1950); Fitzsimmons v. Leon, 141 *F.*2d 886 (1st Cir.1944) (Organic Act of Puerto Rico empowers governor to scale down as well as to disapprove items in appropriation bills since governor may object to an item, part, or portion thereof). Each type of appropriation was properly subject to the line-item veto power, and that power was lawfully exercised.

*498 B

[5] The second challenge to matters concerning appropriated funds is directed to the Governor's veto of a portion of a capital-construction appropriation to the Department of Transportation. As passed by the Legislature, the Appropriations Act contained such an appropriation in the amount of $12,000,000. Of this amount, $7,000,000 was designated to provide State matching funds for federally-aided interstate highway projects; the remaining $5,000,000 was to fund non-federal highway projects. Senate Bill 1600 at 148-49. The Appropriations Act further provided for the expenditure, out of the total appropriation of $12,000,000, for three particular projects. One related to Route 541, *viz:*

> Funds hereinabove shall be available as matching funds for federal monies derived from the redesignation of I-895 and such funds shall be used to purchase the right-of-way of Route 541. [*Id.* at 149A, lines 78-81.]

The Governor used his line-item veto to eliminate in its entirety this appropriation to supply matching funds for Route 541. Although the Legislature estimated this expenditure to be $3,000,000, the Governor did not reduce either the lump-sum appropriation of $7,000,000 or the total appropriation of $12,000,000 by any corresponding amount.

A second authorized expenditure dealt with Laurelton Circle, *viz:*

> Of the amount hereinabove appropriated, $1,000,000 in funds shall be made available for the reconstruction of Laurelton Circle, Ocean County. [*Id.* at lines 70-72.]

The Governor deleted this language in its entirety. He left intact, however, the lump-sum appropriation of $5,000,000 for

non-federal highway projects, as well as the total appropriation of $12,000,000 for capital construction, unreduced by the deletion of $ 1,000,000.

Finally, the Act contained a specific appropriation for a bridge across Overpeck Canal, *viz:*

> Of the amount hereinabove appropriated, $700,000 shall be made available for construction of a vehicular bridge across Overpeck Canal in the vicinity of *499 Cedar Lane and Sheffield Avenue, Englewood, with access road to Route 4. [*Id.* at lines 73-77.]

The Governor utilized his line-item veto power to reduce the $700,000 recommended appropriation to $70,000, a difference of $630,000. However, he did not reduce by this amount either the sub-total appropriation of $5,000,000 or the total appropriation of $12,000,000.

Appellants argue that the "executive's item veto power may be used only to nullify the whole or part of an item of appropriation of money by eliminating or reducing it and then returning the amount eliminated or reduced to the State General Fund as surplus revenue." The Appellate Division agreed, holding that striking these items of appropriation without lowering the overall appropriations subverted the legislative intent and was an improper "affirmative" use of the line-item veto. It concluded that the three portions "of the appropriations vetoed by the Governor were conditions upon which the [larger] appropriations were made, and thus could not be deleted or otherwise changed without a corresponding change in the amount of the general**412 appropriation." 190 *N.J.Super.* at 229, 462 *A.*2d 1273 (citations omitted).

We disagree with this determination. The Governor's action fully conformed to the provisions of the constitutional line-item veto clause. *N.J. Const.* (1947) art. V, § I, para. 15. In its traditional sense, a "line-item" is defined as "[a]ny single line account for which an appropriation is provided in an Appropriations Act." *Budget Message of Governor Kean,* March 15, 1982, Glossary 22b; *accord Brown v. Firestone,* 382 *So.*2d 654, 668 (Fla.1980) (an appropriation is the "smallest identifiable fund to which a qualification or restriction is or can be directly and logically related").

Courts in other jurisdictions that have specifically considered this issue in the context of similar constitutional provisions for a gubernatorial line-item veto power have upheld the executive's right to reduce or eliminate specific appropriations without reducing by a like amount the total appropriation in which *500 the specific item is included. *E.g., Reardon v. Riley,* 10 *Cal.*2d 531, 76 *P.*2d 101 (1938); *Green v. Rawls,* 122 *So.*2d 10 (Fla.1960); *State ex rel. Brotherton v. Blankenship,* 158 *W.Va.* 390, 214 *S.E.*2d 467, 481-83 (1975). In *Reardon v. Riley,* the court expressly ruled that the governor's refusal to make a corresponding reduction in a total appropriation equal to the reduction of a lesser-included appropriation does not constitute an unlawful "affirmative" use of the constitutional veto power. By upholding this exercise of the line-item veto power, the court reasoned that it not only gave full effect to the intent of the legislature, but also preserved the governor's power to reduce or eliminate items of appropriation, as well as to approve them. Thus, although the legislature intended to authorize the total appropriation "regardless of the subsequent fate of the specific and included items of further appropriation," the governor could properly reduce that total by an amount less than the sum of the vetoed included items. *Reardon v. Riley, supra,* 10 *Cal.*2d at 536, 76 *P.*2d at 103. Such action on the part of the governor, in the court's opinion, did not

> improperly increase an appropriation without legislative action, nor did it constitute an unauthorized veto of conditional or provisional language used in connection with the specific and included items of appropriation. It was an 'elimination' of the specific and included items and a reduction of the general and inclusive item of appropriation. Such a conclusion appears to

effectuate the intent of the Legislature without depriving the Governor of the full effect of the veto power granted him. [*Id.* 76 *P.*2d at 104.]

See also Beckman, "The Item Veto Power of the Executive," 31 *Temp.L.Q.* 27, 32 (1957) (noting conflict of authority whether power to veto separate items or parts of items of appropriation bill confers authority to change amount of a single item).

The result espoused by the Appellate Division in the instant case-disallowing the deletion of an included appropriation without a corresponding reduction of the total appropriation-would too easily permit the Legislature to circumvent the Governor's line-item veto power and upset the system of checks and balances that must operate in the budget-making arena. For example, in ***501** *People ex rel. State Bd. of Agriculture v. Brady*, 277 *Ill.* 124, 115 *N.E.* 204 (1917), the legislature adopted a lump-sum appropriation followed by subdivisions calling for the expenditure of the lump-sum in specified amounts for enumerated purposes. The legislature argued that the governor could not item-veto one of the subdivisions without vetoing the total, asserting that the subdivisions constituted qualifications upon the overall appropriation. The court held that to find the whole bill constituted but one item would effect a legislative evasion of the governor's authority to veto distinct items.

We conclude that the Governor properly exercised his line-item veto power to eliminate two appropriations and reduce a third appropriation for particular highway projects consisting of parts of the total ****413** appropriation designated for capital construction by the Department of Transportation. This action fully conforms to his constitutional authority to reduce or eliminate items of appropriation. At the same time, the Governor lawfully exercised his constitutional authority not to reduce the larger capital construction appropriations of $7,000,000 and $5,000,000, respectively, or the total appropriation of $12,000,000. His determination not to disturb the larger appropriation was within his constitutional prerogative to approve portions of appropriations bills.

IV

Appellants' other major challenges to the Governor's veto relate to the application of the line-item veto power to certain general provisions in the Appropriations Act. These provisions, relating to various aspects of governmental operations, were vetoed by the Governor as violative of constitutional standards. Appellants assert that these general provisions are not appropriations *per se* and, further, comprise general restrictions that are constitutional and therefore not subject to the line-item veto. Another provision, relating to the purposes of a capital construction project in the Department of Corrections, was ***502** similarly challenged before the Appellate Division, which, although no longer at issue, we determine to address.

A

Appellants originally challenged the Governor's deletion of nine paragraphs in the Appropriations Act, asserting that his action was outside the line-item veto authority. According to the Attorney General, the Legislature had inserted several provisions in the Appropriations Act intending to condition and direct the manner in which the Governor is to execute state programs funded by items of appropriations contained in the budget. Some of these legislatively-imposed conditions were integrally and permissibly tied to specific items of appropriation in the Act. Other provisions, however, were not ostensibly tied to any particular appropriation. As argued by the Attorney General, they purportedly placed specific restrictions on the way in which the executive branch administers particular areas of the state government on a day-to-day basis, in matters in which the executive traditionally and properly exercises broad discretion. The Governor's position is that the nine paragraphs injected into the Appropriations Act were constitutionally offensive because they violated the doctrine of separation of powers, the prohibition against the delegation of the whole of the Legislature's power to just a few of its members, the requirement that a bill be devoted to a single object, and the principle that a permanent law may not be amended by reference

only to its title.

The Governor exercised his line-item veto power by deleting these provisions. On appeal before the Appellate Division, appellants challenged only three of the vetoes. Before this Court they challenge only two of the vetoes. [FN4] With the exception*503 of these, they do not contest the Governor's veto of the other provisions. The Appellate Division ruled that the nine provisions as a whole "would have infringed unconstitutionally upon the Governor's day-to-day administration of government," and that they violated the doctrines of bicameralism and separation of powers. 190 *N.J.Super.* at 210, 462 *A.*2d 1273. On these grounds, the court upheld the governor's veto.

FN4. The provision challenged in the Appellate Division but no longer contested in the appeal was numbered 35 on page 173 of Senate Bill 1600. It provided

> The Director of the Division of Budget and Accounting is hereby authorized to review the total complement of positions now maintained among the various Executive Departments and abolish 2,500 vacant budgeted positions exclusive of those positions that are vital to the safety and health of the residents in our State institutions, the State Police, or other critically important functions of the government. [Senate Bill 1600 at 173, ¶ 35.]

The entire text of the nine provisions originally challenged are set forth *verbatim* in the Appellate Division opinion. 190 *N.J. Super.* at 208 n. 4, 462 *A.*2d 1273.

**414 [6] The statutory paragraphs that appellants continue to assert still survive the Governor's line-item veto are numbered 36 and 47. Paragraph 36 provides:

> As of July 1, 1982, all full-time salaried vacant authorized, special services and temporary positions supported by the funds hereinabove appropriated, exclusive of those positions in the Legislature, the Office of the Chief Executive and the Judiciary, are abolished. [Senate Bill 1600 at 173, ¶ 36.]

Paragraph 47 states:

> If, as a result of an insufficiency of appropriations in any program account, it is required or determined that there will be a reduction in the number of State offices, positions or employees in that program account, the head of the department which administers the program shall effect that reduction in personnel from among all offices, positions or employment at salaries which exceed $15,000.00 in the unclassified service of the civil service before effecting any reduction in personnel from the classified service. [*Id.* at 175, ¶ 47.]

As noted, the Attorney General argued successfully before the Appellate Division that the Legislature's attempt, through paragraph 36, to control the elimination of particular positions in the executive branch usurps and interferes with the Governor's constitutional responsibility for administering the executive branch of government. This intrusion upon constitutional executive prerogatives was found to violate the doctrine of separation of powers.

*504 The Attorney General also persuaded the Appellate Division that paragraph 47 violates both the doctrine of separation of powers and the single-object clause of the Constitution. By generally mandating that all unclassified positions be eliminated before there can be any reductions in the classified service, the provision arguably offends the doctrine of

separation of powers, insofar as its application would severely hamper the Governor's discretion in the efficient administration of government. In addition, according to the Attorney General, the single-object clause is violated. The establishment of authority to regulate the manner of layoffs of state employees for reasons of economy, it is argued, involves a subject matter other than, and not merely incidental to, the allocation of revenue or the regulation of the State's spending program.

[7] We affirm the judgment of the Appellate Division with respect to its sustaining the Governor's line-item veto of paragraphs 36 and 47. We do not, however, predicate our conclusion on the reasoning of the Appellate Division in reaching this result. It may be that these particular provisions offend relevant constitutional doctrine, as argued by the Attorney General and determined by the Appellate Division. *See, e.g.,* Enourato v. New Jersey Bldg. Auth., 90 N.J. 396, 448 A.2d 449 (1982); General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982). Nevertheless, we need not determine whether a constitutional deficiency of this kind is necessary to invoke or validate the Governor's constitutional power to veto general conditions as items in an appropriations act. The primary standard for determining if the line-item veto authority is properly exercised turns on whether the subject matter is included in the appropriations act and whether the subject is intended to be covered by the constitutional line-item veto power in terms of its relationship to the appropriations made and expenditures authorized by the act.

In this case, both paragraphs 36 and 47 were included within the Appropriations Act. However, these provisions, separately *505 considered, are not themselves an appropriation of funds, that is, an authorization that state funds be spent for a particular purpose. They do not *per se* constitute an appropriation or an item of appropriation, at least in the most restrictive and narrow sense of these terms. *See, e.g.,* Brown v. Firestone, supra, 382 So.2d at 668; Jessen Assocs., Inc. v. Bullock, supra, 531 S.W.2d at 599. Rather, these provisions may, **415 more broadly, be regarded as limitations, restrictions, or conditions on the expenditure of appropriated monies. It is of course entirely possible that a proviso or condition may be utterly extraneous to the appropriations contained in an appropriations act. *See, e.g.,* Bengzon v. Secretary of Justice, 299 U.S. 410, 414-15, 57 S.Ct 252, 254, 81 L.Ed. 312, (1937) ("An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill."). *See also* Givens, "The Validity of a Separate Veto of Nongermane Riders to Legislation," 39 *Temp.L.Q.* 60, 63 (1965) ("[A] piece of substantive legislation attached to an appropriation act might be deemed an unrelated rider if it had nothing to do with the appropriations authorized."). Nevertheless, it is inaccurate to conclude that because they constitute "general conditions," the provisions still challenged in this appeal are unrelated to any appropriation.

Paragraph 36 purports to authorize the abolition of vacant positions supported by appropriated funds. The obvious, albeit indirect, consequence of this condition, if effectuated, is the avoidance of expenditures of appropriated funds for the particular positions, and the resultant transfer of a proportionate amount of the appropriated monies into the General Fund for state purposes.[FN5] Paragraph 47 deals with the particular consequences*506 attendant upon an insufficiency of funds appropriated for "any program." In effect, it is a limitation or condition subsequent triggered or effectuated by the expenditure of appropriated monies that results in the insufficiency of funds to carry on programs for which appropriations were made.

FN5. Similarly, paragraph 35, the veto of which is no longer contested, authorizes the Director of the Division of Budget and Accounting to abolish certain vacant budgeted positions. As such it is a general condition, comparable to paragraph 36, that affects the subject matter of appropriations. Its indirect effect would be to bar the expenditure of appropriated funds for particular purposes with a concomitant increase in the General Fund.

[8] As a condition or limitation on the expenditure of appropriated funds, each of these provisions is generally tied or sufficiently related to the appropriations made by the Appropriations Act. As such, they properly have been included in the

Act. *See* State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141, 148-50, 153 (Iowa 1971) (for purposes of exercise of line-item veto a general condition may be sufficiently related to an appropriation when its effectuation entails the use of other appropriated funds); *cf.* Green v. Rawls, supra, 122 So.2d at 16 (provision constitutes "item" regardless of its inclusion within larger, more general item if it relates to any detail or particular of matters treated in appropriation bill and if it specifies amount and purpose for expenditure).

Further, if there be any doubt as to whether such provisions are intended to be related to appropriations as general conditions on the expenditure of appropriated funds, that doubt must be resolved in favor of a legislative purpose to effect such a connection or relationship. We must assume that the Legislature intended to act constitutionally. *See, e.g.,* Right to Choose v. Byrne, 91 N.J. 287, 311, 450 A.2d 925 (1982); New Jersey Ass'n on Correction v. Lan, 80 N.J. 199, 218, 403 A.2d 437 (1979). If the Legislature included provisions that were totally alien to the central subject of the appropriations law and completely divorced from either the appropriations of funds for state purposes or the manner in which appropriated monies are to be spent, such action would most certainly be in constitutional jeopardy. *See N.J. Const.* **507 (1947) art. IV, § 7, para. 4; New Jersey Association on Correction v. Lan, supra, 80 N.J. at 215, 403 A.2d 437. Thus, the fact that the Legislature has included such provisos in the Appropriations Act itself can, in the absence of totally preclusive language dictating a contrary conclusion, be determinative of an implied intention to **416 relate such conditions to the appropriations contained in the Act. It is fair to presume that the Legislature, by including such conditions, intended to act constitutionally in exercising its fiscal power over appropriations and that such conditions were intended to relate to and govern the expenditure of appropriated funds.

[9] It follows, in terms of the constitutional scheme, governmental policy, and plain logic, that such general conditions, limitations, or restrictions found in an appropriations act can be the discrete subject of the gubernatorial line-item veto. The validity and propriety of the procedure followed by the Governor in this case is illuminated when viewed against the backdrop of the appropriations process. The constitutional framework, as noted, mandates that state government be financed through a single, balanced appropriations act covering the entire fiscal year. See discussion, *supra,* at 405. The constitutional plan has carefully orchestrated the roles of the popular branches of government, meticulously structuring their interactions in the fashioning of the State budget. This process invokes the authority and cooperation of both the Legislature and the Executive.

[10] The constitutional line-item veto power serves the governmental need to have a balanced budget in place at the start of the fiscal year. *Supra* at 406. It reflects a realistic appreciation of the fiscal and operational exigencies that attend the striking of the state's budget. *See* Opinion of the Justices, 384 Mass. 828, 428 N.E.2d 117, 120 (1981) ("[I]f through the appropriation process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the *508 careful balance of powers struck in [the state constitution] would be destroyed, and the fundamental principle of separation of powers * * * would be substantially undermined."). For that fundamental reason, in the budget-making function the Governor is not remitted to the use of only the absolute or conditional veto. The Governor is empowered to make selective reductions or eliminations of appropriations and discrete elements or parts of included appropriations that he deems excessive, unwise, improper, unlawful, or unconstitutional. This authority reasonably is to be implied in order to avoid a stalemate with the Legislature that would arise if the Governor were otherwise required either to veto the entire statutory appropriation or to suffer the nullification of his own constitutional responsibility.

In our opinion, the selective veto power may be exercised with respect to any subject matter that is included in the appropriations act and is broadly related to the State's fiscal affairs as reflected in the act. State ex rel. Turner v. Iowa State Highway Comm'n, supra, 186 N.W.2d 141; Opinion of the Justices, 384 Mass. 820 at ---, 425 N.E.2d 750 at 754 (1981) (to maintain constitutional balance and preserve separation of powers, gubernatorial partial veto power must extend to any

separable provisions contained in general appropriation bill); State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974) (partial veto power extended or enlarged to cover bills of general legislation, which contain incidental items of appropriation, as well as general appropriation bills, and to cover "items or parts" thereof in addition to "items of appropriation"); State ex rel. Brown v. Ferguson, 32 Ohio St.2d 245, 251, 291 N.E.2d 434, 438 (1972) (those provisions in appropriation bill that are separate and distinct from other provisions in same bill, insofar as subject, purpose, or amount of appropriation is concerned, constitute "items" subject to gubernatorial veto); State ex rel. Sundby v. Adamany, 71 Wis.2d 118, 134, 237 N.W.2d 910, 918 (1976) (item veto of governor valid in that portions vetoed, although not actually items of appropriation, *509 were separable provisions, not constituting provisos or conditions to an item of appropriation, and remaining portions constituted a complete and workable law). This executive power would encompass general and broad conditions**417 affixed to the expenditure or use of appropriated funds.

Furthermore, the exercise of this power on general conditions in this case is not contrary to the language line-item veto clause itself. Fairly read, that clause empowers the Governor to object not only to an item of appropriation "in whole" but also to "part" of an appropriation. N.J. Const. (1947) art. V, § I, para. 15. The constitutional choice of language was obviously premised on the expectation that only items of appropriation of money, or conditions on their expenditure, would be included in a general appropriations act. The Governor is thus authorized by the constitutional clause to object "in whole or in part" to any item of appropriation; consequently, any item or "part thereof" that has been subject to the Governor's objection shall be ineffective. Construing this language sensibly, to accord with the constitutional scheme, we are satisfied that a general condition on appropriated funds may itself be regarded as a "part" of an appropriation. Consequently, such conditions are within the ambit of the Governor's line-item veto power and may be eliminated without necessarily and simultaneously eliminating or reducing any specific item of appropriated funds.

We are aware of authority that supports the reasoning of the Appellate Division that such a condition when not related to a specific item of appropriation can be vetoed if the condition is otherwise unconstitutional. E.g., Henry v. Edwards, 346 So.2d 153, 162 (La.1977) (court upheld governor's deletion of language in general appropriations act calling for legislative review of monies spent and of prisoner transfers on grounds such language violated single object and special legislation principles). However, we need not in this case determine whether the constitutional line-item veto clause necessarily requires this expansive interpretation in order to fulfill its essential purpose and vindicate its underlying intent.

*510 [11] We are satisfied that the Governor had the constitutional authority pursuant to his line-item veto power to delete these general provisions because they are sufficiently related to the appropriations that they purport to condition. Hence, the veto of these provisos is committed to the broad discretion of the Governor without regard to whether they were otherwise unlawful or unconstitutional.

B

Another general condition was included with the appropriation of $13,325,000 to the Department of Corrections to fund its correctional capital construction program. Following that appropriation, the Appropriations Act provided:

> The Department of Corrections is prohibited from placing a new correctional facility in a county with a population exceeding 85,000 but less than 100,000 in which another State correctional facility is located. [Senate Bill 1600 at 145, lines 9-13.]

The Governor eliminated this language in its entirety. The deleted paragraph would have prohibited the construction of a new correctional facility only in Hunterdon County, since that is the only county in the State that meets the criteria of the

provision. The appellants no longer challenge this result. Nevertheless, the matter was fully briefed and argued before the Appellate Division, which rendered a decision. Because the issue raised by this challenge is important, capable of recurrence, and was disposed of by the court below on grounds that necessitate our consideration, we have decided to deal with the meritorious issue. *See, e.g.,* State v. Union Co. Park Comm'n, 48 N.J. 246, 248-49, 225 A2d 122 (1966).

[12] It is asserted that this purported limitation on the executive's discretion to establish the siting of necessary state correctional facilities is not tied to any particular item of appropriation. As with other provisions containing general conditions or limitations, the Governor concluded that such language offended several constitutional principles, namely, separation of **418 powers, the prohibition against special legislation, *511 the single-object clause, and the prohibition against amending a law by reference only to its title. These reasons impelled his veto of the provision.

The Appellate Division determined that this paragraph was not tied to any particular appropriation under the budget and that it would more properly be the subject of a conventional bill. 190 N.J. Super. at 224, 462 A.2d 1273. Accordingly, the court concluded that inclusion of the language was unconstitutional and, for that reason, it sustained the Governor's veto. *Id.* at 231, 462 A.2d 1273.

We do not agree that this provision is unrelated to the particular appropriation for the construction of correctional facilities. *See* State ex rel. Turner v. Iowa State Highway Comm'n, supra, 186 N.W.2d 141. We consider the proviso to be a part of the capital construction appropriation for the Department of Corrections. The provision serves to define or specify the purpose of the appropriation and is, in reality, a condition on the expenditure of the appropriated sums. By virtue of this condition, the Legislature, in effect, appropriated $13,325,000 to the Department of Corrections for the construction of a correctional facility anywhere in the state except in Hunterdon County. The provision, thus understood, relates to the purpose of the particular appropriation. The Governor's veto of this exception constitutes the veto of "part" of an item of appropriation, which he is empowered to assert under the line-item veto clause of the Constitution. *Supra* at 417.

Consequently, we affirm this result, although for purposes of this opinion we do not rely on the reasoning of the Appellate Division. As already determined, the line-item veto power does not depend for its exercise on a determination that the subject matter violates constitutional provisions or is otherwise unlawful. Rather, as we have ruled, it depends primarily on whether the subject matter constitutes an appropriation or an item of appropriation or is in any way related to appropriations or the expenditure of appropriated sums. *Supra* at 416-417.

***512** V

For the reasons set forth in this opinion, we affirm in part and reverse in part the judgment of the Appellate Division. So ordered.

For affirmance in part; reversal in part-Chief Justice WILENTZ and Justices CLIFFORD, SCHREIBER, HANDLER, POLLOCK and GARIBALDI join in this opinion.
Opposed -None.

N.J.,1984.
Karcher v. Kean
97 N.J. 483, 479 A.2d 403

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Supreme Court of Kentucky.

The LEGISLATIVE RESEARCH COMMISSION, By and Through Joseph W. PRATHER, Senator, and Bobby H. Richardson, Representative, Kentucky General Assembly, Individually and as Co-Chairmen of the Legislative Research Commission, Appellants,

v.

John Y. BROWN, Jr., Governor, Commonwealth of Kentucky, and Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Appellees.

Jan. 19, 1984.

As Modified on Denial of Rehearing March 1, 1984.

Appeal was taken from a judgment of the Franklin Circuit Court, Squire N. Williams, J., declaring unconstitutional statutes conferring powers on Legislative Research Commission. The Supreme Court, Stephens, C.J., held that: (1) General Assembly may not constitutionally delegate its legislative power to the Legislative Research Commission, and while in adjournment, General Assembly may not legislate through the Commission as its agent; (2) statute declaring that LRC is an "independent" agency of state government was unconstitutional; (3) statutes setting out plan and rules for providing review of proposed regulation by General Assembly or Legislative Research Committee were unconstitutional as in violation of separation of powers, and as a legislative encroachment into power of executive branch; and (4) General Assembly, in enacting laws pertaining to budget and budgetary process, could properly authorize LRC to exercise certain reporting and oversight powers.

Affirmed in part, reversed in part with directions.

West Headnotes

[1] **Constitutional Law 92 ⚷2340**

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and Scope in General. Most Cited Cases
(Formerly 92k50)
General Assembly, as legislative branch, has all powers which are solely and exclusively legislative in nature.

[2] **Constitutional Law 92 ⚷2330**

92 Constitutional Law
92XX Separation of Powers
92XX(A) In General
92k2330 k. In General. Most Cited Cases
(Formerly 92k50)
Any statute subject to scrutiny of separation of powers sections of State Constitution should be judged by strict construction of those provisions. Const. §§ 27, 28.

[3] **Constitutional Law 92 ⚷2400**

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2400 k. In General. Most Cited Cases
(Formerly 92k60)
General Assembly cannot delegate its power to make a law; it can, however, establish standards for administration and delegate authority to implement a law.

[4] **Constitutional Law 92 ⚷2400**

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2400 k. In General. Most Cited Cases
(Formerly 92k60)
State constitutional section vesting legislative power in General Assembly does not absolutely prohibit General Assembly's delegation of legislative power. Const. § 29.

[5] **Constitutional Law 92 ⚲2407**

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2407 k. Standards for Guidance. Most Cited Cases
(Formerly 92k62(2))

General Assembly's delegation of legislative power, to be lawful, must not include exercise of discretion as to what the law shall be; in addition, such delegation must have standards controlling exercise of administrative discretion, and delegating authority must have right to withdraw the delegation.

[6] **Constitutional Law 92 ⚲2400**

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2400 k. In General. Most Cited Cases
(Formerly 92k60)

General Assembly may not constitutionally delegate its legislative power to the Legislative Research Commission, and while in adjournment, General Assembly may not legislate through the Commission as its agent. Const. § 29.

[7] **States 360 ⚲24.1**

360 States
360II Government and Officers
360k24 Legislature
360k24.1 k. In General. Most Cited Cases
(Formerly 360k24)

A legislative body ceases to exist at moment of its adjournment.

[8] **Constitutional Law 92 ⚲2340**

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and Scope in General. Most Cited Cases
(Formerly 92k50)

Legislative Research Commission is an "oversight" and service organization for and on behalf of the General Assembly, and, as such, is part of the General Assembly; therefore, statute declaring that the Commission is an "independent" agency of

state government was unconstitutional as in violation of separation of powers provisions of State Constitution. KRS 7.090, 7.090(1); Const. §§ 27–29.

[9] Constitutional Law 92 ⚿2400

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2400 k. In General. Most Cited Cases
(Formerly 92k50)

States 360 ⚿32

360 States
360II Government and Officers
360k24 Legislature
360k32 k. Sessions and Meetings. Most Cited Cases
Statute authorizing Legislative Research Commission to conduct any and all business of legislative department while General Assembly is not in session was unconstitutional as impermissible under State Constitution's separation of powers provisions, and a third section of Constitution, as bringing new life to General Assembly following its adjournment. Const. §§ 27, 28, 42; KRS 7.100(8).

[10] Constitutional Law 92 ⚿2620

92 Constitutional Law
92XX Separation of Powers
92XX(D) Executive Powers and Functions
92k2620 k. Nature and Scope in General. Most Cited Cases
(Formerly 92k76)
Adoption of administrative regulations necessary to implement and carry out purpose of legislative enactments is executive in nature and is ordinarily within constitutional purview of executive branch of government. Const. §§ 27, 28, 42, 88, 89.

[11] Constitutional Law 92 ⚿2411

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2411 k. In General. Most Cited Cases
(Formerly 92k62(5.1), 92k62(5))

Statutes setting out plan and rules for providing review of proposed regulation by General Assembly or Legislative Research Committee were unconstitutional as in violation of separation of powers doctrine, and as a legislative encroachment into power of the executive branch. KRS 13.085(1)(d, e), 13.087(4–9), 13.092(1, 2); Const. §§ 27, 28.

[12] Constitutional Law 92 ⇐2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In General. Most Cited Cases
(Formerly 92k58)

Statutory nonseverability clause providing, in essence, that if Legislative Research Committee or its subcommittee could not constitutionally veto proposed administrative regulations, then executive department could not issue any more regulations, was unconstitutional as limiting and interfering with governor's mandated duties. KRS 13.092(3); Const. §§ 69, 81.

[13] Constitutional Law 92 ⇐2391

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2391 k. Appointment, Tenure and Removal of Public Employees and Officials. Most Cited Cases
(Formerly 92k58)

Officers and Public Employees 283 ⇐30.3

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(C) Eligibility and Qualification
283k30 Holding Other Office or Employment
283k30.3 k. Membership in Legislature and Other Office. Most Cited Cases
(Formerly 92k58)

States 360 ⇐46

360 States
360II Government and Officers
360k46 k. Appointment or Election of Officers. Most Cited Cases
(Formerly 92k58)

Statutes empowering house speaker and president pro tem. of the Senate to appoint members of particular boards, making house speaker and president pro tem. of the Senate ex officio members of certain boards and commissions, conferring on Legislative Research Commission or joint interim legislative committee power to advise and consent to governor's

appointments to boards or commissions, directing governor to make appointments solely from list submitted to him by LRC, and permitting LRC or its chairman to make appointments to certain boards and commissions, were unconstitutional as restricting and subverting the government's executive prerogative, thereby violating separation of powers. KRS 31.015(1)(b, c), 42.500, 117.015(2), 163.505, 164.010, 174.105(2), 230.220(1), 230.620, 247.090(1)(f); Const. §§ 27, 28, 69.

[14] Constitutional Law 92 ⚿2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In General. Most Cited Cases
(Formerly 92k58)

States 360 ⚿121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of Finances in General. Most Cited Cases
(Formerly 92k58)

Statute requiring each branch of government, when submitting budget request to General Assembly, to develop and submit plan for reduction of that budget in event Commonwealth suffered revenue shortfall in amount of 2 1/2 to 5% of basic revenue estimates upon which overall budget was premised was not unconstitutional as an interference by General Assembly in purely executive function of administering budget, as General Assembly retained power to adopt and modify such plan. KRS 48.130.

[15] Constitutional Law 92 ⚿2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In General. Most Cited Cases
(Formerly 92k58)

Constitutional Law 92 ⚿2525

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2525 k. Taxation and Public Finance. Most Cited Cases
(Formerly 92k70.1(12))

States 360 ⚖121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of Finances in General. Most Cited Cases
(Formerly 92k58)

Statute requiring governor, chief justice and Legislative Research Commission to make allotment reductions for budget units of their respective branches of government was not unconstitutional as in violation of separation of powers doctrine, and was not an incursion into executive duty to administer budget of executive branch of government. KRS 48.600; Const. §§ 27, 28, 69.

[16] Constitutional Law 92 ⚖2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In General. Most Cited Cases
(Formerly 92k58)

States 360 ⚖121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of Finances in General. Most Cited Cases
(Formerly 92k58)

Statute directing executive branch to monitor Commonwealth's financial position and to give monthly reports to each branch was not unconstitutional as an incursion into an executive function, as it placed responsibility on executive branch to participate in overall statutory scheme dealing with revenue shortfalls. KRS 48.400; Const. § 69.

[17] Constitutional Law 92 ⚖2393

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2393 k. Veto Power. Most Cited Cases
(Formerly 92k58)

States 360 ⚖121

360 States

360IV Fiscal Management, Public Debt, and Securities

360k121 k. Administration of Finances in General. Most Cited Cases

(Formerly 92k58)

Statute requiring each branch of government to interpret provisions of appropriation act in conformity with budget memorandum adopted by General Assembly did not unconstitutionally permit veto of executive action in administering budget by legislative committee, as decision on interpretation was ultimately left up to affected branch. KRS 48.500; Const. § 69.

[18] Statutes 361 ⚿22

361 Statutes

361I Enactment, Requisites, and Validity in General

361k22 k. Introduction and Passage of Joint Resolutions. Most Cited Cases

Statute requiring budget to be introduced as joint resolution, rather than a bill, was unconstitutional, as section of Constitution in describing governor's veto power in appropriation matters referred to budget document as a "bill," and second section, which requires that all revenue matters be introduced in House of Representatives, referred to such documents as "bills." KRS 48.310; Const. §§ 47, 88.

[19] Constitutional Law 92 ⚿2400

92 Constitutional Law

92XX Separation of Powers

92XX(B) Legislative Powers and Functions

92XX(B)4 Delegation of Powers

92k2400 k. In General. Most Cited Cases

(Formerly 92k60)

United States 393 ⚿82(2)

393 United States

393VI Fiscal Matters

393k82 Disbursements in General

393k82(2) k. Aid to State and Local Agencies in General. Most Cited Cases

General Assembly may constitutionally preserve and keep secure its legislative power and allow Legislative Research Commission, or another delegate, to monitor applications for federal block grants, so long as authority delegated is not legislative. KRS 45.351(1), 45.3511(2), 45.355.

[20] States 360 ⚿44

360 States

360II Government and Officers

360k44 k. Creation and Abolition of Executive Offices in General. Most Cited Cases

Statute providing that before governor may temporarily reorganize executive department governor's plan must be approved

by the Legislative Reorganization Commission was unconstitutional, as in exercising such a veto LRC would be making legislative decisions properly to be made by entire General Assembly. KRS 12.028(2).

*909 Gross C. Lindsay, Henderson, Kathleen L. Patterson, Frankfort, for appellants.

Bert T. Combs, Wyatt, Tarrant & Combs, Sheryl G. Snyder, Wyatt, Tarrant & Combs, Louisville, Edward F. Prichard, Jr., Prichard & Stallard, Rush Dozier, Jr., General Counsel, Robert L. Chenoweth, Asst. Deputy Atty. Gen., Frankfort, for appellees.

Jane V. Fitzpatrick, Brooks, Coffman & Fitzpatrick, Lexington, for amicus curiae, Kentucky Educ. Ass'n; John J. Slattery, Jr., General Counsel, Kentucky Educ. Ass'n, Louisville, of counsel.

STEPHENS, Chief Justice.

On this appeal, we address the constitutionality of several acts of the Kentucky General Assembly passed by that body's 1982 regular session. This case has been trumpeted abroad as a test of the relative constitutional powers of the Governor of the Commonwealth as opposed to those of the General Assembly and has further been described as a power struggle between these two particular branches of our state government.

It is more accurately a case which deals with legislative enactments that confer certain powers on the Legislative Research Commission,[FN1] most of which are designed to be exercised by that body when the General Assembly is adjourned. The basic legal issues involved deal with the delegation of powers by the General Assembly to the LRC and the application of the historical doctrine of the separation of powers to the particular statutes in question. An answer to the questions posed by this litigation necessarily requires consideration of the nature and limitations of the LRC.

FN1. For brevity, we will hereinafter describe the Legislative Research Commission as "LRC".

I. PROCEDURAL HISTORY

The LRC, acting by and through appellants Prather, President Pro Tem of the Senate, and Richardson, Speaker of the House of Representatives, Co-Chairmen of the LRC, filed this action in Franklin Circuit Court. The complaint sought a declaration of rights as to the validity of several statutes, following a challenge thereto by the Governor. The appellees, by counterclaim, impleaded certain additional statutes[FN2] in order to insure that all issues were litigated. Following an evidentiary hearing, the trial court rendered a written opinion and a judgment.

FN2. The statutes, grouped by subject matter, will be discussed in detail at a later point in this opinion.

Based on agreements and stipulations of the parties, not all of the statutes in question were submitted to the trial court for judgment, and we will not, perforce, decide those issues. The general subject matters of the controverted statutes are as follows: *910 the power of the LRC to act in the stead of the General Assembly while it is adjourned; the power of the Speaker of the House and the President Pro Tem of the Senate to make appointments to and to serve as members of certain boards and commissions; the power of the LRC to determine or to approve budget reductions when the General Assembly is

adjourned; the power of the LRC to approve the action of the executive in applying for so-called Federal "Block Grants;" the power of the LRC to grant or withhold legal effect from any executive order promulgated by the Governor which reorganizes the administrative structure of the executive branch of government; and the power of the LRC to delay the legal effect of administrative regulations adopted by the Governor.

II. JUDGMENT OF THE TRIAL COURT

The trial court ruled that each and every questioned statute was constitutionally defective; in effect, ruling in favor of the appellees.

In summary, the court declared that the powers of the LRC were limited to "oversight" and that a statutory attempt to authorize the LRC to conduct the business of the General Assembly was a violation of Kentucky's separation of powers doctrine. The right of the appellants to make certain appointments to boards and commissions was declared invalid for the reason that the power of appointment was an executive function. The right of the LRC to veto executive decisions concerning the administration of the budget was held to be executive in nature and not the subject of proper delegation by the General Assembly. The legislative power of the LRC to approve an executive request for a Federal Block Grant was held to be void because such action constitutes "lawmaking after adjournment of the full General Assembly." The power of the LRC to, in effect, veto a Governor's reorganization plan was similarly held invalid as being the unconstitutional exercise of lawmaking authority following the adjournment of the General Assembly. Finally, the power given to the LRC to delay the effect of executive administrative regulations was declared to be a violation of the separation of powers doctrine.

Subsequent to the entry of the above judgment and following an appropriate motion, this Court, for obvious reasons, transferred this case from the trial court. CR 76.18.

III. CONTENTIONS OF THE PARTIES

In essence, the appellants, representing the LRC, argue that the LRC is a "legitimate arm" of the General Assembly, and that it may carry out any and all necessary functions of the General Assembly, following the adjournment of the General Assembly. In furtherance of this argument Appellants claim that even though some of the authority given to the LRC under the questioned statutes may be technically executive in nature, such incursion by the legislative branch into the powers of the executive is constitutionally permissible under a so-called "liberal" construction of the Kentucky constitutional provisions creating the separation of powers doctrine.

Predictably, appellees urge that the powers given to the LRC by the statutes constitute far more than mere "oversight" and actually constitute the power to *legislate*. Moreover, appellees argue that this Court has consistently ruled that the doctrine of the separation of powers in this Commonwealth must be strictly construed and that all such incursions by one branch of government into the sphere of influence of another branch are constitutionally prohibited.

IV. A HISTORY OF THE LRC

Because the statutes in question grant the LRC much power, authority and responsibility, it will be helpful to discuss the nature of this organization, and to identify its role in the constitutional scheme of the organization of state government.

The parent of the present LRC, The Legislative Council, was given birth by the 1936 session of the General Assembly.[FN3] It was *911 composed of fifteen members: five Senators appointed by the Lieutenant Governor, five Representatives appointed by the Speaker of the House, and five state officials appointed by the Governor. It was empowered solely to engage in

fact-finding. In 1944, the Legislative Council's membership was enlarged to sixteen members, none of whom were appointed by the Governor.[FN4] The eight Senators and eight Representatives serving were appointed by the Lieutenant Governor and the Speaker of the House, respectively. The Council's powers were expanded to include organizational functions prior to each regular session of the General Assembly. In 1948, the Council was renamed the Legislative Research Commission, and its membership was reduced to seven: the Governor as Chairman, the President Pro Tem of the Senate, the Speaker of the House, and the majority and minority floor leaders of the Senate and the House.[FN5] Its powers were essentially unchanged. Subsequently, the Lieutenant Governor replaced the Governor as Chairman.[FN6] In 1974, the Lieutenant Governor was removed as a member and under the present statute all members of the LRC are members of the legislative branch of government.[FN7]

FN3. §§ 4618–138 through 4618–142, Carroll's Kentucky Code (1936).

FN4. 1944 Kentucky Acts, Chapter 149.

FN5. 1948 Kentucky Acts, Chapter 15.

FN6. 1956 Acts, First Extraordinary Session, Ch. 7, Art. XII, § 1.

FN7. 1974 Kentucky Acts, Chapter 353.

It is patently clear that the LRC as it currently exists, and as it has existed since 1974, is as appellants concede, an "arm" of the General Assembly. It is beyond cavil that the primary role, if not the exclusive role, of the LRC has been historically that of a research, fact-finding, secretariat and general support agency for the General Assembly. Since the LRC's membership consists of a small percentage of the total membership of the two houses of the General Assembly, no one could argue that it has any powers not given to it by its parent, the General Assembly, and no one could argue that it can legislate. The legislative power lies solely within the province of the General Assembly *and its entire, publicly elected membership.* Our constitution makes that clear. Ky. Const. Sec. 29 states, "[T]he legislative power shall be vested in a House of Representatives and a Senate, which, together shall be styled the 'General Assembly of the Commonwealth of Kentucky'." Whatever else the LRC may constitutionally do, it may not legislate.[FN8]

FN8. For an extensive discussion of the governmental scheme set up by the framers of the Constitution see *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982).

V. THE SEPARATION OF POWERS DOCTRINE

President George Washington, in his farewell address, described the problem which is addressed by the separation of powers doctrine when he said:

> The spirit of encroachment [of one branch of government into the functions of another] tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. XIII, *Writings of George Washington,* 277, 306 (Ford ed., N.Y., 1892).

Montesquieu, the father of the doctrine of separation of powers, articulated the concept by writing:

> Here then is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. 1 Montesquieu, *The Spirit of Laws,* Book XI, Chapter VI, 159 (1823).

The extent to which a country can successfully resolve the conflict among the three branches of government is, to a very great extent, the measure of that nation's capacity to self-govern.

The framers of Kentucky's four constitutions obviously were cognizant of the need for the separation of powers. Unlike the federal constitution, the framers of Kentucky's constitution included an express ***912** separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach:

> Section 27 *The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy,* to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> (Emphasis added.)
>
> Section 28 No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Subsequent provisions of the Constitution proceed logically and consistently with the policy established in Sections 27 and 28 that grant powers to the three branches of government. Section 29 vests the legislative power in the General Assembly, Section 69 vests the executive power in the Governor and finally, Section 109, as amended by the people in 1975, establishes the judicial power in the Court of Justice.[FN9]

> FN9. A reading of these sections of the constitution shows that certain normal functions of one branch were specifically granted to another branch, e.g. the veto power of the Governor over Acts of the General Assembly, Ky. Const. Sec. 88 and 89, the power of the General Assembly to remove its own member, Ky. Const. Sec. 39.

A motivating factor that led to the drafting and eventual adoption of our present constitution was a strong desire on the part of the people to curb the power of the General Assembly. Convention delegate John D. Carroll from Henry County exemplified that spirit when he stated,

"It is a well known fact that one of the prime causes for the calling of this convention was the abuses practiced by the

legislative department of this state...." 1 Debates of Constitutional Convention of 1890, p. 1482.

According to delegate J.F. Askew, there was a great necessity to "reform the legislative department...." *Id.* at 3821. A noted Kentucky constitutional historian, Dr. Robert Ireland, clearly established in his testimony before the trial court that the desire to curb the power of the General Assembly was the primary motivation for calling the 1891 Constitutional Convention.

Even a cursory reading of Kentucky history reveals the factual basis for the conclusions of delegates Carroll and Askew and the opinion of Dr. Ireland. The then General Assembly was dominated by a few, powerful special interests who wielded that power for their own benefit. This situation obviously does not exist today; however, constitutions are operative until and unless changed by the people.

A case which was contemporaneously decided with the adoption of our present constitution, *Pratt v. Breckinridge*, 23 Ky.Law Rep. 1858, 112 Ky. 1, 65 S.W. 136 (1901) stated:

> From this it seems clear that the makers of the constitution intended the legislature to discuss and enact laws, and *to do nothing else.* 65 S.W. at 140. (Emphasis added.)

Moreover, it has been our view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be "strictly construed." *Arnett v. Meredith*, Ky., 275 Ky. 223, 121 S.W.2d 36, 38 (1938). In *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455 (1922), we expounded at some ***913** length on the history and the purposes of Sections 27 and 28:

> "Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution, which history tells us came from the pen of the great declaimer of American independence, Thomas Jefferson.... 246 S.W. at 457.
>
> *... We conceive it to be the duty of the courts to adopt the construction most conducive ... [to prevent] ... the destruction of the edifice as contemplated."* 246 S.W. at 458. (Emphasis added.)

Appellants urge this court to adopt a so-called liberal construction of the separation of powers doctrine and argue that the General Assembly is the "dominant" branch of government. In support of this argument, they claim that in *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982), we denigrated the power of the Governor and gave the General Assembly a dominant role in the tripod, by allegedly giving to the General Assembly all "residual" powers. We do not agree and we do not so interpret *Barkley*.

In *Barkley,* following a lengthy discussion of the inherent or implied powers of the Governor, we said:

> The extent that the Governor has any implied or inherent powers in addition to those the Constitution expressly gives him, it seems clear that such unexpressed executive power is subservient to the overriding authority of the legislature.... 628 S.W.2d at 621.

Practically speaking, except for those conferred upon him specifically by the Constitution, his powers like those of the executive officers created by Const. Sec. 91, are only what the General Assembly chooses to give him. 628 S.W.2d at 623.

These words, plus the following, are seized upon by appellants in their argument as proof that somehow, this Court has sawed off one of the legs of the tripod, viz., that of the executive, and that we have made that branch of government less than equal to the other two branches. Appellants remind us that we also said in *Barkley:*

It is axiomatic that under our Constitution *the General Assembly has all powers not denied to it or vested elsewhere by the Constitution.* (Emphasis added.)

and:

Whereas the judicial branch must be and is largely independent of intrusion by the legislative branch, the executive branch exists principally to do its [the legislature's] bidding. 628 S.W.2d at 623.

The inference appellants draw from this language is that the General Assembly possesses all powers and authority to act which are not specifically denied it by the Constitution and has the authority to act in exercising those powers. It is argued that *all powers,* residual in nature, belong to the legislative branch. We do not agree.

[1] To place this interpretation on that language would be tantamount to saying that we were repealing Sections 27 and 28 of the Kentucky Constitution. We would in effect be eliminating the separation of powers doctrine. We would reach a result which would fly in the face of history and the legal precedents of this Commonwealth. Our review of that doctrine's history and our description of its language most assuredly confirm this. Nothing in *Barkley* can be construed to deny the existence of the doctrine of separation of powers and the equality of the three coparceners in government. Implicit in *Barkley* is that the General Assembly as the legislative branch, has all powers *which are solely and exclusively legislative in nature.* To argue that any other power is given to the General Assembly simply won't wash. The power referred to in *Barkley* is *legislative power and legislative power only.* In summation, our view is best expressed in *Sibert v. Garrett,* 197 Ky. 17, 246 S.W. 455 (1922), which we reaffirm. There we stated:

But a deeper probing into and investigation of the subject will reveal the truth ***914** that the rule so generally stated means, not that the Legislature has "all powers" not withheld by the Constitution, but that it "may pass any acts that are not expressly or by necessary implication inhibited by their own Constitutions or by the Federal Constitution." *In other words, the Legislature may perform all legislative acts not expressly or by necessary implication withheld from it, but it may not perform or undertake to perform executive or judicial acts,* except in such instances as may be expressly or by necessary implication directed or permitted by the constitution of the particular state. *To adopt the latitudinous construction that the Legislature may do anything not expressly or impliedly prohibited by the Constitution would, to our minds, at once destroy the separation of the powers of government into the three great departments.* 246 S.W. at 457 (Emphasis added.)

Nearly every one of our sister state courts have similarly resisted any weakening of the doctrine of the separation of powers. See, e.g., *In re Opinion of the Justices,* N.C.App., 295 S.E.2d 589 (1982), and *State ex rel. McLeod v. McInnis,* 278 S.C. 307, 295 S.E.2d 633 (1982). In like manner, the United States Supreme Court, in striking down a federal statute, has spoken to the issue. The Court ruled that an attempt by Congress to vest veto authority in itself over executive action violated the separation of powers doctrine of the United States Constitution. *Immigration and Naturalization Service v. Chadha, Et*

al., 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). There the court said:

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 103 S.Ct. at 2784.

We should not abandon the philosophical principles that were incorporated by the framers of our present constitution. The purpose of the separation of powers doctrine is uncontroverted. The precedents established by this court have been uniform in retaining the goals set out by the framers. The separation of powers doctrine is set in the concrete of history and legal precedent. We will not overrule those cases and we will not, by the fiat of judicial legislation, change the clear and imperative meaning of our constitution. Such action is within the sole province of the voters of this Commonwealth.

[2] We conclude that any statute subject to the scrutiny of Sections 27–28 of the Kentucky Constitution should be judged by a strict construction of those time-tested provisions.

VI. POST–ADJOURNMENT POWERS OF THE GENERAL ASSEMBLY AND THE LRC

Two major legal questions dominate this area: (1) can the General Assembly delegate its authority to legislate to the LRC and (2) can the General Assembly legislate through its agent, the LRC, while the General Assembly is in adjournment? The answers to these legal questions are inextricably intertwined and relate to the nature and role of the LRC.

We premise this discussion on our previous conclusion that the LRC is part and parcel of the General Assembly and is under its control. It must also be remembered that the LRC is a service agency of the General Assembly. Its functions are limited. Its nature, role and authority do not change our form of government from a tripod into a quadrapod.

(1) Can the General Assembly Delegate its Authority to Legislate to the LRC?

Ky. Const. Sec. 29 reads:

"The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.' "

Ky. Const. Sec. 60 provides: "No law ... shall be enacted to take effect upon the approval of any other authority than the ***915** general assembly." While this is not a precise, written constitutional prohibition preventing the General Assembly from delegating its legislative powers to another entity, we have spoken many times on the subject. In *Bloemer v. Turner*, Ky., 281 Ky. 832, 137 S.W.2d 387, 390 (1940), we declared that the Kentucky Constitution "... made sure that the legislature may not in any degree abdicate its power." Further firming up its position, the Court in *Bloemer* said: *It is an accepted principle that "the legislative department has no right to deputize to others the power to perform its governing functions.* " 137 S.W.2d at 391. (Emphasis added.) Recognizing there are practical limitations to the hard and fast rule announced, particularly when it involves the implementation of legislative will, we stated:

But, obviously the legislature cannot deal with subordinate rules or cover the details of administration and execution in its regulatory enactments. Perforce, these must be left to those upon whom the duty of carrying out the legislative will devolves. However, the legislature must lay down policies and establish standards. *Ibid.*

[3] Under *Bloemer,* the General Assembly cannot delegate its *power to make a law.* It can, however, establish standards for administration and delegate authority to implement a law. As in so many instances, the principle is easy to state. Its application is difficult.[FN10]

FN10. The basic rule prohibiting delegation was forcefully reiterated in *Dawson v. Hamilton,* Ky., 314 S.W.2d 532 (1958).

