

ALASKA LEGISLATIVE COMMITTEE REPORT DOZ 0072

1700 SJ . SB 547 - SB 594

SB485, SB547

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279-7541 BOB STOKES - PUBLIC DEFENDER

SB 535

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264-0550 DICK DEPLANE (SP?) - ALASKA COURT SYSTEM  
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Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
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Juneau, Alaska 99811

#### MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

JANUARY 29, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

SB 535 - "An Act relating to the criminal laws of the state."

SB 485 - "An Act permitting the videotaping of testimony of young victims of sexual assault or sexual abuse of a minor; and changing Rule 804, Alaska Rules of Evidence relating to exceptions to the hearsay rule."

SB 547 - "An Act permitting the videotaping of, or the exclusion of the public during, testimony of young victims of sexual assault or sexual abuse of a minor; and changing Rule 804, Alaska Rules of Evidence relating to exceptions to the hearsay rule."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:30 P.M. Committee members present were: Senators Rodey, Ray, and Parr. Senators Hohman and Bennett were absent.

The first item on the agenda was CSSB 485. Mr. Bruce explained the committee substitute draft. Mr. Victor Krumm, Department of Law testified in favor of this committee substitute.

Senator Ray moved that CSSB 485 pass from committee with a do pass. There was no objection and the bill was signed out of committee.

Chairman Rodey next brought CSSB 547 before the committee. Mr. Bruce explained the committee substitute. Mr. Victor Krumm, Department of Law testified in favor of CSSB 547.

Senator Ray moved to make the following amendment: Pg. 1, Line 15, add "under" before the word "16"; delete "or younger" between the words "age" and "at". On Pg. 2, Line 5, add "including these" before the word "essential". There was no objection to the amendment and it was adopted.

Victor Krumm suggests having the bill include court discretion to exclude the public from testimony of minors who are testifying.

Senator Bennett enters the room and his presence was noted for the record.

Senator Ray refers to Mr. Krumm's suggestion and suggests putting it in another bill to avoid any problems.

Chairman Rodey next called Ms. Paula Haley, testifying for the Alaska Network on