[4] The practical modification or exception developed in *Bloemer* was further explained and expanded in *Commonwealth v. Associated Industries of Kentucky,* Ky., 370 S.W.2d 584 (1963). The rule of that case is that Ky. Const. Sec. 29 does not absolutely prohibit the General Assembly's delegation of legislative power.

A more recent statement of the applicable principles is found in *Holsclaw v. Stephens,* Ky., 507 S.W.2d 462 (1974). In that case we stated:

> ... when we say that the legislature may not delegate its powers, we mean that *it may not delegate the exercise of its discretion as to what the law shall be, but not that it may not confer discretion in the administration of the law itself...* Generally speaking *a delegation of discretion* is not unlawful if sufficient standards controlling the exercise of that discretion are found in the act ... such as procedural safeguards *and* the right of the delegating authority to withdraw the delegation. 507 S.W.2d at 471. (Emphasis added.)

[5] It is clear from the aforementioned cases that delegation, of legislative power, to be lawful, must not include the exercise of discretion as to what the law shall be. In addition, such delegation must have standards controlling the exercise of administrative discretion. Finally, the delegating authority must have the right to withdraw the delegation.

[6] Therefore, we conclude that the General Assembly, which constitutionally holds legislative power, cannot delegate that power to the LRC.

(2) While in Adjournment Can the General Assembly Legislate Through its Agent, the LRC?

We begin by reiterating that under Ky. Const. Sec. 29 the General Assembly is the sole legislative branch of government and that its powers, procedures and limitations are set forth in Sections 29 through 68 of that Constitution.

[7] The Kentucky General Assembly is not one of continuous session and a necessary corollary thereto is that it cannot legislate after it has adjourned *sine die.* A legislative body ceases to exist at the moment of its adjournment. *Anderson v. Dunn,* 19 U.S. (6 Wheaton) 204, 5 L.Ed. 242 (1821).

As we have concluded above, the General Assembly may not delegate its authority to *916 legislate. It follows, therefore, that given the inability to delegate said authority, the General Assembly may not bestow upon its agent, the LRC, nor can the LRC seize for itself, the power to legislate. [FN11]

FN11. See, *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982); *In re Opinion of the Justices*, 305 N.C. 767, 295 S.E.2d 589 (1982); *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982); *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975); *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962); *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806 (Mo.1957); *State ex rel. Robinson v. Fluent*, 30 Wash.2d 194, 191 P.2d 241 (1948), *cert. denied sub nom. Washington Pension Union v. Washington*, 335 U.S. 844, 69 S.Ct. 66, 93 L.Ed. 394 (1948); *State ex rel. Hamblen v. Yelle*, 29 Wash.2d 68, 185 P.2d 723 (1947); *In re Opinion of the Justices*, 248 Ala. 590, 29 So.2d 10 (1947).

With the preceding background we move on to analyze the challenged statutes. In each instance, one or more legal questions have been raised. We shall apply the law stated above, to each statute and determine its validity. Since certain additional legal issues have been raised, we shall discuss those where appropriate.

VII. POWERS OF THE LRC

KRS 7.090 (1982) created, or more properly re-created, the LRC. In addition, the statute established the LRC's membership, meetings, compensation, direction, personnel and management. Section (1) provides that the LRC is, "... an *independent agency of state government* ... which is exempt from control by the executive branch and from reorganization by the governor." (Emphasis added.)

KRS 7.100 (1982) sets out all the duties and authority of the LRC. Basically, the statute provides that the agency has those duties that involve fact-finding, investigation, information gathering, record-keeping, publishing, research and education. It is a service organization of the General Assembly. However, Section (8) of KRS 7.100 authorizes the LRC to:

> *Conduct, while the general assembly is not in session, any and all business of the legislative department of government,* except for the passage of legislation, *which could be conducted by the legislative department of government* or the general assembly *if the general assembly was in session.* (Emphasis added.)

The trial court struck down KRS 7.090(1) which made the LRC an "independent" agency of state government. It declared that under Ky. Const. Secs. 27–28, there are *three* branches of government and that the net effect of the words "independent agency of state government" was to create a fourth branch of government. Moreover, the trial court ruled that the provisions of KRS 7.100(8), that broadened the authority of the LRC, when the General Assembly was in adjournment to include "... any and all business of the legislative department of government, except for the passage of legislation ..." were constitutionally invalid. The trial judge declared that the LRC could not, because of the separation of powers doctrine, exercise any supervision over the executive branch and that for the same reason, the LRC could not exercise any authority over the judiciary. The trial court obviously felt that both violations were possible under the broad grant of powers in the questioned statutes. The trial court also declared that the provisions brought new life to the General Assembly following its adjournment and thus were violative of Ky. Const. Sec. 42.

We agree with the trial court and affirm those portions of its judgment holding KRS 7.090(1) and KRS 7.100(8) unconstitutional.

As we have said, it is clear that the LRC is totally an agent of the General Assembly and may aid and assist that branch of government. As we also have said, the LRC cannot do anything the General Assembly cannot do.

[8] KRS 7.090(1) declares that the LRC is an "independent" agency of state government. This does not comport with our previous analysis of the nature of the LRC, nor ***917** does it comport with our constitution which recognizes only three branches of government.

There is, simply put, no fourth branch of government. The LRC was created by, is controlled by, and is a service type agency of the General Assembly. It is independent of the Governor; it is not subject to reorganization by the Governor, it is subject to the control of its creator, the General Assembly. It is an "oversight" and service organization for and on behalf of the General Assembly. As such, it is a part, albeit an important part, of the General Assembly, the legislative branch of government. It is part of the General Assembly by reason of its statutory birth and its statutory nourishing. We therefore, conclude that KRS 7.090(1), which declares the LRC to be an independent agency of state government is constitutionally invalid.

[9] KRS 7.100(8) attempts to grant all authority constitutional and otherwise, express and inherent, save only the power to pass legislation to the General Assembly's agent, the LRC. Such a grant of power includes, but is not limited to the power to confirm executive appointments, the power to reject or modify administrative regulations, and the power to generally exercise supervision over the executive and judicial branches of government. The testimony of a witness for the appellants at trial conceded the potential of such act by saying:

> [I] would say that the Legislature has all functions that are not specifically granted to the Governor or that are not specifically granted to the Judicial Branch. All other powers are inherent in the Legislature whether you term them legislative functions *or whatever, they're still in the Legislature.*

Moreover, the same witness stated that while the General Assembly can "delegate" by statute certain powers to the Governor, it can "rightfully put any strings that it wants to on that delegation of power" and that the LRC can, in effect, act for the General Assembly in "putting the strings on." The witness also described it another way when he said that the LRC could be used to "limit" the power given to the Governor, and that the LRC has "review" authority. He concluded that the LRC could "[d]o *anything short of performing legislative acts* ..."

Such a grant of power clearly is impermissible under Ky. Const. Secs. 27–28. It also violates Ky. Const. Sec. 42, in that such a provision brings new life to the General Assembly (through the LRC) following adjournment.

VIII. LRC REVIEW OF ADMINISTRATIVE REGULATIONS

The General Assembly has in its recent history exercised "oversight" and review of administrative regulations promulgated by the various executive agencies, boards and commissions. KRS 13.080–13.125. This "oversight" and review has been achieved through a subcommittee of the LRC known as the Administrative Regulation Review Subcommittee. KRS 13.087. The effect of this LRC subcommittee's actions was *recommendatory* in nature. KRS 13.087.

However, the 1982 General Assembly made several major changes in the nature of this subcommittee's actions which are the subject of this law suit. KRS 13.085(1)(d) and (e) (effective 7–15–82) provide that no regulation made by any administrative body shall become effective until it has been forwarded to the LRC *and* until it has been *reviewed and accepted* by the LRC, *or* it has been placed before and not disapproved by the General Assembly. KRS 13.087(4) requires that the LRC shall submit all regulations to one of its subcommittees to determine "... *if the regulation conforms to the statutory authority*

under which it was promulgated and if it carries out the legislative intent of the statutory authority under which it was promulgated." (Emphasis added.) The subcommittees' findings are reported to the LRC which then either finds that the regulation conforms***918** to the legislative intent of the statutory authority and accepts the regulation, or attaches a notation of its objection to the regulation and returns it to the promulgating administrative body. KRS 13.087(5) provides that the administrative body may then revise the regulation so as to make it comply with the LRC's determination of the legislative intent or that body may return it unchanged to the LRC. KRS 13.087(6) provides that if the General Assembly is in session when an administrative body returns a regulation, that is objected to by the LRC, then the regulation shall be put before the General Assembly. KRS 13.087(7) requires a monthly reporting to the LRC of all subcommittee actions regarding administrative regulations. KRS 13.087(8) requires that all regulations not accepted by the LRC *or* one of its subcommittees shall be placed before the General Assembly. KRS 13.087(9) provides that the *General Assembly* may, during its regular sessions, and by joint resolution, or bill, require regulations submitted to the LRC to be laid before the General Assembly and may void any regulation already in effect. KRS 13.088(1) provides a procedure for the Governor to issue an executive order, in the event of an emergency, to permit applicable regulations to become effective immediately, provided that the emergency regulations are submitted to the LRC for review. KRS 13.088(2) provides that an emergency regulation shall expire when final review action is taken as provided by KRS 13.080 and 13.085. KRS 13.088(3) provides that when the LRC or a subcommittee thereof has an objection to a regulation, such regulation cannot be filed as an emergency regulation. KRS 13.092(1) provides that when the General Assembly is not in session, no administrative regulation, excepting an emergency regulation, shall become effective until accepted by the LRC. KRS 13.092(2) provides that until an administrative regulation is accepted by the LRC, it shall be of no force or effect. KRS 13.092(3) states that if any of the provisions of KRS 13.092 are held to be unconstitutional, no administrative body shall have authority to promulgate any regulations, notwithstanding any other provision of the law.

It is clear that if the LRC subcommittee or the LRC itself disapproved of a proposed regulation, the regulation's implementation would be delayed until the next session of the General Assembly. Therefore, KRS 13.085 and KRS 13.087 provide a device whereby the LRC or a subcommittee thereof could block, for a period of nearly twenty-one months, the administrative policy of the executive branch of government. KRS 13.085 and KRS 13.087 have the effect of creating a legislative veto of the administrative policy of the executive branch of government. One of appellants' witnesses testified to this effect when he said:

Q. 43. Well, in practical effect it is a legislative veto?

A. *It's a legislative veto;* right.

Q. 44. It's a legislative veto...

A. Yes, sir.

Q. 45. ... of proposed regulations by departments of government?

A. Yes, sir.

Under pre-existing law, LRC objections to prepared regulations were precatory. The objections did not have the force of law. The changes in KRS 13.085, 13.087 and 13.092 which require LRC approval or LRC subcommittee approval of

regulations have the effect of preventing the executive from dealing with emergencies. The power to suspend a regulation's effective date for up to twenty-one months is the power to effectively prevent a regulation from having the force of law. In addition, the legislature has statutorily attempted to deliver this power into the hands of seven members of the General Assembly or into the control of a subcommittee thereof.[FN12]

FN12. In essence, as we have said, a "quadrapod", instead of a tripod.

The trial court held that such constituted a violation of the separation of powers doctrine. The judgment stated that delegation of legislative powers to the LRC when the *919 General Assembly was in adjournment was improper and declared that neither the General Assembly nor its designee could *legislate* when the General Assembly was not in session.

[10][11] The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government. Ky. Const. Secs. 27–28, 42, 88 and 89. *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982). We conclude that KRS 13.085(1)(d) and (e); KRS 13.087(4), (5), (6), (7), (8), (9); KRS 13.088(2)(3); and KRS 13.092(1) and (2) which set out the plan and the rules for providing legislative or LRC review of proposed regulations as those statutes are presently written are violative of Ky. Const. Secs. 27–28 and are a legislative encroachment into the power of the executive branch.[FN13]

FN13. Under *Chadha, supra,* we conclude that the legislative veto of the action of the executive is also a violation of the separation of powers.

It will also be recalled that the review of the regulations was for the stated legislative purpose of determining if they comported with statutory authority and if they carried out the legislative intent. It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary, the Court of Justice.[FN14] For this reason, we also conclude that the statutory scheme discussed above violates the separation of powers doctrine. *See, Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*, Ky., 352 S.W.2d 203 (1961).

FN14. This is not to say that any person, or organization including the LRC, does not have the unrestricted right to form an opinion as to whether a proposed action is legal or not. What we do say is that the determination of such as far as it causes the veto of executive action, is invalid.

[12] One further question remains. Appellants argue that KRS 13.092(3), a non-severability clause, is applicable. The statute, in essence, provides that if the LRC or its subcommittee cannot constitutionally veto proposed regulations, then the executive department cannot issue any more regulations.

The trial court declared KRS 13.092(3) to be void as being in contravention of the Governor's constitutional duty to faithfully execute the laws of the Commonwealth under Sections 69 and 81 of the Kentucky Constitution.

Under Kentucky's Constitution, the executive powers and responsibilities of the Commonwealth lie within the province of the Governor. Ky. Const. Sec. 69. Under Section 81 the Governor has the positive duty to go forward and "take care that the laws be faithfully executed". Ky. Const. Sec. 81. In *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982), we reaffirmed this

executive duty when we said:

> We do not doubt that if the General Assembly should pass a law that requires implementation, and appropriate funds for that purpose but omit specifying the manner in which it is to be carried out, *the chief executive would be required to carry it out and have the right to choose the means by which to do it.* 628 S.W.2d at 623. (Emphasis added.)

This right, this duty, exists because of the specific constitutional duties conferred on the Governor.

The non-severability clause that appears in KRS 13.092(3) has the effect of throwing the baby out with the bath water. The adoption and use of administrative regulations are important tools in the operation of modern government, at all levels. The purpose is to enable the Governor to successfully carry out the constitutionally mandated executive and administrative duties bestowed upon that office: *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982); *Burton v. Mayer*, 274 Ky. 245, 118 S.W.2d 161 (1938). There is no constitutional authority,***920** however, whereby the governor can add, directly or indirectly, to the content of a statute by means of an administrative regulation and, a fortiori, no administrative regulation can be adopted unless it is necessary and is related to the content of the legislative act and to its effective administration.

The statute in question not only impliedly reorganizes the executive duties of the Governor, but also attempts to usurp these powers. Having failed at the first part, it further attempts to restrict the ability of the Governor to carry out his sworn duties. The General Assembly, by enacting the clause, has restricted the power of the Governor to carry out his duties. In *Kenton Water Company v. City of Covington*, 156 Ky. 569, 161 S.W. 988 (1913), we said:

> [W]here the Constitution has by express provision denied the Legislature the right to require a particular thing to be done, or to legislate upon a particular subject or in a particular way, then the Legislature cannot by indirection require it to be done by attaching it as a condition to the exercise of some power which it has granted and which is essential to the public welfare that it be exercised. To do this would be to permit the constitutional provision to be indirectly violated and render it a nullity.... 161 S.W. at 992.

The restriction placed on the executive by KRS 13.092(3) effectively and unconstitutionally limits and interferes with the governor's mandated duties. It should also be noted that the General Assembly, through its enactment of KRS 446.090 clearly established the necessity of being able to sever a constitutionally infirm section of any statute from the sound portion thereof.

We, therefore, conclude that Section 3 of KRS 13.092 is void and we affirm the trial court.

IX. DOES THE GENERAL ASSEMBLY HAVE THE POWER TO PRESCRIBE THE METHODS AND APPOINTING AUTHORITY FOR INFERIOR STATE OFFICES?

The next group of controverted statutes deals with the subject of appointments to various boards and commissions. For purposes of clarity and brevity, we divide these 1982 statutes into five categories.

[13] The first category empowers the Speaker of the House of Representatives and the President Pro Tem of the Senate to appoint one or more members of particular boards.[FN15] In the second category the Speaker of the House of Representatives and the President Pro Tem of the Senate are made ex officio members of certain existing boards and commissions.[FN16] The

third category is that which confers on the LRC or a joint interim legislative committee the power to advise and consent to the Governor's appointments to boards or commissions.[FN17] Category four directs the Governor to make appointments solely from a list submitted to him by the LRC.[FN18] The fifth and final category permits the LRC or its chairmen to make appointments to certain boards and commissions.[FN19]

FN15. KRS 230.220(1), Kentucky State Racing Commission; KRS 31.015(1)(b)–(c), Public Advocacy Commission; KRS 230.620, Kentucky Harness Commission; KRS 42.500, State Investment Commission; KRS 247.090(1)(f), State Fair Board; KRS 117.015(2), State Board of Elections; KRS 163.505, Commission on Deaf and Hearing Impaired; KRS 174.105(2), Motor Carrier Board; and KRS 164.010, Council on Higher Education; KRS 103.2101(1)(a)–(b), Industrial Revenue Bond Oversight Committee.

FN16. KRS 154.675(1), Enterprise Zone Authority.

FN17. KRS 278.050(1), Enterprise Zone Authority; and KRS 248.510(1)(b).

FN18. KRS 151.560(1)(a), Flood Control Advisory Commission, and KRS 18A.050(2), State Personnel Board.

FN19. KRS 153.380(3), Kentucky Oral History Commission; KRS 441.615(1)(g), Kentucky Local Correctional Facilities Construction Authority; KRS 151.560(1)(b), Flood Control Advisory Commission.

The trial court struck down the provisions in the first and fifth categories, ruling that ***921** the power to appoint members of boards and agencies within the executive department of government is an essentially executive power which cannot be exercised by any member of the legislative department, including the Speaker of the House of Representatives and President Pro Tempore of the Senate. It declared that the second grouping of statutes permitting members of the legislature to sit as members of boards or agencies within the executive department was violative of Ky. Const. Sec. 28. Moreover, the trial court ruled that the statutes in the third category in which the General Assembly purported to grant the LRC the power to advise and consent to the Governor's appointments were improper delegations of power by the General Assembly. The trial court also declared the provisions in the fourth grouping requiring that the Governor make appointments to boards from lists of persons nominated by the LRC, to be an improper legislative designation of the appointee.

After limiting the eligibility requirements for re-election to certain statewide offices and after declaring that office holders' duties shall be provided by law, Ky. Const. Sec. 93:

> Inferior State officers, not specifically provided for in this Constitution, may *be appointed or elected, in such manner as may be prescribed by law,* for a term not exceeding four years, and until their successors are appointed or elected and qualified. (Emphasis added.)

From a reading of this section, it is evident that the General Assembly may, by law, *create* these various inferior "state officers." It also appears, at first blush, that the General Assembly may provide the manner of appointment or election of these offices. In 1898, close in time to the adoption of the present Constitution, we decided *Commission of Sinking Fund v. George,* 104 Ky. 260, 47 S.W. 779 (1898), the first of many cases addressing the question of which branch of government has the

constitutional authority to make appointments. The court reviewed an act of the General Assembly which created a Board of Penitentiary Commissioners to regulate the penal institutions of the Commonwealth. The act provided that three members of that commission were to be elected by the General Assembly. It was argued that this "election" of the commissioners was an executive function and not a legislative one and that, therefore, the election provision of the act violated the separation of powers doctrine. In rejecting this contention, we declared that there was no express or implied provision in the Kentucky Constitution which conferred the power to appoint such a commission upon the Governor. In upholding the General Assembly's right to "elect" the commissioners, this Court relied heavily on the specific wording in Section 93:

> Under Section 93 of the Constitution, the Legislature could not only provide for inferior state officers, *but could designate how they should be appointed or elected.* 47 S.W. at 781. (Emphasis added.)

The Court specifically rejected the contention that the appointive authority being placed in the General Assembly violated the doctrine of separation of powers:

> The truth is that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive or judicial departments ... It is an executive function when the law has committed it to the executive ... 47 S.W. at 781.

The import of the decision in this case seems to be that the General Assembly has, under the wording of Ky. Const. Sec. 93, very broad powers in establishing boards and commissions and in determining how the membership thereof is chosen, even to the extent of selecting the membership itself.

However, it was not long before this Court, when confronted with the same principle of law, veered sharply away from the holding in *George.* In *Pratt v. Breckinridge,* 23 Ky. Law Rep. 1858, 112 Ky. 1, **922**65 S.W. 136 (1901), we determined an 1899 election contest for the office of Attorney General. An act of the General Assembly created a three-person state election commission which held the power to resolve election disputes and also had the power to appoint the members of every local election commission in the state. The members of the State Election Commission were to be appointed by the General Assembly.

At the general election of 1899, Breckinridge polled fewer votes than his opponent, Pratt. Breckinridge filed an election contest with the State Election Commission, which declared him the winner, thus overturning the popular vote. Breckinridge filed suit for specific performance of the decision of the Election Commission. On appeal, this Court, in a decision that received much adverse notoriety from both contemporary and subsequent historians, declared that the appointment, by the General Assembly, of members of the Election Commission was violative of the separation of powers doctrine.

Pratt, as appellant, relied on *Commission of Sinking Fund v. George,* 104 Ky. 260, 47 S.W. 779 (1898), and argued that Ky. Const. Sec. 93 meant that the Governor did not have the executive power of appointment and that the General Assembly was constitutionally authorized to exercise the power of appointment. The Court rejected this argument, overruled *George* and held that Section 93 does nothing more than permit the General Assembly to determine whether boards and commissions are to be popularly elected, or appointed. We said:

> The creation of an office is accomplished by the exercise of legislative power. It is done by the enactment of a law. *The filling of it, when not exercised by the people, or in some manner directed or permitted by the constitution, is executive,*

and must be performed by an executive officer. 65 S.W. at 137. (Emphasis added.)

Several years later, in a less volatile atmosphere in the Commonwealth than had existed in *Pratt,*[FN20] this Court made a veer back towards the holding in *George.* In *Sewell v. Bennett,* 187 Ky. 626, 220 S.W. 517 (1920), the General Assembly, in enacting the Workmen's Compensation Act, created a compensation board and provided that the Governor appoint the Board but omitted the requirement of legislative approval of such appointments. A separate, pre-existing statute provided that *all* persons to be appointed by the Governor were subject to the advice and consent of the Senate. We applied the separate statute and held that when the General Assembly created a *legislative board* it could make the appointments itself, it could delegate such power to the Governor or it could delegate it to "any other person or body". The Court, indeed, seemed to retreat from *Pratt* and revitalize *George.*

FN20. For those who desire to learn more of the political atmosphere surrounding *Pratt,* See, Chapter 18, *Kentucky Decades of Discord, 1865–1906,* Hambleton Tapp-James C. Klotter, The Kentucky Historical Society.

However, two years later, we decided the landmark case of *Sibert v. Garrett,* 197 Ky. 17, 246 S.W. 455 (1922). As we have previously said,[FN21] in *Sibert,* this court ruled on the validity of an act which re-created a State Highway Commission of four members and provided that the members should be elected by the General Assembly. In holding that the appointment powers were executive in nature, we explained:

FN21. See discussion of *Sibert* in Section IV of this opinion, infra.

The appointment of officers is intrinsically an administrative or executive act, but this does not imply that no appointment can be made by any department of government other than the executive, for all the authorities agree that the courts and the legislature may appoint those public officers which are necessary to the exercise of their own function. 246 S.W. at 458.
The Court specifically declined to follow *George,* saying it was "short lived". ***923**246 S.W. at 458. It further chose to follow *Pratt,* even though acknowledging that it was a decision with political overtones and ramifications.

Addressing itself to the language in Ky. Const. Sec. 93, the Court said:

So where the Constitution provides that all officers whose appointment is not otherwise provided for in the Constitution shall be chosen in such manner as may be prescribed by law, it is held that, while this provision authorizes the Legislature to provide by law for the appointment or election of such officers, *it does not authorize the Legislature itself to make such appointment or election.* 246 S.W. at 459. (Emphasis added).

The Court used the separation of powers doctrine to bolster its view when it said:

The logical result of the contention, [that the General Assembly, under Section 93, could make appointments] if adopted and followed, would empower the Legislature to appoint or elect the private secretary to the Governor; the Commissioner, sergeant at arms, tipstaff, and bailiff of the Court of Appeals ....

... [S]uch power on the part of the Legislature, if a full exercise of it should be persisted in, would enable it to gradually

absorb to itself the patronage and control of the greater part of the functioning agencies of the state and county governments, and thus endowed it would be little short of a legislative oligarchy. 246 S.W. at 460.

It is our view that *Sibert* has been unchanged and is therefore dispositive of the central issue present in these contested statutes.

Appellants urge that *Craig v. O'Rear,* 199 Ky. 553, 251 S.W. 828 (1923), decided two years after *Sibert,* constituted another veer by the court and is controlling. We do not agree. In that case, the Court ruled that the General Assembly could appoint "temporary" agents to perform a particular task, to serve without term and without pay and whose functions cease when the purpose of such appointment was accomplished.

One other case merits discussion. In *Rouse v. Johnson,* 234 Ky. 473, 28 S.W.2d 745 (1930), a state highway commission was re-created by an act of the General Assembly. The power of appointment to that commission was removed from the Governor and lodged with an "appointing board" which consisted of the Governor, the Lieutenant Governor and the Attorney General. This act was held valid, as being consistent with Ky. Const. Sec. 93 and with Ky. Const. Secs. 27–28.

It was claimed that the conferring of appointive power on the Lieutenant Governor was violative of Ky. Const. Secs. 27 and 28, because that office was said to be primarily a *legislative* one. That being true, it was argued, the delegation of appointive power (executive in nature), violated the separation of powers. We concluded that even though the Lieutenant Governor presides over the Senate and can vote in case of a tie, under our Constitution, the Lieutenant Governor is a member of the executive branch of government. This being true, the contention fell and it was declared that the power of appointment was indeed properly lodged in the commission, a part of the executive branch of government. We will now apply these principles to the contested statutes.

The provisions in category number one, in which the Speaker and the President Pro Tem are authorized to make appointments, fly in the face of the principle which declares such appointments cannot be made by the General Assembly itself. Such statutes constitute an incursion by the General Assembly, or in this case, its designees, into the separation of powers doctrine. The fifth category of statutes, in which the LRC is empowered to make appointments, is invalid for the same reason. The statutes designated as category number four, which direct the Governor to make appointments from lists submitted to him by the LRC, are similarly invalid. The General Assembly ***924** has attempted to do indirectly what it cannot do directly.

The provisions in category number three, which authorize the LRC or an interim legislative committee to advise and consent on certain appointments is invalid.

The statutes contained in category number two, in which the Speaker and the President Pro Tem are made members of certain boards, are also invalid because such constitutes a legislative appointment which infringes on the right of the Governor to make such appointments.

In those statutes where the General Assembly established boards, commissions, etc., and further provided that a member(s) of the General Assembly could actually make the appointment(s) thereto, we declare such appointive powers to be invalid. Therefore, any person(s) so appointed may not properly serve. However, since the General Assembly has properly created the boards and commissions in these situations, the governor should fill such vacancies.

In those statutes involving boards, commissions, etc., where the General Assembly has provided for its members to serve *ex officio,* we declare that such action, while creating a proper category or classification of membership on the board or commission, also constitutes a legislative appointment thereto. Therefore, such *ex officio* "appointment" is invalid. This being true, it follows that there is no position on the board or commission to be filled.

X. MAY THE GENERAL ASSEMBLY, IN ENACTING LAWS PERTAINING TO THE BUDGET AND THE BUDGETARY PROCESS, AUTHORIZE THE LRC TO EXERCISE CERTAIN REPORTING AND OVERSIGHT POWERS?

The next subject deals with controversial statutes relating to the budgetary enactment process and with reporting an oversight following the passage of the budget.

KRS 48.040 provides that the governor, the chief justice and the LRC shall provide their budget requests on forms prescribed by the LRC. KRS 48.130 requires each branch of government, when submitting a budget request to the General Assembly, to develop and submit a plan for a reduction of that budget in the event the Commonwealth suffers a revenue shortfall in the amount of 2 1/2 % to 5% of the basic revenue estimates upon which the overall budget was premised.[FN22] The statute specifically provides that the plan of reduction shall be acted upon by the General Assembly. KRS 48.130(3). If and when actual revenue shortfall develops, the reduction plan as approved by the General Assembly shall be implemented by the head of each of the submitting branches of government. KRS 48.130(4).[FN23] The trial court declared this statute unconstitutional because it "may" permit the LRC to veto executive decisions administering the budget and because a budget, after enactment, is purely within the purview of the executive.

FN22. The statute sets up various criteria that shall "strive to protect the highest possible level of service" and further suggests that services "not essential to constitutional functions shall be subject to reduction."

FN23. The Governor, the Chief Justice of the Commonwealth and the LRC.

KRS 48.400 provides that the Finance and Administration Cabinet shall continuously monitor the "financial situation" of the Commonwealth. It is directed to give monthly reports to the Governor, the Chief Justice, and the Legislative Research Commission. If the Cabinet determines there is a change in the estimated revenue of the Commonwealth that would require action to be taken under the contingency plans enacted by the General Assembly, then notification of such fact is to be given to "all branches of government". KRS 48.400(2). The trial court declared this statute unconstitutional for the same reasons it declared KRS 48.130 unconstitutional.

***925** KRS 48.500 requires each branch of government to interpret provisions of the appropriation act in conformity with the budget memorandum adopted by the General Assembly. Such interpretation however, shall be reviewed by the Interim Joint Legislative Committee on Appropriations and Revenue. That Committee may disagree with the governmental branch's interpretation(s) and in that event, such interpretation shall *not be* implemented until it is reviewed and determined to be in compliance with that of the Interim Committee *or* until such branch of government informs the committee of its intention not to comply and proffers an explanation for its noncompliance. KRS 48.500(2), (3), (4). The trial court also held this statute unconstitutional, giving the same reasons as for the two previous statutes.

KRS 48.600 provides for the situation when revenue shortfalls exceed 5% of the estimates.[FN24] In such a circumstance,

the Governor, the Chief Justice, and the LRC "... shall make such allotment reductions for the budget units of their respective branches of government as are deemed necesary..." KRS 48.600(1). The revisions made shall be *reported* to the Standing and Interim Appropriations and Revenue Committee. The trial court declared this statute unconstitutional, giving the same reasons as above.

FN24. See KRS 48.130.

KRS 48.310 requires that the budget be introduced as a *resolution,* rather than as a *bill.* It further provides that the budget should be subordinate to the Kentucky Revised Statutes and prohibits the budget from containing any language which exempts it "from the operation of a statute." The trial court also declared this act unconstitutional because the statute purported to "denigrate" the budget bill to the "level" of a joint resolution. The court reasoned that Ky. Const. Sec. 88 requires the budget to be enacted by a bill that the Governor may veto on a line-by-line basis.

The budget, which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter. Ky. Const. Sec. 230 empowers the General Assembly to make appropriations; Ky. Const. Sec. 49–50 empowers the General Assembly to contract debts; and Ky. Const. Sec. 53 empowers the General Assembly to provide for investigations into the accounts of the Treasurer and Auditor of Public Accounts.[FN25] Certainly, we acknowledge that the Governor, as executive, *may recommend* to the General Assembly such measures as he "deems expedient" including a budget. Ky. Const. Sec. 79. However, it is equally clear that such budget is not binding on the General Assembly. Constitutionally speaking, the Governor does not have to submit such a document. Moreover, the Governor may utilize a line-by-line veto of the *appropriation* act passed by the General Assembly.[FN26] The General Assembly may, however, override this veto, and enact its desired appropriations. In a word, the final action on the enactment or adoption of the budget is a legislative matter. It is, of course, the duty of the Governor as the Chief Executive to carry out and to implement the budget which is passed by the General Assembly. Ky. Const. Sec. 81.

FN25. See also, Section 58 (General Assembly to pay certain claims); Section 171 (General Assembly to provide for annual taxes); Section 172A (General Assembly to provide for assessment of the value of agricultural lands); Section 181 (General Assembly to provide for payment of license fees and exise tax).

FN26. "... The Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items, and the part or parts disapproved shall not become a law unless recommended and passed, as in case of a bill." Ky. Const. Sec. 88.

It was stated by the trial court and argued by the appellees, that the acts in question constitute an interference by the General Assembly in the purely executive function of administrating the budget. We do not agree.

***926** The trial court declared KRS 48.040 to be invalid. The statute provides that the General Assembly, in exercising its constitutional prerogatives with respect to the preparation and adoption of the budget of this Commonwealth, directs its agent, the LRC, to prepare certain standardized forms upon which *all* branches of government shall make their budget requests. This statute provides for a mechanism to provide information to the General Assembly. It does not prevent any or all branches of government from providing additional information, in any form they may desire. This requirement comports with the duty of the General Assembly to approve and adopt a budget.

[14] KRS 48.130 simply provides that the submitting branch of government shall provide a plan for reducing expenditures in the event of a revenue shortfall of between 2 1/2 % and 5%. The General Assembly may adopt or modify the plan. If and when such a shortfall occurs, the executive branch is directed to notify the three branches of government of that unhappy fact and the legislatively enacted reduction plan is to be implemented. No control is delegated to the LRC. Each branch of government is simply directed to carry out the reduction plan *which was enacted by the General Assembly.* As we see it, each branch of government is to do what the General Assembly has directed. Such is not a part of the administration of the budget. It is carrying out a legislative mandate. There are no constitutional infirmities here.

[15] KRS 48.600 provides for the situation when a revenue shortfall is in excess (sic) of 5% of the anticipated amount. While no specific plan is required to be submitted in advance, the General Assembly has declared that in the event of such shortfall each branch of government shall be the best judge of how to cope with its problems. The General Assembly, under the statute, recognizes that each branch is best equipped to make its own decisions during a revenue emergency and requires that the branch *report* its actions to the appropriate legislative committee. We find that this act comports with the separation of powers doctrine and is not an incursion into the executive duty to administer the budget of the executive branch of government.

[16] KRS 48.400 directs the Executive branch to monitor the Commonwealth's financial position and to give monthly reports to each branch. When a revenue shortfall is found, the resulting notification, presumably, will cause the three branches to take the action directed and authorized by KRS 48.130 and KRS 48.600. We are at a loss to find a constitutional violation here. The executive branch is directed to be a fact-finder, and to notify the affected branch of government when a shortage occurs. This statute simply provides a means whereby a branch of government is made cognizant of a shortfall and thereby may take the requisite statutory action to remedy the situation. There is no violation of an executive function here, in fact, it places the responsibility *on the executive branch,* to participate in the overall statutory scheme dealing with revenue shortfalls.

[17] The trial court determined that KRS 48.500 was void because it permitted a veto of executive action in administering the budget by a legislative committee. A careful reading of the statute shows that this is not true.[FN27] Under the terms of the act, each branch of government is required ***927** to interpret relative provisions of the appropriations act in conformity with the budget memorandum of the General Assembly. Such interpretation is to be reviewed by the Interim Joint Committee on Appropriations and Revenue. If the committee disagrees with the branch's interpretation, that branch may not implement its plan *unless* and *until:* (1) its interpretation is amended to conform to that of the committee, or (2) the branch notifies the committee of its intention not to agree with the committee and explains its view for noncompliance. When the branch complies with either of the conditions, it may proceed with its own interpretation. The decision is ultimately left up to the affected branch. While the committee may disagree or object to a contested interpretation, the bottom line is that it may not veto the decision of the affected branch. Thus, there is no legislative veto and there is no out of session action by the General Assembly or its designee, the LRC, that can effectively prevent the affected branch of government from acting on its own budget with respect to matters of interpretation.

> FN27. 48.500 Interpretation and legislative review of joint budget resolution. "(1) Subject to the provisions of this section, when the general assembly is not in session, all questions that arise as to the meaning of items in a joint budget resolution shall be decided by the finance and administration cabinet, by the chief justice and by the legislative research commission for their respective branches of government. (2) A decision made under subsection (1) of this section shall conform to the appropriate budget memorandum provided for by KRS 48.300. (3) The secretary of the finance and administration cabinet, the chief justice, and the legislative research commission shall transmit decisions made under subsection (1) of this section to the interim joint committee on appropriations and revenue of the legislative research commission and shall include, in detail, the reasons for such decision. (4) If the

> interim joint committee on appropriations and revenue disapproves a decision made under this section, the decision shall not be implemented unless it is: (a) Revised to comply with the objections of the committee; or (b) The committee is informed, in writing, in detail, within thirty (30) days of the committee's disapproval, that a determination has been made not to comply with the objections of the committee."

Our constitution prohibits the exercise of the functions of one branch of government by another branch, but it also envisions some cooperation between the branches. This statute does not permit a usurpation by the legislative branch of an executive function and the degree of intrusion is so *limited* as to render it entirely reasonable and without any substantial impact.

[18] KRS 48.310 gives us some pause.[FN28] As stated, this statute requires the budget to be introduced as a joint resolution, rather than as a bill. The statute provides that the joint budget resolution shall be "subordinate" to the Kentucky Revised Statutes and that the resolution shall not contain any language which exempts it from the operation of a statute. When the budget is enacted as a bill, the provisions thereof could repeal existing statutes. But if the budget document is introduced in the form of a resolution, it can not have the effect of repealing any existing statutes. This is one of the purposes of KRS 48.310.

> FN28. 48.310 Restrictions on joint budget resolutions. (1) A joint budget resolution shall be considered as subordinate to the Kentucky Revised Statutes and temporary in nature. No provision of a joint budget resolution shall be effective beyond the second fiscal year from the date of its enactment. A joint budget resolution enacted at a special session of the general assembly shall not be effective past July 1, of the year in which the next regular session takes place. (2) No joint budget resolution shall contain language which exempts the budget resolution or any appropriation or the use thereof from the operation of a statute. Any language in a joint budget resolution in violation of this section shall be null and void.

Ky. Const. Sec. 88 in describing the Governor's line-by-line veto power in appropriation matters refers to the budget document as a "bill". Appellees and the trial court seize on this language and argue that a resolution "denigrates" the budget document to the "level" of a joint resolution.

We agree. Ky. Const. Sec. 88, provides the method by which *bills* shall be sent to the Governor, for either approval or disapproval (veto). It also provides how the General Assembly may override the veto. Of particular note is the provision that allows a line-by-line veto of "appropriation bills". The relevant part is as follows:

> "The Governor shall have the power to disapprove any part or parts *of appropriation bills* embracing distinct items, and the part or parts disapproved shall not become a law unless reconsidered and passed, *as in case of a bill.*" (Emphasis added.)

***928** While the Governor's veto power applies to all bills, it is only in the case of "appropriation bills" that a line-by-line veto may be exercised. The appropriation bill is the main ingredient of the budget document, and is specially singled out in Sec. 88, which deals with *bills, and bills only.* Appropriations, therefore, must be in the form of a *bill.* In addition, Ky. Const. Sec. 47, requires that all revenue matters must be introduced in the House of Representatives and such documents are referred to as "bills".

We can only conclude that KRS 48.310, which authorizes the budget to be introduced as a joint resolution, flies directly in

the face of the provisions of Ky. Const. Secs. 88, 47, and is therefore, unconstitutional to that extent, we affirm the trial court, but we reverse as to other statutes previously discussed.

XI. MAY THE GENERAL ASSEMBLY DELEGATE TO THE LRC CERTAIN AUTHORITY AND RESPONSIBILITY WITH RESPECT TO THE COMMONWEALTH'S APPLICATION FOR FEDERAL BLOCK GRANTS?

Another area of disputed statutes deals with certain duties, responsibilities and authority that the General Assembly gave to the LRC with respect to the Commonwealth's application for Federal Block Grants.

"Block grants" are allocations of sums of money from the United States Government to the various states. Although they are required to be used in nine functional areas, as a practical matter the use of these funds is largely left to the discretion of the recipient state. When the federal tax dollars are delivered to the states they become state controlled money to be spent in accordance with the state budget document. Some block grants consist of 100% federal money, while some require matching state dollars or matching state "in-kind" services. Most block grants require the expenditure of state funds for personnel, administration costs and use of state facilities.

KRS 45.351(1) provides that the various state agencies applying for block grants shall not make "continuing" application requests. Each application shall be a new one. KRS 45.3511(2) provides that *no state agency shall submit a block grant application unless it is "... approved by the legislative research commission as provided under KRS 45.351 to 45.359 or by the Kentucky general assembly.*" (Emphasis added.) KRS 45.355 provides a system whereby the applicant state agency shall, prior to applying to the federal government for grants, submit relevant information about the grant application to the LRC. Following a review, the LRC may direct modification of the grant or may prioritize the grant application with all other state block grant applications. The LRC has the power to modify any application or to overrule the applicant agency's decision to seek the federal funds.

KRS 45.356 provides that once the LRC has determined that any grant application should be modified or not sought, it shall notify the applying agency of its decision. Once such notification is received the agency has the right to withdraw or to revise and to resubmit the grant application. The statute in Sections (2) and (3) says that the decision of the LRC as to the content of the grant application or as to whether it shall be submitted is final. KRS 48.160 reiterates that the LRC shall have approval authority over block grant applications.

The trial court declared KRS 45.3511(2), KRS 45.355, KRS 45.356(2)–(3) and the described part of KRS 48.160 to be unconstitutional. The court reasoned that the power granted to the LRC under the above statutes constituted "lawmaking" power after the General Assembly is adjourned and that it was a violation of the separation of powers; viz, that the statutes delegated to a "group of legislators" the executive power to implement and execute the state budget. We agree.

The trial court also addressed the validity of KRS 45.359(1) and (2), a purported non*929 -severability statute, which declares that if any section of KRS 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent or allocated unless approved by the General Assembly in regular or special sessions. The court determined that section (1) of KRS 45.359 was unconstitutional because it is an "unconstitutional condition upon the power of the Executive offices to administer the budget", and that both sections (1) and (2) of KRS 45.359 "contravene the Constitution of Kentucky and thus are void and unenforceable." We disagree.

The premise upon which the trial court decided the validity of KRS 45.3511(2), the designated portion of KRS 45.355,

KRS 45.356(2) and (3) and the described part of KRS 48.160 is that the budget and the budgetary process of the Commonwealth are purely an executive function and that these statutes permit a clear incursion by the LRC into this function, thus violating the separation of powers doctrine. The court also declared that the actions permitted by these statutes constituted "legislating" by the LRC when the General Assembly was out of session.

As we have said, in the preceding section of this opinion, the budget document, its preparation and particularly its adoption, is within the authority of the Kentucky General Assembly. This authority, this responsibility, lies solely within the province of the General Assembly. The preparation and adoption of a budget is a *legislative* matter and the General Assembly may not delegate this law making power to the LRC, and again, the General Assembly while in adjournment may not legislate through its agent, the LRC.

It is obvious that the power and authority granted to the LRC under these statutes are purely legislative in nature. The key to this conclusion lies in KRS 45.3511(2), which states:

"No state administering agency shall submit any block grant applications to a federal administrative agency *unless approved by the legislative research commission...*"

This statute allows the LRC absolute control, without criteria, standards or guidelines, over the process of seeking block grants. Literally tens of millions of dollars are involved in the federal block grant program. Once the money is received, it, in effect, becomes state money. The expenditure of money so received is an appropriation which is a function of the General Assembly.

As we have said, many of the federal grants require that matching state funds be committed as a condition of this grant. Such grants, in most cases, require the expenditure of money, allocation and use of state personnel, and the use of state facilities. Such is also the sole province of the General Assembly and cannot be delegated to the LRC. We therefore declare that the sections in question are unconstitutional and affirm the trial court.

[19] We are not unaware that the General Assembly meets and legislates for limited periods of time. We are also not unaware that block grants form a substantial percentage of the Kentucky budget document. Millions of federal tax dollars come into our state, and presumably serve our people. We believe that the General Assembly may constitutionally preserve and keep secure its legislative power, in this area, and allow the LRC (or other delegatee) to monitor applications for block grants so long as the authority delegated is *not legislative.* The General Assembly may allow the LRC to act—as its agent—in matters where it has established adequate standards, guidelines, criteria, findings of fact, tests and other safeguards which will assure that the delegatee is acting within the framework of a legislative plan, and does not exercise such discretion as would constitute law making by such agency.

One further point remains. As we have said, the General Assembly in ***930**KRS 45.359(1) and (2) enacted a non-severability statute which was declared unconstitutional by the trial court because it imposed an invalid condition on the power of the Governor to administer the budget. Since we have established in Section X of this opinion that the responsibility for the preparation and adoption of the state budget is within the purview of the General Assembly, the premise of the trial court's opinion falls and we find no constitutional infirmity here. We accordingly reverse the trial court.

XII. WHEN THE GENERAL ASSEMBLY GRANTS THE GOVERNOR THE POWER TO REORGANIZE CERTAIN

GOVERNMENTAL AGENCIES, CAN IT GRANT THE LRC THE AUTHORITY TO VETO SUCH PLANS AS ARE PROMULGATED BY THE GOVERNOR?

Prior to the 1982 session of the General Assembly, the Governor was, with certain exceptions, empowered by statute to reorganize the executive department. KRS 12.025. The LRC was permitted to *comment* upon those interim reorganizational actions, but the comments were only advisory, did not bind the Governor and did not have the force of law. Such executive actions, however, were subject to the approval of the General Assembly at its next session.

In 1982, by the terms of KRS 12.028(2), the reorganizational procedure was changed. Under the terms of that statute, any temporary reorganization plan must "be approved by the LRC" before it becomes effective. The intended purpose of the 1982 modification is best described by its sponsor who stated that if the Governor desires to temporarily reorganize he can:

> ... propose a reorganization plan by way of Executive Order to the LRC. The LRC then can put that reorganization into effect by approval of that temporary reorganization plan.

Noting the difference between the new and old acts, the sponsor commented on the Governor's power under the new act to single handedly reorganize saying, "... he [the Governor] will not be able to unilaterally do that." If the LRC does not agree with the Governor's plan, the sponsor noted that the LRC "... has the prerogative of not approving the plan."

[20] The trial court, in declaring KRS 12.028(2) unconstitutional, reasoned that in exercising the veto so granted, the LRC would be making legislative decisions which should be made "... by the entire General Assembly." We agree.

Even though the Governor has the supreme executive power of the Commonwealth (Ky. Const. Sec. 69), he cannot transfer the functions of an existing, legislatively-created executive agency or department to another without legislative authority. *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1983). We did say, in that much cited case, that the executive may have the power to transfer those functions if "... it is necessary in order for him to carry out a law or laws that the legislature has created without prescribing in sufficient detail how they are to be executed." 628 S.W.2d at 622.

However, once the General Assembly has made a determination that the power to reorganize state government in the interim periods between legislative sessions does exist, and determines that that power is in the hands of the Governor, such interim action is purely an executive function. As this Court has said: "... the transfer ... [of executive functions] ... is essentially an executive action, like the reassignment of troops or battle missions from one military command to another..." 628 S.W.2d at 622. Any authority given to the LRC to veto or substantially affect this statutorily instituted executive function is a violation of the separation of powers doctrine.

In the 1960 reorganization statute, the General Assembly, by reserving eventual approval of any reorganization to itself, recognized that ultimately reorganization is legislative in nature. In the 1982 version, the Governor is authorized to "... propose ***931** to the general assembly, for its approval, changes in the state government..." KRS 12.028(1). As we understand it, such authority is the normal way to present any legislative suggestion to the General Assembly. Implicit in this provision is that final approval of any plan is legislative in nature.

Section (2) of the 1982 statute, KRS 12.028, authorizes an emerging type of reorganization plan to be prepared by the Governor, but such is made subject to the approval of the LRC. Since the Governor has no inherent power to reorganize and since the 1982 session again recognized that reorganization is legislative in nature, we believe that the General Assembly may

not delegate such legislative power to the LRC. Having declared that there may be a need for interim reorganization and having declared that the Governor is the proper agency to undertake such action in the interim period and finally having declared that approval of such action is legislative in nature, the General Assembly cannot delegate such legislative authority to the LRC.

In accordance with the above, the judgment of the Franklin Circuit Court is affirmed in part, and reversed in part with directions that it be modified in accordance with this opinion.

All concur.

Ky.,1984.
Legislative Research Com'n By and Through Prather v. Brown
664 S.W.2d 907

END OF DOCUMENT

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SB

78

<TARGET><BILL>SB 78</BILL><SUBJECT>SB
78</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Session
State Capitol Building, Room 125
Juneau, Alaska 99801-1182
Phone (907) 465-2995
Fax (907) 465-6592

Interim
716 West Fourth Avenue, Suite 430
Anchorage, Alaska 99501
Phone (907) 269-0250
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SENATOR LESIL MCGUIRE

MEMORANDUM

DATE: April 8, 2011

TO: Representative Carl Gatto, Chair, House Judiciary Committee

FROM: Senator Lesil McGuire, Senate District N

RE: Hearing Request (Pending Referral) for CSSB 78: Liquor License Holder Liability

---

I respectfully request that CSSB 78: Liquor License Holder Liability be scheduled for a hearing in the House Judiciary Committee pending referral at your earliest convenience. Accompanying this memo, you will find:

1. Sponsor Statement
2. Current Version of the Bill: SB 78 (27-LS0282\I)
3. Sectional Analysis / Summary of Changes
4. Fiscal Note
5. Supporting Documents

A list of people willing to testify for CSSB 78 will be forthcoming.

If you have any questions or concerns, please feel free to contact me personally or my staff, Esther Tempel, at 465-3579. Thank you for your time and consideration.

received 4-9-11 @ 1:10 pm JM

Senator.Lesil.McGuire@legis.state.ak.us

ALASKA STATE LEGISLATURE

Session
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Member

Senate Finance Committee
Senate Resources Committee
Senate Judiciary Committee
Senate Special Committee on World Trade, Technology, and Innovations

SENATOR LESIL MCGUIRE

SPONSOR STATEMENT
CS SENATE BILL NO. 78

Committee Substitute for Senate Bill 78 comprises of two sections. The first seeks to treat members of limited liability companies ("LLC") in the same manner as shareholders of corporations for liability purposes under Alaska liquor laws. It seeks to reflect the fact that LLC's are more similar to and used in the business world as alternatives to corporations and are less commonly used as alternatives to sole proprietorships or general partnerships, which pass on general liability to their owners. As it is currently written, AS 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4, governing alcoholic beverages, is not relieved of the liability imposed upon a liquor license holder solely because the license is held by a LLC or a limited liability partnership.

However, businesses have recognized the greater flexibility in internal governance matters afforded by the LLC structure and have increasingly turned to LLC's as a preferred form of entity for doing business. Businesses consciously choose LLC's to have greater management and efficiency without sacrificing the limited liability protection from business creditors afforded to owners of corporations. Therefore CSSB 78 seeks to provide equal treatment to LLCs in the liquor liability context as they are treated in the business world generally.

The committee substitute adds two sections which simply provide a limitation of liability for a taxi or limousine driver who gets in an accident while driving another person's vehicle from a licensed premise. These sections were originally passed in 2004 by a vote of 39-0 in the House and 20-0 in the Senate but had a sunset date of 2007, a fact that was overlooked. This language would correct that oversight and the CS language mirrors the original legislation with some additional language added in the Senate Judiciary Committee.

Everyone is a potential victim of a drunk driver. Therefore everyone will benefit from this program – not only the potential drunk driver, but also every person who may be a victim of that drunk driver. Another basic principal of the program is to remove all physical and psychological barriers to its use. The ride home is completely free to the intoxicated person and confidential.

There are 63 participating establishments in the Anchorage Bowl. Since 2005 when the program began, over 821 individual rides have taken place and over 2379 vouchers have been sold.

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SENATOR LESIL MCGUIRE

Summary of Changes and Sectional Analysis Between SB 78\M and CS for SB 78\I

This document is an identification of the changes between W.O. 27-LS0282\M and W.O. 27-LS0282\I. It also provides a sectional analysis of Version I.

The CS for SB 22 adds new language in the title of SB 78. It adds "; and relating to accidents involving the vehicle of a person under the influence of alcoholic beverages."

Section 1 in the CS is unchanged. Currently, Title 4 treats limited liability companies (LLCs) differently than how LLCs are treated elsewhere in Alaska law regarding non-liability of shareholders. Section 1 deletes reference to LLCs and foreign LLCs from AS 04.21.035, thereby allowing members of LLCs to rely on AS 10.50.265 for purposes of liability when the LLC holds a liquor license under Title 4 and allows LLCs to be treated consistently in Alaska law.

The CS adds Section 2, which adds a new section to AS 09.65 that relates to damages resulting from driving the vehicle of a person under the influence of an alcoholic beverage. Section 09.65.315 (a) gives five conditions under which a person is not liable beyond the limits of any applicable insurance policy purchased by or on behalf of the owner of the vehicle for damages resulting from a motor vehicle accident.

Section 09.65.315(b) states that the taxicab company, drivers and the person who makes arrangements for transportation are not liable for damages resulting from a motor vehicle accident if they meet described under Section 09.65.315(a).

Section 09.65.315(c) outlines that this statute would not preclude liability for civil damages in cases of gross negligence, reckless or intentional misconduct. It also does not limit the ability of a person to recover damages under any applicable uninsured or underinsured motor vehicle insurance coverage or under any applicable liability insurance coverage purchased by or on behalf of the person being transported.

Section 09.65.315(d) defines what is considered consent to another person to drive the owner's motor vehicle.

Section 09.65.315(e) points to where the definitions of "controlled substance", "inhalant" and "licensed premises" can be found in Alaska Statutes.

The CS adds Section 3, which dictates that Section 2 applies to a civil action that accrues on or after the effective date of this Act.

CS FOR SENATE BILL NO. 78(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR MCGUIRE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to liability of certain limited liability organizations holding liquor licenses; and relating to accidents involving the vehicle of a person under the influence of alcoholic beverages."

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

*** Section 1.** AS 04.21.035 is amended to read:

Sec. 04.21.035. Responsibility of <u>partners of a</u> limited liability <u>partnership or foreign limited liability partnership</u> [ORGANIZATION MEMBERS]. Notwithstanding any other provision of [AS 10.50 OR] AS 32.06, a **<u>partner</u>** [MEMBER] of a limited liability **<u>partnership or a foreign limited liability partnership</u>** [ORGANIZATION] holding a license under this title is not relieved of the obligation or the liability otherwise imposed upon a holder of a liquor license under this title solely because the license is held by a limited liability **<u>partnership or a foreign limited liability partnership</u>** [ORGANIZATION].

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.315. Damages resulting from driving the vehicle of a person under the influence of an alcoholic beverage. (a) A person is not liable beyond the limits of any applicable insurance policy purchased by or on behalf of the owner of the vehicle, or the taxicab or limousine company or the company's owner, agents, or employees, for damages resulting from a motor vehicle accident if the person was driving a vehicle involved in the accident and

(1) before the accident, started driving the vehicle involved in the accident from or near licensed premises;

(2) is, at the time of the accident, a person employed in the course and scope of employment to or under contract to drive a taxicab or limousine, a taxicab or limousine owner, a holder of a taxicab or limousine permit issued by a municipality, or an owner or employee of a company that dispatches taxicabs or limousines;

(3) was not under the influence of an alcoholic beverage, inhalant, or controlled substance at the time of the accident;

(4) was driving the vehicle to the motor vehicle owner's residence or designated residential location at the request of the motor vehicle owner or operator or a law enforcement officer; and

(5) was driving the vehicle because the motor vehicle owner or operator was under the influence of an alcoholic beverage or reasonably believed to be under the influence of an alcoholic beverage.

(b) A person licensed under AS 04.11.080 - 04.11.255, or an agent or employee of the person, is not liable for damages resulting from a motor vehicle accident described under (a) of this section. A person or entity that participates in making arrangements for transportation of a vehicle under (a) of this section is not liable for damages resulting from a motor vehicle accident described in (a) of this section.

(c) This section does not

(1) preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct;

(2) limit the ability of a person to recover damages under any applicable uninsured or underinsured motor vehicle insurance coverage; or

(3) limit the ability of a person to recover damages under any applicable liability insurance coverage purchased by or on behalf of the person being transported under (a) of this section.

(d) A motor vehicle owner is considered to have given consent to another person to drive the owner's motor vehicle if the other person is involved in an accident and the provisions of (a) of this section apply to the other person.

(e) In this section,

(1) "controlled substance" has the meaning given in AS 28.33.190;

(2) "inhalant" has the meaning given to the phrase "hazardous volatile material or substance" in AS 47.37.270;

(3) "licensed premises" has the meaning given in AS 04.21.080.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Section 2 of this Act applies to a civil action that accrues on or after the effective date of this Act.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: SB 78
Bill Version:
() Publish Date:

Identifier (file name): SB078-DPS-ABC-03-21-11
Title: "An Act relating to liability of certain limited liability organizations holding liquor licenses."
Sponsor: Senator McGuire
Requester: Senate Labor & Commerce

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Alcoholic Beverage Control Board
OMB Component Number: 2690

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable; initial version.

Prepared by: Shirley Gifford, Director
Division: Alcoholic Beverage Control Board
Approved by: Joseph Masters
Commissioner

Phone: 907-269-0351
Date/Time: 3/21/11 3:45 PM
Date: 3/21/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 78
2011 LEGISLATIVE SESSION

Analysis

SB 78 provides members of limited liability companies ("LLC") the same protections as shareholders of corporations for liability purposes under Alaska liquor laws.

Currently AS 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4 is not relieved of the liability imposed upon a liquor license holder solely because the license is held by a LLC or a limited liability partnership.

Passage of this legislation will not have a fiscal impact on the Alcoholic Beverage Control Board.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **SB078 \M**
() Publish Date

Identifier (file name): SB078-LAW-CRIM-03-25-11
Dept. Affected: Law
Title: An Act relating to liability of certain limited liability organizations holding liquor licenses.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: SENATOR(S) MCGUIRE
Requester: (S) JUD
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/25/11 2:00 PM
Approved by: John J. Burns, Attorney General — Date: 3/25/2011
Department of Law

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. SB078 \M

Analysis

SB78 in its current form proposes amendments to statutes relating to liability of limited liability organizations holding liquor licenses. There will be no fiscal impact on the Department of Law.

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 22, 2011

SUBJECT: Proposed amendments to AS 04.21.035
(Work Order No. 27-LS0282\M)

TO: Senator Lesil McGuire
Attn: Esther Tempel

FROM: Doug Gardner
Director

Currently, AS 04.21.035 is an exception to the protections against individual liability offered to partners of properly registered and maintained LLPs and to members of properly registered and maintained LLCs. In other words, partners of LLPs and LLCs--notwithstanding the fact that they have complied with AS 10.50 (LLCs) or AS 32.06 (LLPs)--are not relieved of the obligation or the liability otherwise imposed upon a liquor license holder under Title 4.

LLCs and LLPs are two approaches that have been used throughout the U.S. in recent years to combine the federal tax benefits of partnerships with the non-liability of the shareholders of corporations.[1] Both LLCs and LLPs are being used to capture the traditional non-liability of shareholders of corporations. Currently, Title 4 treats LLCs differently than how LLCs are treated elsewhere in Alaska law. SB 78 deletes reference to LLCs from AS 04.21.035, thereby allowing members of LLCs to rely on AS 10.50.265 for purposes of liability when the LLC holds a liquor license under Title 4, and allows LLCs to be treated consistently in Alaska law. By removing LLCs from AS 04.21.035 and leaving LLPs in the statute, a person who wants to manage liability under AS 04.21 would be able to form as an LLC rather than as an LLP as long as all the LLC requirements in AS 10.50 are met.

DDG:med
11-028.med

[1] LLCs can elect for federal tax purposes the pass-through taxation of partnerships, where the partner is taxed on partnership income, but the partnership itself is not. In general (there are exceptions), a corporation is taxed on corporate income, and the shareholders are taxed on their dividends.

SENATE BILL 78

Additional Information

CORPORATIONS	GENERAL PARTNERSHIPS
Owned by shareholders; Requires directors and officers; Requires Articles of Incorporation and Bylaws. Sub-S Corporations can be used only in limited circumstances and are not available for certain shareholders. All non-Sub-S Corporations are C-Corporations. Limited liability for owners—no personal liability for shareholders generally for acts of corporation. Officers and Directors maintain fiduciary obligations to run corporations in accordance with applicable laws. Prior to the creation of Limited Liability Companies, which are now authorized by statute in all 50 States*, Sub-S Corporations were used as the corporation of choice for investors. In approximately 1994, Alaska followed the majority of other States in allowing Limited Liability Companies in Alaska.	Owned by partners. No limited liability for owners—all partners are individually liable for acts of partnership. Profits are divided among the partners. LIMITED PARTNERSHIPS At least one general partner which is liable for debts of the Limited Partnership, limited partners are not liable for debts of the Limited Partnership. General Partners in a General Partnership or a Limited Partnership are responsible for the debts of the entity. Prior to the creation of Limited Liability Companies, Limited Partnerships were used as an alternative to Sub-S Corporations for investors, where the Sub-S Corporation was not available to the investment entity. In approximately 2000, Alaska followed the majority of other States in allowing Limited Liability Partnerships in Alaska. A Limited Liability Partnership must start out as a general partnership and be subsequently converted to a Limited Liability Partnership.

Information provided by Aleyska Resort Development

SENATE BILL 78

Additional Information

LIMITED LIABILITY COMPANIES	LIMITED LIABILITY PARTNERSHIPS
Owned by members. Commonly used as alternative to Limited Partnerships and Sub-S Corporations because easier to use—greater flexibility in governance and structuring return on investment to owners. Limited Liability Companies are often managed by the members (owners) without need for officers and/or directors. Managers maintain fiduciary obligations to the LLC. Limited liability for owners—no personal liability for members generally for acts of limited liability company.	Owned by partners Used as alternative to general partnership by vote to amend general partnership agreement to become limited liability partnership and then filing statement of qualification with State Limited liability for owners for partnership obligations incurred after conversion to limited liability partnership

Information provided by Aleyska Resort Development

SENATE BILL 78

Additional Information

PURPOSE OF SENATE BILL 78

Senate Bill 78 deletes the "pass through liability" to members of Limited Liability Companies with respect to liquor license issues imposed by AS 04.21.035, while retaining the current "pass through liability" for limited liability and foreign limited liability partnerships. This modification will make Alaska Law substantively more consistent with other States, including Washington, Oregon, California, Nevada, Idaho and Utah with respect to pass through liability for members of Limited Liability Companies.

***BACKGROUND OF LLCs.**

Starting with the pioneering state of Wyoming in 1977, and ending with the action of the Hawaii legislature in 1996, every state has, during those twenty years, passed laws creating a new type of legal entity called a "limited liability company" (or LLC). These entities, which resemble (and are usually taxed as) partnerships, offer the advantages of limited liability, like corporations. While it has long been possible for partnerships to offer limited liability to their LIMITED partners, a limited partnership always had to have at least one GENERAL partner, who was fully liable for the debts of the business.

In addition, all 50 states and D.C. have now adopted a similar type of entity, the limited liability partnership (LLP) or registered limited liability partnership (RLLP). The LLP (or an RLLP) is simply a garden variety partnership that registers with the state and pays a specified fee, in order to become an LLP or RLLP and to have limited liability conferred upon the partnership, which is generally quite similar to an LLC, except that it may be operated like a regular partnership, for the most part.

However, LLPs are mostly used for professional firms, and in some states (New York and California and, until recently, Nevada) only professional firms may set up LLPs. For professionals, the LLP offers only somewhat limited protection from liability, in that a professional who is a partner in an LLP remains personally liable for his or her own malpractice or gross negligence, or such misdeeds committed by employees of the LLP who operate under that partner's direction. (The same is generally true of professional corporations or professional LLCs.) But in most states, other, non-professional businesses may also operate as LLPs, and generally obtain more liability protection than professional LLPs.

See: www.roninsoft.com/llc.htm

ALYESKA RESORT
ALASKA

February 14, 2011

VIA EXPRESS COURIER

The Honorable Dennis Egan
Chair
Senate Labor & Commerce Committee
State Capitol, Room 150
Juneau, Alaska 99801

Re: Letter of Support for SB 78

Dear Senator Egan:

Alyeska Resort supports passage of Senate Bill 78, which would treat members of limited liability companies in the same manner as shareholders of corporations for liability purposes under Alaska liquor laws by eliminating the pass through exposure that members of limited liability companies now have under AS 04.21.035.

Summary of AS 04.21.035

Alaska Statute 04.21.035 provides that a member of a limited liability company ("LLC") or a partner of a limited liability partnership that holds a license under Title 4, which governs alcoholic beverages, is not relieved of the liability imposed upon a liquor license holder solely because the license is held by an LLC or a limited liability partnership.

Why AS 04.21.035 Is Unworkable

AS 04.21AS 04.21.035 does not recognize the realities of doing business today in the LLC format, unfairly penalizes those who choose to do business as an LLC rather than a corporation in the alcohol business, and causes unnecessary expense. AS 04.21.035 frustrates business development because it does not reflect the fact that LLC's are more similar to and used in the business world as alternatives to corporations, which do not pass general liability to their owners, than similar to and used as alternatives to sole proprietorships or general partnerships, which do pass general liability to their owners. Owners of businesses elect to use the simplified entity form of an LLC over a corporation while retaining the limited liability protection for the LLC's members. The owners of these businesses, however, cannot realize the benefits of using an LLC instead of a corporation without subjecting themselves to liability under AS 04.21.035.

LLC members typically have limited liability protection from LLC creditors, just like shareholders of corporations do from corporation creditors. Under AS 10.50.265 in the Alaska Revised Limited Liability Company Act, a member of an LLC "is not liable, solely by reason of being a member…for a liability of the company to a third party, whether the liability arises in contract, tort or another form, or for the acts or omissions of another member, manager, agent or

employee of the company to a third party." AS 04.21.035 takes away that limited liability protection with respect to the holding of a liquor license and in liquor related businesses. To avoid that result under the current statutes, the owner of a liquor business holding a liquor license seeking limited liability protection must do business through a corporate entity.

Businesses consciously choose LLC's to have greater management and efficiency without sacrificing the limited liability protection from business creditors afforded to owners of corporations. LLC's are routinely used in Alaska (as well as the rest of the United States) as limited liability protection entities in place of corporations. There is no reason to treat LLC's differently in the liquor liability context than they are treated in the business world generally.

Why AS 04.21.035 Should Be Changed

At the time that AS 04.21.035 was enacted in 1999, the LLC statute in Alaska was relatively new (enacted in 1994) and LLC's were not as well understood and as commonly used by the general business community as they are now. Apparently, in 1999, someone thought in the licensed liquor business LLC's should be treated more like sole proprietorships or general partnerships with unlimited liability for their owners. However, now that LLC's are better understood and more commonly used in place of corporations as limited liability vehicles for doing business, the time has come to place LLC's on equal footing with corporations in the liquor business context. When we met with the Executive Director and staff of the Alaska Alcoholic Beverage Control Board ("ABC") and explained the reasons for changing the statute, the ABC Executive Director and staff understood the reason for the requested change and voiced no opposition to the amendment.

Additionally, we are aware of other corporations that hold liquor licenses and would prefer to hold the liquor licenses as LLC's but will not do so until AS 04.21.035 is amended.

Please feel free to contact me if you have any questions.

Very truly yours,

J. Randall Call

J. Randall Call, Esq.
General Counsel

ANCHORAGE CHARR
TAVERN, HOTEL, RESTAURANT & RETAILERS ASSOCIATION

off the road

About the program - "Off the Road" is a unique program because we can provide a safe mode of transportation for the patron and their vehicle. There are other programs in Alaska but they will not compare to the "Off the Road". This service can be requested by the patron or by the determination of the on premise liquor licensed establishment to limit liabilities and to protect the general public.

Although we try to encourage those who choose to drink alcohol to do so responsibly, we recognize that some people are going to choose to drink to the point of intoxication. Even those who make provisions for alternative rides may have those plans thwarted -- a designated driver may lapse into drinking, a bus may be missed, and so forth. The programs administrators assume that it is the nature of safety nets to catch more than the minimum. With the philosophy that it is better to accept some limited amount of abuse (such as using the service when other sage ways home may exist) rather than risk excluding any legitimate use, servers are instructed never to turn down an *Off the Road* request. *Our thinking is that the risk of denying a legitimate ride far outweighs the risk of allowing a certain amount of abuse.*

Everyone, regardless of socio-economic level, is a potential victim of a drunk driver. Therefore everyone in our community will benefit from this program – not only the potential drunk driver, but also every person who may be a victim of that drunk driver. Another basic principal of the program is to remove all physical and psychological barriers to its use. The ride home is completely free and confidential. **Since the program started in 2005, there have not been any accidents proving that it is safer to have a sober professional licensed chauffeur transport the patron's vehicle home by not taking the risk of having the patron drive their vehicle.**

The information required on the *Off the Road* voucher is minimal but necessary for responsible operation of the program. The person initiating the call for the ride must complete basic information on the voucher such as the date and time, establishment name, location of the rides origination, the authorizing person's name and signature, the full name of the rider and the exact destination. The safe ride driver will ask the patron if they are covered with insurance or if they have insurance; the drivers will complete the driver's information part of the voucher. The remaining voucher information will be completed by the personnel at the participating establishments. Vouchers must be completely filled out.

In 2008 in Anchorage there were 2,777 DUI arrests out of this amount 453 resulted in accidents. In 2008 there were 16 total fatalities of which 8 resulted in an alcohol related fatality.

In 2008, Alaska experienced 62 fatalities of which 17 resulted in alcohol related fatal crashes.

In 2009, in Anchorage there were 2,604 DUI arrests of which 324 resulted in accidents. In 2009 there were 17 fatal accidents of which 7 were alcohol related. According to the Anchorage Police Department this number is down from 2008 by 4% and our plan is to continue to assist our police department in taking this percentage down every year. Not everyone will participate in the program, but we hope that with every ride taken a life could be saved.

In 2009, Alaska experienced 64 fatalities of which 20 resulted in alcohol related crashes.
In collaboration with the Anchorage Police Department and the Alaska Highway Safety Office ultimately would help reduce the amount of alcohol related fatalities by finding new and strategic measures to fight against impaired driving in general. We would like to see alcohol related DUI's reduced 1% by the end of 2010 and as of this writing, we can say that alcohol related accidents reduced by 4%. According to the Anchorage Police Department alcohol is no longer the main reason for DUI arrests. DUI arrests have increased because the amount of drug use (prescription and illegal) is on the rise in youth as well as adults. Even enough cough syrup while operating a vehicle can be classified as a DUI. We strongly believe through the power of education, we can help our citizens make the right choice. Conducting program awareness classes in the military bases will help partner our efforts in reducing drunken driving.

The overall result would be a reduction of drunk drivers which will benefit the community at large.

According to the Alaska Highway Safety Office in the State of Alaska in 2008, 17 out of 62 fatalities were alcohol related for a rate of 31%. Our motto "one ride taken can result in one life saved".

Currently there are 63 participating establishments. Since 2005 when the program began, over 821 individual rides have taken place and over 2379 vouchers have been sold.

Although the safe ride is free to the patron, program participants purchase ten vouchers at time at $10 each to support the program. Not all establishments use the vouchers for the complete safe ride; some establishment s use the vouchers when a patron is in need of a ride home without a vehicle; the only down side is that the voucher is used but not counted as an "off the road" ride.

In order to be able to maintain a ridership level that is not abused or under-utilized vouchers are assigned as they are purchased to each individual establishment. Vouchers are recorded on a spreadsheet as they are used and returned to us by the safe ride company. The patrons' information is confidential and kept for informational purpose only.

Original Text: [resides in an area of statute regulating alcohol and defining liability for alcohol providers or activities]
Sec. 04.21.035. **Responsibility of limited liability organization members.**
"Notwithstanding any other provision of AS 10.50 or AS 32.06, a member of a limited liability organization holding a license under this title is not relieved of the obligation or the liability otherwise imposed upon a holder of a liquor license under this title solely because the license is held by a limited liability organization."

Chapter 32.06. UNIFORM PARTNERSHIP ACT [lays out all the regulations, definitions, and duties of partnerships]

Sec. 04.11.080 – 04.11.255 [lists and defines the types of licenses available and sets out the regulations and issuance thereof]

SB

82

<TARGET><BILL>SB 82</BILL><SUBJECT>SB
82</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: March 23, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 4/4/12

The JUDICIARY Committee considered: **CSSSSB 82(JUD)**

CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 82(JUD)
"An Act relating to the procedures and jurisdiction of the Department of Health and Social Services for the care of children who are in state custody; relating to court jurisdiction and findings pertaining to children who are in state custody; and modifying the licensing requirements for foster care."

SB 82-FOSTER CARE LICENSING/STATE CUSTODY

Recommends it be replaced with [X] **HCS** *or* [ ] **CS for** CSSSSB82 (HSS)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [✓] **Same Title** [ ] **New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

FN#	List by Dept(s):	Fiscal	Indet.	Zero
2	DHS			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gruenberg	—			
	Keller	X			
	Thompson	X			
	LYN	X			
	Holmes	X			
	Pruitt	X			
Chair:	GATTO	X			
Chair:					

Alaska State Legislature

Senate
Health & Social
Committee
Chair
•
Senate
Education Committee
Vice-Chair

Legislative Council
Vice-Chair
•
Senate
Transportation
Committee
•
Senate
Labor & Commerce
Committee

100% to 80% Homeowners Assoc. - purchase

Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org/

Senator Bettye Davis

received 3/23/2011 PS

Date: March 23, 2011

To: Representative Carl Gatto
Chair, House Judiciary

From: Senator Bettye Davis BD

RE: **Request for Hearing - SB82 – Foster Care Licensing/State Custody "An Act relating to the procedures and jurisdiction of the Department of Health and Social Services for the care of children who are in state custody; relating to court jurisdiction and findings pertaining to children who are in state custody; and modifying the licensing requirements for foster care."**

Representative Gatto,

You currently have in your possession SB82 – Foster Care Licensing/State Custody. SB82 mirrors HB33, a bill that was originally introduced by Representative Les Gara. I was asked to introduce legislation that mirrored HB33 in an effort to get this important bill moving and hopefully passed.

SB82 modifies various provisions in Title 47, making small but very significant changes that prioritize the needs of youth in foster care. This legislation addresses permanent planning for children in custody under "Another Planned Permanent Living Arrangement (APPLA);" modifies licensing procedures; outlines court requirements for release or termination of custody by the courts; outlines "compelling reason" standards for youth with APPLA permanency goals; and provides a provision to support placement of siblings into the same foster home.

This legislation is supported by the department and carries a zero fiscal note. I would greatly appreciate your consideration in scheduling this important bill for hearing as soon as possible. Please contact Celeste Hodge at 465-4906 if you have any questions.

Thank you.

Session: (January – April)
State Capitol, Room #30, Juneau, AK 99801-1182 Phone: (907) 465-3822 · Fax: (907) 465-3756 · Toll Free: (800) 770-3822
Interim: (April – December)
716 West 4th Avenue, Anchorage, AK 99501-2133 · Phone: (907) 269-0144 · Fax: (907) 269-0148

Alaska State Legislature

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Education Committee
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Legislative Council
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Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org/

Senator Bettye Davis

SPONSOR STATEMENT

SENATE BILL 82-*"Foster Care Licensing/State Custody"*

SB 82 modifies various provisions in Title 47, which prioritizes the needs of children in state custody. This legislation seeks to:

1.Achieve Permanency for Older Children in Foster Care)
Permanency for children in OCS custody is best achieved through reunification with the child's parent, or failing that option, through adoption or guardianship. If these three options are not available, another form of permanency is through APPLA ("Another Planned Permanent Living Arrangement"). This bill seeks to make sure the APPLA option is not chosen unnecessarily by providing guidelines for both OCS and the court as to when APPLA should be used.

2. Presumption to Keep Siblings Together
Although OCS attempts to keep siblings together when they enter foster care, this bill creates a statutory presumption that siblings be placed in the same home when possible and when such a placement is in the siblings' best interests. When the children cannot be in the same home, this bill requires an OCS supervisor to document in the file the efforts made and the reason for the separation.

3. Early Release of Custody
When OCS files a motion to release a child from state custody before the custody order expires, this bill requires OCS and the court to take extra steps to ensure that the child and guardian ad litem have ample notice of the motion and that the release is in the child's best interests.

4. Foster Home Licensing Variance Process
If a potential foster home cannot meet the building codes required to be a licensed foster home, this bill will allow a variance to be granted if the home is consistent with construction of other homes in the community and is otherwise a safe environment for the child.

5. Streamlining Application Process for foster parents
This bill requires that paperwork required for foster parent licensing be streamlined as much as possible.

6. Housekeeping
The bill includes changes to the statute providing for retention of jurisdiction by a court to make it consistent with last year's legislation to extend departmental custody or supervision to age 21.

Session: (January – April)
State Capitol, Room #30, Juneau, AK 99801-1182 Phone: (907) 465-3822 · Fax: (907) 465-3756 · Toll Free: (800) 770-3822
Interim: (April – December)
716 West 4th Avenue, Anchorage, AK 99501-2133 · Phone: (907) 269-0144 · Fax: (907) 269-0148

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 7, 2011

SUBJECT: Sectional Summary (Work Order No. 27-LS0203\D)

TO: Representative Les Gara
Attn: Amanda Metivier

FROM: Jean M. Mischel
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Provides a short title for the bill.

Section 2. Amends the court findings required for establishing another planned permanent living arrangement for a child in state custody.

Section 3. Adds a presumption in favor of placement of a child in state custody with a sibling.

Section 4. Makes changes to the court jurisdiction provisions pertaining to the age of a child in state custody up to the person's 21st birthday, consistent with HB 126, passed by the 26th Legislature.

Section 5. Amends the evidentiary standard for placement of a child in state custody by the Department of Health and Social Services ("department") to take into account a foster care license waiver, variance, or exemption.

Section 6. Requires the department to continue a search for an adoptive parent or guardian except as provided in this section. Requires the department to enroll a child in state custody in a reading program in certain circumstances. Modifies the requirements and adopts a "compelling reason" standard for the department to recommend another planned permanent living arrangement for a child in state custody. Provides a "reasonable efforts" standard for placing children with siblings. Defines terms.

Section 7. Provides for a foster care license variance in certain circumstances and requires the department to simplify licensing paperwork.

JMM:ljw
11-010.ljw

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSSSSB082(JUD)**
Fiscal Note Number:
Publish Date:

Identifier (file name): SB082CSSS(JUD)-DHSS-FLSW-03-19-12
Title: Foster Care Licensing/State Custody
Sponsor: Sen. Davis
Requester: House HSS Committee

Dept. Affected: Health and Social Services
Appropriation: Children's Services
Allocation: Front Line Social Workers
OMB Component Number: 2305

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updates narrative to current version of the bill.

Prepared by: Christy Lawton, Director — Phone: 465-3191
Division: Office of Children's Services — Date/Time: 3/19/12 12:00 PM
Approved by: Nancy Rolfzen, Assistant Commissioner — Date: 3/19/2012
DHSS Finance & Management Services

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** CSSSSB082(JUD)
2012 LEGISLATIVE SESSION

Analysis

CSSSSB 82 has zero fiscal impact on the Department of Health and Social Services. This bill addresses permanent planning for children in custody under "Another Planned, Permanent Living Arrangement "(APPLA); modifies licensing procedures; outlines court requirements for release or termination of custody by the courts; outlines "compelling reason" standards for youth with APPLA permanency goals; provides a provision to support placement of siblings into the same foster home; and adds a new provision requiring the streamlining of the foster parent application process and the approval of building code variance requests under specified circumstances. No additional costs are anticipated.

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

Richard Moore
Senator
Massachusetts Senate
President, NCSL

Tim Rice
Executive Director
Illinois Legislative Information System
Staff Chair, NCSL

William Pound
Executive Director

To: Amanda Metivier, Aide to Alaska Rep. Les Gara

From: Amy Taylor, NCSL Intern and Kelly Crane, NCSL

Date: November 17, 2010

Subject: Another Planned Permanent Living Arrangement

Following is information on state legislation around Another Permanent Planned Living Arrangement as a permanency goal for children in foster care. Also, below is information on states that allow for the reinstatement of parental rights (a strategy states may use to reduce the use of APPLA as a permanency option).

- **State Legislation**

New York:

2005 N.Y. Laws, SB 5805, Chap. 3: Specifies the required contents of permanency hearing reports to the court. Describes acceptable permanency goals. Provides that the permanency goal of "another planned permanent living arrangement" must include a significant connection to an adult who is willing to be a permanency resource for the child.

2007 N.Y. Laws, SB 4551, Chap. 327: Clarifies that the plan of "another planned permanent living arrangement" must include documentation of the child's significant connection to an adult who is willing to be a permanency resource for the child.
New York FCA §§1089(c)(1)(v), 1089(d)(2)(i)(E) can be retrieved at:

Alabama:

Section 12-15-315 of the Alabama Code: States that if the juvenile court determines the permanent plan shall be placement in another planned permanent living arrangement, the Department of Human Resources must document to the juvenile court a compelling reason for determining that it would not be in the best interests of the child to return home, be placed for adoption with no identified resource or with the current foster parent, or be permanently placed with a relative, with a transfer of legal and physical custody to the relative or with a transfer of physical custody to the relative but with the Department of Human Resources retaining legal custody, be placed with a kinship guardian, or be placed in adult custodial care.

Denver
7700 East First Place
Denver, Colorado 80230-7143
Phone 303.364.7700 Fax 303.364.7800

Washington
444 North Capitol Street, N.W. Suite 515
Washington, D.C. 20001
Phone 202.624.5400 Fax 202-737-1069

Website www.ncsl.org
Email info@ncsl.org

Connecticut:

Sec. 4. Section 46b-129 of the Connecticut Code: Orders that at a permanency hearing the court shall approve a permanency plan that is in the best interests of the child or youth and takes into consideration the child's or youth's need for permanency. Another Planned living arrangement can be ordered by the court, provided the Commissioner of Children and Families has documented a compelling reason why it would not be in the best interest of the child or youth for the permanency plan to include a different permanency goal. (Sec. 4. Section 46b-129 of the 2010 supplement to the general statutes)

West Virginia:

Section 49-6-5 of West Virginia Code: Orders that a child may be placed in another planned permanent living arrangement, but only in cases where the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the other permanency options. (Section 49-6-5. Disposition of neglected or abused children)

- **Reinstatement of Parental Rights**

Several states have also passed legislation that allows for the reinstatement of parental rights following termination of parental rights. The laws were developed in response to children who were aging out of the foster care system and re-establishing ties with parents and family members.

Legislation for Reinstatement following Termination of Parental Rights

State	Statute or Code	Who Can File Motion or Petition	Who Must Be Notified
Alaska	Alaska Stat. § 47.10.089	A person who has voluntarily relinquished the child.	
California	Cal. Welfare and Institutions Code § 366.26	Child for whom court has determined that adoption is no longer the permanent plan.	Social worker or probation officer, child's attorney, child's tribe, if applicable, former parent
Hawaii	Act 135, 2010 Session Laws	Child who is 14 or older; child's GAL; department	Former parent; child's GAL; department; child's resource family
Illinois	705 Ill. Comp. Stat. 405/2-28 and 705 Ill. Comp. Stat. 405/2-34	Dept of Child and Family Services on behalf of 13 years or older child	Parties to the Juvenile Court proceeding

Louisiana	La. Child. Code Ann. art. 1051	Child in foster care over the age of 15.	Parents, foster parents, CASA volunteer.
Nevada	Nev. Rev. Stat. Ann. § 128.160, 128.170	Child or legal custodian or guardian of child	Parents, child's legal custodian or guardian, person or entity that petitioned for TPR, child's attorney
New York	N.Y. Fam. Ct. Act. §§ 635-637	Attorney, Guardian of child age 14 or older	Court may issue summons to child, guardian and custodian, respondent in TPR proceeding.
Oklahoma	Okla. Stat. Ann. tit. 10 A, § 1-4-909	Child 15 or older	Department, child's attorney, child, former parent, foster parent or relative guardian, GAL, child's tribe
Washington	Wash. Rev. Code Ann §13.34.215	Child 12 or older, or younger if good cause is shown	Department, child's attorney, child, former parent, existing parent, current caregiver, child's tribe.

Please let us know if we can be of further assistance!

Amy Taylor
National Conference of State Legislatures
Children and Families Program

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
DIVISION OF HEALTH CARE SERVICES

SEAN PARNELL, GOVERNOR

350 Main Street, Room 412
P.O. Box 110660
JUNEAU, AK 99811-0660
PHONE: (907) 465-5829
FAX: (907) 465-2204

November 19, 2010

The Honorable Les Gara
Alaska House of Representatives
716 W. 4th Ave. Suite 310
Anchorage AK. 99501-2133

Dear Representative Gara,

In light of the postponement of our scheduled meeting regarding the status of 2010 foster care reform efforts I wanted to update you on the issues. I look forward to meeting with you in the near future, and to working with you to further improve the lives of Alaska's children and youth in foster care.

In advance of a meeting, I want to touch on some of the points you raised and inform you of some of the progress that has been achieved since your letter of October 12.

Regarding the implementation of the provisions of HB 126, a small number of youth in the past have been released from foster care when continued care would have been to their benefit. Changes in our IL procedures, effective October 1, 2010 have made Regional Independent Living Specialists (RILS) responsible for developing transition plans for all youth age 17 and older. In light of HB 126, transition plans will be revised to include a thorough review of continued support and future requirements if the youth chooses to re-enter custody at a later date.

Recent federal changes to the Fostering Connections Act, allows states to pursue federal reimbursements for foster care for youth to age 21. However, the federal requirements indicate that should states choose to accept reimbursement for youth to age 21, the states must also open this option to youth to age 21 for the adoption and guardianship subsidy programs as well. HB 126 is currently funded with general fund and anticipated federal reimbursement amounts. OCS will implement HB 126 extended foster care using only general funds until it can be determined whether or not existing general fund will adequately support the program or extended adoption and guardianship subsidies will be pursued.

It has been, and continues to be the policy of OCS to utilize transportation funds to allow foster youth who move between placements to stay in their original school for the remainder of the school term. The additional $80,000 for FY 11 will assist us in implementing this policy further.

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
DIVISION OF HEALTH CARE SERVICES

SEAN PARNELL, GOVERNOR

350 Main Street, Room 412
P.O. Box 110660
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PHONE: (907) 465-5829
FAX: (907) 465-2204

Since we received your letter an RFP, *Mentoring for Independent Living* was posted on November 4, 2010. Although the service area is statewide, the proposal evaluation committee will favor those proposing to serve two or more population centers. The deadline for proposals has been extended to December 10, 2010.

In the Fall, 2010 40 youth received funding to attend the University of Alaska, AVTEC and other colleges out of state. Through coordination with the University of Alaska, nine supplemental tuition waivers were issued to youth attending the University of Alaska. This was in addition to the 10 Presidential Tuition Waivers, for a grand total of 19 tuition waivers.

Additional waivers will be issued for the Spring, 2011 semester. Regional Independent Living Specialists contacted all youth who received a waiver and are providing case management services. The RILS are utilizing the additional funds to provide occupational and post secondary training opportunities to youth both in and out of custody. We currently have youth utilizing these funds at UAF Community & Technical College and in UAF's Nurse Aide Program. Meetings have taken place with the Department of Labor and Workforce Development to create coordination of services to utilize funds for Career Exploration and to provide for Apprenticeship and On-the-Job training opportunities for foster care youth.

I understand your concern with the case load of the four RILS and share your belief that two additional staff will positively impact the outcomes of youth coming out of care. Posting of these jobs is anticipated to take place in the near future.

Regarding the housing assistance funds, to date a total seven youth have utilized these funds for a total of 28 months of housing assistance. We are continuing to make efforts to promote this assistance and are contacting all youth out of care, in each region of the state.

With respect to the formal *FosterWear* cards, they have been printed and sent out to all licensed providers. Cards for unlicensed providers have been sent to the field offices as well. We regularly print *FosterWear* information in the Alaska Center For Resource Families (ACRF) newsletter and Izabel Bower's is currently working on a "print mailer" that will be sent out after the holidays.

I am also looking forward to working with you on the new initiatives you outlined in your letter. Dee Pearson and Mike Sobosinski of UAA have discuss peer mentorship in general and will be meeting again to discuss this service delivery more in depth. Dee is exploring a pilot project for peer mentorships for youth attending the University Fall, 2011.

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
DIVISION OF HEALTH CARE SERVICES

SEAN PARNELL, GOVERNOR

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The above is a brief update on the status of some of the initiatives and programs that OCS is working on. I greatly look forward to exploring in more depth at our next meeting these subjects and any others you would like to talk about in our efforts to improve the lives and futures of Alaska's children and young people.

Sincerely,

Christy Lawton
Acting Director

Cc: Tracy Spartz Campbell, Deputy Director
Dee Pearson, Independent Living Coordinator

Covenant House Alaska
Crisis Center • Community Services Center • Transitional Living

March 30, 2011

Senator Bettye Davis
State Capital Room 30
Juneau, AK 99801

Dear Senator Davis,

Thank you for introducing SB 82, a bill focused on improving Alaska's foster care program and protecting children to the best of our ability. Covenant House Alaska (CHA) serves Alaska's homeless and at-risk youth through our Crisis Center, Transitional Living Programs, Healthcare and Educational/Employment Support. CHA appreciates your commitment to keeping Alaska's youth as safe and healthy as possible.

SB 82 enacts the following changes to protect foster care youth:

> (1) SB 82 requires the department to seek permanency for all youth and, if positive permanency plans are unsuccessful, imposes substantive and procedural protections around planning for youth to be placed in another planned permanent living arrangement;
> (2) SB 82 simplifies the application process to become a foster home and allows the department to waive strict compliance with building code requirements for foster and relative placements if the placement is in the child's best interest and is otherwise preferable and safe; and
> (3) SB 82 requires the department to make all reasonable efforts to place siblings together.

All of the changes listed above evince strong policy underpinnings. Specific to CHA's population of homeless and runaway youth, the provisions regarding waiving strict building code compliance for relatives' homes and placing siblings together are particularly noteworthy. Research indicates that foster care youth who are placed with siblings in the home of a relative or family friend, usually in a familiar community, tend to run away less frequently.

These statutory changes may be viewed as measures targeted to prevent youth homelessness. And, just as important, if a youth comes to Covenant House from the foster care system who qualifies for extended court supervision, it appears that this legislation would allow CHA to work with the department to continue to provide services for the youth.

Thank you for your efforts at protecting Alaska's vulnerable children. Please do not hesitate to contact me if I can answer any questions or provide further feedback on SB 82.

Sincerely,

Deirdre A. Cronin

Deirdre A. Cronin
Executive Director

Advisory Board on Alcoholism and Drug Abuse

abada amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

February 23, 2011

Representative Les Gara
Alaska State Legislature
State Capitol, Room 500
Juneau, Alaska 99801

Re: Support for HB 33

Dear Representative Gara,

On behalf of the Alaska Mental Health Board and the Advisory Board on Alcoholism and Drug Abuse, I would like to express our thanks and appreciation for the commitment that you and your co-sponsors have made to improving the lives of Alaskan children in foster care. HB 33 continues that process of system improvement, and we support the small but very significant changes that better prioritize the needs of foster children.

Being removed from your home, even when that home is not a safe or healthy environment, is traumatic. Being removed from your home and then separated from your brothers and sisters compounds the initial harm caused by abuse or neglect exponentially. While we know this from research and study, the Boards recognized fully the devastating effect this separation has on foster children when we heard from youth involved in the 2011 Youth Policy Summit. No child should have to beg, plead and fight for years to see a brother or sister, and yet we heard how this is the case for far too many youth who grow up in foster care.

HB 33 also prioritizes family connections as an important source of strength, support and resiliency for children and youth who experience abuse or neglect by making family placements easier in rural Alaska. Too often children in rural Alaska are placed with foster parents in urban communities rather than with relatives in villages, with the justification that the rural homes fail to meet foster care licensing standards. How can an aunt in a village where no one has running water ever hope to care for a niece or nephew who is in need, if there is no reasonableness standard in determining a safe physical environment for placement? HB 33 provides that element of reason to family placement decisions.

We are grateful for your continued advocacy for Alaska's children and are glad to be able to support HB 33.

Sincerely,

J. Kate Burkhart
Executive Director

cc: Representative Bill Thomas
Representative Bob Herron
Representative Berta Gardner

NASW, ALASKA CHAPTER
National Association of Social Workers

401 E. Northern Lights Blvd., Suite 205
Anchorage, Alaska 99503
907-332-NASW (6279) Fax: 907-332-6270
1-800-478-NASW (6279)
director@naswak.org
http://www.naswak.org

January 2nd, 2011

Representative Les Gara
State of Alaska
State Capitol, Room 500
Juneau, Alaska 99801-1182

Dear Representative Gara:
The National Association of Social Workers (NASW) – Alaska Chapter, a membership organization that represents over 500 social workers across the State of Alaska, supports The Alaska Foster Family Protection Act.

The mission of NASW is to enhance the effective functioning and well-being of individuals, families, and communities through its work and through its advocacy. The Alaska Foster Family Projection act upholds this mission by ensuring that Alaska's most vulnerable children can more easily transition into safe and permanent homes. The increase in the number of rural foster care placements is especially crucial so youth in rural Alaska can continue to live in their home communities. Research demonstrates that youth from rural communities, and specifically Alaska Native youth, have more promising futures when they are able to maintain connection with their communities and tribes.

Thank you for your consistent attention to child welfare issues in Alaska. We look forward to working with you on behalf of children and families in our state.

Sincerely,

M. L

Meg Loomis, MSW
Executive Director

January 26, 2011

The Honorable Les Gara
Alaska House of Representatives
State Capital
Juneau, AK. 99801-1181

RE: HB 33: Stability and Opportunity for Foster Youth

Dear Representative Gara,

The members of the Alaska Behavioral Health Association would like to inform you of their support for this legislation. It's intent is consistent with the goals and values of the members that provide services in our state and also provides opportunities to expand a system that is currently incapable of meeting the needs of youth.

Our providers have experienced tremendous difficulties in placing children and youth back in their home communities when a foster home is required due to the home situation of the biological parents. Frequently, homes may be available but they don't meet the more ridged codes and standards that govern construction in metropolitan areas. While no one would ever want a child placed in an unsafe environment, we are aware that minor code violations can be prohibitively expensive to repair and a foster home can be lost.

We hear reports from providers that it often takes up to six months or more from the time a family begins the application process and they are finally able to accept a child in their home. We appreciate the careful attention to ensure that a child is placed in a safe environment; however, redundancy and over-attention can become a barrier rather than a safe guard.

Thank you for your commitment to foster children and working to make their lives better.

Sincerely,

Donn Bennice

Donn Bennice, Ph.D.
President

aahc
ALASKA ASSOCIATION OF
Homes for Children

Alaska Baptist Family Services
Anchorage, AK

Alaska Children's Services
Anchorage, AK

Alaska Family Services
Palmer, AK

Covenant House of Alaska
Anchorage, AK

Family Centered Services of Alaska
Fairbanks, AK

Juneau Youth Services
Juneau, AK

Kenai Peninsula Community Care Center
Kenai, AK

Maniilaq Association
Kotzebue, AK

Nome Children's Home
Nome, AK

North Slope Borough Children's Services
Barrow, AK

North Star Behavioral Health
Anchorage & Palmer, AK

Presbyterian Hospitality House
Fairbanks, AK

Providence Behavioral Health Systems
Anchorage, AK

Residential Youth Care
Ketchikan, AK

Searhc
Sitka, AK

The Boys and Girls Home of Alaska
Fairbanks, AK

The Salvation Army Booth Memorial Home
Anchorage, AK

Youth Advocates of Sitka
Sitka, AK

March 7, 2011

Senator Bettye Davis
Alaska Senate
State Capitol
Juneau, Alaska 99801

RE: SB 82: Stability and Opportunity for Foster Youth

Dear Senator Davis,

Alaska Association of Homes for Children (AAHC) thanks you for introducing legislation to improve the service delivery of foster care. Several agencies within our association provide foster care and many of the youth we serve benefit from this critical service.

Unfortunately, we all have witnessed children on long waiting lists for a viable foster care placement for various reasons. The intent of SB 82 provides concrete solutions to streamline the process for foster parents, develop resources for children, and reinforce the goals related to permanency planning.

Placing children in rural areas poses additional challenges related to numerous licensing issues. It can be extremely difficult finding foster homes that meet state licensing requirements. Licensing variances for homes failing to meet specific codes when indicated would provide opportunities for families to open up their homes to provide care for foster children.

Foster care provides for a very cost effective way of helping children. Allowing more families to commit to the many Alaskan children waiting for a quality home creates a win win opportunity for all. AAHC truly appreciates your continued efforts to assist with the foster care system in Alaska.

The provisions within your bill would provide a wise investment in the health and wellbeing of Alaska's children.

Thank you,

Brad Ohs
AAHC President

cc: Representative Les Gara

Alaska Children's Services

The Honorable Les Gara
Alaska House of Representatives
State Capitol
Juneau, AK 99801-1182

RE: HB 33: Stability and Opportunity for Foster Youth

Dear Representative Gara:

This letter is to inform you of the strong support the Administration and Board of Directors have for the above-mentioned bill. It's intent is consistent with the goals and values of the Treatment Foster Care Program operated by Alaska Children's Services and provides opportunities to expand a system that is currently incapable of meeting the needs of youth.

We are particularly appreciative of the section regarding permanency placement. As you have stated the ultimate goal in foster care is to place a child in a good, stable, permanent home through adoption, guardianship, or reunification. Frequently, however, in our haste to find a child a bed or a roof over their head, we lose sight of this goal. By adding additional oversight to the permanency planning process, this goal can be reached.

Alaska Children's Services has experienced tremendous difficulties in placing children and youth back in their home communities when a foster home is required due to the home situation of the biological parents. Frequently, homes may be available but don't meet the more rigid codes and standards that govern construction in metropolitan areas. While no one would ever want to place a child in an unsafe environment, we are aware that minor code violations can be prohibitively expensive to repair and a foster home can be lost.

Alaska Children's Services has three full-time professional staff who comprise the treatment foster care licensing department. They report that it frequently takes up to six months or more from the time a family begins the application process and they are finally able to accept a child in their home. We appreciate the careful attention to ensure that a child is placed in a safe environment; however, redundancy and over-attention can become a barrier rather than a safeguard.

Overall, thank you very much for your continued commitment to one of our most vulnerable populations, our foster children, and please advise if there is more we can do to support this legislation.

Regards,

Jim Maley,
President & CEO

1600 Abbott Road, Anchorage, Alaska 99507-1314 • (907) 346-2101 • Fax (907) 248-4220
e-mail: ...@acsak.org • www.acsak.org

4600 DeBarr Rd., Suite 301 • Anchorage, Alaska 99508
Phone: (907) 274-8281 • Fax (907) 274-4055
www.denalifs.org

February 8, 2011

Representative Les Gara
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Gara:

I am writing in support of HB33, the legislation you have proposed relating to foster care in Alaska. Denali Family Services (DFS) is a community mental health agency that provides therapeutic foster care to many children in the custody of the State / Office of Children's Services. DFS is also a child placement agency and in that role, processes foster home applications and licenses foster home in cooperation with OCS (i.e., the license is still a State foster care license). As an agency licensing foster homes, we support using the variance for homes in rural communities as long as the home is a safe environment and there are adequate ways to exit the home in case of a fire.

Denali Family Services serves many adolescents who are moving from care to independence and I am especially pleased to see the language changes that will make extending foster care to age 21 easily accessible for youth who want to take advantage of that opportunity. For youth who do not have a support system in place, those additional three years can make a huge difference in their maturity and readiness to survive on their own.

With regard to the application process for foster parents, DFS has significantly reduced our paperwork requirements in the last two years. In addition, effective this fiscal year, DFS will be utilizing a new foster parent training curricula (Presley Ridge). This curricula offers foster care providers in-depth, specialized training and OCS has agreed that DFS' foster parents who complete the Presley Ridge training will not have to take the OCS CORE training. This change will provide foster parents with more specialized training while maintaining the total hours at a number (per year) that is manageable.

On behalf of Denali Family Services, I am writing in support of HB33. Should you need additional information, please feel free to contact me at 907-222-2322.

Sincerely,

Yvonne M. Chase, PhD, LCSW
President / CEO

Melanie Lesh

From: Laughlin, Wilda J (HSS) <wilda.laughlin@alaska.gov>
Sent: Tuesday, April 03, 2012 12:42 PM
To: Thomas Obermeyer; Melanie Lesh
Cc: Spartz Campbell, Tracy A (HSS); Harris, Naomi E (HSS); Lawton, Christy (HSS)
Subject: RE: SB 82 // foster care licensing

Correction: Christy will be available for questions. She does not plan to have written testimony. Thanks.
w.

From: Laughlin, Wilda J (HSS)
Sent: Tuesday, April 03, 2012 12:11 PM
To: Obermeyer, Thomas S (LAA); Lesh, Melanie G (LAA)
Cc: Spartz Campbell, Tracy A (HSS); Harris, Naomi E (HSS); Lawton, Christy (HSS)
Subject: SB 82 // foster care licensing

Please be advised that Christy Lawton, Director of the Office of Children's Services, will be testifying in Juneau on SB 82, foster care licensing, at the House Judiciary Committee hearing Wednesday, April 4 at 1 pm.

SB

89

<TARGET><BILL>SB 89</BILL><SUBJECT>SB
89</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE CS FOR CS FOR SENATE BILL NO. 89(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR COGHILL

A BILL

FOR AN ACT ENTITLED

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to

refrain from disclosure under the Legislative Ethics Act; relating to the applicability of certain provisions of the Legislative Ethics Act to certain legislative employees, volunteers, and interns; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

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

*** Section 1.** AS 24.60.030(a) is amended to read:

(a) A legislator or legislative employee may not

(1) solicit, agree to accept, or accept a benefit other than official compensation for the performance of public duties; this paragraph may not be construed to prohibit lawful solicitation for and acceptance of campaign contributions, solicitation or acceptance of contributions for a charity event, as defined in AS 24.60.080(a)(2)(B), or the acceptance of a **gift** [LAWFUL GRATUITY] under **AS 24.60.075 or 24.60.080** [AS 24.60.080];

(2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of [EITHER] the legislator, legislative employee, or another person; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) the legislative council, notwithstanding AS 24.05.190, from designating a public facility for use by legislators and legislative employees for health or fitness purposes; when the council designates a facility to be used by legislators and legislative employees for health or fitness purposes, it shall adopt guidelines governing access to and use of the facility; the guidelines may establish times in which use of the facility is limited to specific groups;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others;

(E) a legislator from use of legislative employees to prepare and send out seasonal greeting cards;

(F) a legislator from using state resources to transport computers or other office equipment owned by the legislator but primarily used for a state function;

(G) use by a legislator of photographs of that legislator;

(H) reasonable use of the Internet by a legislator or a legislative employee except if the use is for election campaign purposes;

(I) a legislator or legislative employee from soliciting, accepting, or receiving a gift on behalf of a recognized, nonpolitical charitable organization in a state facility;

(J) a legislator from sending any communication in the form of a newsletter to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(K) full participation in a charity event approved in advance by the Alaska Legislative Council;

(3) knowingly seek, accept, use, allocate, grant, or award public funds for a purpose other than that approved by law, or make a false statement in connection with a claim, request, or application for compensation, reimbursement, or travel allowances from public funds;

(4) require a legislative employee to perform services for the private benefit of the legislator or employee at any time, or allow a legislative employee to perform services for the private benefit of a legislator or employee on government time; it is not a violation of this paragraph if the services were performed in an unusual or infrequent situation and the person's services were reasonably necessary to permit the legislator or legislative employee to perform official duties;

(5) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for the purpose of political fund raising or campaigning; this paragraph does not prohibit

(A) limited use of state property and resources for personal purposes if the use does not interfere with the performance of public duties and either the cost or value related to the use is nominal or the legislator or legislative employee reimburses the state for the cost of the use;

(B) the use of mailing lists, computer data, or other information lawfully obtained from a government agency and available to the general public for nonlegislative purposes;

(C) storing or maintaining, consistent with (b) of this section, election campaign records in a legislator's office;

(D) a legislator from using the legislator's private office in the capital city during a legislative session, and for the 10 days immediately before and the 10 days immediately after a legislative session, for nonlegislative purposes if the use does not interfere with the performance of public duties and if there is no cost to the state for the use of the space and equipment, other than utility costs and minimal wear and tear, or the legislator promptly reimburses the state for the cost; an office is considered a legislator's private office under

this subparagraph if it is the primary space in the capital city reserved for use by the legislator, whether or not it is shared with others; or

(E) use by a legislator of photographs of that legislator.

*** Sec. 2.** AS 24.60.030(i) is amended to read:

(i) **A** [EXCEPT FOR SUPPLYING INFORMATION REQUESTED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, OR WHEN RESPONDING TO CONTACTS INITIATED BY THE HEARING OFFICER OR THE INDIVIDUAL, BOARD, OR COMMISSION WITH AUTHORITY TO MAKE THE FINAL DECISION IN THE CASE, A] legislator or legislative employee may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision in the **matter** [CASE] unless [THE]

(1) **the legislator or legislative employee is representing another person for compensation subject to AS 24.60.100 and as a professional who is licensed in the state;**

(2) the contact is made in the presence of all parties to the hearing or the parties' representatives **while the legislator or legislative employee is acting as a party or a witness in the matter or responding to a question asked of the legislator or legislative employee by the hearing officer, individual, board, or commission** and the contact is made a part of the record; or

(3) the contact is inadvertent and ex parte and the legislator or legislative employee

(A) promptly discloses the [(2)] fact and substance of the contact

(i) directly to each party to the hearing whose identity as a party is public information; or

(ii) through the hearing officer for each party to the hearing whose identity as a party is not public information; and

(B) makes the fact and substance of the contact [IS

PROMPTLY DISCLOSED BY THE LEGISLATOR OR LEGISLATIVE EMPLOYEE TO ALL PARTIES TO THE HEARING AND THE CONTACT IS MADE A] part of the record.

*** Sec. 3.** AS 24.60.030 is amended by adding a new subsection to read:

(j) In this section, "administrative hearing" means a quasi-judicial hearing before an agency; "administrative hearing" does not include an informal conference or review held by an agency before a final decision is issued or a rate-making proceeding or other nonadjudicative public hearing.

*** Sec. 4.** AS 24.60.050(c) is amended to read:

(c) A legislator or legislative employee who participates in a program or receives a loan that is not exempt from disclosure under (a) of this section shall file with the committee by the date required under AS 24.60.105 a disclosure stating the amounts of the loans outstanding or benefits received during the preceding calendar year from nonqualifying programs. If the committee requests additional information necessary to determine the propriety of participating in the program or receiving the loan, it shall be promptly provided. The committee shall **maintain the disclosure as a public record and promptly forward the information contained in the disclosure** [PROMPTLY COMPILE A LIST OF THE STATEMENTS INDICATING THE LOANS AND PROGRAMS AND AMOUNTS AND SEND IT] to the presiding officer of each house who shall have it published in the supplemental journals on or before the next regularly scheduled publication of ethics disclosures. If a legislator or legislative employee asks the committee to keep any part of the disclosure confidential and a quorum of the committee determines by vote of a majority of committee members that making the entire disclosure public would cause an unjustifiable invasion of personal privacy, the committee may elect to publish only the fact that a person has participated in the program and the amount of benefit that the unnamed person received. The committee shall maintain the disclosure of the name of the person as confidential and may only use the disclosure in a proceeding under AS 24.60.170. If the disclosure becomes part of the record of a proceeding under AS 24.60.170, the disclosure may be made public as provided in that section.

*** Sec. 5.** AS 24.60.060(a) is amended to read:

(a) A legislator, [OR] legislative employee, **or public member of the committee** may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law.

*** Sec. 6.** AS 24.60.080(a) is amended to read:

(a) Except as otherwise provided in this section, a legislator or legislative employee may not

(1) solicit, accept, or receive, directly or indirectly, a gift worth $250 or more, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, or gifts from the same person worth less than $250 that in a calendar year aggregate to $250 or more in value;

(2) solicit, accept, or receive a gift with any monetary value from a lobbyist, an immediate family member of a lobbyist, or a person acting on behalf of a lobbyist, except

(A) food or beverage for immediate consumption;

(B) a contribution to a charity event, [FROM ANY PERSON AT ANY TIME, AND] tickets **to** [FOR] a charity event, **and** [AT ANY TIME, EXCEPT THAT TICKETS TO OR] gifts **to which the tickets may entitle the bearer; however, under this subparagraph a legislator or legislative employee may not solicit, accept, or receive from the same lobbyist, an immediate family member of the lobbyist, or a person acting on behalf of the lobbyist, tickets to a charity event, gifts to which the tickets may entitle the bearer, or both, that in a calendar year aggregate to $250 or more in value** [RECEIVED AT A CHARITY EVENT UNDER THIS SUBPARAGRAPH ARE SUBJECT TO THE CALENDAR YEAR LIMIT ON THE VALUE OF GIFTS RECEIVED BY A LEGISLATOR OR LEGISLATIVE EMPLOYEE IN (1) OF THIS SUBSECTION]; in this subparagraph, "charity event" means an event the proceeds of which go to a charitable organization with tax-free status under 26 U.S.C. 501(c)(3) and that the Alaska Legislative Council has approved in advance; the tickets may entitle

the bearer to admission to the event, to entertainment, to food or beverages, or to other gifts or services **in connection with** [INVOLVED IN] the charity event;

(C) a gift that is unconnected with the recipient's legislative status and is from a member of the legislator's or legislative employee's immediate family;

(D) a gift delivered on the premises of a state facility and accepted on behalf of a recognized nonpolitical charitable organization; or

(E) a compassionate gift under AS 24.60.075.

* **Sec. 7.** AS 24.60.080(c) is amended to read:

(c) Notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept

(1) hospitality, other than hospitality described in (4) of this subsection,

(A) with incidental transportation at the residence of a person; however, a vacation home located outside the state is not considered a residence for the purposes of this subparagraph; or

(B) at a social event or meal;

(2) discounts that are available

(A) generally to the public or to a large class of persons to which the person belongs; or

(B) when on official state business, but only if receipt of the discount benefits the state;

(3) food or foodstuffs indigenous to the state that are shared generally as a cultural or social norm;

(4) travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern;

(5) gifts from the immediate family of the person; in this paragraph, "immediate family" means

(A) the spouse of the person;

(B) the person's domestic partner;

(C) a child, including a stepchild and an adoptive child, of the person or of the person's domestic partner;

(D) a parent, sibling, grandparent, aunt, or uncle of the person;

(E) a parent, sibling, grandparent, aunt, or uncle of the person's spouse or the person's domestic partner; and

(F) a stepparent, stepsister, stepbrother, step-grandparent, step-aunt, or step-uncle of the person, the person's spouse, or the person's domestic partner;

(6) gifts that are not connected with the recipient's legislative status;

(7) a discount for all or part of a legislative session, including time immediately preceding or following the session, or other gift to welcome a legislator or legislative employee who is employed on the personal staff of a legislator or by a standing or special committee to the capital city or in recognition of the beginning of a legislative session if the gift or discount is available generally to all legislators and the personal staff of legislators and staff of standing and special committees; this paragraph does not apply to legislative employees who are employed by the Legislative Affairs Agency, the office of the chief clerk, the office of the senate secretary, the legislative budget and audit committee, the office of victims' rights, or the office of the ombudsman;

(8) a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern;

(9) a gift of transportation from a legislator or a legislative employee to a legislator or a legislative employee if the transportation takes place in the state on or in an aircraft, boat, motor vehicle, or other means of transport owned or under the control of the donor; this paragraph does not apply to travel described in (4) of this subsection or travel for political campaign purposes; or

(10) a contribution to a charity event**, a ticket to a charity event, or a gift in connection with a charity event** [FROM ANY PERSON AT ANY TIME]; in this paragraph, "charity event" has the meaning given in (a)(2)(B) of this section.

*** Sec. 8.** AS 24.60.080(d) is amended to read:

(d) A legislator or legislative employee who accepts a gift under (c)(4) **of this section that has a value of $250 or more or a ticket to a charity event or gift in connection with a charity event under (c)(10)** of this section that has a value of $250 or more shall disclose to the committee, within **60** [30] days after receipt of the gift, the name and occupation of the donor and the approximate value of the gift. A legislator or legislative employee who accepts a gift under (c)(8) of this section that the recipient expects will have a value of $250 or more in the calendar year shall disclose to the committee, within 30 days after receipt of the gift, the name and occupation of the donor, a general description of the matter of legislative concern with respect to which the gift is made, and the approximate value of the gift. The committee shall maintain a public record of the disclosures it receives relating to gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section and shall forward the disclosures to the appropriate house for inclusion in the journal. The committee shall forward to the Alaska Public Offices Commission copies of the disclosures concerning gifts under (c)(4), (c)(8), **(c)(10),** and (i) of this section that it receives from legislators and legislative directors. A legislator or legislative employee who accepts a gift under (c)(6) of this section that has a value of $250 or more shall, within 30 days after receiving the gift, disclose to the committee the name and occupation of the donor and a description of the gift. The committee shall maintain disclosures relating to gifts under (c)(6) of this section as confidential records and may only use, or permit a committee employee or contractor to use, a disclosure under (c)(6) of this section in the investigation of a possible violation of this section or in a proceeding under AS 24.60.170. If the disclosure under (c)(6) of this section becomes part of the record of a proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosure.

*** Sec. 9.** AS 24.60.080(h) is amended to read:

(h) A legislator, a legislative committee other than the Select Committee on Legislative Ethics, or a legislative agency may accept a gift of (1) volunteer services for legislative purposes so long as the person making the gift of services is not receiving compensation from another source for the services, or (2) the services of a **legislative intern** [TRAINEE] who is participating in an educational program

approved by the committee if the services are used for legislative purposes. The committee shall approve training under a program of the University of Alaska and training under 29 U.S.C. 2801 - 2945 (Workforce Investment Act of 1998).

* **Sec. 10.** AS 24.60.105 is amended by adding a new subsection to read:

(d) A person may submit a written request to refrain from making a disclosure that is required by this chapter if making the disclosure would violate state or federal law, including the United States Constitution and the Constitution of the State of Alaska, or a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow. The committee shall approve or deny the request, or require further justification from the person making the request. At the request of the committee or a person authorized to act on behalf of the committee, a person who seeks to refrain from making a disclosure under this subsection shall provide the committee with justification in writing, and the committee may review the written justification to determine whether it is sufficient.

* **Sec. 11.** AS 24.60.112 is repealed and reenacted to read:

Sec. 24.60.112. Applicability to legislative interns and volunteers. A legislative intern or legislative volunteer shall be considered to be a legislative employee for purposes of compliance with AS 24.60.030 - 24.60.039, 24.60.060, 24.60.080, 24.60.085, 24.60.158 - 24.60.170, 24.60.176, and 24.60.178. If a person believes that a legislative intern or legislative volunteer has violated the provisions of one of those sections, the person may file a complaint under AS 24.60.170. The provisions of AS 24.60.170 apply to the proceeding.

* **Sec. 12.** AS 24.60.130(h) is amended to read:

(h) A member is disqualified from participating as a member in any proceeding before the committee involving a complaint against the member or an employee whose work is supervised by the member or an advisory opinion requested by the member. If a regular legislative member of the committee is disqualified under this subsection from participating in a proceeding involving a complaint, the member's alternate shall be designated under **AS 24.60.131** [(n) OF THIS SECTION].

* **Sec. 13.** AS 24.60.130(o) is amended to read:

(o) Notwithstanding (h) [AND (n)] of this section **and AS 24.60.131**, if a

complaint before the committee alleges a violation of this chapter by a group of legislators that includes a legislative member of the committee and that member's alternate, the member and alternate member are disqualified from serving on the committee with regard to the complaint. If the two disqualified members of the committee are members of the majority organizational caucus, the presiding officer of the house in which the two disqualified members serve shall appoint from that house an alternate to serve with regard to the complaint. If one of the two disqualified legislative members of the committee is not a member of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate to serve with regard to the complaint. If a complaint alleges a violation of this chapter that includes all legislative members of the majority organizational caucus of one house, the presiding officer of that house shall appoint from the other house an alternate to serve with regard to the complaint. If the complaint alleges a violation of this chapter that includes all legislative members of a minority organizational caucus of one house, the leader of that minority organizational caucus shall appoint from the other house an alternate to serve with regard to the complaint.

* **Sec. 14.** AS 24.60 is amended by adding a new section to read:

Sec. 24.60.131. Alternate members. (a) When appointing members of the legislature to serve on the committee under AS 24.60.130(b), the speaker of the house of representatives or the president of the senate, as appropriate, shall appoint an alternate member for each regular member. The alternate member shall have the same qualifications for appointment to the committee as the regular member for whom the alternate stands as alternate. The alternate member's appointment is subject to confirmation as required for appointment of the regular member.

(b) When selecting public members to serve on the committee under AS 24.60.130(b), the Chief Justice of the Alaska Supreme Court shall select one alternate public member. The alternate public member's selection is subject to ratification as required for selection of the regular public members.

(c) Subject to (d) of this section, if a regular member of the committee or a subcommittee is unable to participate in a proceeding other than a proceeding under

AS 24.60.170, the chair of the committee or subcommittee that holds the proceeding shall designate the regular member's alternate to participate in place of the regular member at the proceeding, and the alternate shall participate for the duration of that proceeding unless the alternate is unable to participate.

(d) If a regular member of the committee or a subcommittee or an alternate member appointed under (a) or (b) of this section participates at the commencement of a proceeding under AS 24.60.170, the member shall participate for the duration of the proceeding unless the member is disqualified under AS 24.60.130(h) or is unable to continue participating. If the participating member is disqualified under AS 24.60.130(h) or becomes unable to participate, the chair of the committee or subcommittee that holds the proceeding shall designate the member's alternate to participate in place of the member for the duration of the proceeding unless the alternate is disqualified or is unable to participate.

(e) If both a regular legislative member and that member's alternate appointed under (a) of this section are not available to participate at the commencement of a proceeding under AS 24.60.170 because they are disqualified under AS 24.60.130(h), the presiding officer of the house in which the two members serve shall appoint from that house an alternate and designate that alternate to participate in the proceeding; however, if the two members who are not available to participate are not members of the majority organizational caucus, the leader of the minority organizational caucus with the greatest number of members shall appoint from that house an alternate and designate that alternate to participate in the proceeding.

(f) A designation under (c) - (e) of this section shall be treated as confidential to the same extent that the identity of the subject of a complaint is required to be kept confidential.

* **Sec. 15.** AS 24.60.155 is repealed and reenacted to read:

Sec. 24.60.155. Legislative ethics course. (a) A person who is a legislator, legislative employee, public member of the committee, legislative intern, or legislative volunteer shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature or, if the person first takes office or begins service after the 10th day

of that session, within 30 days after the person takes office or begins service. The committee may grant a person additional time to complete the course required by this section.

(b) A legislative intern or legislative volunteer who serves fewer than 30 days in one legislature is not subject to the requirements under (a) of this section.

*** Sec. 16.** AS 24.60.260(a) is amended to read:

(a) A person required to make a disclosure under this chapter may not knowingly make a false or deliberately misleading or incomplete disclosure to the committee or to the Alaska Public Offices Commission. A person who files a disclosure after a deadline set by this chapter or by a regulation adopted [BY THE COMMITTEE OR] by the Alaska Public Offices Commission has violated this chapter and may be subject to imposition of a fine as provided in (c) of this section or AS 24.60.240.

*** Sec. 17.** AS 24.60.990(a)(11) is amended to read:

(11) "legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, [INCLUDING SECURITY, MESSENGER, MAINTENANCE, AND PRINT SHOP EMPLOYEES,] and other employees designated by the committee;

*** Sec. 18.** AS 24.60.130(n) is repealed.

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 8, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 3/21/12

The JUDICIARY Committee considered: **CSSB 89(JUD)**

CS FOR SENATE BILL NO. 89(JUD)

"An Act clarifying that a legislator or legislative employee is allowed to accept certain compassionate gifts; allowing legislators and legislative employees who are representing persons in an administrative hearing to contact hearing officers and attempt to influence the outcome of the hearing if they are professionals licensed in the state, and allowing legislators and legislative employees who are not professionals licensed in the state to contact hearing officers for the purpose of influencing the outcome of the hearing in certain instances; requiring the Select Committee on Legislative Ethics to maintain a public record of certain ethics disclosures made by legislators and legislative employees; prohibiting a public member of the Select Committee on Legislative Ethics from disclosing confidential information without authorization; clarifying the ethics disclosure requirements for tickets to or gifts in connection with charity events; amending disclosure deadlines under the Legislative Ethics Act; relating to requests to refrain from disclosure under the Legislative Ethics Act; relating to the applicability of certain provisions of the Legislative Ethics Act to certain legislative employees, volunteers, and interns; establishing a seat for an alternate public member on the Select Committee on Legislative Ethics; clarifying the requirements related to participation by alternate public members and alternate legislative members in the proceedings of the committee; amending the definition of 'legislative employee' in the Legislative Ethics Act; and repealing a procedure for appointment of alternate legislative members."

SB 89-LEGISLATIVE ETHICS ACT

Recommends it be replaced with [X] **HCS** *or* [ ] **CS** *for* HCS CS SB 89 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] **Same Title** [ ] **New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
2	LEG			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	-			
	Keller			X	
	Holmes	X			
	Pruitt			X	
Vice Chair: Stan M Thompson	THOMPSON	X			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSSB 89(JUD)**
Fiscal Note Number	2
(S) Publish Date	1/30/12

Identifier (file name)	CSSB89-LEG-COU-1-17-2012	Dept. Affected	Legislature
Title	"Legislative Ethics Act"	Appropriation	Legislative Council
		Allocation	Select Committee on Ethics
Sponsor	Senator Coghill		
Requester	Senate Judiciary Committee	OMB Component Number	2321

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by	Jessica Geary, Finance Manager	Phone	465-6626
Division	Legislative Affairs Agency	Date/Time	1/17/12 10:46 AM
Approved by	Pamela Varni, Executive Director	Date	1/17/2012
	Legislative Affairs Agency		

(Revised 8/17/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 89(JUD)

Analysis

This legislation has zero fiscal impact on the Legislative Affairs Agency.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 89(JUD)**
Fiscal Note Number: 2
(S) Publish Date: 1/30/12

Identifier (file name): CSSB89-LEG-COU-1-17-2012
Title: "Legislative Ethics Act"
Sponsor: Senator Coghill
Requester: Senate Judiciary Committee

Dept. Affected: Legislature
Appropriation: Legislative Council
Allocation: Select Committee on Ethics
OMB Component Number: 2321

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Jessica Geary, Finance Manager — Phone: 465-6626
Division: Legislative Affairs Agency — Date/Time: 1/17/12 10:46 AM
Approved by: Pamela Varni, Executive Director — Date: 1/17/2012
Legislative Affairs Agency

(Revised 8/17/2011 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 89(JUD)

Analysis

This legislation has zero fiscal impact on the Legislative Affairs Agency.

ALASKA STATE SENATE

Contact:
Interim Address:
301 Santa Claus Lane, St. #b
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4271

Session

(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 504

SENATOR JOHN COGHILL

HCS CSSB 89(STA)
Version O

This bill is a **product of discussions by the Select Committee of Legislative** Ethics over the **past couple of years**. There are some clarifications of existing statutes and amendments to current law to accommodate issues arisen dealing with confidentiality and meeting quorums.

The bill creates three exceptions to the bright line for legislators and legislative staff to follow for assisting constituents with problems they encounter with state agencies. Once an issue has been appealed to an administrative hearing officer, the legislator or legislative staffer may no longer make contacts with the agency, unless that person is a licensed professional to represent a person in such a proceeding and is being compensated for that representation. There are also provisions for inadvertent ex parte contact.

SB 89 clarifies that a **gift of a ticket from a lobbyist to a charity** event sanctioned by Legislative Council **cannot exceed $249.99**. It also further **describes a contribution to a charity event** as a ticket to a charity event or a gift in connection with the charity event.

It also **extends the reporting deadline for reporting gifts of travel and from charitable events from 30 to 60 days** and **expands legislative ethics training to legislative volunteers or educational trainees who are on the job for more than 30 days**.

The bill adds **public members of the ethics committee** to the statute prohibiting members from knowingly making **unauthorized disclosure of confidential information**. This bill clarifies that disclosures prohibited by state and federal confidentiality laws are not required by the Select Committee on Legislative Ethics

Lastly, the bill adds a statute **creating an alternate public member** and would allow **any alternate member** of the ethics committee who participates in the beginning of a proceeding to **participate in the entire proceeding**. The Chief Justice of the Alaska Supreme Court would appoint the alternate for the public members.

ALASKA STATE LEGISLATURE

SENATOR JOHN COGHILL

State Capitol, Room 504, Juneau, AK 99801-1182 (907) 465-3719
3340 Badger Road Suite #290, North Pole, AK 99705 (907) 488-5725

MEMORANDUM

HCS CSSB 89(STA) Legislative Ethics Bill Summary of Version O

Sec. 1. **Replaces** "lawful gratuity" with **"gift"** to make section of law consistent with the usage of "gift".

Sec. 2. **Provides exceptions to the bright line** for legislators or staff being actively involved in constituent problems with the State. Once the issue is assigned to an administrative hearing the involvement of the legislative office ceases. Exceptions are included for lawyers, witnesses, and a provision for inadvertent exparte contact.

Sec. 3. Adds a **definition for "administrative hearing"** to ethics statutes.

Sec. 4. **Eliminates requirement** of committee to **compile lists of financial disclosure** statements. They must only maintain public records and forward them to chief clerk and senate secretary.

Sec. 5. **Adds public members** to statute **prohibiting disclosure of confidential information.**

Sec. 6. Clarifies that a **ticket to a charity event from a lobbyist**, or gifts received because of the ticket from a lobbyist **cannot exceed $250**.

Sec. 7. **Further describes "a contribution to a charity event"** by clarifying it could be a ticket to a charity event or a gift in connection with a charity event.

Sec. 8. **Extend the reporting period** for gifts of travel for the purpose of obtaining information on legislative matters and disclosure of gifts from charitable events **from 30 days to 60 days**.

Sec. 9. **Grammatik correction** replacing the word **"trainee"** with the word **"intern"**.

Sec. 10. **Allows for exceptions from disclosure** under the legislative ethics law **if** it would be in **violation of the state or federal constitution or state or federal law. The State Affairs Committee added language that includes exceptions**

for disclosures for a rule, adopted formally by a trade or profession, that state or federal law requires the person to follow. A written request with justification must be submitted to the committee.

Sec. 11. Requires a **legislative intern to be compliant** with the legislative **ethics statutes**.

Sec. 12. Adds cite for new section on Alternate Members to statute describing the committee, its structure and its duties.

Sec. 13. Adds cite for new section on Alternate Members to statute describing the committee, its structure and its duties.

Sec. 14. This is a **new section describing the process for appointing alternates.** The section adds a **new provision that provides for the Chief Justice to appoint an alternate public member.**

Sec. 15. **Redefines** legislative employee.

Sec. 16. **Repeals** old statute describing the process for appointing alternates.

ALASKA STATE HOUSE OF REPRESENTATIVES

Contact:
Interim Address:
301 Santa Claus Lane, Suite 3B
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4271

Session
(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 504

SENATOR JOHN COGHILL

Date: March 6, 2012

To: Representative Carl Gatto, Chairman
House Judiciary Committee

From: Senator John Coghill

Re: Request to schedule SB 89 for a hearing

I am respectfully requesting Senate Bill 89, an Act amending certain provisions of the Select Committee on Legislative Ethics statutes be scheduled for a hearing in the House Judiciary Committee.

The legislation was amended in House State Affairs. I have attached the backup information for the bill and am available to answer any questions you might have on the bill.

Thank you for your consideration.

Amendment pack 3/21/12

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 14, 2012

✓ Trial Legal req.

SUBJECT: Title change may be needed; amendments to HCS CSSB 89(STA) (Work Order Nos. 27-LS0452\O.1 & O.2)

TO: Senator John Coghill
Attn: Rynnieva Moss

FROM: Dan Wayne
Legislative Counsel

Enclosed are the two draft amendments, O.1 and O.2, that you requested for the bill referenced above.

The Constitution of Alaska, article II, section 13 requires that the subject of each bill shall be expressed in the title. There may be an issue as to whether proposed amendment O.1 will require a title change to the bill that it is amending. If a title change is required to this house bill in the Senate, a joint resolution would be required to suspend Uniform Rules 24(c), 35, 41(b) and 42(e), which prohibit changes to a bill's title in the second house. Although amendment O.1 explicitly concerns the ostensible authority of the Select Committee on Legislative Ethics to establish disclosure deadlines by adopting regulations, it would probably fit within the title under "amending disclosure deadlines under the Legislative Ethics Act," on page 1, line 12, because it relates indirectly to disclosure deadlines in the Legislative Ethics Act.[1] On the other hand, it could be argued that the amendment does not fit within the title because it does not actually amend an existing deadline. If you want to exercise the most caution, the amendment could be revised to include a title change. If the title is changed, the committee may ask for a concurrent resolution at the time a committee substitute is prepared.

DCW:plm
12-162.plm

Enclosures

[1] The committee does not adopt regulations, and the Legislative Ethics Act does not explicitly authorize the committee to adopt regulations.

Joni
Leg Legal

27-LS0452\O.1
Wayne
3/14/12

AMENDMENT # 1

OK
3/19/12

JUD CS
new Sec. 16

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

Page 13, following line 16:

Insert a new bill section to read:

"* **Sec. 15.** AS 24.60.260(a) is amended to read:

(a) A person required to make a disclosure under this chapter may not knowingly make a false or deliberately misleading or incomplete disclosure to the committee or to the Alaska Public Offices Commission. A person who files a disclosure after a deadline set by this chapter or by a regulation adopted [BY THE COMMITTEE OR] by the Alaska Public Offices Commission has violated this chapter and may be subject to imposition of a fine as provided in (c) of this section or AS 24.60.240."

Renumber the following bill sections accordingly.

3/19/12

27-LS0452\O.2
Wayne
3/14/12

AMENDMENT #2

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

M table, tell Wednes
explan./defnt.

Page 11, line 8:

Following "**interns**":

Insert "**and volunteers**"

Following "intern":

Insert "or legislative volunteer"

Page 11, line 11, following "intern":

Insert "or legislative volunteer"

3/21/12

27-LS0452\O.1
Wayne
3/14/12

AMENDMENT #1 adopted

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

(new Sec. 16)

Page 13, following line 16:

Insert a new bill section to read:

"* **Sec. 15.** AS 24.60.260(a) is amended to read:

(a) A person required to make a disclosure under this chapter may not knowingly make a false or deliberately misleading or incomplete disclosure to the committee or to the Alaska Public Offices Commission. A person who files a disclosure after a deadline set by this chapter or by a regulation adopted [BY THE COMMITTEE OR] by the Alaska Public Offices Commission has violated this chapter and may be subject to imposition of a fine as provided in (c) of this section or AS 24.60.240."

Renumber the following bill sections accordingly.

27-LS0452\O.2
Wayne
3/14/12

✓ Legles

AMENDMENT #2

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

tabled on 3/19/12

3/21 Rep. Holmes obj. rem.

m OK ✓ JUDCS

Page 11, line 8:

Following "**interns**":

Insert "**and volunteers**"

Following "intern":

Insert "or legislative volunteer"

Page 11, line 11, following "intern":

Insert "or legislative volunteer"

27-LS0452\O.3
Wayne
3/20/12

AMENDMENT #3

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

3/21 M Rep. Keller
4 obj. OK

✓ CSSJW Sec. 15

Page 11, line 10:

Delete "24.60.155,"

Page 13, following line 16:

Insert a new bill section to read:

"* **Sec. 15.** AS 24.60.155 is repealed and reenacted to read:

Sec. 24.60.155. Legislative ethics course. (a) A person who is a legislator, legislative employee, public member of the committee, legislative intern, or legislative volunteer shall complete a legislative ethics course administered by the committee under AS 24.60.150(a)(4) within 10 days of the first day of the first regular session of each legislature or, if the person first takes office or begins service after the 10th day of that session, within 30 days after the person takes office or begins service. The committee may grant a person additional time to complete the course required by this section.

(b) A legislative intern or legislative volunteer who serves fewer than 30 days in one legislature is not subject to the requirements under (a) of this section."

Renumber the following bill sections accordingly.

m Rep Keller

27-LS0452\O.4
Wayne
3/20/12

AMENDMENT #4

(c. withdrawn Def #5

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

Page 5, line 25, following "hearing":

Insert "**whose names are public**"

Rep. Gruenberg. Can't vote if have substt. interest - + in Cmt.

AS 24.60.030(g)

M Rep. Keller to HCS CSSB 89 (STA) #5 (rev 4)

Conceptual Amendment by Brierley

page 5 lines 25-26 strike all language as

inserted:

O.K. ✓

"employee to all parties to the hearing whose public

names are ~~part of the record~~ and to the hearing

officer for transmittal to all parties whose

names are not public; and the contract is made a

part of the record."

(See subsequent email from sponsor)

Melanie Lesh

From: Rynnieva Moss
Sent: Wednesday, March 21, 2012 2:43 PM
To: Melanie Lesh; LAA Legal
Subject: Attn: Dan Wayne

Terry Thurbon with Office of Administrative Hearings asked me to makes sure you noted on the conceptual amendment #5 that the hearing officer is just responsible for transmittal to all parties is an administrative hearing under Title 44 but does not include hearings being conducted by boards or commissioners, so those hearing officers should be included in the amended section.

3/21/12

AMENDMENT #6 w/d

OFFERED IN THE HOUSE BY REPRESENTATIVE (withdrawn)

TO: HCS CSSB 89(STA) Version O

Page 5, line 30:

Delete:

"or a rate-making proceeding"

HJUD 3/21/12

27-LS0452\O.5
Wayne
3/21/12

AMENDMENT #7 OK

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

Page 13, lines 22 - 23:

Delete "**are hourly employees who**"

withdrawn

27-LS0452\O.6
Wayne
3/21/12

AMENDMENT #8 M

obj. Susan vote?

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

amdt. w/d max

Page 5, line 28, following "quasi-judicial hearing":

Insert ","

Page 5, line 29, following "agency":

Insert ", that formulates issues of law and fact in terms of specific parties and specific transactions and that is conducted according to procedures that provide to parties who may be bound by the outcome adequate notice and the right to argue and present evidence;"

withdrawn #9

0.7 Wayne

☆ get from Lynn

disclosure of conflict of interest.

Sen. Coghill – Uniformrule Δ 2/3

Rep Keller – disclosure already required.

27-LS0452\O.7
Wayne
3/21/12

AMENDMENT

OFFERED IN THE HOUSE

TO: HCS CSSB 89(STA)

Page 1, line 2, following "**gifts;**":

Insert "**specifying that a Legislative Ethics Act restriction on legislative voting applies to committee hearings and floor sessions;**"

Page 5, following line 3:

Insert a new bill section to read:

"*** Sec. 2.** AS 24.60.030(g) is amended to read:

(g) Unless required by the Uniform Rules of the Alaska State Legislature, a legislator may not vote on a question**, in a committee hearing or during a floor session,** if the legislator has an equity or ownership interest in a business, investment, real property, lease, or other enterprise if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on a substantial class of persons to which the legislator belongs as a member of a profession, occupation, industry, or region.

Renumber the following bill sections accordingly.

SB

94

<TARGET><BILL>SB 94</BILL><SUBJECT>SB
94</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Senate
Health & Social
Services
Committee
Chair
•
Senate
Education Committee
Vice-Chair

Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org

Senate
Labor & Commerce
Committee
Member
•
Legislative Council
Member
•
Joint Armed
Services
Member

Memorandum

To: Representative Gatto
House Judiciary Committee

From: Senator Bettye Davis

Date: April 14, 2011

Re: Request for Hearing of SB 94

Enclosed is our committee packet for SB 94 an act adding a second verse to the official Alaska state song. I have included a sponsor statement, a copy of the bill, Zone Fiscal note and other supplemental information.

Please schedule a committee hearing before the House Community and Regional Affairs at your earliest convenience.

Please contact my staff member Pamela Marsch at 465-3822 with any questions or comments regarding this request.

Thank you,

Senator Bettye Davis

Session: (Jan. - May)
State Capitol, Suite 30, Juneau, AK 99801-1182 Phone: (907) 465-3822 • Fax: (907) 465-3756 • Toll free: (800) 770-3822
Interim: (May - Dec.)
716 West 4th Ave., Suite 400, Anchorage, AK 99501 Phone: (907) 269-0144 • Fax: (907) 269-0148

Pamela Marsch

To: Sarah Munson
Subject: FW: Request for Hearing of SB 94
Attachments: SB 94 Sponsor Statement.pdf; SB 94.pdf; SB 94 Background Material Newpaper letter from Fran Ulmer.pdf; SB 94 Fiscal Note.PDF; SB 94 Request for Hearing House Judiciary.docx

Dear Sarah,

Here is the request for a hearing of SB 94 "Second verse of Alaska's State song" package in House Community and Regional Affairs. I have attached a copy of the bill, fiscal note, a request for hearing of SB 94 signed by the bill's primary sponsor, a sponsor statement and other supplemental information. This bill passed the Senate with eighteen Senators supporting the bill SB 94 "Second verse of Alaska's State song". I am hopeful this bill can move quickly in the house.

Thanks,

Pamela Marsch
Office of Senator Bettye Davis
716 W. 4th Avenue #400
Anchorage, Alaska 99501
(907) 269-0144; (907) 269-0148 (Fax)

(While in Session)
State Capitol
Juneau, Alaska 99801
(907) 465-3822; (907) 465-3756 (Fax)
Toll Free: 1-800-770-3822
Pamela_Marsch@legis.state.ak.us

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ALASKA STATE LEGISLATURE

SESSION ADDRESS
Alaska State Capitol,
Juneau, AK 99801

INTERIM ADDRESS
716 W. 4th Avenue,
Anchorage, AK 99501

Senator Bettye Davis

Memorandum

To: Representative Gatto
House Judiciary Committee

From: Senator Bettye Davis

Date: April 14, 2011

Re: Request for Hearing of SB 94

Enclosed is our committee packet for SB 94 an act adding a second verse to the official Alaska state song. I have included a sponsor statement, a copy of the bill, Zone Fiscal note and other supplemental information.

Please schedule a committee hearing before the House Community and Regional Affairs at your earliest convenience.

Please contact my staff member Pamela Marsch at 465-3822 with any questions or comments regarding this request.

Thank you,

Bettye Davis

Senator Bettye Davis

ALASKA STATE LEGISLATURE

Senate
Health & Social
Services
Committee
Chair
•
Senate
Education Committee
Vice-Chair

Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org

Senate
Labor & Commerce
Committee
Member
•
Legislative Council
Member
•
Joint Armed
Services
Member

Senate Bill 94 Sponsor Statement

Senate Bill 94 would add a second verse to The Alaska's Flag Song. The late Carol Beery Davis wrote a beautiful second verse, which gives recognition to Alaska Natives and to Benny Benson, who designed the Alaskan flag.

Similar bills have been introduced in the past. Last year The Alaska's Flag Song was performed with both verses as the Senate gaveled in on the first day of session. Also last year, the Senator from District G introduced SB 43. It passed the Senate, but stalled in the House.

This year is the year to join me in supporting a long overdue addition of the second verse to the Alaska Flag Song. By passing this bill you will be recognizing history, our progress as a state and our first people.

Session: (Jan. - May)
State Capitol, Suite 30, Juneau, AK 99801-1182 Phone: (907) 465-3822 • Fax: (907) 465-3756 • Toll free: (800) 770-3822
Interim: (May - Dec.)
716 West 4th Ave., Suite 400, Anchorage, AK 99501 Phone: (907) 269-0144 • Fax: (907) 269-0148

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: SB 94
(S) Publish Date: 4/1/11

Identifier (file name)
Title: SB 94 - Second Verse of Alaska's State Song
Sponsor: Senate Finance Committee
Requester: Senate Finance Committee

Dept. Affected: All
Appropriation
Allocation
OMB Component Number

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Darwin Peterson, Senate Finance Committee staff
Phone: 465-3873
Date/Time: 3/31/11 5:50 PM

Senator Bert Stedman, Co-Chair Senate Finance Committee
Senator Lyman Hoffman, Co-Chair Senate Finance Committee
Date: 3/31/2011

(Revised 1/27/2011 OMB)

SB 94
BACKGROUND
MATERIAL

Why a second verse for 'Alaska Flag Song'?

Editor's Note: A copy of the following letter to Betty Kjare, secretary of Pioneers of Alaska Auxiliary No. 8 in Fairbanks, was submitted for publication.

Dear Betty:

I have received your letter dated March 27, in which you objected to the adoption of the second verse of the "Alaska Flag Song."

I would like to explain to you why I introduced HB 117 and why I hope you will change your decision to oppose the bill.

No one loves the flag song any more than I do. For many years, I have sung it for groups, meetings, conventions, commencements and even for Gov. Bill Egan's memorial service here in Juneau. I offer the second verse out of deep respect for the first verse and for its recognition of Alaska's history. I believe the second verse complements the first verse and gives recognition not to one ethnic group, but to all Alaskans and their ability to work together in a unified and harmonious way.

The addition of a second verse has been discussed for many years by various groups. At one time, funds were inserted into the House's version of the budget to hold a contest for selecting a second verse. Carol Beery Davis was asked to write another verse to the flag song to recognize the contribution of Native Alaskans, who were here long before you or I, or even the Pioneers. She did so, and offered it as a gift to the State of Alaska. I was asked to support its adoption and to introduce a bill to make it officially recognized by the state. I did so, and it has passed the House.

In order to understand the special significance of this verse, you must know about Carol Beery Davis, a former poet laureate of Alaska. She is a 60-year resident of Juneau. Her husband, Trevor, was born here 84 years ago, and is the only living member of the original selection committee for the design of Alaska's flag, which selected Benny Benson's North Star and Big Dipper (to whom the second verse refers in lines 1 and 2). Carol has written dozens of books about Alaska, including "The Alaska Flag Song" book which is credited with helping to make the song so well-known. I have enclosed a copy of this book. She knew personally both Elinor Dusenbury and Marie Drake, the two women who decided to write the song and offer it to the state, just as Carol has done.

oneer, is still contributing to her loved state by offering this beautiful verse, a tribute to unity of all Alaskans:

"A Native lad chose the Dipper's stars
For Alaska's flag that there be no bars
Among our cultures..."

She is recognizing history and our progress as a state:

"Be it known
through years, the Natives' past has grown.
To share life's treasures, hand in hand,
To keep Alaska our Great Land."

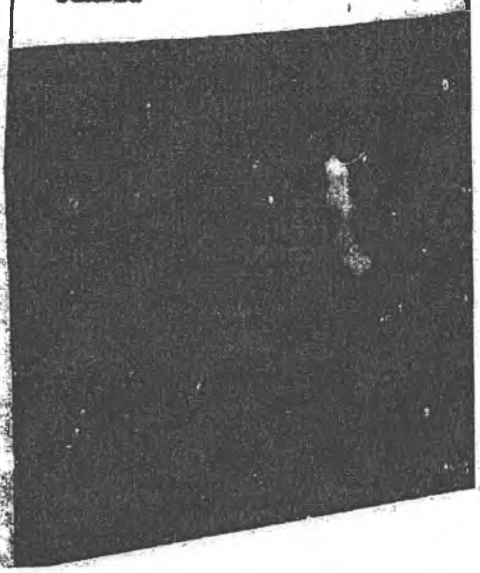
She is focusing our attention on the natural beauty of our land and reminds us of the treasures of its beauty:

"We love the northern, midnight sky,
The mountains, lakes, and streams nearby.
The great North Star with its steady light
Will guide all cultures, clear and bright,
With nature's flag to Alaskans dear,
The simple flag of a last frontier."

It is hard for me to understand why anyone who has read these words could object to them. It is impossible for me to understand how anyone who knows who Carol Beery Davis is and the contributions she has made to art, music and literature in Alaska could object to her offering this beautiful gift.

Why did this legislator propose HB 117? Out of respect for a beautiful Alaskan lady who has offered a beautiful verse to a beautiful song about a great state.

Sincerely,
Rep. Fran Ulmer
Juneau



SB

98

<TARGET><BILL>SB 98</BILL><SUBJECT>SB
98</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Session

State Capitol, Rm. 101
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Senator_Bill_Wielechowski@legis.state.ak.us

Chair
State Affairs Committee

Co-chair
Joint Armed Services Committee

Vice Chair
Resources Committee
Judiciary Committee

Member
Administrative Regulation Review

SENATOR BILL WIELECHOWSKI

SB 98: Biometrics
SPONSOR STATEMENT

"Civilization is the progress toward a society of privacy." – Ayn Rand

Article 1, Section 22 of Alaska's State Constitution explicitly states that "the right of the people to privacy is recognized and shall not be infringed." This constitutional right underscores Alaskans' abiding desire for privacy. Much like genetic information, biometric information holds great promise for fields such as medicine, law enforcement and security. This bill is meant to ensure that Alaskan's constitutional right to privacy is protected by adopting common sense measures of accountability.

In 2004, the Alaska Legislature unanimously passed legislation outlawing the collection, analysis or storage of a law-abiding citizen's genetic information without their express written consent. This legislation was drafted in response to rapidly evolving technology that has the potential to discriminate against citizens based on personal genetic information that would otherwise be private. SB 98 applies the same privacy protections to biometric information, as it is just as permanent and irreplaceable as genetic information.

The term "biometric information" refers to any information about an individual based on their unique behavioral or physiological characteristics. The most commonly known form of biometric information is a person's fingerprints, but also includes hand geometry recognition, voice recognition, iris and retinal scans, and vein recognition.

Data merchants today can exploit Alaskans' private biometric information for financial gain. Certain genetic disorders and medical conditions can be strongly correlated from biometric information. Because it so easy for data to be sold or stolen in today's digital world, Alaska needs to be sure to have strong legal measures in place to protect Alaskans.

Senate Bill 98 will protect Alaskans' biometric information. This legislation is all protecting sensitive information. The bill has strong bipartisan support, passed the Senate unanimously, and will ensure the privacy of all Alaskans is protected.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 17, 2012

SUBJECT: CSSB 98(JUD) relating to biometric information
(Work Order No. 27-LS0661\R)

TO: Senator Bill Wielechowski
Attn: Samuel Gottstein

FROM: Terry Bannister
Legislative Counsel

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

Section 1. Adds a new chapter, AS 18.14, relating to biometric information.

Sec. 18.14.010(a) prohibits a person from collecting another person's biometric information unless the person first notifies the individual about the collection and receives the individual's full consent. The notification must indicate the specific purpose for which the information will be used and how long it will be kept. The consent may be written, electronic, or in another form that can be documented.

Sec. 18.14.010(b) allows an individual to revoke or amend consent at any time, unless the information was needed for a specific authorized law enforcement, security, or fraud prevention purpose.

Sec. 18.14.020(a) prohibits a collector and the collector's contractor from disclosing, transferring, or distributing an individual's biometric information, except to a contractor or to a person to authenticate the individual's identity.

Sec. 18.14.020(b) limits the disclosures, transfers, and distributions under (a) to the original purpose for which the information was collected.

Sec. 18.14.030 prohibits a person from selling biometric information. But does allow a contractor to sell the contractor's business and transfer the biometric information to the buyer.

Sec. 18.14.040 allows an individual to provide alternate identification to a person administering an occupational examination that requires identifying biometric information, if the alternate identification is acceptable to the person.

Sec. 18.14.050(a) requires a collector to remove an individual's biometric information from databases and storage systems and destroy the information within 120 days when the information is no longer needed or an individual requests the destruction in writing. This requirement is subject to other laws and court orders prohibiting the removal and destruction.

Sec. 18.14.050(b) directs the collector to notify the collector's contractor within 30 days that the collector must remove and destroy the information under this section.

Sec. 18.14.060 prohibits a collector from using biometric information for marketing or general surveillance purposes. But does allow a collector to use the information for a specific authorized security or fraud prevention purpose in addition to the specific purpose for which the information was collected.

Sec. 18.14.070 directs a collector and a contractor to store biometric information in a secure manner.

Sec. 18.14.080(a) allows an individual (except as provided in (b)) to bring a civil action for damages and a penalty against a person who knowingly violates this chapter. Increases the penalty if the violation resulted in profit or monetary gain.

Sec. 18.14.080(b) prohibits an action for damages and penalties against the state, state agencies, or officers or employees of the state or state agencies, for violations of or other claims under this chapter.

Sec. 18.14.085 lists certain exemptions from the chapter. Also removes from the chapter's coverage the retention of voices recorded for quality assurance purposes.

Sec. 18.14.090 defines terms for the chapter.

If I may be of further assistance, please advise.

TLB:ljw
12-021.ljw

ALASKA STATE LEGISLATURE

Session

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SENATOR BILL WIELECHOWSKI

Biometrics Fact Sheet

- "Biometric Information" refers to any information about an individual based on their unique behavioral or physiological characteristics. The most commonly known form of biometric information is a person's fingerprints, but also includes hand geometry recognition, voice recognition, iris and retinal scans, and vein recognition.

- Many Alaskans are nervous about their biometric information being sold or stolen. Since biometric information is irreplaceable, this sharing of biometric data can cause Alaskans irreparable harm.

- Certain genetic disorders and medical conditions have been strongly correlated with biometric information, and customers could experience price discrimination based on facial recognition technology.

- Senate Bill 98 will ensure that biometric data is not disseminated to third parties without an individual's consent, and will only be used for the purposes for which it was collected. SB-98 does not ban the collection of biometric data; it simply requires consent for collection and prohibits the sale or unauthorized distribution of the data.

ALASKA STATE LEGISLATURE

SENATOR BILL WIELECHOWSKI

April 10, 2012

The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
State Capitol, Room 428
Juneau, Alaska 99801

Dear Representative Thompson:

I am writing to request a hearing for the House CS for CS for SB 98(HSS), "An Act relating to biometric information."

House CS for CS for SB 98(HSS) will protect Alaskan citizens from having their biometric information, such as fingerprints and iris images, from being collected and disseminated to third parties without their consent.

While the medical and law enforcement benefits of such biometric information is not in question, law-abiding citizens of the state should not be treated as criminals when being hired or taking a licensing exam.

Privacy is of vital importance to the people of Alaska, and House CS for CS for SB 98(HSS) is intended to ensure that the people are able to protect their most private forms of identification, while still allowing for reasonable, and lawful, use of biometrics throughout the state.

Included with this letter you will find:

1. Sponsor Statement and Fact Sheet
2. Current Version of the Bill (LSO661\L) as well as the previous version R as it passed the Senate
3. Zero Fiscal Note
4. Sectional Summary for version R, an explanation of changes and an adopted conceptual amendment
5. Articles detailing privacy concerns surrounding biometrics
6. Letters of Support
7. List of Alaskan Supporters
8. List of expected testimony

My legislative aide Sam Gottstein is assigned to this legislation. His direct line is 465-2435. He intends to present a PowerPoint presentation during the initial hearing. Thank you for your consideration of this request.

Sincerely,

Senator Bill Wielechowski
Prime Sponsor

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Senator_Bill_Wielechowski@legis.state.ak.us • www.aksenate.org/wielechowski/

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB 98**
Fiscal Note Number
Publish Date

Identifier (file name) SB098CS(JUD) LAW-CIV-03-23-12
Title An Act relating to biometric information.
Sponsor SENATORS WIELECHOWSKI
Requester (H) Health & Social Services

Dept. Affected Law
Appropriation Civil
Allocation Human Services
OMB Component Number 2962

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new Attorney General.

Prepared by Sheila Bugbee, Administrative Officer
Division Administrative Services
Phone 465-5427
Date/Time 3/23/12 10:00AM

Approved by Michael C. Geraghty, Attorney General
Department of Law
Date 3/23/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SB 98
2012 LEGISLATIVE SESSION

Analysis

This bill provides a framework for all entities, including state agencies that collect, analyze, or distribute biometric information. The state uses biometric information in a number of instances, such as occupational licensing, back ground checks, etc... This bill provides specific rules as to the retention and destruction of biometric information and includes express exceptions for law enforcement, information collected by the DMV, and for uses that are authorized by state and federal law. Finally, although this bill includes a private right of action if this statute is violated, it also includes an immunity provision for state agencies. With this immunity provision, the fiscal impact of this legislation is zero.

April 13, 2012

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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WWW.AKCLU.ORG

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EMMA HILL, Anchorage
STUDENT ADVISOR

The Honorable Steve Thompson
House Judiciary Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Representative_Steve_Thompson@legis.state.ak.us

Re: Committee Substitute for Senate Bill 98 (HSS)
ACLU Statement of Support

Dear Representative Thompson:

Thank you for the opportunity to submit a written statement of support for the Health and Social Services Committee Substitute for Senate Bill 98.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

From a constitutional rights and privacy perspective, **the ACLU of Alaska endorses protections for individuals' personal biometric information, and supports this Bill's goal of avoiding violations of privacy before they occur**.

Need for Biometrics Legislation

Recent advances in genomics, bioinformatics and data mining are encouraging a worldwide proliferation of "gene banks" – large collections of biological samples that usually include genetic information derived from those samples, as well as linked medical, family history or lifestyle

information. The use of these biological repositories for genetics research could lead to advances in public health, such as the identification of genetic factors in diseases, or the development of diagnostic tests. ***On the other hand, they also create an avenue for privacy infringements, stigmatization and discrimination, and improper commercial exchange of personal data.***

The ACLU supports legislation to prevent privacy infringement and genetic discrimination. SB 98 can advance these goals.

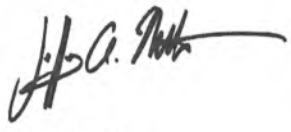
Protections Against Coerced Consent

Given the ability to condition the provision of necessary services on the disclosure of personal information, we also note that CS for SB 98 (HSS) is intended to protect against coerced "consent."

Given the sensitivity of biometric information, and the plethora of medical information obtainable from it, we endorse legislation that would protect Alaskans from improperly being compelled to waive their rights to protect their personal, private information.

Thank you again for the opportunity to share our support of this bill. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
Representative Max Gruenberg, Representative_Max_Gruenberg@legis.state.ak.us
Representative Lindsey Holmes, Representative_Lindsey_Holmes@legis.state.ak.us
Representative Mike Hawker, Representative_Mike_Hawker@legis.state.ak.us
Senator Bill Wielechowski, Senator_Bill_Wielechowski@legis.state.ak.us

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Memorandum

TO: Senator Bill Wielechowski
FROM: Katie Spielberger, Legislative Analyst
DATE: March 15, 2012
RE: Federal Privacy Protections for Biometric Information
LRS Report 12.192

You asked for information about federal biometric privacy protections. Specifically, you wished to know whether Senate Bill 98 includes any duplication of federal privacy standards. You were particularly interested in laws regulating collecting biometric information without authorization, secondary uses of the information, disclosing the information to a third party, and disposal of information after intended use.

In brief, Senate Bill 98 would provide broader privacy protections for biometric data than currently exist on a federal level in the United States, and does not duplicate federal protections.[1] There are currently no comprehensive federal privacy laws that specifically address biometric data. While federal laws do offer some protections for personal data, these laws are sectoral—that is, they are applicable only to data collected by a specific industry, for example, or only to data collected by the federal government. In addition, much federal legislation does not explicitly address biometric data in defining what personal data are covered; it would likely need to be determined on a case-by-case basis whether these laws apply to biometric data.

The US is one of very few developed nations without broad-based data privacy legislation. As a report on data privacy produced for the European Commission cautions, "the US approach is incoherent, sectorally-based, and ... legislative protections are largely reactive, driven by outrage at particular, narrow practices."[2] In the US, the most comprehensive privacy legislation has generally been passed at the state level, and this seems to be the case with biometric data privacy as well. While most state legislation addressing biometric data privacy is still fairly narrow in scope, we identified three states that have passed more comprehensive measures—Illinois, Indiana, and Texas.

Data privacy issues are not contained by political or national boundaries. Biometric data are used increasingly in passports and border clearance programs—for example, Canada's NEXUS border clearance program, which United States citizens may also participate in, uses iris image scans. In the private sector, electronic data are routinely transferred between countries—for example, the US company Facebook stores digital photos of users from scores of different countries. Since technology development may outpace regulation, many countries have forward-thinking data privacy protections to encompass emerging technologies. In Canada and the European Union (EU), the right to privacy encompasses personal information, and biometric data privacy is typically interpreted in the context of general data privacy. That is, the same laws that apply to data such as names and identification numbers are extended to such data as iris images and DNA.[3]

---

[1] We used bill version CSSB 98 (JUD) for this report. As you know, "biometrics" refers to the various ways humans can be identified through unique aspects of their bodies. CSSB 98 defines "biometric data" as including fingerprints, handprints, voices, facial mapping, retinal images, vein scans, hand geometry, and finger geometry. Given that other biometric identifiers exist—for example, body odor and walking characteristics—and given that other biometric systems may be developed in the future, a broader definition might prove more useful in the long term.

Compared to other forms of identification, biometric data are generally more difficult to steal or falsify, and biometric systems are widely believed to be more reliable and secure than other identification systems. However, there are many privacy concerns specific to biometric data collection. For instance, some biometric information, such as fingerprints and facial images, can be collected without a person's knowledge or consent, which raises concerns about covert surveillance. Additionally, there is no way short of surgery to reassign biometric data—a person can be given a new social security number but not a new fingerprint—so protections against the mishandling of biometric data are especially important.

[2] "Comparative Study on Different Approaches to New Privacy Challenges, in Particular in the Light of Technological Developments-United States of America," by Chris Hoofnagle, can be viewed at *http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_country_report_B1_usa.pdf.*

[3] The right of privacy was added to the Alaska Constitution by a 1972 amendment in response to fears of electronic surveillance, and may be understood to include the right to privacy of personal information (Gordon Harrison, *Alaska's Constitution: A Citizen's Guide*, 4th ed., Legislative Affairs Agency, 2002). Other states with similar constitutional rights to privacy are Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington.

Many countries, including Canada and EU member states, have a central Privacy Commissioner or equivalent position to enforce privacy laws. Citizens of these countries who believe their personal data have been mishandled, or who believe themselves to be victims of identity theft, have the right to file complaints to this office, which is responsible for investigating such cases. In the US there is no Privacy Commissioner or equivalent.[4]

US Federal Data Privacy Laws and Applications to Biometrics

While there are no broad federal laws specifically addressing biometric data privacy, the US government's increasing use of biometric technology in the last decade, largely in the interest of national security, has raised questions about how existing federal privacy laws apply to biometric data. The National Biometric Security Project (NBSP), a non-profit consultancy under contract to the National Security Agency, has prepared several helpful reports on the application of privacy laws to biometrics, both in the US and internationally.[5] The organization's report on US privacy laws notes that since September 11, 2001, the nation's concerns for national security have generally outweighed concerns for privacy, and laws protecting privacy are far more lax in the context of national security; the report, however, still recommends that the government protect any data collected against unauthorized use or disclosure.

Much federal data privacy legislation can be traced to recommendations made in 1973 by the Department of Health Education and Welfare, which advocated for broad federal legislation to protect personal data from being mishandled in light of new technology. Of federal laws that regulate government collection of information on people, the Privacy Act of 1974 is likely the one most applicable to biometric data.

There is no data privacy legislation governing the entire private sector in the US; rather, privacy legislation governs the concerns of specific industries, such as the Gramm-Leach Bliley Act of 1999, which protects information held by financial institutions. Many private sector laws could be deemed applicable to biometric data, but few explicitly mention biometrics. It is important to note that much private sector privacy legislation is reactionary rather than forward thinking, leading to very narrow protections such as the Video Privacy Protection Act of 1988, which prohibits the disclosure of an individual's rental history without consent and requires that video stores destroy rental records within a year after an account is closed.[6] In 2011, a bill was introduced in the US Senate which would potentially fill some of the gaps in data privacy protections in the private sector; this bill specifically mentions biometric data.

We discuss below what we believe to be the most significant and far-reaching federal data privacy laws; these laws are by no means exhaustive of federal data privacy legislation.

U.S. Department of Health Education and Welfare's Fair Information Practices, 1973

In 1972, the U.S. Department of Health Education and Welfare (HEW) Secretary Elliot Richardson, established an Advisory Committee on Automated Personal Data Systems to analyze potential harmful consequences from using new computer technology to collect, store, and use personal data about citizens. As Secretary Richardson wrote in a public interest determination to establish the committee,

[4] A 2009 American Civil Liberties Union report has called for stronger privacy oversight institutions in the US. The report, "Enforcing Privacy: Building American Institutions to Protect Privacy in the Face of New Technology and Government Powers," can be accessed at *www.aclu.org/technology-and-liberty/enforcing-privacy-building-american-institutions-protect-privacy-face-new-tec*. The *Privacy Journal*, February 2012, notes that the five-member federal Privacy and Civil Liberties Oversight Board has a "miniscule budget" and its members have not yet been confirmed by the Senate.

[5] The National Biometric Security Project's "Report on United States Federal Laws Regarding Privacy and Personal Data and Applications to Biometrics," along with other related reports, can be accessed at *www.nationalbiometric.org*.

[6] The Video Privacy Protection Act of 1988 (18 U.S.C. §§ 2710–2711), passed after Supreme Court nominee Robert Bork's video rental records were disclosed in a newspaper, may be one of the strongest consumer privacy protections in the US, according to the Electronic Privacy Information Center (*www.epic.org*).

> The use of automated data systems containing information about individuals is growing in both the public and private sectors . . . At the same time, there is a growing concern that automated personal data systems present a serious potential for harmful consequences, including infringement of basic liberties. This has led to the belief that special safeguards should be developed to protect against potentially harmful consequences for privacy and due process.

The committee's report, issued in 1973, recommended the enactment of a federal Code of Fair Information Practice for *all* personal data systems, based on the following principles:

1. There must be no personal data record-keeping systems whose very existence is secret.
2. There must be a way for a person to find out what information about the person is in a record and how it is used.
3. There must be a way for a person to prevent information about the person that was obtained for one purpose from being used or made available for other purposes without the person's consent.
4. There must be a way for a person to correct or amend a record of identifiable information about the person.
5. Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuses of the data.[7]

Although such omnibus legislation has not been enacted in the US, these principles are reflected to varying in degrees in subsequent US privacy legislation.

Privacy Act of 1974

Many of the HEW principles are embodied in the federal Privacy Act of 1974 (P.L. 93-579, codified at 5 USCA § 552a), which provides protections for records of U.S. citizens and legal resident aliens collected by federal agencies. Under the Act, federal agencies must adopt and publish standards regarding the collection, maintenance, use, and disclosure of *personally identifiable records*. There are provisions in the Act regulating the collection of information—requiring, for example, that each individual be informed of the purpose for which information is collected—and restricting the disclosure of this information to other parties. There are civil and criminal penalties attached to violations of the Act. The Act does not specifically address secondary use of information collected (that is, using the information for purposes other than which it was collected) or require disposal of information after use. The Act defines "record" as follows:

> the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

To be covered by the Privacy Act, a record must be contained in a *system of records,* that is, "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." The NBSP notes that the Privacy Act's definition of "record" and "system of records" could be interpreted in varying ways regarding biometric data, and a case-by-case analysis would likely be needed to determine whether a particular use of biometrics is considered a "record maintained in a system of

[7] The committee's 1973 report to the HEW Secretary can be viewed at *http://aspe.hhs.gov/datacncl/1973privacy/tocprefacemembers.htm*.

records." All the same, the NBSP recommends that government agencies collecting biometric data strictly comply with the Act, both to avoid potential penalties and to "help allay public fears that the system will be compromised."

The Privacy Act does not address data collected by private entities, or state or local governments. Additionally, there are several significant exceptions to the act, such as disclosures mandated under the Freedom of Information Act.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The Health Insurance Portability and Accountability Act (P.L. 104-191) of 1996 (HIPAA) includes a Privacy Rule, which protects "individually identifiable health information" held by health care institutions. "Individually identifiable health information" includes biometric data, both as health information itself (for example, genetic information) and as information that identifies a specific individual (for example, finger prints).

A key concept in the HIPAA Privacy Rule is *minimum necessary* use and disclosure of information—that is, only the minimum necessary amount of protected health information may be used and disclosed. The U.S. Department of Health and Human Services (HHS) Office for Civil Rights enforces the Privacy Rule of HIPAA, including investigating complaints by individuals that their health information has been mishandled. There are both civil and criminal penalties for violation of the Privacy Rule. It should be noted, however, that some organizations holding health information about individuals do not have to follow the Privacy Rule, including life insurers.[8]

Gramm-Leach Bliley Act of 1999

The Gramm-Leach Bliley Act of 1999 (P.L. 106-102, codified at 15 U.S.C. §§ 6801–6809) offers limited protections to "nonpublic personal information" held by financial institutions. The Act requires financial institutions to securely store personal data; inform consumers of the institution's policies on information sharing; and give consumers the option to opt-out of sharing of financial information with a third party. Whether the Act covers biometric data, however, hinges on whether biometric information is considered nonpublic personal information.

Proposed Legislation: Personal Data Privacy and Security Act of 2011

In 2011, Senate Bill 1151 was introduced in the US Senate. The bill is intended to increase safeguards for "sensitive personally identifiable information" and would require, among other things, that all business entities collecting sensitive information on 10,000 or more US persons establish standards for developing and implementing safeguards to protect the security of the information collected. This bill, however, does not specify these standards. The bill uses a very broad definition of "sensitive personal identifiable information," which explicitly mentions "unique biometric data such as a finger print, voice print, a retina or iris image, or any other unique physical representation."

Biometric Privacy in Other States—Illinois, Indiana, and Texas

As noted earlier, the most comprehensive legislation we found specifically addressing biometric data privacy in the US is at the state, not the federal, level. According to the National Conference of State Legislatures (NCSL), at least 18 states have passed legislation that addresses biometrics, but many of these laws are somewhat limited in scope—for example, many states regulate the collection of biometric data in the context of driver licensing, and several states require school districts to obtain parental consent before collecting biometric data from students. Based on a recent review by NCSL, it appears that Alaska is one of only a small number of states either considering or having passed comprehensive biometric data privacy legislation. Three states—Illinois, Indiana, and Texas—have passed such broad-based legislation. Of the three, only Indiana's legislation uses a definition of "personal information" sufficiently broad to encompass new identification systems developed in the future. We include copies of these laws as Attachment A.

[8] The US Department of Health and Human Services publishes information about the HIPAA Privacy Rule at *http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html*.

Illinois

Illinois, like Alaska, recognizes the right to privacy in its state constitution. The Illinois Biometric Information Privacy Act (740 ILCS 14/1 *et seq.*), enacted in 2008, addresses biometric data collected by private entities, but not governmental entities. Under the Act, biometric data may not be collected or disclosed without the subject's informed written consent, with few exceptions. The Act obligates entities in possession of biometric data to make a public schedule and create guidelines for destroying the data after the initial purpose for collection has been satisfied, or after three years, whichever comes first. The Act notes that the ramifications of biometric technology are not fully known, yet the definition of "biometric identifier" only includes the following: a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.

Indiana

Indiana Code 4-1-6, Fair Information Practices; Privacy of Personal Information, addresses data collected by governmental agencies, regulating the collection, maintenance, and use of personal information. "Personal information" is here given a broad definition that encompasses biometric identifiers:

> "Personal information" mean any information that describes, locates, or indexes anything about an individual or that affords a basis for inferring personal characteristics about an individual including, but not limited to, his education, financial transactions, medical history, criminal or employment records, finger and voice prints, photographs . . .

The code restricts the collection of personal information to that which is relevant and necessary to accomplish a statutory purpose, and directs state agencies to inform individuals regarding the use and confidentiality of the information. The code includes a right of data subjects to inspect, challenge, or correct their personal information.

Texas

Texas addresses biometric privacy in both its Government Code and Business and Commerce Code, thus covering both public and private sectors. Government Code Chapter 560, enacted in 2001, prohibits government bodies from disclosing biometric data without the subject's consent, and obligates these bodies to securely store and protect biometric data. The Business and Commerce Code Chapter 503, enacted in 2007, requires informed consent for collecting and disclosing biometric data; obligates secure storage; and requires disposal no later than one year after the data are no longer needed. "Biometric identifier" is defined here as "a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry."

International Perspective—OECD Guidelines

As noted above, most other industrialized countries have wide-ranging and forward-thinking data privacy legislation. There is a great deal of overlap in data privacy protections among these countries, in large part stemming from the Organization for Economic Co-Operation and Development's (OECD) 1980 *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, a set of nonbinding principles that OECD member countries were recommended to adopt. Data privacy legislation reflects these guidelines in many member countries, including in the EU and Canada. The US, while a member of OECD, has not passed comparable federal legislation.[9]

The OECD Guidelines, which the organization recommends be applied to biometric data as well, are as follows:

- *Collection Limitation Principle*: There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

[9] There are 34 OECD Members, including most EU countries, Australia, Canada, Chile, Israel, Japan, Korea, Mexico, New Zealand, and the US.

- *Data Quality Principle*: Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.
- *Purpose Specification Principle*: The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.
- *Use Limitation Principle*: Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with [The Purpose Specification Principle] except a) with the consent of the data subject; or b) by the authority of law.
- *Security Safeguards Principle*: Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.
- *Openness Principle*: There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.
- *Individual Participation Principle*: An individual should have the right:

  a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;

  b) to have communicated to him, data relating to him within a reasonable time; at a charge, if any, that is not excessive; in a reasonable manner; and in a form that is readily intelligible to him;

  c) to be given reasons if a request made under subparagraphs(a) and (b) is denied, and to be able to challenge such denial; and

  d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.
- *Accountability Principle*: A data controller should be accountable for complying with measures which give effect to the principles stated above.

In a 2004 report, the OECD advocated that these guidelines, as well as its 2002 *Guidelines for the Security of Information Systems and Networks,* be embodied in any biometric system design and project.[10]

Indeed, most, if not all, OECD member countries have determined that existing data privacy legislation generally encompasses biometric data as well. For example, the Office of the Privacy Commissioner of Canada has identified major privacy concerns specific to biometric data collection and has analyzed how these concerns are addressed by privacy principles applicable to personal information in general.[11]

We hope this is helpful. If you have questions or need additional information, please let us know.

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[10] "Biometric Based Technologies," a report by the OECD Working Party on Information Security and Privacy, can be accessed at *www.oecd.org/officialdocuments/displaydocumentpdf?cote=dsti/iccp/reg(2003)2/final&doclanguage=en*.

[11] "Data at Your Fingertips: Biometrics and the Challenges to Privacy," Office of the Privacy Commissioner of Canada. This report, as well as links to the complete texts of Canadian data privacy legislation, the Privacy Act and the Personal Information Protection and Electronic Documents Act, can be found on the Privacy Commissioner's website, *www.priv.gc.ca/index_e.cfm*.

Attachment A

740 Illinois Compiled Statutes, 14/1, *et seq.*

Indiana Code 4-1-16, *et seq.*

Texas Government Code 560.001, *et seq.*

Texas Business and Commerce Code 503.011, *et seq.*

Information maintained by the Legislative Reference Bureau

Updating the database of the Illinois Compiled Statutes (ILCS) is an ongoing process. Recent laws may not yet be included in the ILCS database, but they are found on this site as Public Acts soon after they become law. For information concerning the relationship between statutes and Public Acts, refer to the Guide.

Because the statute database is maintained primarily for legislative drafting purposes, statutory changes are sometimes included in the statute database before they take effect. If the source note at the end of a Section of the statutes includes a Public Act that has not yet taken effect, the version of the law that is currently in effect may have already been removed from the database and you should refer to that Public Act to see the changes made to the current law.

( )

(740 ILCS 14/1)

Sec. 1. Short title. This Act may be cited as the Biometric Information Privacy Act.
(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/5)

Sec. 5. Legislative findings; intent. The General Assembly finds all of the following:

(a) The use of biometrics is growing in the business and security screening sectors and appears to promise streamlined financial transactions and security screenings.

(b) Major national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.

(c) Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions.

(d) An overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information.

(e) Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.

(f) The full ramifications of biometric technology are not fully known.

(g) The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.
(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/10)

Sec. 10. Definitions. In this Act:

"Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers do not include donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include biological materials regulated under the Genetic Information Privacy Act. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

"Biometric information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

"Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property. Examples of confidential and sensitive information include, but are not limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a PIN number, a pass code, a driver's license number, or a social security number.

"Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity does not include a State or local government agency. A private entity does not include any court of Illinois, a clerk of the court, or a judge or justice thereof.

"Written release" means informed written consent or, in the context of employment, a release

executed by an employee as a condition of employment.
(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/15)

Sec. 15. Retention; collection; disclosure; destruction.

(a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

(d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:

(1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

(e) A private entity in possession of a biometric identifier or biometric information shall:

(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/20)

Sec. 20. Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:

(1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;

(2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;

(3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/25)

Sec. 25. Construction.

(a) Nothing in this Act shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

(b) Nothing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act.

(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder.

(d) Nothing in this Act shall be construed to conflict with the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 and the rules promulgated thereunder.

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/30)

Sec. 30. (Repealed).

(Source: P.A. 95-994, eff. 10-3-08. Repealed internally, eff. 1-1-09.)

(740 ILCS 14/99)

Sec. 99. Effective date. This Act takes effect upon becoming law.

(Source: P.A. 95-994, eff. 10-3-08.)

Information Maintained by the Office of Code Revision Indiana Legislative Services Agency

IC 4-1-6

Chapter 6. Fair Information Practices; Privacy of Personal Information

IC 4-1-6-1

Definitions

Sec. 1. As used in this chapter, the term:

(a) "Personal information system" means any recordkeeping process, whether automated or manual, containing personal information and the name, personal number, or other identifying particulars of a data subject.

(b) "Personal information" means any information that describes, locates, or indexes anything about an individual or that affords a basis for inferring personal characteristics about an individual including, but not limited to, his education, financial transactions, medical history, criminal or employment records, finger and voice prints, photographs, or his presence, registration, or membership in an organization or activity or admission to an institution.

(c) "Data subject" means an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in a personal information system.

(d) "State agency" means every agency, board, commission, department, bureau, or other entity of the administrative branch of Indiana state government, except those which are the responsibility of the auditor of state, treasurer of state, secretary of state, attorney general, superintendent of public instruction, and excepting the department of state police and state educational institutions.

(e) "Confidential" means information which has been so designated by statute or by promulgated rule or regulation based on statutory authority.

As added by Acts 1977, P.L.21, SEC.1. Amended by Acts 1978, P.L.10, SEC.1; P.L.19-1983, SEC.1; P.L.2-2007, SEC.17.

IC 4-1-6-2

Personal information system

Sec. 2. Any state agency maintaining a personal information system shall:

(a) collect, maintain, and use only that personal information as is relevant and necessary to accomplish a statutory purpose of the agency;

(b) collect information to the greatest extent practicable from the data subject directly when the information may result in adverse determinations about an individual's rights, benefits and privileges under federal or state programs;

(c) collect no personal information concerning in any way the political or religious beliefs, affiliations and activities of an individual unless expressly authorized by law or by a rule promulgated by the oversight committee on public records pursuant to IC 4-22-2;

(d) assure that personal information maintained or disseminated from the system is, to the maximum extent possible, accurate, complete, timely, and relevant to the needs of the state agency;

(e) inform any individual requested to disclose personal information whether that disclosure is mandatory or voluntary, by what statutory authority it is solicited, what uses the agency will make of it, what penalties and specific consequences for the individual, which are known to the agency, are likely to result from nondisclosure, whether the information will be treated as a matter of public record or as confidential information, and what rules of confidentiality will govern the information;

(f) insofar as possible segregate information of a confidential nature from that which is a matter of public record: and, pursuant to statutory authority, establish confidentiality requirements and appropriate access controls for all categories of personal information contained in the system;

(g) maintain a list of all persons or organizations having regular access to personal information which is not a matter

of public record in the information system;

(h) maintain a complete and accurate record of every access to personal information in a system which is not a matter of public record by any person or organization not having regular access authority;

(i) refrain from preparing lists of the names and addresses of individuals for commercial or charitable solicitation purposes except as expressly authorized by law or by a rule promulgated by the oversight committee on public records pursuant to IC 4-22-2;

(j) make reasonable efforts to furnish prior notice to an individual before any personal information on such individual is made available to any person under compulsory legal process;

(k) establish rules and procedures to assure compliance with this chapter and instruct each of its employees having any responsibility or function in the design, development, operation or maintenance of such system or use of any personal information contained therein of each requirement of this chapter and of each rule and procedure adopted by the agency to assure compliance with this chapter;

(l) establish appropriate administrative, technical and physical safeguards to insure the security of the information system and to protect against any anticipated threats or hazards to their security or integrity; and

(m) exchange with other agencies official personal information that it has collected in the pursuit of statutory functions when:

(i) the information is requested for purposes authorized by law including a rule promulgated pursuant to IC 4-22-2;

(ii) the data subject would reasonably be expected to benefit from the action for which information is requested;

(iii) the exchange would eliminate an unnecessary and expensive duplication in data collection and would not tangibly, adversely affect the data subject; or

(iv) the exchange of information would facilitate the submission

of documentation required for various state agencies and departments to receive federal funding reimbursement for programs which are being administered by the agencies and departments.

As added by Acts 1977, P.L.21, SEC.1. Amended by Acts 1978, P.L.10, SEC.2; Acts 1979, P.L.40, SEC.3.

IC 4-1-6-3

Right of inspection by data subject or agent; document search and duplication; standard charges

Sec. 3. Unless otherwise prohibited by law, any state agency that maintains a personal information system shall, upon request and proper identification of any data subject, or his authorized agent, grant such subject or agent the right to inspect and to receive at reasonable, standard charges for document search and duplication, in a form comprehensible to such individual or agent:

(a) all personal information about the data subject, unless otherwise provided by statute, whether such information is a matter of public record or maintained on a confidential basis, except in the case of medical and psychological records, where such records shall, upon written authorization of the data subject, be given to a physician or psychologist designated by the data subject;

(b) the nature and sources of the personal information, except where the confidentiality of such sources is required by statute; and

(c) the names and addresses of any recipients, other than those with regular access authority, of personal information of a confidential nature about the data subject, and the date, nature and purpose of such disclosure.

As added by Acts 1977, P.L.21, SEC.1.

IC 4-1-6-4

Disclosures limited to business hours; standard charges

Sec. 4. An agency shall make the disclosures to data subjects required under this chapter during regular business hours. Copies of the documents containing the personal information sought by the data subject shall be furnished to him or his representative at reasonable, standard charges for document search and duplication.

As added by Acts 1977, P.L.21, SEC.1.

IC 4-1-6-5

Challenge of information by data subject; notice; minimum procedures

Sec. 5. If the data subject gives notice that he wishes to challenge, correct or explain information about him in the personal information system, the following minimum procedures shall be followed:

(a) the agency maintaining the information system shall investigate and record the current status of that personal information;

(b) if, after such investigation, such information is found to be incomplete, inaccurate, not pertinent, not timely or not necessary to be retained, it shall be promptly corrected or deleted;

(c) if the investigation does not resolve the dispute, the data subject may file a statement of not more than two hundred (200) words setting forth his position;

(d) whenever a statement of dispute is filed, the agency maintaining the data system shall supply any previous recipient with a copy of the statement and, in any subsequent dissemination or use of the information in question, clearly mark that it is disputed and supply the statement of the data subject along with the information;

(e) the agency maintaining the information system shall clearly and conspicuously disclose to the data subject his rights to make such a request;

(f) following any correction or deletion of personal information the agency shall, at the request of the data subject, furnish to past recipients notification delivered to their last known address that the item has been deleted or corrected and shall require said recipients to acknowledge receipt of such notification and furnish the data subject the names and last known addresses of all past recipients of the uncorrected or undeleted information.

As added by Acts 1977, P.L.21, SEC.1.

IC 4-1-6-6

Securing of confidential information protected

Sec. 6. The securing by any individual of any confidential information which such individuals may obtain through the exercise of any right secured under the provisions of this chapter shall not condition the granting or withholding of any right, privilege, or benefit, or be made a condition of employment.

As added by Acts 1977, P.L.21, SEC.1.

IC 4-1-6-7

State agencies maintaining one or more systems; requirements

Sec. 7. (a) Any state agency maintaining one (1) or more personal information systems shall file an annual report on the existence and character of each system added or eliminated since the last report with the governor on or before December 31.

(b) The agency shall include in such report at least the following information:

(1) The name or descriptive title of the personal information system and its location.

(2) The nature and purpose of the system and the statutory or administrative authority for its establishment.

(3) The categories of individuals on whom personal information is maintained including the approximate number of all individuals on whom information is maintained and the categories of personal information generally maintained in the system including identification of those which are stored in computer accessible records and those which are maintained manually.

(4) All confidentiality requirements, specifically:

(A) those personal information systems or parts thereof

which are maintained on a confidential basis pursuant to a statute, contractual obligation, or rule; and

(B) those personal information systems maintained on an unrestricted basis.

(5) In the case of subdivision (4)(A) of this subsection, the agency shall include detailed justification of the need for statutory or regulatory authority to maintain such personal information systems or parts thereof on a confidential basis and, in making such justification, the agency shall make reference to section 8 of this chapter.

(6) The categories of sources of such personal information.

(7) The agency's policies and practices regarding the implementation of section 2 of this chapter relating to information storage, duration of retention of information, and elimination of information from the system.

(8) The uses made by the agency of personal information contained in the system.

(9) The identity of agency personnel, other agencies, and persons or categories of persons to whom disclosures of

personal information are made or to whom access to the system may be granted, together with the purposes therefor and the restriction, if any, on such disclosures and access, including any restrictions on redisclosure.

(10) A listing identifying all forms used in the collection of personal information.

(11) The name, title, business address, and telephone number of the person immediately responsible for bringing and keeping the system in compliance with the provisions of this chapter.

As added by Acts 1977, P.L.21, SEC.1. Amended by Acts 1978, P.L.10, SEC.3; P.L.19-1983, SEC.2.

IC 4-1-6-8

Policy of access; restricted access as condition for receipt of donated materials

Sec. 8. (a) All state agencies subject to the provisions of this chapter shall adhere to the policy that all persons are entitled to access to information regarding the affairs of government and the official acts of those who represent them as public servants, such access being required to enable the people to freely and fully discuss all matters necessary for the making of political judgments. To that end, the provisions of this chapter shall be construed to provide access to public records to the extent consistent with the due protection of individual privacy.

(b) Where such assurance is needed to obtain valuable considerations or gifts (which may include information) for the state, any agency, with the prior written approval of the oversight committee on public records, may allow restrictions upon public access to be imposed upon it as a specific condition of a contract, with a time limit not to exceed fifty (50) years or the lifetime of the individual, whichever is less. In order to promote the preservation of

historical, cultural, natural, and other irreplaceable resources, the department of natural resources or the Indiana state library may extend, beyond the lifetime of the individual, restrictions upon disclosure of information received, providing that such restrictions do not exceed fifty (50) years from the date of the donation in the case of the Indiana state library.

As added by Acts 1977, P.L.21, SEC.1. Amended by Acts 1978, P.L.10, SEC.4; Acts 1979, P.L.40, SEC.4; P.L.19-1983, SEC.3.

IC 4-1-6-8.5

Consistent handling of information among and between agencies; principles and procedures

Sec. 8.5. In order to establish consistent handling of the same or similar personal information within and among agencies, each state agency collecting, maintaining, or transmitting such information shall apply the following principles and procedures:

(1) Information collected after December 31, 1978, which is classified as confidential must be clearly and uniformly designated as confidential in any form or other document in which it appears.

(2) When an agency which holds information classified as confidential disseminates that information to another agency, the receiving agency shall treat it in the same manner as the originating agency.

As added by Acts 1978, P.L.10, SEC.5. Amended by P.L.19-1983, SEC.4.

IC 4-1-6-8.6

Requests for access to confidential records; improper disclosure; actions

Sec. 8.6. (a) In cases where access to confidential records containing personal information is desired for research purposes, the agency shall grant access if:

(1) the requestor states in writing to the agency the purpose, including any intent to publish findings, the nature of the data sought, what personal information will be required, and what safeguards will be taken to protect the identity of the data subjects;

(2) the proposed safeguards are adequate to prevent the identity of an individual data subject from being known;

(3) the researcher executes an agreement on a form, approved by the oversight committee on public records, with the agency, which incorporates such safeguards for protection of individual data subjects, defines the scope of the research project, and informs the researcher that failure to abide by conditions of the approved agreement constitutes a breach of contract and could result in civil litigation by the data subject or subjects;

(4) the researcher agrees to pay all direct or indirect costs of the research; and

(5) the agency maintains a copy of the agreement or contract for

a period equivalent to the life of the record.

(b) Improper disclosure of confidential information by a state employee is cause for action to dismiss the employee.
As added by Acts 1978, P.L.10, SEC.6. Amended by Acts 1979, P.L.40, SEC.5; P.L.19-1983, SEC.5.

IC 4-1-6-9

Annual report to general assembly; specific statutory authorization for confidentiality; recommendations

Sec. 9. (a) Under the authority of the governor, a report shall be prepared, on or before December 1 annually, advising the general assembly of the personal information systems, or parts thereof, of agencies subject to this chapter, which are recommended to be maintained on a confidential basis by specific statutory authorization because their disclosure would constitute an invasion of personal privacy and there is no compelling, demonstrable and overriding public interest in disclosure. Such recommendations may include, but not be limited to, specific personal information systems or parts thereof which can be categorized as follows:

(1) Personal information maintained with respect to students and clients, patients or other individuals receiving social, medical, vocational, supervisory or custodial care or services directly or indirectly from public bodies.

(2) Personal information, excepting salary information, maintained with respect to employees, appointees or elected officials of any public body or applicants for such positions.

(3) Information required of any taxpayer in connection with the assessment or collection of any income tax.

(4) Information revealing the identity of persons who file complaints with administrative, investigative, law enforcement or penology agencies.

(b) In addition, such report may list records or categories of records, which are recommended to be exempted from public disclosure by specific statutory authorization for reasons other than that their disclosure would constitute an unwarranted invasion of personal privacy, along with justification therefor.

(c) A report described in this section must be in an electronic format under IC 5-14-6.
As added by Acts 1977, P.L.21, SEC.1. Amended by P.L.28-2004, SEC.13.

PALMER — Smashed windows and damage totaling more than $10,000 were

andrew.welbner@frontiersman.com or 352-2270.

HELP US STOP COMPULSORY FINGERPRINTING OF INNOCENT ALASKANS:

Right now in Alaska, students who refuse to submit their fingerprints "for ID purposes" to a national database are being denied educational and testing opportunities... and that's just not right.

to a national biometric database "as ID" or they will be denied the opportunity to take the SAT...and thus denied the ability to attend most colleges. Without Juneau passing a tough new privacy law, this could happen to kids here in Alaska.

For some exams, even if you present a US passport as ID, you will be denied access to the exam room if you don't first submit to a fingerprinting supposedly "for ID purposes." The Wall Street Journal even exposed that the firm giving the SAT exam has considered requiring children to submit their biometrics/fingerprints

Call Representative Gatto 465-3743 and Representative Wes Keller 465-2186, tell them to stand up for Alaskans and our right to privacy. If a US passport is good enough ID to travel the world and enter the USA, it's good enough ID to take an exam. This is America, let's take our privacy back.

Citizens for Privacy in Alaska PrivacyNowAK@aol.com www.PrivacyNowAlaska.org

Interested in a great life in A

HOPE Community Resources Inc.

We at Hope in the are seeking outgoi who will enjoy sha lives with two indi who describe thei follows:

"My friend and I share a home together locat Wasilla, Alaska. We love the outdoors, exer good meals and fun times together. We also need assistance with our personal c meal preparation, homecare and going to/fr variety of community locations."

Job descriptions, pay rates and other employment in availableatwww.hopealaska.org,oryoucancontactthel at our local office by calling 433-4762. Many describ work as life-changing and rewarding. Lots of traini Give Hope a call and stop in to meet us.

We can all enjoy Alaska together

Lifeline service.

Qualified low-income residents of Alaska may receive discounted service

Valley Healing Se

March 3rd

6 p.m. – 8:30 p.

Church on the Roc

GOVERNMENT CODE

TITLE 5. OPEN GOVERNMENT; ETHICS

SUBTITLE A. OPEN GOVERNMENT

CHAPTER 560. BIOMETRIC IDENTIFIER

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003, except that the term includes each entity within or created by the judicial branch of state government.

Added by Acts 2001, 77th Leg., ch. 634, Sec. 2, eff. Sept. 1, 2001. Renumbered from Government Code Sec. 559.001 by Acts 2003, 78th Leg., ch. 1275, Sec. 2(78), eff. Sept. 1, 2003.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Added by Acts 2001, 77th Leg., ch. 634, Sec. 2, eff. Sept. 1, 2001. Renumbered from Government Code Sec. 559.002 by Acts 2003, 78th Leg., ch. 1275, Sec. 2(78), eff. Sept. 1, 2003.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Added by Acts 2001, 77th Leg., ch. 634, Sec. 2, eff. Sept. 1, 2001. Renumbered from Government Code Sec. 559.003 by Acts 2003, 78th Leg., ch. 1275,

BUSINESS AND COMMERCE CODE

TITLE 11. PERSONAL IDENTITY INFORMATION

SUBTITLE A. IDENTIFYING INFORMATION

CHAPTER 503. BIOMETRIC IDENTIFIERS

Sec. 503.001. CAPTURE OR USE OF BIOMETRIC IDENTIFIER. (a) In this section, "biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(b) A person may not capture a biometric identifier of an individual for a commercial purpose unless the person:

(1) informs the individual before capturing the biometric identifier; and

(2) receives the individual's consent to capture the biometric identifier.

(c) A person who possesses a biometric identifier of an individual that is captured for a commercial purpose:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure for identification purposes in the event of the individual's disappearance or death;

(B) the disclosure completes a financial transaction that the individual requested or authorized;

(C) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552, Government Code; or

(D) the disclosure is made by or to a law enforcement agency for a law enforcement purpose in response to a warrant;

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the person stores, transmits, and protects any other confidential information the person possesses; and

(3) shall destroy the biometric identifier within a reasonable time, but not later than the first anniversary of the date the purpose for collecting the identifier expires, except as provided by Subsection (c-1).

(c-1) If a biometric identifier of an individual captured for a commercial purpose is used in connection with an instrument or document that is required by another law to be maintained for a period longer than the period prescribed by Subsection (c)(3), the person who possesses the biometric identifier shall destroy the biometric identifier within a reasonable time, but

not later than the first anniversary of the date the instrument or document is no longer required to be maintained by law.

(c-2) If a biometric identifier captured for a commercial purpose has been collected for security purposes by an employer, the purpose for collecting the identifier under Subsection (c)(3) is presumed to expire on termination of the employment relationship.

(d) A person who violates this section is subject to a civil penalty of not more than $25,000 for each violation. The attorney general may bring an action to recover the civil penalty.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.
Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1163, Sec. 1, eff. September 1, 2009.

Stronger Privacy Laws

The Alaskan Biometric Privacy bill SB-98 February 21, 2012

Dear Representative Gatto:

In your district and all over Alaska, Alaskans are now being denied educational opportunities and the ability to take many exams unless they first submit their fingerprints & biometrics to a database as a form of identification. Shockingly, even students who show a US passport and driver's license are being *refused educational opportunities* if they don't submit to a fingerprinting "as ID." As you may know, this happened to me in February 2008.

If a US passport is good enough identification to travel the world and enter the United States…it is certainly good enough identification to take a test. This is what The Alaskan Biometric Privacy Bill SB-98 is all about; standing up for Alaskans and their right to privacy.

Last April, the Senate unanimously voted to support SB-98. The bill is now before the House Health & Social Services and the Judiciary committees. Senate co-sponsors include Senators Coghill (R), Menard (R), Giessel (R), McGuire (R), Paskvan (D), Thomas (D), Ellis (D), Wagoner (R), Egan (D) and Dyson (R).

As you can imagine, the Privacy Bill is extremely popular with Alaskan voters – and only opposed by the data mining corporations and the biometrics industry lobbyists (SIA/LexisNexis|ChoicePoint/Prometric) *who are currently making money off exploiting Alaskans' loss of privacy.* Luckily, they don't vote.

Mandating fingerprints as ID for an exam is already illegal in Canada under their PIPEDA (Personal Information Protection and Electronic Documents Act) privacy laws, but no such protection exists for Alaskans. We need your help to change that.

Important: The current wording in the critical "Alternative ID" section 18.14.040 of SB-98 is too loose, essentially undermining much of the bill's intended protection. It needs to be clear that

1) If an individual shows a US Passport or State ID (driver's license), they don't need to also submit to being fingerprinting for identification
2) An individual can't be discriminated against and denied educational or testing opportunities because of their refusal to provide their biometrics as identification if they provide an Alternative ID.

As you know, Article 1 Section 22 of the Alaska Constitution states "the right of the people to privacy is recognized and shall not be infringed." There are very few issues on which Alaskans from across the political spectrum agree. The *urgent* need to protect our privacy from constant corporate and Federal Government intrusion is one of them.

Sincerely,

Jason Giaimo
Co-Chairman, Citizens for Privacy in Alaska
602-9250 giaimo1@aol.com
www.PrivacyNowAlaska.org

Tim Pearson
Co, Chairman, Citizens for Privacy in Alaska
952-3498
tim@timpearson.net

Citizens for Privacy in Alaska is a group of concerned Alaskans now nearly 1,000 strong who support stronger State privacy laws.

Facts about data privacy:

• 24 million customer records at Amazon.com accessed by criminals 1/16/2012
Have you ever shopped at Amazon.com? As reported in USA Today just a few weeks ago on 1/16, their "state-of-the-art" database was hacked into and criminals gained access to 24 million confidential customer records—maybe yours. **What if a similarly "state-of-the-art" database that contained the fingerprints of you or your children were hacked into, and your prints were planted at a crime scene?** If your fingerprints were found, would you really be able to prove you weren't there? Is this really the sort of Orwellian surveillance society Alaskans in your district want to live in?

• "There have been 535 data breaches made public in 2012 alone, affecting a total of 30.4 million records. 2011 saw some of the biggest data breaches in history, coming in a number of different forms and affecting a wide range of industries." Privacy Rights Clearinghouse notes that over 544 million confidential records have been compromised since just 2005. http://www.privacyrights.org/

• FBI, Pentagon pays ChoicePoint for access to trove of public records
National Journal Reports: By Shane Harris *sharris@nationaljournal.com*:
"…the FBI and the Defense Department…have been paying a Georgia-based company [ChoicePoint/LexisNexis—*the same firm collecting Alaskan fingerprints for some exams*] for access to its vast databases that contain billions of personal records about nearly every person in the United States. This system allows for the ability to use the private data broker to do something that they legally can't -- keep tabs on nearly every American citizen and foreigner in the United States. ChoicePoint is famous for being the largest and most sophisticated aggregator of public records on U.S. citizens and residents. The company has built an enormous electronic cache of more than 19 billion records." 11/11/2005
http://www.govexec.com/story_page.cfm?filepath=/dailyfed/1105/111105nj1.htm&oref=search

• Biometrics collection is Big Business, and very lucrative
The international Biometric Group estimates that annual biometric industry revenue for 2012 will be over $12.4 billion dollars, with 25% of revenues being related to fingerprinting, and 13% related to facial recognition (www.biometricgroup.com).

• US Senator Charles Schumer and Lindsey Graham proposed a compulsory fingerprinting of all Americans as a requirement to work (National work ID cards)
In an article written by them in the Washington Post, Schumer and Graham state that as a "cornerstone" of their Immigration Reform Proposal, we "would require all US citizens who want to work to obtain a biometric social security card." The compulsory fingerprinting of all law-abiding Americans is essentially a **National ID card.** Washington Post, 3/19/2010

• "Biometric requirement could make E-Verify worth billions"
Sen. Charles Schumer (D-N.Y.) enthusiastically supports adding a biometric identifier [ie. the compulsory fingerprinting of all working Americans] to the federal E-Verify employment eligibility verification system, which is setting the stage for potentially one of the largest federal biometric collection opportunities, potentially encompassing the entire U.S. workforce of 140 million employees. "Obviously, it will be a big boost for the industry," said David Coleman of International Biometric Group. SIA, the Security Industry Association also strongly supports it, as their members would profit greatly.
http://washingtontechnology.com/articles/2009/08/10/policy--everify-biometrics.aspx

ISSUE SUMMARY & FAQ:

SB-98 The Alaskan Biometric Privacy Bill

2/21/2012

Last session, the Alaskan Senate voted unanimously to pass The Alaskan Biometric Privacy Bill, SB-98. The bill is now in the House Health & Social Services and Judiciary committees.

What's this all about?

It's about standing up for Alaskan's privacy, and stopping corporations from compelling innocent Alaskans to submit to fingerprinting as ID.

The goal is to make illegal the practice of compelling people to submit their fingerprints or other biometrics as identification when they are willing to show their driver's license or a United States passport. This does not affect fingerprinting done for background checks, and law enforcement is exempt from this bill.

Why this is urgently needed:

An update to our privacy laws is urgently needed to address the rapid & accelerating erosion of personal privacy, driven in large part by the biometrics and data mining industry-fueled "identity paranoia." Compelling an individual to submit fingerprints as ID for an exam is already illegal in Canada under their PIPEDA privacy laws (Private Information Protection and Electronic Documents Act), but no such protection exists for Alaskans.

1) It is offensive and immoral to treat honest, law-abiding and privacy loving Alaskans like criminals needing to be fingerprinted. Alaskans have a deep-seated respect for their privacy, AND it's guaranteed by our Constitution. We'll show our State ID/driver's license or passport- that's enough.

2) The right to privacy is fundamental to Alaska's heritage and unique culture, and is guaranteed by Article 1, Section 22 of the Alaska Constitution: *"The right of the people to privacy is recognized and shall not be infringed."*

3) Updated privacy laws will help to stem the rapid erosion of personal privacy; reining in some of the worst abuses of data technology by both private industry and government:

"The FBI is embarking on a $1 billion effort to build the world's largest computer database of people's physical characteristics, a project that would give the government unprecedented abilities to identify individuals in the United States and abroad. Digital images of faces, fingerprints and palm patterns are flowing into FBI systems in a climate-controlled, secure basement in Clarksburg. West Virginia. Next month, the FBI intends to award a 10-year contract that would significantly expand the amount and kinds of biometric information it receives." By Ellen Nakashima, The Washington Post, 12/23/07
http://seattletimes.nwsource.com/html/politics/2004088505_biometrics23.html?syndication=rss

4) Despite the industry's best efforts and "state-of-the-art database security," major data breaches are practically a daily occurrence in the news. There were over 223 million data records of US residents exposed due to security breaches in the last 3 years alone (privacyrights.org).

Fingerprints are like passwords that can never be changed.
Once compromised, individuals will be at risk of identity theft for the rest of their lives.

5) The best way to keep personal data from being lost, hacked or exposed is to not collect it in the first place. After-the-fact restrictions will be largely ineffective, as we will never know what global datamining firms do with the data once collected. **This legislation will protect Alaskans from identity theft.**

6) As of January 1, 2008, Alaskan college students, and anyone else who takes any part of the CPA and various other Prometric-proctored exams are being forced to submit their fingerprints to a global fingerprint database maintained by a foreign-owned data-reseller called ChoicePoint, now part of Reed Elsevier Corp. This is the same company which was assessed a $15 million fine, *the largest fine in the history of the Federal Trade Commission* for "making false and misleading statements about privacy policies, violating privacy rights and violating Federal Laws" according to the FTC website. ChoicePoint combines personal data sourced from multiple public and private databases and sells it to "an estimated 7,000 clients" including the Dept of Homeland Security (see item #3 above). This is just one example of the existing and potential privacy abuses which updated privacy laws would stop. Some exam centers in Alaska (PearsonVue) are right now even forcing exam candidates into having their veins of their palms scanned (by infrared radiation) in addition to fingerprinting, even if a US passport is presented as ID.

This "identity paranoia" is as lucrative to the companies involved as it is absurd. Compelling an individual who is willing to show their US passport or driver's license to submit fingerprints to the database of a private foreign-owned corporation "for ID" is unnecessary and it violates our Constitutionally guaranteed right to privacy.

What is Biometrics?
Biometrics include: fingerprints, DNA, hand geometry, vein scanning, retinal or iris scans and similar technology.

If a US passport is sufficient ID to travel the world and enter the USA, it is certainly sufficient ID to take a test.
Clearly, the goal is to collect & transmit the fingerprints. Both the test center at the University of Alaska-Fairbanks and the Prometric exam centers in Spenard are collecting fingerprints and immediately transferring them over the internet to the notorious data reseller ChoicePoint/ReedElsevier, whose largest customer is the Federal Government. Unlike in Canada, there is currently no law to protect Alaskans from this.

Will this stop the police from using fingerprints on criminals?
No. This does not in any way affect laws or procedures related to law enforcement.

But isn't biometrics "the way of the future?"
Loss of our personal privacy is not the "future" Alaskans want.

Don't the US Government and the Dept of Homeland Security want our fingerprints?
You bet they do (see #3 above)! Some Federal Legislators (Chuck Schumer of NY in particular) are even pushing for a biometric social security card *which would require every American to get fingerprinted in order to work* -- a compelling reason on its own to quickly strengthen our State's biometric privacy laws.

Is the current Alaskan Biometric Privacy Bill SB-98 sufficient?

No – not as worded currently. The most important section of the bill by far in our opinion is the "Alternative Identification" section; however it is so loosely worded so to undermine most of the protection in this bill. **The only true protection is to not compel Alaskans to submit their fingerprints and other biometrics "for ID" in the first place**. IF A US PASSPORT IS SUFFICIENT IDENTIFICATION TO TRAVEL THE WORLD AND ENTER THE USA, IT IS GOOD ENOUGH IDENTIFICATION TO TAKE A TEST.

As Ronald Reagan once said, "Freedom is never more than one generation away from extinction." This is a critical moment. This is our chance to help preserve something all Alaskans hold dear.

By Rep. Greenberg / HJUD
SB98 4/14/12

HIPAA PRIVACY RULE

Law Enforcement Purposes. Covered entities may disclose protected health information to law enforcement officials for law enforcement purposes under the following six circumstances, and subject to specified conditions: (1) as required by law (including court orders, court-ordered warrants, subpoenas) and administrative requests; (2) to identify or locate a suspect, fugitive, material witness, or missing person; (3) in response to a law enforcement official's request for information about a victim or suspected victim of a crime; (4) to alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death; (5) when a covered entity believes that protected health information is evidence of a crime that occurred on its premises; and (6) by a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.[34]

http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html

The HIPAA Privacy Rule provides a great model for definition of *'law enforcement purposes'*

SB 122

<TARGET><BILL>SB 122</BILL><SUBJECT>SB 122</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 10, 2012 **FURTHER REFERRALS:**

Date of Committee Action: April 11, 2012

The JUDICIARY Committee considered: **CSSB 122(L&C)**

CS FOR SENATE BILL NO. 122(L&C)
"An Act relating to research on and examination of titles; relating to residency requirements for title insurance limited producers; relating to real estate transfer fees; and providing for an effective date."
SB 122-REAL ESTATE TRANSFER FEES/TITLE INSURANCE

Recommends it be replaced with [X] HCS *or* [ ] CS for CSSB 122 (L&C)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
2	CED			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Bob M	LYNN				X
Max Gruenberg	Gruenberg				—
Wes Keller	Keller			X	
Mel Hawker	Hawker			*	
Lyman Hoffman	Holmes	X			
Lora Reinbold	Reinbold			X	
Chair: Peter M Thompson	THOMPSON			X	
Chair:					

Alaska State Legislature

State Capitol, Room 510
Juneau, Alaska 99801
Phone: (907) 465-4947
Fax: (907) 465-2108

Committee Members:
Senator Dennis Egan, Chair
Senator Joe Paskvan, V. Chair
Senator Bettye Davis
Senator Linda Menard
Senator Cathy Giessel

Senate Labor and Commerce Committee

HCS CSSB 122 (L&C) Real Estate Transfer Fees/Title Plants
Sponsor Statement

Committee Substitute for Senate Bill 122 (Labor & Commerce) seeks to improve the transfer of title to real property in Alaska. Firstly, the bill would ensure that Alaskans maintain oversight of title searches. Companies that operate mainly overseas routinely solicit business in Alaska. While promising lower back office costs, these companies are divorced from actual, on the ground, Alaskan experience, increasing the chance of imperfections in title due to inaccurate or incomplete title searches. The bill would mandate that anyone performing a title search in Alaska be licensed in Alaska and reside here.

Additionally, Alaska law currently allows a deed to real estate to contain a covenant requiring a fee to be paid to the original seller for any subsequent transfer of title. While these transfer fee covenants benefit the original seller, who can look forward to a steady income in perpetuity without performing any additional service, it is a positive harm to each successive buyer. Courts in the state of New York outlawed the practice in 1852, calling it a vestige of feudalism. Recently, Idaho, Indiana, Mississippi, and Montana have passed their own prohibitions, making 41 states that have outlawed the practice. There appears to be no justification for allowing title fee covenants in Alaska.

Alaska State Legislature

State Capitol, Room 510
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Phone: (907) 465-4947
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Committee Members:
Senator Dennis Egan, Chair
Senator Joe Paskvan, V. Chair
Senator Bettye Davis
Senator Linda Menard
Senator Cathy Giessel

Senate Labor and Commerce Committee

SB 122 Real Estate Transfer Fees/Title Plants
Summary of Changes

SB 122 to CSSB122 (CRA)

- Deletes Sec. 1, regarding title plant requirements. (Original bill would have extended the time that title plant records must cover from 25 to 50 years.)
- Adds Sec. 2, immediate effective date.
- New bill title to reflect both changes.

CSSB 122 (CRA) to CSSB122 (L&C)

- Adds Sec. 1, requiring a title insurance company to use a licensed title insurance limited producer to search and examine a title.
- Adds Sec. 2, requiring a title insurance limited producer to be an Alaska ✓ resident.
- New bill title to reflect these changes.

HCS for CSSB 122 (L&C)

- Deletes p.2, lines 15 – 16, providing for a one-time transfer fee on the next transfer of title.

HJUD
4/11/12

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 15, 2012

SUBJECT: Preparation of title reports and title examinations; amendment drafting issues (CSSB 122(CRA); Work Order No. 27-LS0789\B.1)

TO: Senator Dennis Egan
Attn: Dana Owen

FROM: Dennis C. Bailey DCB
Legislative Counsel

This memo accompanies the amendment prepared for you using language provided on the phone. Please be aware of the following issues that have come to my attention during drafting.

The proposed amendment reads:

> All preliminary title reports and title examination reports shall be prepared by a person licensed under AS 21.66.270.

1. The licensing requirement under AS 21.66.270 requires a title insurance limited producer to be licensed in the manner provided for in AS 21.27.[1] Licensing under AS 21.66.270 only applies to title insurance limited producers.[2] The question that arises

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[1] AS 21.66.270 provides:

> **Sec. 21.66.270. Title insurance limited producers to be licensed.** A title insurance limited producer shall be licensed in the manner provided for in AS 21.27. A title insurance limited producer may not be licensed to sell insurance other than title insurance.

See AS 21.27.010 for licensing requirements; see also, AS 21.27.275 (director may issue license to nonresident who does not have a home state if the person meets the requirements of the chapter applicable to a resident applying for the same license)

[2] A title insurance limited producer is defined in AS 21.66.480(8):

> (8) "title insurance limited producer" means a person, firm, association, trust, corporation, cooperative, joint-stock company, or other legal entity authorized in writing by a title insurance company to solicit

is whether you intend that only title insurance limited producers may prepare preliminary title reports and title examinations. The proposed licensing requirement apparently excludes a title insurance company from preparing a preliminary report or title examination. The ability to prepare a preliminary report or title examination seems integral to the power of a "title insurance company" to conduct a title insurance business.[3] Is that what you intend?

2. You may want to substitute "a licensed title insurance limited producer" instead of referring to AS 21.66.270.

3. The proposed language requires that the person preparing a preliminary title report or title examination report must be a resident of the state. As we briefly discussed, the residency requirement raises the question of whether a residency requirement violates the privileges and immunities clause of the U.S. Constitution.

The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (Article IV, section 2, Constitution of the United States). A state violates the federal privileges and immunities clause by denying a nonresident equal treatment with respect to a fundamental right or privilege that is essential "to the promotion of interstate harmony." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279, 84 L.Ed.2d 205, 210 (1985). The courts will require that a state justify residency-based discrimination under the privileges and immunities clause if the court finds that the activity that is the subject of the discrimination enjoys privileges and immunities clause protection. Pursuit of an occupation outside one's home state is an activity that has been protected by the privileges and immunities clause. The United States Supreme Court has determined that state discrimination against nonresidents seeking to pursue employment within the state violates the privileges and immunities clause. *Hicklin v. Orbeck*, 437 U.S. 518, 52 L.Ed.2d 304 (1977).

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title insurance, collect premiums, determine insurability in accordance with the underwriting rules and standards prescribed by the title insurance company that the licensee represents, and issue policies in its behalf.

[3] AS 21.66.180 provides:

> **Sec. 21.66.180. General powers.** A title insurance company may
> (1) do business as defined in AS 21.66.480;
> (2) do any act, directly or through a title insurance limited producer, incidental to making a contract or policy of title insurance, including, but not limited to, conducting or holding an escrow, settlement, or closing of a transaction; and,
> (3) provide other services relative or incidental to the sale and transfer of real or personal property.

In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution.

Further, establishing a residency requirement would conflict with the insurance chapter, AS 21, including, for example, AS 21.66.480(7), which provides, in part, that a title insurance company means a foreign title insurance company issued a certificate of authority to transact a title insurance business within this state. A "'foreign insurer' means an insurer formed under the laws of a jurisdiction other than this state and includes an alien insurer." AS 21.97.900(18). An "'alien insurer' means an insurer formed under the laws of a country other than the United States of America, its states, districts, territories, and commonwealths." AS 21.97.900(3). In general, the insurance statute allows foreign insurance companies to be licensed to do business in the state. In the interest of getting you an amendment in a reasonable time, and in order to allow you to consider the residency issue in the context discussed, I have not prepared amendments to the insurance chapter to make the necessary exceptions prohibiting foreign title insurance companies from doing business in the state. Let me know if you want to proceed in that direction.

4. Incorporating the title insurance provisions of the amendment in a bill that currently addresses the topic of transfer fee covenants may violate the requirement that a bill address only a single subject. The single subject rule requires that all matters in an Act "fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."[4] The Alaska Supreme Court has held that the purpose of this constitutional provision is to guard against legislative log-rolling, "the practice of 'deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure.'" *Evans v. State*, 56 P.3d 1046. 1069, quoting from *Gellert*, infra, at 1122.

Historically, the Alaska Supreme Court has interpreted Alaska's single subject rule to permit very broad subject matter in one bill without violating the single subject requirement. For example, the Court has held that bills relating to such broad themes as "development of water resources,"[5] "taxation,"[6] "land,"[7] "intoxicating liquor,"[8] and

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[4] *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982).

[5] *Gellert v. State*, 522 P.2d 1120 (Alaska 1974).

[6] *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 545 (Alaska 1978).

[7] *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982).

[8] *Van Brunt v. State*, 646 P.2d 872 (Alaska App. 1982).

"criminal law"[9] are acceptable.[10] However, there was a strong dissent in one case against allowing broad subject matter in a single bill.[11] And in 2010, for the first time, the Alaska Supreme Court invalidated a piece of proposed legislation for failure to satisfy the single subject requirement.[12,13]

CSSB 122(CRA) currently addresses transfer fee covenants in a document conveying real estate. The proposed amendment addresses licensing of title insurance producers. It is difficult to articulate a common subject. Both might be in the subject of "land transactions." Given Alaska's broad interpretation of the single subject rule, including the two topics in the same bill could be found constitutional. Failure to comply with the single subject requirement -- however unlikely -- could jeopardize your bill if it were ever challenged. The issue, of course, may be avoided entirely by using separate bills for each subject.

5. I routinely advise that bill sponsors engage the division of insurance in consideration of a bill in order to make use of their expertise. It seems appropriate to do so with respect to this amendment.

If I may be of further assistance, please advise.

DCB:ljw
12-126.ljw

Enclosure

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[9] *Galbraith v. State*, 693 P.2d 880 (Alaska App. 1985).

[10] *Evans v. State*, 56 P.3d 1046, 1070 (Alaska 2002).

[11] *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985). In his dissent, at page 1182, Justice Moore stated: "This court has mistakenly continued to give the rule such an extremely liberal interpretation that the rule has become a farce."

[12] *Croft v. Parnell*, 236 P.3d 369 (Alaska 2010).

[13] The *Croft* ruling and the *Yute Air* dissent may indicate that the Alaska Supreme Court is moving toward a more stringent single subject standard by adding a dimension to the rule expounded in *Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987). *Harbor* interprets California's single subject rule to prohibit excessive generality because it violates the purpose and intent of the single subject rule.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 122 (L&C)**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB122-DCCED-INS-03-14-12
Title: Real Estate Transfer Fees/Title Plants
Sponsor: Senate Labor & Commerce
Requester: Senate Rules

Dept. Affected: DCCED
Appropriation: Insurance
Allocation: Insurance
OMB Component Number: 354

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note updates the analysis section to reflect the changes made by the CS.

Prepared by: Linda S. Hall, Director — Phone: 907-465-2560
Division: Insurance — Date/Time: 3/14/12 9:00 AM
Approved by: Susan K. Bell, Commissioner — Date: 3/14/2012
Commerce, Community, and Economic Development

(Revised 11/28/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 122 (L&C)

Analysis

SB 122 requires a licensed title insurance limited producer conduct a reasonable search and examination and the company makes a determination of insurability of title. This legislation also provides that a title insurance limited producer may not obtain a license unless the producer is a resident of the state and that a document that conveys real estate may not include a provision that requires a subsequent transfer fee to convey the real estate.

There is no anticipated fiscal impact to the Division as a result of this legislation.

AlaskaUSA®
Title Agency

April 11, 2012

Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
600 E. Railroad Ave.
Wasilla, AK 99654

Dear Representative Thompson:

Re: CS for Senate Bill No.122 (L&C)

Alaska USA Title Agency has followed and commented on SB122 since introduced in the Senate Labor and Commerce Committee in 2011. Alaska USA position has consistently been that legislation should not restrict competition nor limit choices for Alaska consumers.

Alaska USA supports the current proposed SB122 only if Section 2 is removed since it may violate the privileges and immunities clause of the U.S. Constitution. Alaska USA concurs with Dennis Bailey's memorandum of February 15, 2012 (copy attached) that the proposed language in SB 122, section 2 raises the question of whether a residency requirement violates the U.S. Constitution. The memorandum states two specific case law examples on page 2, item 3. Both case law examples ruled against similar restrictive residency requirements. Accordingly, we do not believe section 2 of SB122 is good public policy.

Thank you for the opportunity to provide Alaska USA Title Agency's concerns on Senate Bill 122.

Sincerely,

Crystal Peltola
Vice President/General Manager

Enclosure

cc: Linda Hall, Director, Alaska Division of Insurance
Curtis Thayer, Deputy Commissioner, Commerce, Community and Economic Development
Dan Fauske, CEO/Executive Director, Alaska Housing Finance Corporation

P.O. Box 196380 • Anchorage, Alaska 99519-6380
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Alaska USA Title Agency, LLC, a member of the Alaska USA family of financial service companies

received
3/16/2012
1:51 pm
PS

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM March 15, 2012

SUBJECT: Residency requirement for title insurance limited producers (CSSB 122(L&C), Work Order No. 27-LS0789\I)

TO: Senator John Coghill
Attn: Rynnieva Moss

FROM: Dennis C. Bailey
Legislative Counsel

You asked whether the provision of CSSB 122(L&C), sec. 2, which requires a title insurance limited producer to be a resident before the person may obtain a license under AS 21.66.270, raises constitutional issues. The residency requirement raises the question of whether a residency requirement violates the privileges and immunities clause of the U.S. Constitution.

The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (Article IV, section 2, Constitution of the United States). A state violates the federal privileges and immunities clause by denying a nonresident equal treatment with respect to a fundamental right or privilege that is essential "to the promotion of interstate harmony." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279, 84 L.Ed.2d 205, 210 (1985). The courts will require that a state justify residency-based discrimination under the privileges and immunities clause if the court finds that the activity that is the subject of the discrimination enjoys privileges and immunities clause protection. Pursuit of an occupation outside one's home state is an activity that has been protected by the privileges and immunities clause. The United States Supreme Court has determined that state discrimination against nonresidents seeking to pursue employment within the state violates the privileges and immunities clause. *Hicklin v. Orbeck*, 437 U.S. 518, 57 L.Ed.2d 397 (1978).

In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution.

If I may be of further assistance, please advise.

DCB:plm
12-163.plm

SB 151

<TARGET><BILL>SB 151</BILL><SUBJECT>SB 151</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

Interim:
716 West 4th Ave.
Anchorage, Alaska 99501
(907) 269-0199

Session:
State Capitol Building
Juneau, Alaska 99801-1182
(907) 465-4945

Senator Kevin Meyer
Senate District O

(3 cmts. on H / S)

SPONSOR STATEMENT FOR CSSB 151

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

SB 151 would include Fetal Alcohol Spectrum Disorders (FASD) as a mitigating factor in sentencing. This would allow some flexibility in sentencing if the defendant is found by the court to be affected by FASD and this condition substantially impaired the defendant's judgment, behavior, and capacity to recognize reality or ability to cope with the ordinary demands of life.

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) are disproportionately represented within Alaska's criminal justice system. SB 151 does not require a judge to use the mitigating factor and it DOES NOT automatically adjust a presumptive sentence. The defense would have to provide clear and convincing evidence that the defendant's disability *significantly affected the defendant's conduct* and *substantially impaired judgment, behavior, and capacity to recognize reality* in order to apply the mitigating factor.

Evidence shows that directing people with mental illness and other brain disorders to supported services, both inside and outside of Corrections, significantly reduces the high financial and social costs associated with re-incarceration and recidivism. Felons and repeat offenders with FASD are more likely to stop committing crimes when they are given the same supports that benefit people with mental illness and other disabilities, which can include Therapeutic Court, housing and employment assistance, case management, counseling and rehabilitation.

CS FOR SENATE BILL NO. 151(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 3/23/12
Referred: Finance

Sponsor(s): SENATORS MEYER, Hoffman, Dyson, Menard, Paskvan, Egan, Davis, Ellis, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

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

*** Section 1.** AS 12.55.155(d) is amended to read:

(d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that

significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(12) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense**;**

(20) except in the case of an offense defined under AS 11.41 or AS 11.46.400, the defendant committed the offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this paragraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy.

Alaska State Legislature

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716 West 4th Ave.
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Session:
State Capitol Building
Juneau, Alaska 99801-1182
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Senator Kevin Meyer
Senate District O

CSSB 151 FASD AS A MITIGATING FACTOR IN SENTENCING
Explanation of Changes

SHSS
From version X to O

- Removal of Section 1 which set out a definition of mental disease or defect.
- Section (18) there has been some debate over previously convicted felons, and how this can be applied.
- Addition of section (20) which adds FASD as a mitigating factor, defines it and sets out how it can be diagnosed.

SJUD
From version O to U

- Section (18), page 3, lines 13-14 has been deleted, which makes this mitigator applicable to felons, however in section (20) crimes against a person and arson are not eligible for a mitigating factor.
- Section (20), page 3, line 20 and 21 the language exempting arson and crimes against a person was added. The intent of this bill is to provide flexibility for non-violent offenders who are affected by FASD. If an assault or arson has occurred, this mitigator would not apply.
- Section (20), page 3, line 30 has been deleted. It is not outlined for other mitigating factors how mental disease or defect is determined. This can be done as it is now; through clear and convincing evidence, the court can find someone to be suffering from a mental disease or defect.

SFIN
No changes

HHSS
CS to HB 367
The companion bill introduced by the HHSS committee adopted a CS conforming to CSSB 151.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSSB 151(JUD)**
Fiscal Note Number	5
(S) Publish Date	4/4/12

Identifier (file name)	SB151CSSB(JUD)-LAW-CRIM-03-30-12	Dept. Affected	Law
Title	An Act realing to mitigation at sentencing in a criminal case for a defendant found by the court to have been...	Appropriation	Criminal
		Allocation	Criminal Justice Litigation
Sponsor	Senator Meyer		
Requester	(S) Finance	OMB Component Number	2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Update to identifier and requester.

Prepared by	Sheila Bugbee, Administrative Officer	Phone	465-5427
Division	Administrative Services	Date/Time	3/30/12 12:00 PM
Approved by	Michael C. Geraghty, Attorney General	Date	3/30/2012
	Department of Law		

(Revised 1/17/2012 OMB)

COMMITTEE COPY

FISCAL NOTE #5

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(JUD)

Analysis

SB 151 CSSB(JUD) would add as a mitigating factor at sentencing. It would allow a new mitigator if the defendant was affected by a fetal alcohol spectrum disorder that significantly affected the defendant's behavior. If proven, the court would have discretion to reduce the term of imprisonment to below the presumptive range.

The proposed new factor would not apply to persons convicted of crimes against a person (AS 11.41), or arson in the first degree (AS 11.46.400).

The fiscal impact for the Department of Law is indeterminate because it will require expert testimony on the issue of whether the person suffers from such a disorder and if so, did it significantly affect his or her behavior.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**CSSB 151(HSS)**
Fiscal Note Number	4
(S) Publish Date	3/6/12

Identifier (file name)	SB151-DOC-OC-03-02-12	Dept. Affected	DOC
Title	"An Act relating to mitigation at sentencing in a criminal defendant convicted of certain sex offenses a prohibition... "	Appropriation	Admin & Support
		Allocation	Commissioner's Office
Sponsor	Senator Meyer		
Requester	(S)HSS	OMB Component Number	694

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by	Leslie Houston, Director	Phone	907-465-3339
Division	Department of Corrections - Administrative Services	Date/Time	3/2/12 11:05 AM
Approved by	Joseph D. Schmidt, Commissioner	Date	3/2/2012
	Department of Corrections		

(Revised 8/17/2011 OMB)

COMMITTEE COPY

FISCAL NOTE #4

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(HSS)

Analysis

This bill would add fetal alcohol spectrum disorder to the list of mitigating factors at sentencing in a criminal trial. The burden of assessment would be on the courts and therefore would have zero fiscal impact on the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 151(HSS)**
Fiscal Note Number: 3
(S) Publish Date: 3/6/12

Identifier (file name): SB151-DOA-PDA-1-23-12
Title: Fetal Alcohol Spec. Disorder as Mitigator
Sponsor: Senators Meyer, Hoffman, Dyson, Menard
Requester: Senate Health and Social Services

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner, Public Defender — Phone 907 334-4414
Division: Public Defender Agency — Date/Time 1/20/12 12:15 PM
Approved by: John Cramer, Deputy Commissioner — Date 1/23/2012
Department of Administration

(Revised 8/17/2011 OMB)

COMMITTEE COPY

FISCAL NOTE #3

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSSB 151(HSS)

Analysis

AS 12.55.155(d) allows a sentencing court to impose a sentence less than the presumptive range where mitigating factors have been proven. This bill amends AS 12.55.155(d) by adding section 20, which allows the court to find a factor of mitigation where the defendant committed the offense while affected by fetal alcohol spectrum disorder.

The Public Defender Agency does not anticipate a fiscal impact from this change. Accordingly, the Agency submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 151(HSS)**
Fiscal Note Number: 2
(S) Publish Date: 3/6/12

Identifier (file name): SB151-ACS-TRC-3-02-2012
Title: Mitigation at sentencing for defendant with FASD
Sponsor: Senator Meyer
Requester:

Dept. Affected: Alaska Court System
Appropriation: Trial Courts
Allocation:
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0..0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Nancy Meade, General Counsel
Division: Alaska Court System
Phone: 907-463-4736
Date/Time: 3/02/2012 4:00 p.m.

Approved by: Nancy Meade for Christine Johnson, Administrative Director
Alaska Court System
Date: 3/2/2012

(Revised 11/17/2011 OMB)

COMMITTEE COPY

FISCAL NOTE #2

STATE OF ALASKA **BILL NO.** CSSB 151(HSS)
2012 LEGISLATIVE SESSION

Analysis

Senate Bill 151 adds a new factor to the list of mitigating factors in AS 12.55.155(d) that the court shall consider at sentencing; if proven, the court may then impose a sentence below the presumptive range for certain crimes. Specifically, except for defendants convicted of offenses against persons , arson, and criminal mischief, and except if the defendant has any prior felony conviction, the court may consider whether the defendant committed the offense "while affected by a fetal alcohol spectrum disorder that was insufficient to constitute a complete defense . . . but that significantly affected the defendant's conduct."

The court cannot predict the number of cases in which parties will attempt to prove this factor as a mitigator at sentencing, but believes the sentencing hearings will be held and handled in the normal course without a fiscal impact. The Alaska Court System therefore submits a zero fiscal note.

Alaska FASD Partnership

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 • (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm
Email: ak-fasd-partnership@mhtrust.org

SB 151 - Inclusion of FASD as a Mitigating Factor

This legislative session, Senator Kevin Meyer (Anchorage) worked with the Alaska FASD Partnership, the Department of Law, and the Courts to craft a bill that would address the large number of people affected by fetal alcohol spectrum disorders (FASD) in the state's criminal justice system. SB 151 is an "Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

The Partnership approached Senator Meyer when a workgroup of the Partnership, FASD and the Legal System, determined the mitigating factor to be one of their top priorities. Other priorities of the workgroup include expanding screening in Corrections, training for professionals in the justice system, and improving services for individuals with FASD transitioning from Corrections and juvenile detention, such as case management, assistance with housing, employment, and treatment.

The Need for SB 151

The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions.

In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

SB 151 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission, that "the legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder."[1]

A draft resolution proposed by the American Bar Association (ABA) Commission on Youth At Risk, for consideration at this year's annual ABA meeting, reads: "... the American Bar Association urges lawyers and judges, as well as bar associations and law school clinical programs, to ... work with medical, mental health, and FASD disability experts to promote ... applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

Overview of SB 151

SB 151 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "defendant committed [an] offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary

[1] Alaska Criminal Justice Assessment Commission (2000). *Final Report.* Retrieved October 12, 2010 from , at p.71.

demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct."

SB 151 defines a fetal alcohol spectrum disorder in the subsection on mitigating factors as "a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy."

The legislation:

1) does not *require* a judge to use the mitigating factor;
2) does not automatically adjust a presumptive sentence; the defendant would have to prove by *clear and convincing evidence* 1) that he or she has a fetal alcohol spectrum disorder and 2) that the condition "significantly affected the defendant's conduct" before the judicial officer can consider the possibility of adjusting the presumptive sentence; and
3) is not a "get out of jail free" card, but an attempt to be "smarter" within the justice system to better direct people who have impaired brain function to services both within and after release from the criminal justice system.

What is a mitigating factor?

A mitigating factor, in law, is any information or evidence presented to the court regarding the defendant or the circumstances of the crime that might result in reduced charges or a lesser sentence.

The economic benefits of SB 151

A 2009 study by the Institute of Social and Economic Research (ISER) at the University of Alaska Anchorage, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, showed that strategically expanding intervention and prevention programs can reduce crime, keep more Alaskans out of prison, and save the state substantial costs.

The cost of incarceration in an Alaskan prison is about $136 per day. Over the course of five to ten years, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management (a recommended alternative intervention for people with FASD) is about $48 per day. If electronic monitoring ($21 per day) and probation/parole ($7 per day) are added, the total cost per day is about $76. Implementing one or all three of these interventions could save the state up to $21,900 per offender, per year.[2]

SB 151 provides justice for a vulnerable population and represents a better investment of our state's resources. With appropriate supports, people with FASD can live successfully in the community as contributing citizens, while at the same time providing jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists.

A move toward "Smart Justice"

Alaska's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and greater rehabilitative results for offenders. While some offenders are clearly dangerous and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders,

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[2] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: . *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

treatment programs inside the prison combined with adequate transition and case management services, will result in lower costs, less recidivism, and a safer general public.

Senator Meyer noted that "studies have repeatedly shown that repeat offenders with FASD and other impaired brain functions are more likely to stop committing crimes when they are given the same support as people with other mental illnesses, which can include therapeutic courts, housing and employment assistance, case management, counseling and rehabilitation. The potential benefits to society, through decreased crime and costs, are tremendous."

In Chief Justice Carpeneti's address to the Alaska State Legislature this year, he suggested that the justice system needs to consider the cost of its actions on the system's resources, on public safety, and on the potential of all citizens. He asked legislators to include the judiciary in tailoring prison or treatment sentences to offenders.

"In practice, it means making criminal justice decisions that reserve our most costly response to crime – prison time – for those cases where less costly alternatives will not effectively protect the public or rehabilitate the perpetrator," Chief Justice Carpeneti said. "There is a better way. We need to move from anger-based sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results."

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Bill would let judges consider fetal alcohol spectrum disorders

FETAL ALCOHOL: First, its direct role in a crime must be proved.

By AUSTIN BAIRD

(03/03/12 21:43:50)

JUNEAU -- A proposal before the Alaska Legislature would give judges flexibility when handing down criminal sentences to people who were born with effects caused by their mother drinking during pregnancy.

Judges are not allowed to consider fetal alcohol spectrum disorders -- a catch-all phrase for conditions caused by prenatal exposure to alcohol -- during criminal sentencing. SB151 would change that by adding FASD to the list of mental conditions that judges can consider as a mitigating factor.

Senate Majority Leader Kevin Meyer, R-Anchorage, worked with a statewide coalition from various professions called the Alaska FASD Partnership to craft the bill in response to the large number of people affected by the fetal alcohol disorders in the criminal justice system. Meyer said a mitigating factor is not a "get out of jail free card" and only reduces punishment if it's proved that a condition played a direct role in a crime. The bill calls for proof of documentation of prenatal alcohol use as well as a convincing clinical diagnosis.

The proposal is welcomed by advocates but not touted as a cure-all.

Public understanding of the issue is lacking, according to Teri Tibbett, the partnership's coordinator, and problems are multifaceted and complex.

"Alcohol has been around for a long time and so have women," Tibbett said. "Those two have gone together about that long but we understand the impacts better now than ever."

Modern research has determined that cell death caused by exposure to alcohol in the womb is the root of damage, according to Susan Astley, an epidemiology professor at the University of Washington. The best-known result is a series of distinct facial features -- smaller eye openings, a thin upper lip and the ridges below the nose are smooth -- but other problems are also common, she said.

Morgan Fawcett is a 19-year-old getting ready to study journalism but for now he travels around the U.S. and Canada sharing the story of his struggles with prenatal alcohol exposure with clinicians, lawmakers and others interested groups.

Fawcett recently told a group in Juneau that he made it to his early teens with an array of unexplained problems. He said he couldn't focus or remember things he was just told; that he was often at a loss during class; that his jaw would lock, sometimes tightly enough that he couldn't eat or drink, and that he suffered debilitating migraines.

He was 14 when he realized those problems and others resulted from his mother's drinking during pregnancy.

"I was angry at (my mother) in the beginning but I love her and I know she didn't do this on purpose," Fawcett said. "No mother would do this intentionally. If more people understood this, mothers wouldn't be the focus."

Alaska has been somewhat of a national leader by creating a network of diagnostic clinics and treatment programs, Astley said.

"Damage can take place throughout pregnancy, from very early to the very end," she said. "It's impossible to predict exactly what damage will take place if you drink at a certain time and you can't tell for sure when certain effects were caused."

Seven-term Rep. Beth Kerttula, D-Juneau, remembers when discussion in the Capitol started and ended with how severely mothers should be punished. Kerttula recalls a fellow legislator saying during a committee hearing a few years ago that drinking pregnant women should be taken to the wharf in downtown Juneau, latched into stockades and have tomatoes thrown at them.

Meyer said another bill would have held bartenders in Alaska criminally liable if they served alcohol to pregnant women.

"People have the right heart, even when they put up ideas like this," Meyer said. "You want an easy target and, sure, the mothers are easy targets. But if it was that simple, someone else would have fixed this already."

Judge Michael Jeffery of the Barrow District Court, which serves the North Slope, said a 1990 case that involved an 18-year-old affected by fetal alcohol syndrome brought the problem to his attention. Jeffery sympathized with a request by the young man's lawyer who wanted the condition to count as a mitigating factor but a panel of judges determined he could not add conditions at his discretion.

"Extra jail time didn't help him or anyone else and it's true for many people," Jeffery said.

Jeffery learned the problem is endemic in his community and around the state, especially so in the justice system: An estimated 27 percent of Alaska's inmate population has fetal alcohol syndrome, according to a 2006 state report.

Long before Jeffery's experience in the United States' northernmost court became the basis of SB151, he implemented a few changes of his own.

He uses plain English and large type to account for poor reading comprehension commonly associated with FASD during his court cases. Listening comprehension is another common problem, with only the last few words of sentences heard and remembered, so Jeffery repeats important points often and carefully structures sentences. Another procedure has caused tense moments, he said: He explains common effects of FASD, how it is caused and where to find treatment, often with parents and relatives in attendance.

"If someone doesn't speak the language, you give them a translator in court," Jeffery said. "What I'm doing for people with this disorder is no different. They don't understand things the same way, interpret information the same."

He said he wants to see similar changes elsewhere, and to that end the American Bar Association is working on a resolution that addresses some of the concerns about justice and FASD. Howard Davidson, who runs the ABA's Center on Children and the Law, said the resolution is modeled after a similar step taken by the Canadian Bar Association in 2010; he said the wording is still being refined but could be ready for a vote of approval in time for the group's national convention this

August.

SB151 has attracted eight co-sponsors and the Senate Health and Social Services Committee will start discussion Monday.

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Advisory Board on Alcoholism
and Drug Abuse

abada
amhb

Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

March 2, 2012

Senator Kevin Meyer
Alaska State Capitol, Room 103
Juneau, Alaska 99801

Re: Letter of Support for CSSB 151 – Mitigation at Sentencing for a Defendant Affected by FASD

Dear Senator Meyer,

The Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse support the committee substitute for SB 151 (CSSB 151). This bill recognizes the special needs presented by Alaskans experiencing fetal alcohol spectrum disorders (FASD) in the justice system.

It is an objective of Alaska's comprehensive mental health program that people with mental and cognitive disabilities are treated with dignity in all aspects of life. Our judges, prosecutors, defenders, and court staff work to ensure that everyone who appears in court is treated fairly and with respect. However, Alaskans experiencing FASD often present with special needs and situations that impede the course of justice. Low cognitive functioning, inability to understand and stay within accepted social norms, limited short term memory, impulsivity, and impaired judgment can all result in a person experiencing FASD not being able to explain his or her actions, understand why they resulted in a criminal charge, or understand the criminal justice process. Usually, these impairments do not rise to the level of legal incompetence – but they often make it hard for judges and juries to make decisions that serve our notions of fairness and justice.

Based on research in other jurisdictions, an estimated 60% of inmates experience an FASD, brain injury, or similar organic cognitive impairment. The cost of incarceration is very high and usually does not result in restoration or rehabilitation. In fact, according to a 2009 ISER Study,[1] the cost of prison far exceeds the cost of services. CSSD 151 allows judges – **at their discretion** – to modify presumptive sentences to take into account the defendant's disabilities and to provide the sort of sentence needed to prevent recidivism and ensure a just outcome for victims, defendants, and our communities.

We thank you for your work on behalf of all Alaskans.

Sincerely,

J. Kate Burkhart
Executive Director

[1] *The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* published by Institute of Social and Economic Research (ISER), University of Alaska (January 2009). Available online at www.iser.uaa.alaska.edu.

DISABILITY LAW CENTER OF ALASKA

ANCHORAGE
3330 Arctic Boulevard
Suite 103
Anchorage, AK 99503
(907) 565-1002
FAX (907) 565-1000
1-800-478-1234
www.dlcak.org

March 2, 2012

Senator Kevin Meyer
State Capitol Room 103
Juneau AK, 99801

Re: Support for SB 151

Dear Senator Meyer:

The Disability Law Center of Alaska supports the objective of SB 151, which is to allow the courts to take into consideration during sentencing whether the defendant was diagnosed with a fetal alcohol spectrum disorder, a traumatic brain injury or an acquired brain injury. If these conditions cannot be considered as mitigating factors, then as one jurist observed, these individuals are paying for their disability with their freedom.

Thank you for your efforts in correcting this manifest injustice.

Sincerely,

DISABILITY LAW CENTER OF ALASKA

David C. Fleurant
Executive Director

MEMBER OF THE NATIONAL DISABILITY RIGHTS NETWORK

Alaska FASD Partnership

Over 75 organizations and individuals supporting:

Advocacy ▪ Diagnosis
▪ Case Management
▪ Prevention
▪ Substance Abuse Treatment for Pregnant Women
▪ Parent Navigation
▪ Training for Parents
▪ Public Awareness
▪ Alternatives to Incarceration
▪ Court Interpreters
▪ Peer Support
▪ Training for Judges, Public Defenders, and Prosecutors
▪ Training for Educators and Medical Professionals
▪ Traditional Healing
▪ Supported Housing and Employment
▪ Family Support

March 30, 2012

Senator Kevin Meyer
Alaska State Legislature
Juneau, Alaska 99801

Dear Senator Meyer,

It is with great pleasure that the Alaska FASD Partnership supports SB 151 to include FASD as a mitigating factor in sentencing.

The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

The cost of incarceration in Alaska's prison is about $136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management, including electronic monitoring and probation/parole, is about $76 per day ($48 for intensive case management, $21 for electronic monitoring, $7 for probation/parole) – for a savings of $21,900 per person, per year.[1]

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*" the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD and other brain-based disabilities can live successfully in the community as contributing citizens, *and* provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does SB 151 further

[1] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf . *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 ▪ (907) 465-8920
Webpage: www.hss.state.ak.us/fasd.htm ▪ email: akfasdpartnership@alaska.gov

the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

Additionally, the state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism, and a safer general public.

Thank you for the time and effort you have put into supporting this important effort.

Sincerely,

Monica Charles-Leinberger

Monica Charles-Leinberger, Chair
Alaska FASD Partnership

Partnership members include: *Abused Women's Aid in Crisis, Advisory Board on Alcoholism and Drug Abuse, Alaska Behavioral Health Association, Alaska Center for Children & Adults, Alaska Children's Services, Alaska Mental Health Board, Alaska Mental Health Trust Authority, Alaska Peer Support Consortium, Alaska Youth & Family Network, Aleutian Pribilof Islands Association, All-Alaska Pediatric Partnership, Anchorage Coordinated Resources Project, Anchorage School District (Anchorage), Anchorage Tlingit & Haida Indian Tribes of Alaska, Arctic FASD Regional Training Center, Assets Inc., Association for the Education of Young Children-SEAK , Big Brothers Big Sisters of Alaska, Boys & Girls Home of Alaska, Camp Fire USA Alaska Council, Central Council of the Tlingit & Haida Indian Tribes of Alaska, Christian Health Associates, Copper Basin Neurodevelopmental Center, Deltana Community Services Partnership, Dena A Coy/Southcentral Foundation, Diocese of Juneau, Fairbanks Community Behavioral Health Center, Family Centered Services of Alaska, Frontier Community Services, Gastineau Human Services, Governor's Council on Disabilities and Special Education, Hoonah Indian Association, Hope Community Resources, Independent Living Center, Kenai Peninsula FASD Program, Ketchikan Indian Community, Kinetictions, Kobuk Valley Consulting, Kodiak Area Native Association, Juneau Family Health and Birth Center, Juneau FASD Diagnostic Clinic, Juneau Partnerships for Families and Children, Lower Kuskokwim School District, Lynn Canal Counseling Services, Nenana City School District, Ninilchik Traditional Council, Nome Youth Facility, Nondalton Tribe, Regional Wellness Forum, Set Free Alaska, Inc. (Wasilla), Southcentral Foundation FAS Diagnostic Team, Southeast Regional Health Consortium, Southeast Regional Resource Center, Southern Kenai Peninsula Communities Project, Sprout Family Services, Stone Soup Group, Tongass Substance Screening, UAA Department of Health Sciences, UAA Center for Human Development, Volunteers of America-Alaska ...and many individuals.*

Melanie Lesh

From: House Judiciary
Sent: Friday, April 06, 2012 10:16 AM
To: Allen, Richard K (DOA); 'Anne Carpeneti '; 'Brandy Cote'; Cori M. Badgley; Crystaline Jones; 'Deb Behr'; 'Douglas Wooliver '; Jackie Schulz; James Waldo; 'Jane Pierson'; 'Jeffrey Mittman'; Jenna Crouse; Jim Pound; Juli Lucky; 'Kelly A. Howell (DPS)'; LIO Juneau Group; Londi Ensor; Mike Coumbe; Mike Sica; Miles Brookes; Nancy Meade; Paulyn Swanson; 'Quinlan Steiner '; Rep. Bob Lynn; Rep. Lance Pruitt; Rep. Lindsey Holmes; Rep. Max Gruenberg; Rep. Steve Thompson; Rep. Wes Keller; 'Shalon Szymanski-Harrington'; Shannon Ewing; 'Sonia Christensen'; Susan Rael; Thomas Studler
Cc: Christine Marasigan
Subject: House Judiciary Meeting Update for Today

HJUD Update for today:

There are new documents for the Senate companion bill on the meeting documents link of BASIS for today's hearing.

JUDICIARY	STANDING COMMITTEE *	Meeting Documents
Apr 06 Friday 1:00 PM		CAPITOL 120
	Confirmation Hearing:	TELECONFERENCED
	<Pending Referral – still no referral>	
	Board of Governors of the Alaska Bar	
HB 367	FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR	TELECONFERENCED
SB 151	FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR	
	<Companion Bill to HB 367>	
	Bills Previously Heard/Scheduled:	TELECONFERENCED
=+HB 269	COMMON INTEREST COMMUNITIES	TELECONFERENCED

Melanie

Melanie Lesh
House Judiciary Committee Aide
Rep. Carl Gatto, Chair
State Capitol, Room 118
Juneau, Alaska 99801
(907)465-4990
Melanie.Lesh@legis.state.ak.us

House Judiciary ~ April 6th, 2012

(GAVEL IN) Let's call this meeting of the House Judiciary Committee to order.

It is 1:05 p.m. Wednesday April 6th , 2012.

Present are:

___ Representative Lynn

___ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

___ Representative Holmes

___ Representative Hawker (was previously excused)

___ Representative Gatto (was previously excused)

And Myself Representative Thompson

First things first: Housekeeping: Please disable your electronic devices, if they're left on - even on vibrate - they may interfere with the recording system. Thank you.

We have one new bill plus one previously heard in this order:

HB 269 COMMON INTEREST COMMUNITIES

HB 367's Senate Companion bill:

SB 151 FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

Our first bill today is: HB 269 COMMON INTEREST COMMUNITIES

> "An Act relating to the amendment of a declaration that creates a common interest community."

Here to continue the presentation of the bill is James Waldo staff to Rep. Lindsey Holmes.

Mr. Waldo, please put your name on the record and describe the changes in the draft (JUD) CS for HB 269.

DRAFT CS DISCUSSION

Thank you Mr. Waldo.

Are there any further questions for Mr. Waldo or the sponsor?

Public comment was closed on Wednesday.

Can I have a motion to adopt the draft CS 27-LS1125/M?

That brings the new draft CS HB 269 (JUD), back before the committee for discussion. Are there any further questions for the sponsor?

Can I have a motion to move HB 269 (27-LS1125/M), with individual recommendations, and with attached fiscal note from committee?

Rep. Thompson: I move to report HB 269 (27-LS1125/M), with committee recommendations, and with attached fiscal note from committee.

Any objection, have Susan call the roll. If not, HB 269 moves from committee.

.....

Next up, we will hear the Senate Companion bill, SB 151, in place of our previously scheduled bill:

HB 367 FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

SB 151 FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

<Companion Bill to HB 367>

CS FOR SENATE BILL NO. 151(JUD)

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

Here to present the bill is Senator Kevin Meyer and/or Christine Maragasin staff to Senator Meyer.

Senator Meyer, please come to the table, put your name on the record and provide us with an overview of SB 151.

BILL PRESENTATION

Thank you Senator Meyer.

Is there anyone online or in the room who would like to provide public testimony?

Public testimony:

- Judge Michael Jeffery, Superior Court Judge from Barrow
- David Fleurant, Disability Law Center
- Trish Smith, Wellness Court

For questions there are:

- Nancy Meade, Court System
- Liaison from Corrections
- Dept. of Law

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Is there anyone else who would like to provide public testimony on SB 151?

Public comment is now closed.

That brings the bill, CS for SB 151 (JUD) (24-LS 1132/U) back before the committee for discussion. Are there any further questions for the sponsor?

May I have a motion to move CS for SB 151 (JUD) (24-LS 1132/U) ,with individual recommendations, and with attached fiscal note from committee?

Rep. Thompson: I move to report CS for SB 151 (JUD) (24-LS 1132/U), with committee recommendations, and with attached fiscal note from committee.

Any objection, have Susan call the roll. If not, SB 151 moves from committee.

Having concluded our scheduled business for today... At _____ p.m., I adjourn today's meeting of the House Judiciary Committee (GAVEL OUT).

SB 173

<TARGET><BILL>SB 173</BILL><SUBJECT>SB 173</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: February 27, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 3-5-12

The JUDICIARY Committee considered: **SB 173**

SENATE BILL NO. 173
"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

SB 173-2012 REVISOR'S BILL

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	LAW			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	✓			
	Keller	X			
	Hawker	☆			
	Holmes	X			
	Pruitt	X			
Chair:	Thompson	X			
Chair:					

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 27, 2012

SUBJECT: 2012 Revisor's Bill (SB 173, Work Order No. 27-LS0888\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Kathryn L. Kurtz KK
Assistant Revisor

Enclosed is a sectional summary of the 2012 revisor's bill, which has been referred to your committee. I hope you will schedule this bill for a hearing in the near future. I would be happy to appear at the hearing and speak to the bill. Please call me if you have any questions. My direct line is 465-6663.

Thank you.

KLK:plm
12-131.plm

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SEAN PARNELL, GOVERNOR

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

February 27, 2012

Representative Carl Gatto, Chair
House Judiciary Committee
Alaska State Legislature
State Capital, Room 118
Juneau, Alaska 99801-1182

Re: Hearing Request for 2012 Revisor's Bill (SB 173)

Dear Representative Gatto:

The Department of Law would appreciate scheduling of the above bill for a hearing in your committee, at your earliest convenience. The bill makes technical improvements in Alaska law.

We have reviewed the bill and have found no legal concerns.

If you have any questions, please feel free to contact me.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Chief Assistant Attorney General

DEB:ljm

cc: Heather Brakes, Legislative Director, Office of the Governor
Kathryn Kurtz, Assistant Revisor of Statutes, Legislative Affairs Agency

LEGAL SERVICES

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FAX (907) 465-2029
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 27, 2012

SUBJECT: Sectional Summary of the 2012 Revisor's Bill
(Work Order No. 27-LS0888\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Kathryn L. Kurtz KK
Assistant Revisor

The following is a sectional summary of the 2012 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the revisor of statutes

> . . . shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of any portion of the statute law of this state.

To assist the reader in understanding the bill, I have summarized the contents by listing sections that have similar purposes or effects.

Sections that delete, repeal, or update obsolete provisions: Sections 1 - 3, 7 - 12, and 14 amend or repeal provisions that have become obsolete.

Sections that correct errors or oversights: Sections 4 - 6 correct errors or oversights.

Sections that improve the form or substance of the law: Section 13 proposes an amendment to improve the form or substance of the statutory law of Alaska.

SECTION 1. Amends AS 18.50.165(a) to remove the phrase "on and after July 1, 1997" in two places. The subsection requires the state registrar of vital statistics to prepare a form for acknowledging paternity under AS 25.20.055. The date is long past, along with any transition period needed to adapt to the requirements specified -- the date reference has become obsolete.

SECTION 2. Amends AS 18.56.110(g) to remove the phrase "beginning after June 30, 1983". This subsection has been in place since 1981. The limitation it expresses

originally applied to periods beginning after June 30, 1982; that was extended by sec. 2, ch. 35, SLA 1982, to apply to periods beginning after June 30, 1983. Given the length of time the provision has now been in place, the date reference has become obsolete.

SECTION 3. Amends AS 26.05.060 to remove references to 48 U.S.C. 473 - 479, part of a larger portion of the federal code that was omitted from the 1970 (and subsequent) editions of the United States Code because it related to Alaska as a territory. Since those sections became obsolete for federal purposes when Alaska achieved statehood, the reference to them here in the Alaska Statutes is also obsolete. The section retains language that makes the Alaska National Guard and the Alaska Naval Militia subject to all applicable federal laws.

SECTION 4. Amends AS 29.60.800 to change the name of the "municipal harbor facility grant fund" to the "harbor facility grant fund", in order to match the changes made in secs. 6 and 7, ch. 7, SLA 2011. Those sections made regional housing authorities eligible to apply for the harbor facility grants, and removed the word "municipal" in reference to those grants in AS 29.60.810 and 29.60.820.

SECTION 5. Amends AS 42.05.711(r) to remove a definition of the term "renewable energy resources" by reference to AS 42.45.045, since that section is the subject of a delayed repeal scheduled to occur in 2013. The text of the definition now found in AS 42.45.045 is added to AS 42.05.711 by the following section of this bill, so that AS 42.05.711 will not be affected by the repeal of AS 42.45.045. Also changes a reference to the effective date of the subsection to August 31, 2010, the actual effective date of the subsection.

SECTION 6. Amends AS 42.05.711 by adding a new subsection. See the analysis for the previous section.

SECTION 7. Amends AS 43.20.014(f)(1), which defines "school district" by reference to the definition in AS 14.03.126 (repealed by sec. 8, ch. 41, SLA 2006, effective June 30, 2009). This bill section removes the reference to AS 14.03.126, and inserts the text of the definition from that section as it read prior to the repeal.

SECTION 8. In AS 43.55.019(g)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 9. In AS 43.56.018(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 10. In AS 43.65.018(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 11. In AS 43.75.018(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 12. In AS 43.77.045(f)(1), substitutes a reference to the definition of "school district" in AS 43.20.014, as amended by sec. 7, for a reference to AS 14.03.126, which has been repealed. See Sec. 7 for further explanation.

SECTION 13. Amends AS 44.62.190, relating to notice of the proposed adoption, amendment or repeal of a regulation. The paragraph amended, AS 44.62.190(a)(6), provides for electronic notice of these changes to legislators. The amendment deletes the qualifying phrase "if the state agency has the technological capability," because, according to the Regulations Attorney at the Department of Law, all state departments now have this capability. This section also deletes the clause permitting an agency that does not have the technological capability to furnish electronic notification to legislators through an alternative method.

SECTION 14. Repeals AS 21.27.380(f), which provides for the renewal of two year trainee licenses issued to a managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, or surplus lines broker. The provisions permitting issuance of those two year trainee licenses, AS 21.27.600, 21.27.680, 21.27.740, and 21.27.800, were repealed by sec. 53, ch. 96, SLA 2004, making the renewal provision in AS 21.27.380(f) superfluous.

SECTION 15. Provides for an immediate effective date.

TEXT OF REPEALED PROVISION

AS 21.27.380(f):

> (f) A two-year trainee license issued to a managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, or surplus lines broker may be renewed only once.

KLK:plm
12-132.plm

Title 21. INSURANCE
Chapter 21.27. PRODUCERS, AGENTS, ADMINISTRATORS, BROKERS, ADJUSTERS, AND MANAGERS

Sec. 21.27.380. License renewal, lapse, and reinstatement.

(a) Except as provided in this title, the director may renew a license biennially on a date set by the director if the licensee continues to be qualified under this chapter and, on or before the close of business of the renewal date, meets all renewal requirements established by regulation and pays the renewal license fees set under AS 21.06.250 for each license to the director. A licensee is responsible for knowing the date that a license lapses and for renewing a license before expiration. The director shall notify the licensee of the license renewal 30 days before the renewal date.

(b) If a license is not renewed on or before the renewal date set by the director, the license lapses. A licensee may not act as or represent to be an insurance producer, managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, surplus lines broker, or independent adjuster during the time a license has lapsed. The director may reinstate a lapsed license if the person continues to qualify for the license, pays renewal license fees, and a delayed renewal penalty. Reinstatement does not exempt a person from a penalty provided by law for transacting business while unlicensed. A license may not be renewed if it has lapsed for two years or longer.

(c) If a licensee does not wish to renew a license issued under this chapter, the licensee shall surrender the license to the director on or before the close of business of the renewal date in the manner prescribed in AS 21.27.460.

(d) Notice of lapse from the director stating the reason for the lapse shall be mailed to a licensee at the licensee's last address on record with the director. The director shall obtain a certificate of mailing from the United States Postal Service.

(e) A trainee license issued to an independent adjuster shall be for a term not to exceed 12 months and may not be renewed.

(f) A two-year trainee license issued to a managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, or surplus lines broker may be renewed only once.

History -

(Sec. 1 ch 120 SLA 1966; am Sec. 11, 12 ch 26 SLA 1985; am Sec. 23 ch 29 SLA 1987; am Sec. 38 ch 51 SLA 1990; am Sec. 85 ch 67 SLA 1992; am Sec. 43 ch 62 SLA 1995; am Sec. 23 ch 96 SLA 2004; am Sec. 10 ch 1 FSSLA 2005)

Amendment Notes - The 2005 amendment, effective June 25, 2005, rewrote the last sentence in subsection (a).

SB 179

<TARGET><BILL>SB 179</BILL><SUBJECT>SB 179</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 13, 2012 **FURTHER REFERRALS:**

Date of Committee Action: 4/14/12

The JUDICIARY Committee considered: **SB 179**

SENATE BILL NO. 179
"An Act relating to missing vulnerable adult prompt response and notification plans."
SB 179-MISSING VULNERABLE ADULT RESPONSE PLAN

Recommends it be replaced with [X] HCS *or* [ ] CS *for* SB 179 (STA)
***For Senate Bills with new title:* [ ] *Technical Title* [ ] *New Title: HCR*_____ [X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	DPS			X
2	MVA			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Greenberg	✓			
	Hawker	✓			
Vice Chair:	Thompson	X			
Chair:					

Alaska State Legislature

Senate
Health & Social
Committee
Chair
•
Senate
Education Committee
Vice-Chair

Legislative Council
Vice-Chair
•
Senate
Transportation
Committee
•
Senate
Labor & Commerce
Committee

Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org/

Senator Bettye Davis

Date: April 12, 2012

To: Representative Steve Thompson
Vice-Chair, Judiciary

From: Senator Bettye Davis

RE: **Request for SB 179 "Missing Vulnerable Adult Response Plan" to be heard in the State Affairs Committee**

Representative Thompson,

You currently have in your possession (current bill pending House referral) SB 179 – **"An Act relating to missing vulnerable adult prompt response and notification plans."** I am requesting that SB 179 be heard in the Judiciary Committee as soon as possible and have included the bill packet.

SB 179 creates a new statewide alert system to help find vulnerable missing adults. The system, which is similar to the nationwide Amber Alert program, would help local law enforcement notify the public when a mentally or physically impaired Alaskan goes missing. This program is of immediate importance because of the urgency of the issue that it seeks to address. The tragic incident in December of 2011 when a 63-year-old woman in Fairbanks who suffered from Alzheimer's Disease froze to death after becoming disoriented while driving and running out of gas, provides an indication of the immediacy of the issue. With Alaska's increasing senior population and the corresponding growth in the number of Alaskans suffering from Alzheimer's Disease and related dementia, such incidents as the tragedy in Fairbanks can be expected to occur more frequently. Furthermore, the dangers posed by the elements and the potential for wandering into isolated areas that are particular to Alaska create an even greater urgency for an alert system to be implemented. Such a system, which would be operated by the Department of Military Affairs and the Department of Public Safety, is a necessary tool in the protection of Alaska's citizens.

Thanks in advance for your consideration. If you have any questions, please contact Celeste Hodge at (907)-465-4906.

Session: (January – April)
State Capitol, Room #30, Juneau, AK 99801-1182 Phone: (907) 465-3822 · Fax: (907) 465-3756 · Toll Free: (800) 770-3822
Interim: (April – December)
716 West 4th Avenue, Anchorage, AK 99501-2133 · Phone: (907) 269-0144 · Fax: (907) 269-0148

Melanie Lesh

From: Katya Wassillie
Sent: Thursday, April 12, 2012 11:39 AM
To: Melanie Lesh
Subject: SB 179- Missing Vulnerable Adults Prompt Response Plan- Request for Hearing
Attachments: SB 179 Original.pdf; SB 179 Fiscal Note DMVA.pdf; SB 179 Fiscal Note DPS.pdf; SB 179 Sponsor Statement.pdf; SB 179 Judiciary Request for Hearing.pdf; Explanation of Changes 27-LS1250A to 27-LS1250M.pdf; SB 179 Background Information.pdf; SB 179 ACOA support letter.pdf; SB 179 Letter of Support.pdf

Hi Melanie,

Attached are the contents of the request for hearing packet for SB 179- Missing Vulnerable Adults Prompt Response Plan. As soon as we have the current version I'll bring it up to you. Please let me know if you have any questions!

Thank you,

Katya Wassillie- Intern
Office of Senator Bettye Davis
907-465-5194

Alaska State Legislature

Senate
Health & Social
Committee
Chair

•

Education Committee
Vice-Chair

Legislative Council
Vice-Chair

Senate
Military & Veterans Affairs

Senate
Labor & Commerce
Committee

Senator_Bettye_Davis@legis.state.ak.us
http://www.aksenate.org/

Senator Bettye Davis

SPONSOR STATEMENT

SENATE BILL 179-*"MISSING VULNERABLE ADULT RESPONSE PLAN"*

SB179 creates a new statewide alert system to help find vulnerable missing adults. The system, which is similar to the nationwide Amber Alert program, would help local law enforcement notify the public when a mentally or physically impaired Alaskan goes missing.

According to the Alaska Commission on Aging, there were approximately 7,785 Alaskans suffering from Alzheimer's Disease and related dementia in 2010, and that number is expected to grow to more than 17,000 by 2030. Alaska has the fastest growing senior population in the nation and we can't afford to ignore this problem any longer.

Recently, in Fairbanks, a 63-year-old woman suffering from Alzheimer's Disease froze to death after she became disoriented while driving, ran out of gas, and tried walking several miles to seek help. This incident and several others like it demonstrate the need for an alert system to assist in the search for missing vulnerable adults. When a vulnerable adult goes missing, his or her best chance of survival is if someone finds them within 24 to 48 hours.

The bill calls for the Department of Military Affairs to coordinate with Department of Public Safety to create and implement prompt response and notification plans that would use a voluntary network of statewide and local newspapers as well as radio and television stations to rapidly alert the public that a vulnerable adult is missing. The bill also calls for both departments to establish standards on what triggers an alert and when a vulnerable adult is officially considered missing. This legislation would ensure the search for Alaska's most vulnerable citizens happens a lot faster.

Currently, there are 28 states that have implemented or will implement Silver Alert programs, an increase of 10 states since the National Association of States United for Aging and Disabilities (NASUAD's) last report.

Session: (January – April)
State Capitol, Room #30, Juneau, AK 99801-1182 Phone: (907) 465-3822 · Fax: (907) 465-3756 · Toll Free: (800) 770-3822
Interim: (April – December)
716 West 4th Avenue, Anchorage, AK 99501-2133 · Phone: (907) 269-0144 · Fax: (907) 269-0148

HOUSE CS FOR SENATE BILL NO. 179(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS DAVIS, Wielechowski, Dyson, Kookesh, Ellis, Meyer, Menard, Paskvan, McGuire, Stedman, Thomas, Olson, Wagoner, Stevens

A BILL

FOR AN ACT ENTITLED

"An Act relating to missing vulnerable adult prompt response and notification plans."

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

*** Section 1.** AS 44.35.020(a) is amended to read:

(a) The Department of Military and Veterans' Affairs shall

(1) conduct the military affairs of the state as prescribed by the Military Code;

(2) cooperate with the federal government in matters of mutual concern pertaining to the welfare of Alaskan veterans, including establishing, extending, or strengthening services for veterans in the state; [AND]

(3) annually, not later than February 1, make available a report to the legislature, through the governor, outlining the department's activities during the previous calendar year; the department shall notify the legislature that the report is available**; and**

(4) cooperate with the Department of Public Safety to develop and implement vulnerable adult prompt response and notification plans under

AS 44.41.060.

* **Sec. 2.** AS 44.41 is amended by adding a new section to read:

Sec. 44.41.060. Missing vulnerable adult prompt response and notification plans. (a) The Department of Public Safety, in cooperation with the Department of Military and Veterans' Affairs, shall, using statewide and local radio and television broadcasters and newspaper publishers, develop missing vulnerable adult prompt response and notification plans for use by law enforcement to locate a vulnerable adult who is missing, or who has disappeared, and coordinate the use of those plans. The plans must, at a minimum, include standards

(1) for determining when implementation of a notification plan would be appropriate; at a minimum, these standards must address

(A) when a vulnerable adult is to be considered missing; and

(B) the format, contents, and distribution process of reports prepared by participating law enforcement agencies searching for a missing vulnerable adult;

(2) for determining the proper area in which the plan is to be implemented;

(3) providing for the voluntary participation of radio and television broadcasters and newspaper publishers in the plan.

(b) Notwithstanding another provision of law,

(1) a law enforcement agency, or an officer or employee of the law enforcement agency, is not civilly liable for

(A) failing to participate in a missing vulnerable adult prompt response and notification plan;

(B) failing to implement a missing vulnerable adult prompt response and notification plan; or

(C) activating a missing vulnerable adult prompt response and notification plan if implementation is undertaken in good faith;

(2) a radio or television broadcaster or newspaper publisher is not civilly liable for participating in a missing vulnerable adult prompt response and notification plan or for participating in the actual implementation of a plan if the

broadcaster or publisher has verified the authenticity of that implementation with the law enforcement agency.

(c) In this section, "vulnerable adult" has the meaning given in AS 47.24.900.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 179**
Fiscal Note Number: 2
(S) Publish Date: 2/17/12

Identifier (file name): SB179-MVA-CO-2-6-12
Title: Missing Vulnerable Adult Response Plan
Sponsor: SENATOR DAVIS
Requester: (S) State Affairs

Dept. Affected: Dept. of Military & Veterans Affairs
Appropriation: Military and Veterans Affairs
Allocation: Homeland Security & Emergency Management
OMB Component Number: 2657

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: McHugh Pierre, Deputy Commissioner — Phone: (907) 428-6003
Division: Office of the Commissioner, DMVA — Date/Time: 2/6/12 4:00 PM
Approved by: Major General Thomas H. Katkus — Date: 2/6/2012
Commissioner, DMVA

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 179

Analysis

The bill requires cooperation between the Department of Military and Veterans Affairs (DMVA) and Department of Public Safety to develop and implement vulnerable adult prompt response and notification plans under AS 44.41.060.

There is no fiscal impact to DMVA for this bill.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB179**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB179-DPS-R&I-02-08-12
Title: MISSING VULNERABLE ADULT RESPONSE PLAN
Sponsor: Senator Davis
Requester: (S) STA

Dept. Affected: Public Safety
Appropriation: Statewide Support
Allocation: Criminal Records & Identification
OMB Component Number: 1190

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: David Schade, Director — Phone: (907) 269-0202
Division: Statewide Services — Date/Time: 2/8/12 5:05 PM
Approved by: Joseph A. Masters, Commissioner — Date: 2/8/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB179

Analysis

This bill amends AS 44.41 by adding a new section requiring the Department of Public Safety (DPS), in cooperation with the Department of Military and Veterans' Affairs (DMVA), to develop and implement missing vulnerable adult response and notification plans using statewide and local radio and television broadcasters and newspaper publishers.

It is expected that DPS will implement the notification using DMVA's modernized emergency alert system, EMnet. This system is new and it is anticipated that it includes all the capabilities necessary to implement the missing vulnerable adult notification on a statewide or regional basis. Therefore, a zero fiscal note is being submitted.

A **Silver Alert** is a public notification system in the United States to broadcast information about missing persons - especially seniors with Alzheimer's Disease, dementia or other mental disabilities - in order to aid in their return.

Silver Alerts use a wide array of media outlets—such as commercial radio stations, television stations, and cable TV—to broadcast information about missing persons. Silver Alerts also use variable-message signs on roadways to alert motorists to be on the lookout for missing seniors. In cases in which a missing person is believed to have gone missing on foot, Silver Alerts have used Reverse 911 or other emergency notification systems to notify nearby residents of the neighborhood surrounding the missing person's last known location.

Supporters of Silver Alert point to America's growing elderly population as a reason to support new programs to locate missing seniors. Approximately 6 in 10 dementia victims will wander at least once, health care statistics show, and the numbers are growing worldwide, fueled primarily by Alzheimer's disease.[1] If not found within 24 hours, up to half of wandering seniors with dementia suffer serious injury or death.[2]

History

In December 2005, Oklahoma state Representative Fred Perry (R-Tulsa) announced his intention to introduce an "AMBER Alert for seniors," which he dubbed "Silver Alert."[3] In March 2006, the Oklahoma House of Representatives passed H.R. 1075, a resolution calling for a Silver Alert system to find missing seniors.[4] In response to this non-binding resolution, the Oklahoma Department of Public Safety added Silver Alert notifications to the statewide alerts sent to law enforcement agencies and the media for rapid distribution.[5] In April 2009, Governor Brad Henry signed legislation permanently establishing the Silver Alert program.[6]

In Georgia, public efforts to locate missing seniors increased following the April 2004 disappearance of Mattie Moore, a 68-year-old Atlanta resident suffering from Alzheimer's disease. Eight months after Moore's disappearance, her body was found 500 yards from her home.[7] The City of Atlanta created "Mattie's Call" to coordinate and support Metro Atlanta law enforcement, emergency management and broadcasters to issue an urgent bulletin in missing persons cases involving persons with Alzheimer's disease, dementia and other mental disabilities.[8] Legislation to create a statewide Mattie's Call program was enacted in April 2006.[9]

In Florida, Mary Zelter, an 86-year-old resident of Largo, drove away from her assisted living facility on Feb. 26, 2008 and never returned. Her body was found a week later 10 miles (16 km) away in the Intracoastal Waterway near a Clearwater boat ramp. Her submerged car was nearby. This tragedy prompted Pinellas County officials to create a Silver Alert pilot program that later grew into a statewide initiative.[10]

[edit] National growth

29 states and New York City[11] have Silver Alert or similar programs targeting missing seniors. More than 195 million people live in jurisdictions served by Silver Alert or a similar program.

20 states have missing senior recovery programs that are formally called "Silver Alert":

- Arkansas[12]
- Connecticut[13]
- Florida[14]
- Illinois[15]
- Indiana[16]
- Kansas[17]
- Louisiana[18]
- Maine[19]
- Maryland[20]
- Massachusetts[21]
- Mississippi[22]
- Nevada[23]
- New Jersey[24]
- North Carolina[25]
- Oklahoma[26]
- Rhode Island[27]
- South Carolina[28]
- Tennessee[29]
- Texas[30]
- West Virginia[31]

Additionally, 9 states have programs to help locate missing seniors that are not officially called "Silver Alert" but contain criteria similar to existing Silver Alert programs:

- Alabama, Missing Senior Alert[32]
- Delaware, Gold Alert[33]
- Colorado, Missing Senior Citizen Alert[34]
- Georgia, Mattie's Call[35]
- Kentucky, Golden Alert[36]
- New Hampshire, Missing Senior Citizen Alert[37]
- New York, Golden Alert[38]
- Ohio, Missing Adult Alert[39]
- Virginia, Senior Alert[40]

SILVER ALERT INITIATIVES IN THE STATES

11/9/2010

Protecting Seniors with Cognitive Impairments

Silver Alert Initiatives in the States

PROTECTING SENIORS WITH COGNITIVE IMPAIRMENTS

INTRODUCTION

In March 2009, NASUAD released a report that identified states that have a Silver Alert program, how they fund it, and how each administers the program. The report revealed that 18 states have a Silver Alert program, 14 states had pending legislation, and 18 states did not have legislation.

Several states have implemented Silver Alert programs since our last report. The following chart reflects the updated status of states across the country.

States with Silver Alert Programs		States with Pending Legislation	States Without Silver Alert Programs
Alabama *	Mississippi *	California	Alaska
Arizona	Missouri	Hawaii	Idaho
Arkansas **	New Hampshire	Massachusetts	Illinois
Colorado	New Jersey *	Pennsylvania	Iowa
Connecticut *	New Mexico		Maine
Delaware	North Carolina		Michigan
Florida	Oklahoma		Montana
Georgia	Ohio		Nebraska
Indiana *	Rhode Island		Nevada
Kansas *	South Carolina		New York
Kentucky	Tennessee *		North Dakota
Louisiana	Texas		Oregon
Maryland *	Virginia		South Dakota
Minnesota	West Virginia *		Utah
			Vermont
			Washington
			Wisconsin ***
			Wyoming

* State has legislation that went into effect since NASUAD's 2009 Report.
** Arkansas has a Memorandum of Understanding that establishes the Silver Alert Program.
*** Wisconsin governor vetoed legislation for a lack of funding.

States with Silver Alert Programs

Currently, there are 28 states that have implemented or will implement Silver Alert programs, an increase of 10 states since the NASUAD's last report. The following section provides a brief summary of the legislation that establishes the programs, the agencies administering the programs, and the program requirements for initiating an alert. The links below will provide you with further information on each state's Silver Alert program.

Alabama

The Alabama Missing Senior Citizen Alert Act (HB 33) went into effect on June 1, 2009. The purpose of this law is to provide immediate response to missing or lost seniors age 60 or older who are at risk of bodily harm or death and to gain the voluntary assistance of the broadcast media to help locate missing seniors. The Department of Public Safety, who administers this program, works collaboratively with other local and state law enforcement agencies, the Alabama Association of Broadcasters and licensed broadcasters in the state.

To view the legislation, please visit the following Web site.

http://www.dps.state.al.us/ABI/pdf/MissingSeniorAct.pdf

Arkansas

House Bill 2087, "An Act to Establish the 'Silver Alert System' for Adults Who Are Living with Dementia or Other Cognitive Impairment," was filed, but it never became law. However, in March 2009, the Arkansas State Police entered into a Memorandum of Understanding with the Arkansas Sheriffs' Association and the Arkansas Association of Chiefs of Police to host an Internet website that provides Arkansas broadcasters and news organizations a means to receive Arkansas Silver Alerts that are shared with the public. Silver Alerts are disseminated for missing persons 18 years of age or older who are living with dementia or other cognitive impairment.

To view the legislation, please visit the following Web site.

https://staging.arkleg.state.ar.us/ftproot/bills/2009/public/HB2087.pdf

Connecticut

Substitute Senate Bill 451 went into effect July 1, 2009 establishing Connecticut's Silver Alert System. The Department of Public Safety's Missing Child Information Clearinghouse administers the program and notifies the public of missing persons 65 years of age or older and anyone 18 or over who has a mental impairment.

To view the legislation, please visit the following Web site.

http://search.cga.state.ct.us/dtSearch_cga.html

Indiana

Governor Mitch Daniels signed Senate Bill 307 to establish the Indiana Silver Alert, effective July 1, 2009. The Indiana Clearinghouse for Information on Missing Children and Missing Endangered Adults administers the program and works collaboratively with private organizations and law enforcement agencies in alerting the public of missing persons age 18 or older with mental illness, dementia, or other mental or physical incapacity.

To view the legislation, please visit the following Web site.

http://coinwit.com/fonca/inc/webreturn.?url=http%3A%2F%2Fwww.in.gov%2Fapps%2Flsa%2Fsession%2Fbillwatch%2Fbillinfo%3Fyear%3D2009%26session%3D1%26request%3DgetBill%26docType%3DSB%26docNo%3D307

Kansas

The Kansas Silver Alert Plan was implemented on July 30, 2009 following a resolution that called for the establishment of this senior alert system, but did not require it by law (SHL Resolution 2506). It is administered by the Kansas Bureau of Investigation, which collaborates with local law enforcement agencies and the media to alert the public of missing persons living with dementia or persons over age 65 with a medical or mental condition or one who is at risk of harming himself.

The following Web site provides the protocol and policies for the Silver Alert Plan.

http://www.ksag.org/page/attorney-general-establishes-silver-alert-protocol

Maryland

In October 2009, Maryland established its Silver Alert Program (HB 192) that is designed to alert the public about missing persons with cognitive impairments such as Alzheimer's or dementia. The Department of State Police administers the statewide program and works collaboratively with the State Highway Administration on this initiative.

You can view the bill by going to the following Web site.

http://mlis.state.md.us/2009rs/fnotes/bil_0002/hb0192.pdf

Mississippi

The Mississippi Silver Alert System Act of 2010 (HB 664) went into effect July 1, 2010. The Bureau of Investigation of the Department of Public Safety will be responsible for implementing the statewide alert system. The purpose of the Silver Alert System is to provide a tiered, rapid response system to notify the public about missing endangered adults age 18 or older with dementia or other cognitive impairments. The Bureau of Investigation will work with local law enforcement agencies and the Mississippi Highway Patrol Headquarters Communication Center to alert the public about missing persons.

You can view the bill by going to the following Web site.

http://billstatus.ls.state.ms.us/documents/2010/pdf/HB/0600-0699/HB0664PS.pdf

New Jersey

The Silver Alert System Act went into effect on December 22, 2009. The State Police administers the program and disseminates missing person information on people age 65 or older to broadcast media, the Department of Transportation, the New Jersey Highway Authority, the New Jersey Turnpike Authority, and the South Jersey Transportation Authority.

You can view the bill by going to the following Web sites.

http://www.njleg.state.nj.us/2008/Bills/A3000/1844_I1.HTM

http://www.njleg.state.nj.us/2008/Bills/S2000/1844_I1.HTM

Tennessee

The Tennessee Senior Alert Act went into effect on August 4, 2009. The Tennessee Bureau of Investigation administers the Silver Alert system that provides a statewide system for the rapid dissemination of information on missing persons age 18 or older who have dementia or other cognitive impairment.

You can view the bill by going to the following Web site.

http://www.capitol.tn.gov/Bills/106/Bill/HB0346.pdf

West Virginia

HB 2504 was signed into law by Governor Joe Manchin and went into effect on July 10, 2009 establishing the West Virginia's Silver Alert Plan. The State Police administers the program by providing alerts for cognitively impaired missing persons to broadcast media, the Department of Transportation, the Division of Highways, the West Virginia Turnpike Commission, and affected authorities. HB 2504 does not specify an age requirement of a cognitively impaired missing person.

You can view the bill by going to the following Web site.

http://www.legis.state.wv.us/Bill_Text_HTML/2009_SESSIONS/RS_BILLS/hb2504%20enr%20sub.htm

Pending Legislation

California

On December 22, 2008, Senators Alquist, Correa, and Oropeza introduced SB 38, a bill that would establish a missing senior person alert system. The bill specifies that a missing person would have to be 65 years of age or older and must have an impaired mental condition. As of August 27, 2009, there has been a second reading of the bill and it is currently being held in committee.

You can view the bill and its history by going to the following Web site.

http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=sb_388&sess=CUR&house=B&author=cleveland

Hawaii

Since January 2009, Hawaii legislators have introduced six bills that would establish a Silver Alert system in their state. However, it appears that SB2226 SD2 HD1 is the only bill that has received considerable action. It was introduced January 21, 2010 and, as of March 12, 2010, it passed the second reading as amended in HD 1 and was referred to the Committee on Judiciary without opposition. The bill specifies that the public alert would be made for missing senior citizens and defines a senior citizens as one who is 65 years of age or older.

You can view the bill and its history by going to the following Web site.

http://www.capitol.hawaii.gov/session2010/bills/SB2226_HD1_.pdf

http://www.capitol.hawaii.gov/session2010/lists/measure_indiv.aspx?billtype=SB&billnumber=2226

Massachusetts

H4344 (new draft of S322, H44, and H603) would establish a Silver Alert community response system to protect seniors. This Silver Alert system would be used to alert the public of missing adults with serious memory impairment such as Alzheimer's disease or other dementia. The last action recorded for this bill was on November 17, 2009 when the Joint Committee on Community Development and Small Business reported favorably on it and referred it to the House Committee on Ways and Means.

You can view the bill and its history by going to the following Web site.

http://www.mass.gov/legis/bills/house/186/ht04pdf/ht04344.pdf

http://www.mass.gov/legis/186history/h04344.htm

Pennsylvania

On March 5, 2009, the General Assembly of Pennsylvania referred HB 726 to Committee on Aging and Older Adult Services. HB 726, which is also referred to as the Silver Alert for Missing Senior Citizens Act, would establish a statewide alert system for notifying the public of missing persons age 65 or older who have an impaired mental condition and whose disappearance poses a credible threat to the senior citizens' health and safety. The Secretary of the Department of Aging is responsible for appointing a director to serve as the statewide coordinator of the alert system.

You can view the bill and its history by going to the following Web site.

http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2009&type=HB&body=H&bill=0726

NASUAD will continue to monitor pending legislations.

Legislation That Did Not Pass

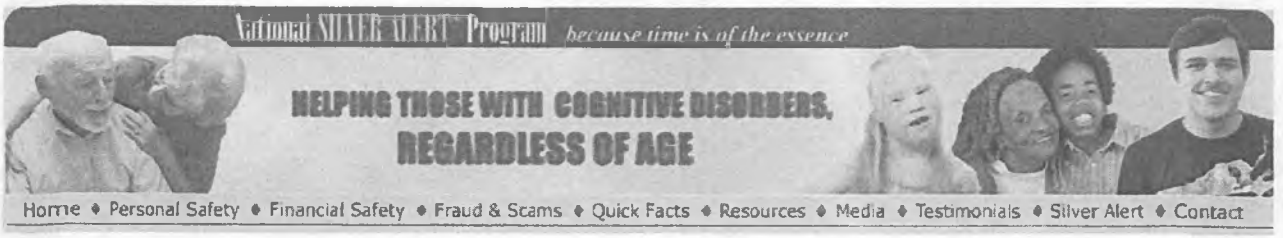
Nevada
According to the Nevada Silver Haired Legislative Forum, AB 4 that would establish a statewide Silver Alert system was referred to the Health and Human Services Committee and died on April 11, 2009 due to no further action being taken on the bill.

Vetoed Legislation

Wisconsin
Unfunded legislation to establish a Silver Alert program was vetoed by Governor Jim Doyle.

For more information:

John Thompson
National Association of States United for Aging and Disabilities
1201 15th Street, NW
Suite 350
Washington, DC 20005
202-898-2578
www.nasuad.org



Silver Alert

Modeled after the Amber Alert, the Silver Alert is an emergency system in which law enforcement can broadcast regional or statewide alerts for missing seniors and/or other adults with Alzheimer's or other cognitive disorders.

A growing number of states are enacting laws that call for the development of the Silver Alert program and some have implemented their own notification systems.

Activation criteria varies from state to state, see list below for information on the Silver Alert program in your state.

Alabama	
Effective Date	March 25, 2009 AKA "Missing Senior Citizen Alert"
Administered By	Department of Public Safety
Age Requirement	Not specified
Phone	contact your local law enforcement agency
Website	http://community.dps.alabama.gov/Pages/wfAlertListing.aspx?Type=30&Status=5,10
Other	House Bill 33

Arizona	
Effective Date	October 2008 AKA "Endangered Person Alert"
Administered By	Department of Public Safety
Age Requirement	Must be age 18 or older
Phone	contact your local law enforcement agency or (602) 223-2212
Website	http://www.azag.gov/press_releases/oct/2008/End%20Person%20Alert%20Info.pdf
Other	

Arkansas	
Effective Date	April 2009
Administered By	The Arkansas State Police, working with the Arkansas Sheriffs' Association and Arkansas Association of Chiefs of Police
Age Requirement	Adults with Alzheimer's or other cognitive disorders
Phone	contact your local law enforcement agency Arkansas State Police: 501-618-8000
Website	https://www.ark.org/asp/alerts/mnaa/silver.php
Other	

Colorado	
Effective Date	February 2007
Administered By	Colorado Department of Public Safety, Bureau of Investigation (CBI)
Age Requirement	Must be age 60 or older
Phone	contact your local law enforcement agency

Website	None
Other	House Bill 07-1005

Connecticut	
Effective Date	July 1, 2009
Administered By	Department of Public Safety
Age Requirement	(1) anyone 65 or over and (2) anyone 18 or over who has a mental impairment
Phone	contact your local law enforcement agency
Website	None
Other	Senate Bill 451

Delaware	
Effective Date	July 2008 AKA "Gold Alert Program"
Administered By	The initial decision to issue a local Gold Alert is at the discretion of the investigating law-enforcement agency.
Age Requirement	Must be age 60 or older
Phone	contact your local law enforcement agency
Website	None
Other	CHAPTER 85. STATE BUREAU OF IDENTIFICATION. Subchapter VII. Gold Alert Program for Certain Missing Persons

Florida	
Effective Date	October 8, 2008
Administered By	Florida Department of Law Enforcement
Age Requirement	Must be age 60 or older
Phone	contact your local law enforcement agency
Website	http://www.fdle.state.fl.us/MCICSearch/Documents/SilverAlertFAQ.pdf
Other	House Bill HM 753

Georgia	
Effective Date	April 2006 AKA "Mattie's Call"
Administered By	Georgia Bureau of Investigation
Age Requirement	Missing disabled adults
Phone	contact your local law enforcement agency
Website	http://alerts.gbi.georgia.gov/00/channel_modifieddate/0,2096,67865199_74426401,00.html
Other	House Bill 728

Illinois	
Effective Date	January 1, 2010 AKA "Endangered Missing Person Advisory Program"
Administered By	The Illinois Department on Aging (IDoA), in coordination with the Illinois State Police
Age Requirement	Older adults
Phone	contact your local law enforcement agency
Website	http://www.state.il.us/aging/1news_pubs/news/2009-1230.htm http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=8136
Other	Senate Bill 0027

Indiana	
Effective Date	July 2009
Administered By	Indiana Clearinghouse for Information on Missing Children and Missing Endangered Adults
Age Requirement	Must be age 18 or older
Phone	contact your local law enforcement agency or 800-831-8953
Website	http://www.in.gov/silveralert/index.htm http://www.in.gov/silveralert/2331.htm

Other	Senate Bill 307

Kansas	
Effective Date	July 30, 2009
Administered By	Kansas Bureau of Investigation Communications
Age Requirement	Must be age 65 or older
Phone	contact your local law enforcement agency
Website	http://www.ksag.org/files/SilverAlertProtocol.pdf http://www.ksag.org/page/attorney-general-establishes-silver-alert-protocol
Other	SHL Resolution No. 2506

Kentucky	
Effective Date	July 2008 AKA "Golden Alert"
Administered By	Kentucky Division of Emergency Management
Age Requirement	Must be age 18 or older
Phone	Contact your local law enforcement agency or (502) 607-1638
Website	none
Other	Senate Bill 125

Louisiana	
Effective Date	July 2008
Administered By	Department of Public Safety and Corrections
Age Requirement	Must be age 60 or older
Phone	Contact your local law enforcement agency
Website	none
Other	House Bill 1378

Maine	
Effective Date	April 12, 2010
Administered By	Maine Department of Public Safety
Age Requirement	Must be age 18 or older
Phone	Contact your local law enforcement agency
Website	none
Other	Legislative Documents: HP1138, LD 1610, item 1

Maryland	
Effective Date	October 2009
Administered By	Maryland State Police
Age Requirement	Anyone who may have a cognitive disorder
Phone	Contact your local law enforcement agency or (410)486-3101
Website	
Other	House Bill 192 Press Release

Minnesota	
Effective Date	July 2009 AKA "Brandon's Law"
Administered By	Bureau of Criminal Apprehension
Age Requirement	All ages
Phone	Contact your local law enforcement agency
Website	None
Other	S.F. No. 1146 (Minnesota Missing Person's Act)

Mississippi	
Effective Date	July 1, 2010 "Mississippi Silver Alert System Act of 2010."

Administered By	Mississippi Department of Public Safety
Age Requirement	Must be age 18 or older
Phone	Contact your local law enforcement agency
Website	None
Other	House Bill 664, House Bill 664 Amended

Missouri	
Effective Date	Silver Alert House Bill still in limbo Current program is called "Endangered Person Advisory"
Administered By	Department of Public Safety
Age Requirement	Must be age 18 or older
Phone	Contact your local law enforcement agency
Website	Website
Other	House Bill 1119

New Hampshire	
Effective Date	Approved July 29, 2009, Effective on July 1, 2010
Administered By	Unknown at this time
Age Requirement	Must be age 55 or older
Phone	Contact your local law enforcement agency
Website	None
Other	House Bill 279

New Jersey	
Effective Date	December 23, 2009 law signed into effect
Administered By	State Police
Age Requirement	Must be age 65 or older
Phone	Contact your local law enforcement agency
Website	http://www.njleg.state.nj.us/2008/Bills/A3000/2844_I1.HTM
Other	Assembly No. 2844 Senate Bill 1551 and Senate Bill 1844

New York	
Effective Date	February 20, 2009, bill introduced, but still not signed into law at this time (Apr 2010)
Administered By	State Police
Age Requirement	Must be age 18 or older
Phone	Contact your local law enforcement agency
Website	None, but a list of missing persons is available online. web link
Other	Bills A05783, S04307

New Mexico	
Effective Date	The New Mexico Missing Persons Clearinghouse issues a "Endanger Person Advisory"
Administered By	Department of Public Safety
Age Requirement	All ages
Phone	Contact your local law enforcement agency or (505) 827-9297
Website	http://missingpersons.dps.state.nm.us/
Other	

North Carolina	
Effective Date	Approved June 19, 2009
Administered By	Department of Crime Control and Public Safety
Age Requirement	All ages
Phone	Contact your local law enforcement agency
Website	http://www.nccrimecontrol.org/Index2.cfm?a=000003,000005,000081,001670 http://www.nccrimecontrol.org/div/ale/missingpersons/SilverAlertBrochure3c.pdf
Other	General Statute § 143B-499.8

Oklahoma	
Effective Date	November 1, 2009, passed Senate April 16, 2009
Administered By	Department of Public Safety - Commissioner of Public Safety
Age Requirement	Must be age 60 or older
Phone	Contact your local law enforcement agency
Website	none
Other	House Bill 2030, 63 O.S. §1-1990.2

Ohio	
Effective Date	June 20, 2008 AKA "Missing Adult Alert"
Administered By	Ohio Emergency Management Agency
Age Requirement	Must be age 65 or older
Phone	Contact your local law enforcement agency or 866-693-9171
Website	http://www.missingadults.ohio.gov/OhioMAA/Home.aspx
Other	Senate Bill 87, Sec. 5502.522

Pennsylvania	
Effective Date	September 1, 2009 (based on HB276, although no program confirmation can be found)
Administered By	State Police
Age Requirement	Must be age 65 or older
Phone	Contact your local law enforcement agency
Website	none
Other	House Bill 2558 (2008). House Bill 726 (2009)

Rhode Island	
Effective Date	January 3, 2008 AKA ""Missing Senior Citizen Alert Program"
Administered By	State Police
Age Requirement	Must be age 60 or older
Phone	Contact your local law enforcement agency
Website	none
Other	S7048 and H7048

South Carolina	
Effective Date	May 2010 AKA "The Endangered Person Notification System"
Administered By	South Carolina Law Enforcement Division Missing Persons - Missing Person Information Center
Age Requirement	All ages
Phone	Contact your local law enforcement agency or 803-737-9000
Website	none
Other	Article 5, Chapter 3, Title 23 of the 1976 Code is amended by adding Section 23-3-330, January 13, 2009. House Bill 3817 introduced on March 24, 2009. A192, R240, H3719 General Bill.

Tennessee	
Effective Date	August 4, 2009
Administered By	Tennessee Bureau of Investigation
Age Requirement	Must be age 18 or older
Phone	Contact your local law enforcement agency
Website	none
Other	House Bill 346

Texas	
Effective Date	Sept 1, 2007
Administered By	Department of Public Safety

Age Requirement	Must be age 65 or older
Phone	Contact your local law enforcement agency or Texas Silver Alert Coordinator (512) 424-2208
Website	ftp://ftp.txdps.state.tx.us/dem/amber/silver_alert_instructions.pdf
Other	

Virginia	
Effective Date	July 2007 AKA "Senior Alert System"
Administered By	Virginia State Police
Age Requirement	Must be age 60 or older
Phone	Contact your local law enforcement agency
Website	http://www.vasenioralert.com/index.htm
Other	§ 52-34.5

West Virginia	
Effective Date	April 22, 2009
Administered By	The State Police
Age Requirement	No minimum age
Phone	Contact your local law enforcement agency
Website	none
Other	House Bill 2504 §15-3B-3

Free Online Registration
Home | Personal Safety | Financial Safety | Fraud & Scams | Quick Facts | Resources
Silver Alert Bracelets & Pendants | Media | Testimonials | Silver Alert | Contact

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print

Fairbanks woman's death sheds light on harsh reality of living with Alzheimer's disease

by Dorothy Chomicz / dchomicz@newsminer.com
12.03.11 - 12:28 am

FAIRBANKS — When you are caring for a loved one with Alzheimer's, the possibility of that person wandering off is an ever-present worry. In fact, six out of 10 Alzheimer's patients will wander at some point, and many do so repeatedly, according to the Alzheimer's Association website (www.alz.org).

The situation becomes even more serious in places like Alaska, where severe weather conditions can spell death for someone who has wandered outside and is unprepared for the elements.

This danger was brought to reality this week when Bonnie L. Scott, a 63-year-old Fairbanks woman who suffered from Alzheimer's, became confused while driving an acquaintance home in Fairbanks and ended up 80 miles northeast on the Steese Highway.

Scott wandered away from her vehicle after running out of gas, and Alaska State Troopers were able to follow her footprints into the woods, where they found her body. She had died of exposure after walking by a manned Department of Transportation maintenance facility in which she could have found shelter and aid.

Most cases of wandering do not occur in vehicles and are instead instances of the individual simply walking out of the door while a caretaker is distracted or sleeping.

To minimize the risk of wandering, experts suggest making changes around the home, such as camouflaging exit doors by painting them the same color as the wall, and draping door knobs with same-color cloth.

Placing a mirror next to the door can also stop the potential wanderer — they either think there is someone else there, or they become distracted by their own reflection.

Extra door latches can be placed at the tops or bottom of doors, where they will not be noticed, and car keys should be kept hidden. Chimes or alarms can be placed on doors to alert the caregiver.

Since wandering is often caused by restlessness, fear or physical need, make sure that basics such as hunger, thirst and the need to use the toilet are all met regularly.

If it is physically possible, provide the individual with recreational opportunities such as short, supervised walks or get them to help with simple household chores. Reassure them if they feel agitated or fearful, and give them a routine to help them feel secure.

Even though caregivers are often tempted to keep a person's Alzheimer's a secret, it is important that neighbors and family members be told of potential wandering, and be provided with a good contact number. Always keep a current, clear photo of the individual on hand, and consider keeping one on file with your local police department.

Keep as much identification as possible on the person — place it in every coat, purse, pocket or wallet, and think about providing the person with an ID bracelet or necklace.

Since identification is only helpful once the person has been found, consider purchasing an electronic tracking device that can be used to locate them before tragedy occurs. According to the Alzheimer's Foundation of America website, a person with dementia "only stands a 50 percent chance of survival if they are not found within the first 24 hours."

Finally, do not leave the individual alone. Since it is virtually impossible for one person to keep an Alzheimer's sufferer in sight at all times, it is essential that the caregiver establish a support network that can help out and provide a break when needed.

Alzheimer's Resource of Alaska provides services, information and education to Alaskans dealing with Alzheimer's and has five offices statewide. They can be reached at their Fairbanks office at 452-2277, or visited at www.alzalaska.org.

Contact staff writer Dorothy Chomicz at 459-7590.

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Celeste Hodge

From: O'Hare, Michael F (MVA) <mike.ohare@alaska.gov>
Sent: Monday, January 30, 2012 1:34 PM
To: Celeste Hodge
Cc: Pierre, McHugh (MVA); Howell, Kelly A (DPS); Fisher, Bryan J (MVA); Carney, Roberta D (MVA)
Subject: FW: 27-LS1250\A - An Act relating to missing vulnerable adult prompt response and notification plans
Attachments: Silver Alert Updated Report_11-9-10.pdf

Celeste,

Per your request, and after review of the draft legislation, I am providing the following response from our Emergency Operations Section:

A portion of the Alaska Amber Alert Plan involves the local law enforcement agency and the Alaska State Troopers providing additional "emergency public information" to broadcast outlets to assist with the recovery effort. Most Sliver Alert plans revolve around that. Not using EAS, but notifying and providing information on the missing person, vehicle, etc, and the broadcast outlets voluntarily providing that information to their viewers/listeners. In many cases State DOTs or those who control highway signs would also post the information to the public, as well as the investigating law enforcement agency providing a BOLO alert in the state APSIN/NCIC systems.

Attached is a seven page report from the 2010 summary of States performed by the National Association of States United for Aging and Disabilities. The report is a summary of states that have plans, and the enabling legislation behind it. It doesn't speak to operational aspects.

From an EAS standpoint there is no event code that is designated for missing persons (adults), so we couldn't utilize EAS like we do for Amber alerts, which uses the special "Child Abduction Emergency" code.

We certainly could work with DPS on this plan, the same players from AST, DHS&EM, APD, and the Alaska Broadcasters Association could work out the plans that would be required by the bill/law.

So, to be clear, we have no issues on the draft legislation.

Please do not hesitate to contact me should you have any questions. Thank you.

Sincerely,

Mike O'Hare

Michael F. O'Hare
State of Alaska
Department of Military and Veterans Affairs
Division of Homeland Security and Emergency Management
Deputy Director
(907) 428-7066 Office
(907) 529-2406 Cell
(907) 428-7009 Fax
mike.ohare@alaska.gov

From: Fisher, Bryan J (MVA)
Sent: Thursday, January 26, 2012 4:09 PM

www.alz.org

Public Policy Office
1212 New York Avenue, NW
Suite 800
Washington, DC 20005-6105

202 393 7737 p
866 865 0270 f

alzheimer's association

8 February 2012

Senator Bill Wielechowski
Chairman, Senate State Affairs Committee
State Capitol Room 101
Juneau AK, 99801

Dear Senator Wielechowski:

On behalf of the Alzheimer's Association, I am pleased to extend our support for Senate Bill 179, sponsored by Senator Bettye Davis, which would address the need for a prompt response system when a vulnerable adult has gone missing. The Association supports creating a system that provides for dissemination of relevant information about missing individuals with Alzheimer's disease or a related dementia to appropriate law enforcement personnel.

An estimated six out of ten people with Alzheimer's disease will wander from their homes or caregiving facilities at some point during the disease process. Most people with dementia who wander are found within 1.5 miles of home, and 50 percent of individuals who wander risk serious injury or death if not found within the first 24 hours. Environmental dangers pose serious threats to people with Alzheimer's who are particularly vulnerable to succumb to natural elements such as weather, and who may lose their ability to remember when to eat or drink. An immediate response with emphasis on local searching is imperative once an individual with dementia is reported missing.

The Alzheimer's Association supports a comprehensive approach to constructing a notification, or "silver alert", system that addresses the needs of persons with dementia and their families. This approach includes first responder dementia training and coordinating search efforts between families, caregivers and local authorities. The system should be interoperable with existing programs, such as the MedicAlert and Safe Return program, which is a nationwide identification, support and enrollment program providing assistance to adult wanders and their families.

I appreciate the opportunity to comment on this issue and applaud Senator Davis for spearheading this effort.

With best regards,

Randi Chapman
Director, State Affairs
Alzheimer's Association

Cc: Senator Bettye Davis

STATE OF ALASKA

DEPT. OF HEALTH & SOCIAL SERVICES

Alaska Commission on Aging

SEAN PARNELL, GOVERNOR

P.O. BOX 110693
JUNEAU, ALASKA 99811-0693
PHONE: (907) 465-3250
FAX: (907) 465-1398

April 6, 2012

The Honorable Bob Lynn, Chair
House State Affairs Committee
Alaska State Capitol, Room 108
Juneau, AK 99801-1182

Subject: Support for SB 179, Missing Vulnerable Adult Prompt Response Plan

Dear Chair Lynn:

The Alaska Commission on Aging (ACoA) is pleased to offer our support for SB 179 to establish a vulnerable adult prompt response and notification plan by the Department of Public Safety in cooperation with the Department of Military and Veterans' Affairs. SB 179, authored by Senator Bettye Davis, has a $0 fiscal note. Although this legislation addresses the problems of all vulnerable missing adults, our support letter will focus on the benefits we perceive for vulnerable older Alaskans from this legislation.

Wandering is one of the most significant personal safety risks faced by individuals with Alzheimer's disease and related dementia (ADRD). According to the Alzheimer's Association (2011), nearly 60% of people with Alzheimer's disease wander at some point during the course of their disease with approximately one-half of all wanderings resulting in personal injury if the person is not found within 24 hours. For an elder living in a rural and remote community, especially in the wintertime, getting lost has life and death consequences.

As part of our efforts to learn more about the needs of people with ADRD and their caregivers, the ACoA hosted two Community Forums at the Anchorage Senior Citizens Activities Center (December 2011) and at the Juneau Senior Center (February 2012). Both forums were well-attended with the majority of participants being family and professional caregivers. Improving public response services to reduce safety risks for persons with ADRD who wander was identified as a priority concern by the Forum participants. While Anchorage's "Project Lifesaver," administered by Search and Rescue is an effective program for individuals with Alzheimer's disease, this program is available in Anchorage only with limited programs of this kind available statewide.

The ACoA supports SB 179 to authorize the Department of Public Safety to work with the Department of Military and Veterans' Affairs to develop a missing vulnerable adult response plan that will improve the safety of vulnerable Alaskans, such as individuals with Alzheimer's disease and related dementia. Thank you for your support of this legislation. Please feel free to contact Denise Daniello, ACoA's executive director, by phone (465-4879) or email (denise.daniello@alaska.gov) should you have questions or require additional information.

Sincerely,

Sharon Howerton-Clark
Chair, Alaska Commission on Aging

Sincerely,

Denise Daniello
ACoA Executive Director

Cc: Representative Wes Keller
Representative Peggy Wilson
Representative Max Gruenberg
Representative Pete Petersen
Representative Kyle Johansen
Senator Bettye Davis, Sponsor

SB 210

<TARGET><BILL>SB 210</BILL><SUBJECT>SB 210</SUBJECT><COMM>HJUD27</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 9, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 4/12/12

The JUDICIARY Committee considered: **CSSB 210(FIN)**

CS FOR SENATE BILL NO. 210(FIN)
"An Act relating to crimes against children; and providing for an effective date."
SB 210-CRIMES AGAINST CHILDREN/ SUPPORT/CINA

Recommends it be replaced with [X] HCS *or* [ ] CS *for* CS SB 210 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	ADM		X	
2	LAW		X	
3	DPS			X
4	ADM		X	
5	CRT		X	
6	ADM			X
7	COR		X	

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
	LYNN	X			
	Gruenberg				✓
	Keller	X			
	Holmes				X
	Pratt	X			
Vice Chair:	J THOMPSON	X			
Chair:					

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 12, 2012

SUBJECT: Crimes against children. (HCS CSSB 210(JUD); Work Order No. 27-LS1362\U)

TO: Representative Steve Thompson
Vice-Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Dan Wayne
Legislative Counsel

Enclosed is the draft blank committee substitute bill you requested. Please note that sec. 2 of the bill creates an offense, "nonsexual abuse of a minor," that overlaps with the bill's proposed new definition of "serious physical injury," and has elements very similar to those of existing crimes, including felony assault under AS 11.41.220(a). When two offenses have elements that are very similar the offenses can merge at trial or sentencing in some cases, causing prosecution or sentencing of the defendant to be limited to the lesser offense.

DCW:plm
12-227.plm

Enclosure

HJUD 4/12/12

LAA 4/12 P55Y

27-LS1362\U
Wayne
4/12/12

HOUSE CS FOR CS FOR SENATE BILL NO. 210(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, French, Dyson, Ellis, Wielechowski, Davis, Olson, Giessel, Huggins, Meyer, Menard, Egan, Thomas, Stedman, Hoffman, Wagoner, Stevens

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes against children; relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; relating to the recommendations and report of the task force; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

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

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older,

(i) causes physical injury to a child under **12** [10] years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member, makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence, causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

Amdt. #1

* **Sec. 2.** AS 11.41 is amended by adding a new section to read:

Sec. 11.41.255. ~~Nonsexual abuse of a minor.~~ ~~(a) A person commits the crime~~ Definitions in AS 11.41.200 — 11.41.250, as used "serious physical injury", in addition to the definition in AS 11.81.900(b)(56)(B)(ii)

of nonsexual abuse of a minor if, being 18 years of age or older, the person knowingly engages in conduct prohibited under AS 11.41.200 - 11.41.250 that causes extensive bruising or other physical injury to a child under 12 years of age that results in serious

(1) disfigurement;

(2) impairment of health that would cause a reasonable person ~~who is 18 years of age or older and legally charged with the care of the child~~ to seek medical attention for the child from a health care professional in the form of diagnosis or treatment; or

(3) impediment of blood circulation or breathing.

~~(b) Nonsexual abuse of a minor under (a) of this section is a class C felony.~~

*** Sec. 3.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person is

(A) registered or required to register as a sex offender or child kidnapper under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; [OR]

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child**; or**

(4) recklessly fails to provide an adequate quantity of food or

liquids to a child, causing protracted impairment of the child's health.

*** Sec. 4.** AS 11.51.100(f) is amended to read:

(f) Endangering the welfare of a child in the first degree under (a)(1), **(2), or (4)** [OR (2)] of this section is a class C felony.

Amdt. 1

*** Sec. 5.** AS 11.81.900(56) is amended to read:

(56) "serious physical injury" means

(A) physical injury **to a person of any age** caused by an act performed under circumstances that create a substantial risk of death; [OR]

(B) physical injury **to a person of any age** that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

(C) physical injury to a person under 12 years of age that causes

(i) serious disfigurement;

(ii) impairment of health, by serious bruising or other injury, that reasonably requires medical evaluation or treatment by a health care professional;

(iii) loss or impairment of the function of a body member or organ; or

(iv) serious impediment of blood circulation or breathing;

*** Sec. 6.** AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

*** Sec. 7.** AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted

at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. **A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill.** A hearing must be held on this issue [AT OR] before the **same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court** [SENTENCING HEARING]. At the hearing, the **fact finder** [COURT] shall determine whether the defendant has been shown to be guilty but mentally ill **beyond a reasonable doubt, considering** [BY A PREPONDERANCE OF THE] evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

*** Sec. 8.** AS 12.47.060(b) is amended to read:

(b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

*** Sec. 9.** AS 12.55.025(i) is amended to read:

(i) Except as **otherwise** provided **in this chapter** [BY AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence standard of proof applies to sentencing proceedings.

*** Sec. 10.** AS 12.55.090(b) is amended to read:

(b) **Except as otherwise provided in (f) of this section, the** [THE] court may revoke or modify any condition of probation [,] or may change the period of probation.

*** Sec. 11.** AS 12.55.090 is amended by adding a new subsection to read:

(f) Unless the defendant and the prosecuting authority agree at the probation revocation proceeding or other proceeding, the court may not reduce the specific

period of probation, or the specific term of suspended incarceration except by the amount of incarceration imposed for a probation violation, if

(1) the sentence was imposed in accordance with a plea agreement under Rule 11, Alaska Rules of Criminal Procedure; and

(2) the agreement required a specific period of probation or a specific term of suspended incarceration.

*** Sec. 12.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

*** Sec. 13.** AS 12.55.125 is amended by adding a new subsection to read:

(p) If the state seeks either (1) the imposition of a sentence under (a) of this section that would preclude the defendant from being awarded a good time deduction under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4), (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be decided shall be presented to a trial jury and proven beyond a reasonable doubt under procedures set by the court, unless the defendant waives trial by jury and either stipulates to the existence of the fact or consents to have the fact proven to the court sitting without a jury. Written notice of the intent to establish a fact under this subsection must be served on the defendant and filed with the court as provided for notice under AS 12.55.155(f)(2).

*** Sec. 14.** AS 12.55.155 is amended by adding a new subsection to read:

(i) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

*** Sec. 15.** AS 33.05.050 is amended to read:

Sec. 33.05.050. Report of probation officer. When directed by the court, the probation officer shall report to the court [,] with a statement of the conduct of the probationer while on probation. **Except as otherwise provided by law, the** [THE] court may then discharge the probationer from further supervision and may terminate the proceedings against the probationer, or may extend the probation, as shall seem advisable.

*** Sec. 16.** AS 33.05.070(b) is amended to read:

(b) As speedily as possible after arrest, the probationer shall be taken before the court for the district having jurisdiction over the probationer. **Except as provided in AS 12.55.090(f),** [THEREUPON] the court may revoke the probation and require the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if

imposition of sentence was suspended, may impose any sentence **that** [WHICH] might originally have been imposed, subject to the limitation specified in AS 12.55.086(c).

*** Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 12.55.125(p), enacted by sec. 13 of this Act, and AS 12.55.155(i), enacted by sec. 14 of this Act, have the effect of changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for sentencing persons convicted of certain crimes.

*** Sec. 18.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 12.47.040(b), as amended by sec. 6 of this Act, AS 12.47.060(a), as amended by sec. 7 of this Act, AS 12.47.060(b), as amended by sec. 8 of this Act, AS 12.55.025(i), as amended by sec. 9 of this Act, and AS 12.55.125(a), as amended by sec. 12 of this Act, apply to proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(b) AS 12.55.090, as amended by secs. 10 and 11 of this Act, applies to offenses occurring on or after the effective date of this Act.

(c) AS 12.55.125(p), enacted by sec. 13 of this Act, applies to sentencing proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

OK
Amdt #2

*** Sec. 19.** The uncodified law of the State of Alaska is amended by adding a new section to read:

PROMOTING PROSTITUTION; SEX TRAFFICKING

HUMAN TRAFFICKING TASK FORCE. (a) The Human Trafficking Task Force is established in the Department of Law. The attorney general, or the attorney general's designee, shall serve as the chair of the task force. The task force consists of representatives of the Department of Law, the Department of Public Safety, the Department of Health and Social Services, and two members, appointed by the governor, representing nongovernmental health and social services organizations that provide services to victims of human trafficking. The task force shall examine the prevalence of the crimes of human trafficking in the state and the services that are available to victims of the crimes of human trafficking under

AS 11.41.360 and 11.41.365.

(b) The task force established in (a) of this section shall submit a report to the legislature by January 15, 2013. The report must include a current assessment of services currently available to victims of human trafficking, recommendations for improving services to victims of human trafficking, and the following information:

(1) the number of human trafficking cases reported to state and local law enforcement agencies in the state since 2007;

(2) the number of human trafficking cases prosecuted under Alaska law;

(3) the number of human trafficking cases state and local law enforcement agencies have investigated in cooperation with federal law enforcement agencies;

(4) the services currently available in the state to victims of human trafficking, including services provided by state agencies, federal agencies, or nongovernmental agencies relating to

(A) medical or psychological counseling;

(B) emergency shelter;

(C) translation;

(D) other assistance related to safe housing and legal services.

(c) The task force established in (a) of this section shall solicit information and input from local, state, and federal agencies, nongovernmental organizations, and other interested persons. The task force shall hold at least one public meeting and shall provide reasonable public notice, teleconference capability, and an opportunity for interested organizations, groups, or individuals to provide written or oral comments. Minutes of meetings and written comments provided to the task force shall be included in the report provided under (b) of this section.

(d) The state agency members of the task force shall be employees of their respective agencies, designated by the attorney general, the commissioner of public safety, or the commissioner of health and social services. Expenses, other than the personnel expenses, of the state agency members of the task force shall be shared by the Department of Law, the Department of Public Safety, and the Department of Health and Social Services. The nongovernmental health and social service organizations whose members are appointed by the governor shall be responsible for their members' costs in participating on the task force.

*** Sec. 20.** Section 19 of this Act is repealed June 1, 2013.

*** Sec. 21.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Sections 13 and 14 of this Act take effect only if sec. 17 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 22.** This Act takes effect July 1, 2012.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 11, 2012

SUBJECT: Draft blank committee substitute bill; title change resolution may be required (HCS CSSB210( ); Work Order No. 27-LS1362\O)

TO: Representative Steve Thompson
Attn: Jane Pierson

FROM: Dan Wayne
Legislative Counsel

Enclosed is the draft committee substitute for the above-numbered bill.

The Constitution of the State of Alaska, article II, section 13, requires that the subject of each bill shall be expressed in the title. If the committee substitute is adopted, the title of the bill will need to be changed. Because the title change would be to a Senate bill in the House, a concurrent resolution would be required to suspend Uniform Rules 24(c), 35, 41(b) and 42(e), which prohibit changes to a bill's title in the second house. If the committee substitute is adopted by a committee, the committee may ask this office to draft a concurrent resolution at the time a committee substitute is prepared.

DCW:ljw
12-278.ljw

Enclosure

faxed 4/11/12 8:00 p.m. MC

27-LS1362\O
Wayne
4/10/12

HOUSE CS FOR CS FOR SENATE BILL NO. 210( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, French, Dyson, Ellis, Wielechowski, Davis, Olson, Giessel, Huggins, Meyer, Menard, Egan, Thomas, Stedman, Hoffman, Wagoner, Stevens

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes against children; relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

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

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older,

(i) causes physical injury to a child under **12** [10] years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member, makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence, causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 2.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the

first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person is

(A) registered or required to register as a sex offender or child kidnapper under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; [OR]

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child**; or**

(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health. quantities of

*** Sec. 3.** AS 11.51.100(f) is amended to read:

(f) Endangering the welfare of a child in the first degree under (a)(1)**, (2), or (4)** [OR (2)] of this section is a class C felony.

now Sec. 4 in V'

*** Sec. 4.** AS 11.81.900(56) is amended to read:

(56) "serious physical injury" means

(A) physical injury **to a person of any age** caused by an act performed under circumstances that create a substantial risk of death; [OR]

(B) physical injury **to a person of any age** that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

New Section AS 11.41.255 (or whatever) New Crime of Assault Against Children under 12 years of Age Under AS 11.41.200-250,

(C) physical injury to a person under 12 years of age that causes

(i) serious disfigurement; (serious)

(ii) impairment of health, by ~~serious~~ bruising or other injury, that (extensive) would cause a reasonable caregiver ~~to seek~~ medical attention from a health care professional in the form of diagnosis or treatment;

~~**(iii) loss or impairment of the function of a body member or organ; or**~~ (delete iii)

(iv) serious impediment of blood circulation or breathing;

*** Sec. 5.** AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

*** Sec. 6.** AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. **A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill.** A hearing must be held on this issue [AT OR] before the **same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court** [SENTENCING HEARING]. At the hearing, the **fact**

finder [COURT] shall determine whether the defendant has been shown to be guilty but mentally ill **beyond a reasonable doubt, considering** [BY A PREPONDERANCE OF THE] evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

*** Sec. 7.** AS 12.47.060(b) is amended to read:

(b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

*** Sec. 8.** AS 12.55.025(i) is amended to read:

(i) Except as **otherwise** provided **in this chapter** [BY AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence standard of proof applies to sentencing proceedings.

*** Sec. 9.** AS 12.55.090(b) is amended to read:

(b) **Except as otherwise provided in (f) of this section, the** [THE] court may revoke or modify any condition of probation [,] or may change the period of probation.

*** Sec. 10.** AS 12.55.090 is amended by adding a new subsection to read:

(f) Unless the defendant and the prosecuting authority agree at the probation revocation proceeding or other proceeding, the court may not reduce the specific period of probation, or the specific term of suspended incarceration except by the amount of incarceration imposed for a probation violation, if

(1) the sentence was imposed in accordance with a plea agreement under Rule 11, Alaska Rules of Criminal Procedure; and

(2) the agreement required a specific period of probation or a specific term of suspended incarceration.

*** Sec. 11.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or

otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

* **Sec. 12.** AS 12.55.125 is amended by adding a new subsection to read:

(p) If the state seeks either (1) the imposition of a sentence under (a) of this section that would preclude the defendant from being awarded a good time deduction under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4), (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be decided shall be presented to a trial jury and proven beyond a reasonable doubt under procedures set by the court, unless the defendant waives trial by jury and either stipulates to the existence of the fact or consents to have the fact proven to the court sitting without a jury. Written notice of the intent to establish a fact under this subsection must be served on the defendant and filed with the court as provided for notice under AS 12.55.155(f)(2).

*** Sec. 13.** AS 12.55.155 is amended by adding new subsections to read:

(i) If the state seeks to establish a factor in aggravation at sentencing under (c)(10) of this section,

(1) the assessment of the facts underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense shall be made by the trial jury under procedures set by the court and as provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates to the existence of the aggravating factor or to the facts alleged by the state, or consents to have the assessment proved under procedures set out in (f)(1) of this section; factual assertions underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense must be proved beyond a reasonable doubt;

(2) the legal decision concerning whether the defendant's conduct determined under (1) of this subsection was among the most serious included in the definition of the offense shall be made by the court under procedures set out in (f)(1) of this section.

(j) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

*** Sec. 14.** AS 33.05.050 is amended to read:

Sec. 33.05.050. Report of probation officer. When directed by the court, the probation officer shall report to the court [,] with a statement of the conduct of the probationer while on probation. **Except as otherwise provided by law, the** [THE] court may then discharge the probationer from further supervision and may terminate the proceedings against the probationer, or may extend the probation, as shall seem advisable.

*** Sec. 15.** AS 33.05.070(b) is amended to read:

(b) As speedily as possible after arrest, the probationer shall be taken before

the court for the district having jurisdiction over the probationer. **Except as provided in AS 12.55.090(f),** [THEREUPON] the court may revoke the probation and require the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if imposition of sentence was suspended, may impose any sentence **that** [WHICH] might originally have been imposed, subject to the limitation specified in AS 12.55.086(c).

*** Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 12.55.125(p), enacted by sec. 12 of this Act, and AS 12.55.155(i) and (j), enacted by sec. 13 of this Act, have the effect of changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for sentencing persons convicted of certain crimes.

*** Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 12.47.040(b), as amended by sec. 5 of this Act, AS 12.47.060(a), as amended by sec. 6 of this Act, AS 12.47.060(b), as amended by sec. 7 of this Act, AS 12.55.025(i), as amended by sec. 8 of this Act, and AS 12.55.125(a), as amended by sec. 11 of this Act, apply to proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(b) AS 12.55.090, as amended by secs. 9 and 10 of this Act, applies to offenses occurring on or after the effective date of this Act.

(c) AS 12.55.125(p), enacted by sec. 12 of this Act, applies to sentencing proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

*** Sec. 18.** The uncodified law of the State of Alaska is amended by adding a new section to read:

HUMAN TRAFFICKING TASK FORCE. (a) The Human Trafficking Task Force is established in the Department of Law. The attorney general, or the attorney general's designee, shall serve as the chair of the task force. The task force consists of representatives of the Department of Law, the Department of Public Safety, the Department of Health and Social Services, and two members, appointed by the governor, representing nongovernmental

health and social services organizations that provide services to victims of human trafficking. The task force shall examine the prevalence of the crimes of human trafficking in the state and the services that are available to victims of the crimes of human trafficking under AS 11.41.360 and 11.41.365.

(b) The task force established in (a) of this section shall submit a report to the legislature by January 15, 2013. The report must include a current assessment of services currently available to victims of human trafficking, recommendations for improving services to victims of human trafficking, and the following information:

(1) the number of human trafficking cases reported to state and local law enforcement agencies in the state since 2007;

(2) the number of human trafficking cases prosecuted under Alaska law;

(3) the number of human trafficking cases state and local law enforcement agencies have investigated in cooperation with federal law enforcement agencies;

(4) the services currently available in the state to victims of human trafficking, including services provided by state agencies, federal agencies, or nongovernmental agencies relating to

(A) medical or psychological counseling;

(B) emergency shelter;

(C) translation;

(D) other assistance related to safe housing and legal services.

(c) The task force established in (a) of this section shall solicit information and input from local, state, and federal agencies, nongovernmental organizations, and other interested persons. The task force shall hold at least one public meeting and shall provide reasonable public notice, teleconference capability, and an opportunity for interested organizations, groups, or individuals to provide written or oral comments. Minutes of meetings and written comments provided to the task force shall be included in the report provided under (b) of this section.

(d) The state agency members of the task force shall be employees of their respective agencies, designated by the attorney general, the commissioner of public safety, or the commissioner of health and social services. Expenses, other than the personnel expenses, of the state agency members of the task force shall be shared by the Department of Law, the

Department of Public Safety, and the Department of Health and Social Services. The nongovernmental health and social service organizations whose members are appointed by the governor shall be responsible for their members' costs in participating on the task force.

*** Sec. 19.** Section 18 of this Act is repealed June 1, 2013.

*** Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Sections 12 and 13 of this Act take effect only if sec. 16 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 21.** This Act takes effect July 1, 2012.

Alaska State Legislature

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Senator Lesil McGuire

Sponsor Statement for 210

"An Act relating to crimes against children."

On February 8, 2012 the Children's Justice Task Force (CJA) a federally-mandated, state-wide multidisciplinary group presented their findings to the Joint Senate Judiciary and HESS Committees with their system recommendations for improvement through criminal legislation. I became aware through this presentation, research, and other important conversations that we have shortcomings in the current criminal laws regarding the prosecution of harm to children.

Those that suffer from these short comings are Alaska's children and the numbers are staggering. In 2008, approximately 12,400 children were likely victims of at least one incident of maltreatment, which breaks down to 34 children per day. In the instance of a child death, 1 out of every 5 was related to maltreatment.

SB 210 works with the recommendations from CJA to create tougher penalties on crimes committed against a child. The bill will create increased criminal liability for assaults to children by modifying the current definition of "serious physical injury" and increases penalties when a parent intentionally withholds adequate food or liquids.

Together, the Legislature can assist our future generations by providing them with laws that protect their rights and create safer communities for their growth and development. I urge your support for this legislation.

CSSB210(FIN) 27-LS1362\R – ***"An Act relating to crimes against children; and providing for an effective date."*** *(Senator MCGuire)*

CSSB 212(JUD) 27-LS1370\M – ***"An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."*** (Senator McGuire)

SB186 27-LS0811\I - ***"An Act relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."***

Section 1. (HB 212) Uncodified law – Human Trafficking Task Force established in the Department of Law. Shall examine the prevalence of the crime, and services available to victims of the crime. Repealed June 13, 2013, after report is due on January 15, 2013.

Sections 2- Section 5 (SB210) – CRIMES AGAINST CHILDREN

Sections 6 – 17 (SB186) – SENTENCING/PROBATION/MENTALLY ILL

BOARD RESOLUTION OF THE CHILDREN'S PLACE

ADOPTED ON MARCH 14, 2012

The undersigned, being the Board Chair and Executive Director of The Children's Place **"The Children's Place"**, a 501(c)(3) private, not for profit agency providing support and coordination of services related to the evaluation, investigation, and treatment of child abuse to the communities in the Matanuska-Susitna Valley, with the approval, direction, and concurrence of the Board of Directors of The Children's Place **"The Board of Directors"**, hereby sign the following resolution in support of SB 210, "An Act Relating to Crimes Against Children":

WHEREAS:

1. The Children's Place and the Board of Directors has become aware through presentation, research, and other important conversations brought by the Children's Justice Act Task Force that the State of Alaska has shortcomings in the current criminal laws regarding the prosecution of harm to children, and;
2. The Children's Place and the Board of Directors are aware that SB 210 works with the recommendations from the Children's Justice Act Task Force to create tougher penalties on crimes committed against children, and;
3. The Children's Place and the Board of Directors knows that in 2008, over 12,000 children were likely victims of at least one type of child maltreatment – approximately 34 children each day; that 1 out of every 5 infant deaths in Alaska Is related to maltreatment; that Alaska has one of the highest rates of maltreatment-related infant mortality in the nation; and that child abuse has life-long implications including adverse effects on adult physical and mental health, and;
4. The Children's Place and the Board of Directors believes that young children may be unable to describe what has happened to them (due to age, developmental status or knowledge base) in a way that fits Alaska's current assault or strangulation statues, and;
5. The Children's Place and the Board of Directors is aware that in some situations, current Alaska state laws do not allow perpetrators of serious child physical abuse and neglect to be held appropriately accountable, and;
6. The Children's Place and the Board of Directors believes that criminal penalties for harming children should be higher than those penalties for harming adults who are much more likely to be able to defend themselves, and;
7. The Children's Place and the Board of Directors requests the Legislature assist our future generations by providing them with laws that protect their rights and create safer communities for their growth and development.

IT IS RESOLVED THAT:

The Children's Place and the Board of Directors urge your support for this legislation.

Kibe Lucas, Board Chair
The Children's Place

Jennifer Burkmire, Executive Director
The Children's Place

KTVA 11 Alaska
Saturday, February 25, 2012

Mom Arrested for Emotional, Physical Abuse of Adopted Children
Anya James, 50, was arrested Tuesday and is charged with ten counts of kidnapping and six counts of first-degree assault.
By Colleen Kelly

An Anchorage mom has been arrested for subjecting her six adopted children to years of emotional and physical abuse, according to Anchorage police.

Following an eight-month investigation, 50-year-old Anya James now faces criminal offenses for the gross mistreatment of her children. James was arrested Tuesday and is charged with ten counts of kidnapping and six counts of first-degree assault.

APD Detective Chris Thomas began the investigation in early October 2010 after receiving a claim of child abuse against four of James' children living in her Hillside home. That same month, several of James' children were removed from the home and hospitalized due to severe malnourishment.

The investigation further revealed that due to malnourishment, James' adopted children endured stunted growth, which prevented some of them from going through puberty during their teenage years.

According to police, the children were confined to small rooms with alarms rigged up to the doors and windows to alert James if the children tried to escape. The mother also used audio and video monitors to oversee the children's activity and conversations.

Despite three functioning bathrooms inside the home, the children were forced to use a bucket filled with kitty litter instead of a toilet placed inside the small rooms.

James is currently booked at the Anchorage Jail; her bail is set at $100,000 cash plus third-party custodian. She will not have contact with any of her adopted children or minors under 16 years old, according to police. She will be arraigned in Superior Court Wednesday afternoon at the Nesbitt Courthouse in downtown Anchorage.

Between 2000 and 2010, James fostered and adopted six children and collected more than $750,000 in adoption subsidies from the State of Alaska.

If you have information about children living under James' care before 2000, contact Anchorage Police Detective Chris Thomas at 786-2628.

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- 'Hot Sauce Mom' Trial Begins; Opening Arguments Heard

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Mom pleads guilty to putting needles in boy's stomach

Anchorage Daily News
Published: February 25th, 2011 10:42 PM
Last Modified: February 28th, 2011 04:45 PM

A 29-year-old Anchorage woman pleaded guilty Friday to first-degree assault and two counts of second-degree assault for abuse of her 5-year-old son that included putting needles in his stomach, according to the Anchorage District Attorney's office.

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Lily Doss-Puder entered her plea before state Superior Court Judge Michael Wolverton, who scheduled sentencing for May, the office said.

The case against her arose last June, when her son was admitted to the hospital for emergency surgery and doctors found three sewing needles in his stomach. Anchorage Police Detective Chris Thomas investigated and, in a review of the child's medical records, found a pattern of injuries to the boy dating to June 2009, the District Attorney's office said.

When Thomas interviewed Doss-Puder, she admitted inserting the needles into her son's stomach, intentionally cutting the webbing of his hand with a knife and intentionally hitting him on the head with a 2-pound weight, the office said.

In exchange for her pleas, Doss-Puder will be sentenced to 18 years in prison with six years suspended, and she won't be allowed to contact her son until he is 18, the District Attorney's office said.

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FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSSB 210(FIN)**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB210CSSB(FIN)-LAW-CRIM-04-10-12
Title: An Act relating to crimes against children; and providing for an effective date.
Sponsor: Senator MCGUIRE
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Criminal
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Update for CS.

Prepared by: Sheila Bugbee, Administrative Officer — Phone 465-3675
Division: Administrative Services — Date/Time 4/10/12 2:15 PM
Approved by: Michael C. Geraghty, Attorney General — Date 4/10/2012
Department of Law

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** CSSB 210(FIN)
2012 LEGISLATIVE SESSION

Analysis

SB 210 adopts a new crime prohibiting recklessly withholding food or liquids from a child and causing protracted impairment of the child's health. It also amends the definition of "serious physical injury" by the addition of physical injury to a child under 12 that causes serious disfigurement, impairment of health by serious bruising or other injury that reasonably requires evaluation or treatment by a health care professional, loss or impairment of a body member or organ, or serious impediment of blood circulation or breathing.

The fiscal impact to Department of Law is indeterminate.

CSSB210(FIN) 27-LS1362\R – ***"An Act relating to crimes against children; and providing for an effective date."*** *(Senator MCGuire)*

CSSB 212(JUD) 27-LS1370\M – ***"An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."*** (Senator McGuire)

SB186 27-LS0811\I - ***"An Act relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."***

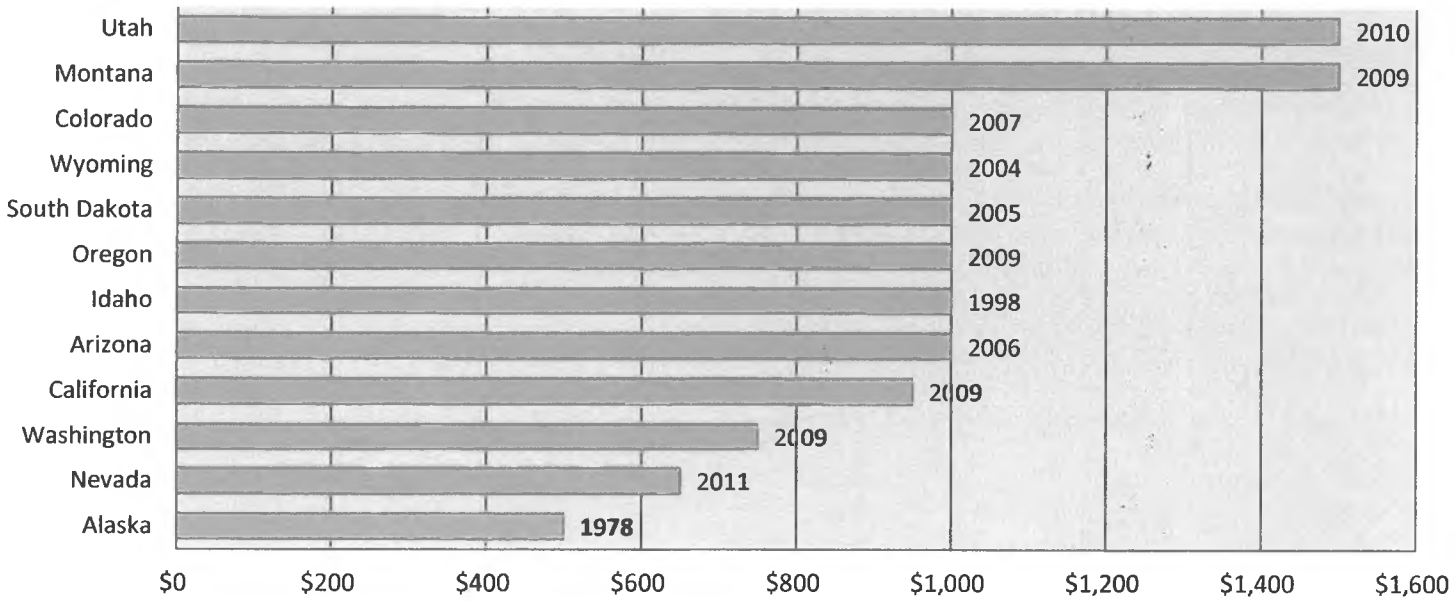
Section 1- Section 4 (SB210) – CRIMES AGAINST CHILDREN

Section 5 – 17, Section 20 (SB186) – SENTENCING/PROBATION/MENTALLY ILL

Section 18-19. (HB 212) Uncodified law – Human Trafficking Task Force established in the Department of Law. Shall examine the prevalence of the crime, and services available to victims of the crime. Repealed June 13, 2013, after report is due on January 15, 2013.

HJUD 4/11/12
5:30

Theft Felony Thresholds in Western U.S. and Year of Adoption



Alaska	$500
Nevada	$650
Washington	$750
California	$950
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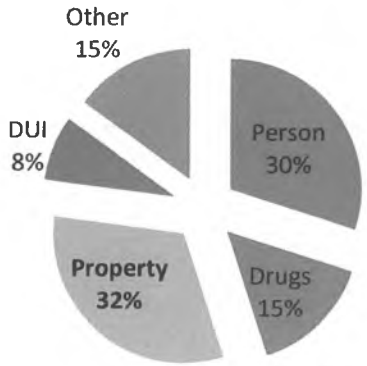
Idaho	$1,000
Oregon	$1,000
South Dakota	$1,000
Wyoming	$1,000
Colorado	$1,000
Montana	$1,500
Utah	$1,500

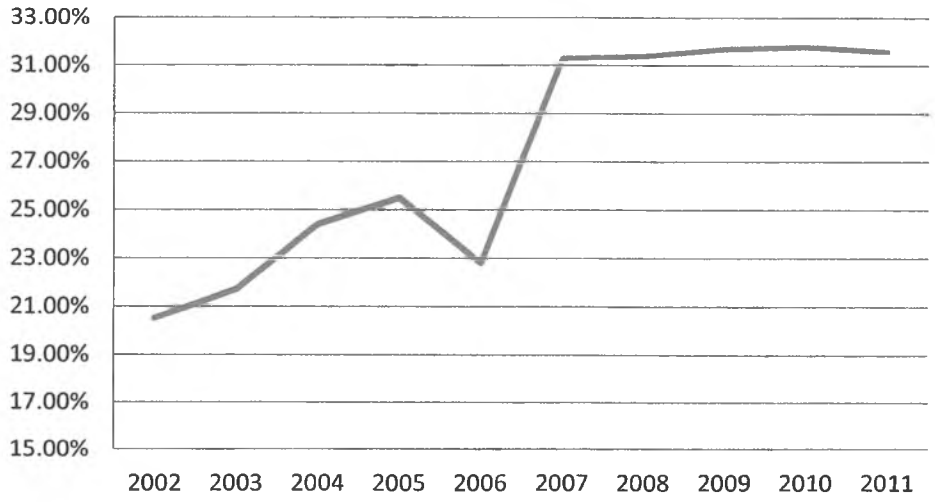
AK Felonies by Case Type FY11



U.S. Dollar Inflation

1978	2011
$50	$173.06
$500	$1730.61

Property Crimes as a Precentage of All Felonies



Prepared by Jordan Shilling in Senator Coghill's office

4/11/12 530pm

for draft JUD CS

27-LS1362\O
Wayne
4/10/12

HOUSE CS FOR CS FOR SENATE BILL NO. 210( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, French, Dyson, Ellis, Wielechowski, Davis, Olson, Giessel, Huggins, Meyer, Menard, Egan, Thomas, Stedman, Hoffman, Wagoner, Stevens

A BILL

FOR AN ACT ENTITLED

"An Act relating to crimes against children; relating to persons found guilty but mentally ill; relating to sentencing procedures for factors that may increase the presumptive range or affect mandatory parole eligibility; relating to the granting of probation; relating to procedures for finding aggravating factors at sentencing; relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force; amending Rule 32.1, Alaska Rules of Criminal Procedure; and providing for an effective date."

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

*** Section 1.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

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

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older,

(i) causes physical injury to a child under **12** [10] years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under **12** [10] years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member, makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least **12** [10] years of age and the injury reasonably requires medical treatment;

(4) with criminal negligence, causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; or

(5) commits a crime that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 2.** AS 11.51.100(a) is amended to read:

(a) A person commits the crime of endangering the welfare of a child in the

first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person is

(A) registered or required to register as a sex offender or child kidnapper under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) charged by complaint, information, or indictment with a violation of AS 11.41.410 - 11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; [OR]

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child**; or**

(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health.

*** Sec. 3.** AS 11.51.100(f) is amended to read:

(f) Endangering the welfare of a child in the first degree under (a)(1)**, (2), or (4)** [OR (2)] of this section is a class C felony.

*** Sec. 4.** AS 11.81.900(56) is amended to read:

(56) "serious physical injury" means

(A) physical injury **to a person of any age** caused by an act performed under circumstances that create a substantial risk of death; [OR]

(B) physical injury **to a person of any age** that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy; **or**

(C) physical injury to a person under 12 years of age that causes

(i) serious disfigurement;

(ii) impairment of health, by ~~serious~~ bruising or other injury, that reasonably requires medical evaluation or treatment by a health care professional;

(iii) loss or impairment of the function of a body member or organ; or

(iv) serious impediment of blood circulation or breathing;

*** Sec. 5.** AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

*** Sec. 6.** AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. **A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill.** A hearing must be held on this issue [AT OR] before the **same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court** [SENTENCING HEARING]. At the hearing, the **fact**

finder [COURT] shall determine whether the defendant has been shown to be guilty but mentally ill **beyond a reasonable doubt, considering** [BY A PREPONDERANCE OF THE] evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

*** Sec. 7.** AS 12.47.060(b) is amended to read:

(b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

*** Sec. 8.** AS 12.55.025(i) is amended to read:

(i) Except as **otherwise** provided **in this chapter** [BY AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence standard of proof applies to sentencing proceedings.

*** Sec. 9.** AS 12.55.090(b) is amended to read:

(b) **Except as otherwise provided in (f) of this section, the** [THE] court may revoke or modify any condition of probation [,] or may change the period of probation.

*** Sec. 10.** AS 12.55.090 is amended by adding a new subsection to read:

(f) Unless the defendant and the prosecuting authority agree at the probation revocation proceeding or other proceeding, the court may not reduce the specific period of probation, or the specific term of suspended incarceration except by the amount of incarceration imposed for a probation violation, if

(1) the sentence was imposed in accordance with a plea agreement under Rule 11, Alaska Rules of Criminal Procedure; and

(2) the agreement required a specific period of probation or a specific term of suspended incarceration.

*** Sec. 11.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or

Annie needs QS: cite Rule 11

otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) [THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT] the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

* **Sec. 12.** AS 12.55.125 is amended by adding a new subsection to read:

(p) If the state seeks either (1) the imposition of a sentence under (a) of this section that would preclude the defendant from being awarded a good time deduction under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4), (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be decided shall be presented to a trial jury and proven beyond a reasonable doubt under procedures set by the court, unless the defendant waives trial by jury and either stipulates to the existence of the fact or consents to have the fact proven to the court sitting without a jury. Written notice of the intent to establish a fact under this subsection must be served on the defendant and filed with the court as provided for notice under AS 12.55.155(f)(2).

*** Sec. 13.** AS 12.55.155 is amended by adding new subsections to read:

(i) If the state seeks to establish a factor in aggravation at sentencing under (c)(10) of this section,

(1) the assessment of the facts underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense shall be made by the trial jury under procedures set by the court and as provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates to the existence of the aggravating factor or to the facts alleged by the state, or consents to have the assessment proved under procedures set out in (f)(1) of this section; factual assertions underlying the state's allegation that the defendant's conduct was among the most serious included in the definition of the offense must be proved beyond a reasonable doubt;

(2) the legal decision concerning whether the defendant's conduct determined under (1) of this subsection was among the most serious included in the definition of the offense shall be made by the court under procedures set out in (f)(1) of this section.

(j) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

*** Sec. 14.** AS 33.05.050 is amended to read:

Sec. 33.05.050. Report of probation officer. When directed by the court, the probation officer shall report to the court [,] with a statement of the conduct of the probationer while on probation. **Except as otherwise provided by law, the** [THE] court may then discharge the probationer from further supervision and may terminate the proceedings against the probationer, or may extend the probation, as shall seem advisable.

*** Sec. 15.** AS 33.05.070(b) is amended to read:

(b) As speedily as possible after arrest, the probationer shall be taken before

the court for the district having jurisdiction over the probationer. **Except as provided in AS 12.55.090(f),** [THEREUPON] the court may revoke the probation and require the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if imposition of sentence was suspended, may impose any sentence **that** [WHICH] might originally have been imposed, subject to the limitation specified in AS 12.55.086(c).

*** Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 12.55.125(p), enacted by sec. 12 of this Act, and AS 12.55.155(i) and (j), enacted by sec. 13 of this Act, have the effect of changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for sentencing persons convicted of certain crimes.

*** Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 12.47.040(b), as amended by sec. 5 of this Act, AS 12.47.060(a), as amended by sec. 6 of this Act, AS 12.47.060(b), as amended by sec. 7 of this Act, AS 12.55.025(i), as amended by sec. 8 of this Act, and AS 12.55.125(a), as amended by sec. 11 of this Act, apply to proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(b) AS 12.55.090, as amended by secs. 9 and 10 of this Act, applies to offenses occurring on or after the effective date of this Act.

(c) AS 12.55.125(p), enacted by sec. 12 of this Act, applies to sentencing proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

*** Sec. 18.** The uncodified law of the State of Alaska is amended by adding a new section to read:

HUMAN TRAFFICKING TASK FORCE. (a) The Human Trafficking Task Force is established in the Department of Law. The attorney general, or the attorney general's designee, shall serve as the chair of the task force. The task force consists of representatives of the Department of Law, the Department of Public Safety, the Department of Health and Social Services, and two members, appointed by the governor, representing nongovernmental

health and social services organizations that provide services to victims of human trafficking. The task force shall examine the prevalence of the crimes of human trafficking in the state and the services that are available to victims of the crimes of human trafficking under AS 11.41.360 and 11.41.365.

(b) The task force established in (a) of this section shall submit a report to the legislature by January 15, 2013. The report must include a current assessment of services currently available to victims of human trafficking, recommendations for improving services to victims of human trafficking, and the following information:

(1) the number of human trafficking cases reported to state and local law enforcement agencies in the state since 2007;

(2) the number of human trafficking cases prosecuted under Alaska law;

(3) the number of human trafficking cases state and local law enforcement agencies have investigated in cooperation with federal law enforcement agencies;

(4) the services currently available in the state to victims of human trafficking, including services provided by state agencies, federal agencies, or nongovernmental agencies relating to

(A) medical or psychological counseling;

(B) emergency shelter;

(C) translation;

(D) other assistance related to safe housing and legal services.

(c) The task force established in (a) of this section shall solicit information and input from local, state, and federal agencies, nongovernmental organizations, and other interested persons. The task force shall hold at least one public meeting and shall provide reasonable public notice, teleconference capability, and an opportunity for interested organizations, groups, or individuals to provide written or oral comments. Minutes of meetings and written comments provided to the task force shall be included in the report provided under (b) of this section.

(d) The state agency members of the task force shall be employees of their respective agencies, designated by the attorney general, the commissioner of public safety, or the commissioner of health and social services. Expenses, other than the personnel expenses, of the state agency members of the task force shall be shared by the Department of Law, the

Department of Public Safety, and the Department of Health and Social Services. The nongovernmental health and social service organizations whose members are appointed by the governor shall be responsible for their members' costs in participating on the task force.

*** Sec. 19.** Section 18 of this Act is repealed June 1, 2013.

*** Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Sections 12 and 13 of this Act take effect only if sec. 16 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 21.** This Act takes effect July 1, 2012.

TO: Legislegal

Karen Lidster

27-LS0811\I.1
Gardner
2/9/12

AMENDMENT

OFFERED IN THE ~~SENATE~~ HOUSE

TO: ~~SB 186~~ HCS SB210 (JUD) or whatever)

~~BY SENATOR COGHILL~~ Blank

Page 1, line 1, following "**Act**":

Insert "**relating to property crimes;**"

Page 1, following line 6:

Insert new bill sections to read:

Q5: $ hasn't Δ'd since 1978.

"*** Section 1.** AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,500** [$500] or more but less than $25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment;

(6) the value of the property is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) an offense under AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) an offense under AS 11.46.140(a)(1), or an offense under another law or ordinance with similar elements; or

(D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements; or

(7) the property is an access device.

*** Sec. 2.** AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$250** [$50] or more but less than **$1,500** [$500]; **or**

(2) [REPEALED

(3)] the value of the property is less than **$250** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

*** Sec. 3.** AS 11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$250** [$50].

*** Sec. 4.** AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,500** [$500] or more; or

(C) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(i) the offense of concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) an offense under AS 11.46.120, 11.46.130, or 11.46.140(a)(1), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500]; or

(B) the value of the merchandise is less than **$250** [$50] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$250** [$50].

*** Sec. 5.** AS 11.46.260(b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

*** Sec. 6.** AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

* **Sec. 7.** AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $25,000 or more;

(2) a class C felony if the face amount of the check is **$1,500** [$500] or more but less than $25,000;

(3) a class A misdemeanor if the face amount of the check is **$250** [$50] or more but less than **$1,500** [$500];

(4) a class B misdemeanor if the face amount of the check is less than **$250** [$50].

* **Sec. 8.** AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $25,000 or more;

(2) a class C felony if the value of the property or services obtained is **$1,500** [$50] or more but less than $25,000;

(3) a class A misdemeanor if the value of the property or services obtained is less than **$1,500** [$50].

* **Sec. 9.** AS 11.46.295 is amended to read:

Sec. 11.46.295. Prior convictions. For purposes of considering prior convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or **11.46.140(a)(2)** [11.46.140(a)(3)], or in prosecuting the crime of concealment of merchandise under AS 11.46.220(c), a conviction for an offense under another law or ordinance with similar elements is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed. The court shall consider the date of a prior conviction as occurring on the date that sentence is imposed for the prior offense.

* **Sec. 10.** AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft

of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,500** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,500** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under

(A) this section or AS 11.46.365;

(B) former AS 11.46.482(a)(4) or (5);

(C) former AS 11.46.484(a)(2);

(D) AS 11.46.120 - 11.46.140 of an offense involving the theft of a propelled vehicle; or

(E) a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 11.** AS 11.46.482(a) is amended to read:

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

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,500** [$500] or more;

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

(3) the person knowingly

(A) defaces, damages, or desecrates a cemetery or the contents of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,

grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected;

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

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

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$250** [$50] or more but less than **$1,500** [$500];

(2) the person tampers with a fire protection device in a building that is a public place;

(3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;

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

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

*** Sec. 13.** AS 11.46.486(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

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

(2) with intent to damage property of another, the person damages property of another in an amount less than **$250** [$50]; or

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

* **Sec. 14.** AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$250** [$50].

* **Sec. 15.** AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,500** [$500].

* **Sec. 16.** AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,500** [$500] or more as a result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is $25,000 or more;

(2) a class C felony if the loss is **$1,500** [$500] or more but less than $25,000."

Page 1, line 7:

Delete "**Section 1**"

Insert "**Sec. 17**"

Renumber the following bill sections accordingly.

Page 5, line 23:

Delete "sec. 8"
Insert "sec. 24"

Page 5, line 24:
Delete "sec. 9"
Insert "sec. 25"

Page 5, line 29:
Delete "sec. 1"
Insert "sec. 17"

Page 5, line 30:
Delete "sec. 2"
Insert "sec. 18"
Delete "sec. 3"
Insert "sec. 19"

Page 5, line 31:
Delete "sec. 4"
Insert "sec. 20"

Page 6, line 1:
Delete "sec. 7"
Insert "sec. 23"

Page 6, line 3, following "(b)":
Insert "AS 11.46.130(a), as amended by sec. 1 of this Act, AS 11.46.140(a), as amended by sec. 2 of this Act, AS 11.46.150(a), as amended by sec. 3 of this Act, AS 11.46.220(c), as amended by sec. 4 of this Act, AS 11.46.260(b), as amended by sec. 5 of this Act, AS 11.46.270(b), as amended by sec. 6 of this Act, AS 11.46.280(d), as amended by sec. 7 of this Act, AS 11.46.285(b), as amended by sec. 8 of this Act, AS 11.46.295, as

amended by sec. 9 of this Act, AS 11.46.360(a), as amended by sec. 10 of this Act, AS 11.46.482(a), as amended by sec. 11 of this Act, AS 11.46.484(a), as amended by sec. 12 of this Act, AS 11.46.486(a), as amended by sec. 13 of this Act, AS 11.46.530(b), as amended by sec. 14 of this Act, AS 11.46.620(d), as amended by sec. 15 of this Act, AS 11.46.730(c), as amended by sec. 16 of this Act, and"

Page 6, line 3:

Delete "sec. 6"

Insert "sec. 22"

Delete "applies"

Insert "apply"

Page 6, line 5:

Delete "sec. 8"

Insert "sec. 24"

Page 6, line 10:

Delete "Sections 8 and 9"

Insert "Sections 24 and 25"

Delete "sec. 12"

Insert "sec. 28"

Not offered
4/11/12

27-LS1362\R.1
Wayne
4/10/12

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE KELLER

TO: CSSB 210(FIN)

Page 1, line 1, following "**children;**":

Insert "**relating to the definition of 'serious physical injury';**"

Page 3, lines 15 - 31:

Delete all material and insert:

"(56) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or

(B) physical injury that

(1) causes serious and protracted disfigurement**;**

(2) causes [,] protracted impairment of health **by serious bruising or other injury that reasonably requires medical evaluation or treatment by a health care professional;**

(3) causes serious impediment of blood circulation or breathing;

(4) causes [,] protracted loss or impairment of the function of a body member or organ**; or**

(5) [, OR THAT] unlawfully terminates a pregnancy;"

27-LS0811\I.1
Gardner
2/9/12

AMENDMENT

OFFERED IN THE SENATE BY SENATOR COGHILL

TO: SB 186

Page 1, line 1, following "**Act**":

Insert "**relating to property crimes;**"

Page 1, following line 6:

Insert new bill sections to read:

"*** Section 1.** AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,500** [$500] or more but less than $25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment;

(6) the value of the property is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) an offense under AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) an offense under AS 11.46.140(a)(1), or an offense under another law or ordinance with similar elements; or

(D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements; or

(7) the property is an access device.

*** Sec. 2.** AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$250** [$50] or more but less than **$1,500** [$500]; **or**

(2) [REPEALED

(3)] the value of the property is less than **$250** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

*** Sec. 3.** AS 11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$250** [$50].

*** Sec. 4.** AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,500** [$500] or more; or

(C) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(i) the offense of concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) an offense under AS 11.46.120, 11.46.130, or 11.46.140(a)(1), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$250** [$50] or more but less than **$1,500** [$500]; or

(B) the value of the merchandise is less than **$250** [$50] and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$250** [$50].

*** Sec. 5.** AS 11.46.260(b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

*** Sec. 6.** AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$250** [$50].

* **Sec. 7.** AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $25,000 or more;

(2) a class C felony if the face amount of the check is **$1,500** [$500] or more but less than $25,000;

(3) a class A misdemeanor if the face amount of the check is **$250** [$50] or more but less than **$1,500** [$500];

(4) a class B misdemeanor if the face amount of the check is less than **$250** [$50].

* **Sec. 8.** AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $25,000 or more;

(2) a class C felony if the value of the property or services obtained is **$1,500** [$50] or more but less than $25,000;

(3) a class A misdemeanor if the value of the property or services obtained is less than **$1,500** [$50].

* **Sec. 9.** AS 11.46.295 is amended to read:

Sec. 11.46.295. Prior convictions. For purposes of considering prior convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or **11.46.140(a)(2)** [11.46.140(a)(3)], or in prosecuting the crime of concealment of merchandise under AS 11.46.220(c), a conviction for an offense under another law or ordinance with similar elements is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed. The court shall consider the date of a prior conviction as occurring on the date that sentence is imposed for the prior offense.

* **Sec. 10.** AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft

of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,500** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,500** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under

(A) this section or AS 11.46.365;

(B) former AS 11.46.482(a)(4) or (5);

(C) former AS 11.46.484(a)(2);

(D) AS 11.46.120 - 11.46.140 of an offense involving the theft of a propelled vehicle; or

(E) a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 11.** AS 11.46.482(a) is amended to read:

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

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,500** [$500] or more;

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

(3) the person knowingly

(A) defaces, damages, or desecrates a cemetery or the contents of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,

grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or memorial appears to be abandoned, lost, or neglected;

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

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

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$250** [$50] or more but less than **$1,500** [$500];

(2) the person tampers with a fire protection device in a building that is a public place;

(3) the person knowingly accesses a computer, computer system, computer program, computer network, or part of a computer system or network;

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

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

* **Sec. 13.** AS 11.46.486(a) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

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

(2) with intent to damage property of another, the person damages property of another in an amount less than **$250** [$50]; or

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

* **Sec. 14.** AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$250** [$50] or more but less than **$1,500** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$250** [$50].

* **Sec. 15.** AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,500** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,500** [$500].

* **Sec. 16.** AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,500** [$500] or more as a result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is $25,000 or more;

(2) a class C felony if the loss is **$1,500** [$500] or more but less than $25,000."

Page 1, line 7:

Delete "**Section 1**"

Insert "**Sec. 17**"

Renumber the following bill sections accordingly.

Page 5, line 23:

Delete "sec. 8"
Insert "sec. 24"

Page 5, line 24:
Delete "sec. 9"
Insert "sec. 25"

Page 5, line 29:
Delete "sec. 1"
Insert "sec. 17"

Page 5, line 30:
Delete "sec. 2"
Insert "sec. 18"
Delete "sec. 3"
Insert "sec. 19"

Page 5, line 31:
Delete "sec. 4"
Insert "sec. 20"

Page 6, line 1:
Delete "sec. 7"
Insert "sec. 23"

Page 6, line 3, following "(b)":
Insert "AS 11.46.130(a), as amended by sec. 1 of this Act, AS 11.46.140(a), as amended by sec. 2 of this Act, AS 11.46.150(a), as amended by sec. 3 of this Act, AS 11.46.220(c), as amended by sec. 4 of this Act, AS 11.46.260(b), as amended by sec. 5 of this Act, AS 11.46.270(b), as amended by sec. 6 of this Act, AS 11.46.280(d), as amended by sec. 7 of this Act, AS 11.46.285(b), as amended by sec. 8 of this Act, AS 11.46.295, as

amended by sec. 9 of this Act, AS 11.46.360(a), as amended by sec. 10 of this Act, AS 11.46.482(a), as amended by sec. 11 of this Act, AS 11.46.484(a), as amended by sec. 12 of this Act, AS 11.46.486(a), as amended by sec. 13 of this Act, AS 11.46.530(b), as amended by sec. 14 of this Act, AS 11.46.620(d), as amended by sec. 15 of this Act, AS 11.46.730(c), as amended by sec. 16 of this Act, and"

Page 6, line 3:

Delete "sec. 6"

Insert "sec. 22"

Delete "applies"

Insert "apply"

Page 6, line 5:

Delete "sec. 8"

Insert "sec. 24"

Page 6, line 10:

Delete "Sections 8 and 9"

Insert "Sections 24 and 25"

Delete "sec. 12"

Insert "sec. 28"

AMERICAN CIVIL LIBERTIES UNION of ALASKA

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STUDENT ADVISOR

April 11, 2012

The Honorable Steve Thompson
House Judiciary Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Representative_Steve_Thompson@legis.state.ak.us

Re: CS for SB 210 (FIN): Crimes Against Children
ACLU Review of Legal Issues

Dear Representative Thompson:

Thank you for the opportunity to provide written testimony with respect to the Committee Substitute for Senate Bill 210 (Finance), which addresses crimes against children.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we bring one provision to the attention of the Committee.

Section 4: Redefining "Serious Physical Injury"

The Committee Substitute for Senate Bill 210 (Finance) redefines the term "serious physical injury" to include some special categories of injury to children.

Of concern is the inclusion in (C) (ii) of "impairment of health, by *serious bruising or other injury*, that reasonably requires medical evaluation or treatment by a health care professional" under the

definition of "serious physical injury" with regard to children under 12, (emphasis added).

"Serious physical injury" is a common statutory term used throughout the criminal statutes. Assault in the first degree, a Class A felony, can be committed by "recklessly caus[ing] serious physical injury . . . by means of a dangerous instrument" or by intentionally causing serious physical injury. AS 11.41.200. Assault in the second degree, a Class B felony, can be accomplished by recklessly causing serious physical injury. AS 11.41.210. Murder in the second degree occurs when a person acts with the intent to cause serious physical injury and actually causes death to another person. AS 11.41.110. A person may justifiably use deadly force to avoid the imposition of serious physical injury on one's self or another. AS 11.81.335 and AS 11.81.340. A first-degree robbery occurs when a person takes an item of value from another by causing or attempting to cause serious physical injury. AS 11.41.500. A person commits an act of reckless endangerment when a person recklessly acts in a way that presents a "substantial risk" of serious physical injury to another. AS 11.41.250. Failure to report an assault leading to serious physical injury to a child is itself a crime. AS 11.56.765. A "bacteriological, biological, chemical, or radiological substance" is one capable of causing serious physical injury. AS 11.56.807.

Changing the definition of "serious physical injury" to include "serious bruising or other injury" to a child under 12 could have wide-ranging effects in the law, far outside the intent of the drafters. For instance, an ordinary fistfight between two students at a school could become a B felony if one student ended up with a black eye and visited the school nurse. The nurse could be guilty of a class A misdemeanor if she failed to report the fistfight to the police. A 14-year-old who took an 11-year-old's lunch money by punching him could end up in juvenile court facing an A felony, just as if he had pointed a gun at the other child. A careless driver who knocked a child off his bicycle could be charged with an A felony or a B felony if the child was bruised and taken to the doctor. A person could legally use deadly force against another in order to prevent a child from being seriously bruised. A device capable of bruising a child would be treated like a gun.

Recommended Alternative

We presume that these effects were not intended by the drafters. **To the extent the drafters intended to address the very real problem of serious assaults on children by parents and caregivers, we would suggest that the "serious bruising" provision of CS for SB 210 (FIN) be removed, and another course be chosen.**

The Legislature could propose a new offense narrowly aimed at intentional assaults on children by adults, or propose enhancing sentencing aggravators for adults who assault children. However, **altering the fundamental definition of "serious physical injury" for every criminal statute (and many non-criminal statutes) could have far-reaching effects, most of them likely not intended by the Legislature.**

Conclusion

We agree that crimes against children are very serious and the subject of child abuse is very important. We hope that the Judiciary Committee will reconsider the provision we identified and work with the Drafter find a different legislative means to address its concerns.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
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Representative Mike Hawker, Representative_Mike_Hawker@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us

CSSB 210 (FIN)
SECTIONAL ANALYSIS

Section 1 changes the age of the victim from under 10 to under 12 years in the elements of the crime of Assault in the 3rd degree. AS 11.41.220(a) in part currently prohibits a person (18 years old or over) from recklessly causing physical injury to a child under 10 years of age that would cause a reasonable person to seek medical care, or causes physical injury on two or more occasions. The bill would raise the victim's age to under 12 years old.

Section 2 amends the crime of endangering the welfare of a child in the first degree by adding the prohibition of recklessly failing to provide adequate food or liquids to a child, causing protracted impairment to a child's health. This change will increase criminal liability for offenders that harm children by withholding food and water.

Section 4 amends the definition of "serious physical injury" in Title 11. It expands the definition of serious physical injury for victims under 12 years old. It does so by adding the following

> Physical injury to a person under 12 years of age that causes:
>
> Serious disfigurement;
>
> Impairment of health, by serious bruising or other injury that reasonably requires medical evaluation or treatment by a health care professional;
>
> Loss or impairment of the function of a body member or organ;
>
> Serious impediment of blood circulation or breathing.

This broadened definition will allow for increased criminal liability for crimes committed on children under the age of 12. This broadened definition is important for children because of their quick ability to heal from injuries that would be sustained much longer in adults. In addition it would increase possible penalties for signs of strangulation and severe causes of bruising that lead to anemia.

Sections 5 – 7 amend the law (AS 12.47.040 and 12.47.060) addressing procedures for persons found to be guilty of a crime but mentally ill, by clarifying that the decision that the person is guilty but mentally ill must be made by the jury, by proof beyond a reasonable doubt, unless the defendant waives this requirement. Under AS 12.47.050(d), a person incarcerated and found guilty but mentally ill and still receiving treatment for a mental illness, is not eligible for parole release or furlough. For this reason, *Blakely v. Washington*, 542 U.S. 296 (2004) (*Blakely)* requires the decision relating to whether a person is guilty but mentally ill to be made by the jury by proof beyond a reasonable doubt.

Section 8 amends AS 12.55.025(i), addressing sentencing procedures, to clarify that while the burden of proof in sentencing proceedings is generally by a preponderance of evidence, under AS 12.55 there are various statutes that specify a different burden of proof.

Section 9 and 10 clarify the law when a defendant enters into a plea agreement that calls for a specific term of probation or a specific term of incarceration, by providing that the court, in a probation revocation proceeding, cannot unilaterally terminate or reduce those terms, except by the amount of incarceration time imposed for the offense that is the basis of the probation violation. When a court imposes sentence for a probation revocation in these cases, the court is not obligated to impose the full amount of remaining suspended time, but rather must consider the nature of the probation violation in light of applicable sentencing law and impose an appropriate sentence, subject to the caveat that its authority to impose an appropriate sentence does not include the authority to terminate or reduce the term of probation or the suspended term.

Sections 11 and 12 amend AS 12.55.125 (sentences of imprisonment for felony convictions) to clarify that factual findings (1) that result in a mandatory term of imprisonment of 99 years for conviction of murder in the first degree; (2) result in a term that would preclude a defendant from being awarded good time under AS 33.20.010(a) – for example, a person sentenced under the "three strikes" law; or (3) would increase the presumptive sentencing range – for example, a person convicted of a class A felony who possessed a firearm – must be made by a jury by proof beyond a reasonable doubt, unless the defendant waives this requirement.

Section 13 adopts a procedure for finding aggravating factor AS 12.55.155(c)(10) – the defendant's conduct was the most serious under the definition of the offense – that is consistent with the decisions of Alaska courts. That is, that the jury must decide the factual issues, but the court must make the legal decision whether it is the most serious in relation to other conduct defined in the offense.

Section 13 also provides that if one aggravating factor has been established, either by the court or the jury as required by law, additional aggravating factors may then be determined by the court by clear and convincing evidence rather than by the jury. The reason is that the finding of one aggravating factor authorizes the court to sentence an individual up to the maximum term provided by law. An additional aggravating factor cannot increase the maximum term; thus the *Blakely* decision does not require that additional factors to be decided by a jury by proof beyond a reasonable doubt.

Sections 14 and 15 make conforming amendments to the changes described in **Sections 9 and 10.**

Sections 16 and 17 describe the indirect court rule changes and the applicability provisions.

Section 18 would adopt a task force to study the crime of human trafficking. It would require that the task force prepare a report describing the number of human trafficking cases reported to law enforcement in the state since 2007, the number of cases prosecuted under Alaska law, the number of cases investigated by local and federal law enforcement agencies, and the services available to victims of human trafficking.

Alaska State Legislature

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Senator Lesil McGuire

MEMORANDUM

To: Representative Gatto
House Judiciary Chair

Cc: Melanie Lesh
Judiciary Committee Aide

From: Senator Lesil McGuire

Date: April 9, 2012

Re: Hearing request for SB 210, "An Act relating to crimes against children."

Please schedule Senate Bill 210, relating to crimes against children and increasing criminal liability for offenders, at your earliest convenience.

Attached to this memo please find:

- A sponsor statement
- CS SB210 Version R
- SB210, the original bill, Version A
- Fiscal notes
- Resolution of support

The contact for SB 210 is Amy Saltzman, 465-2995

Thank you.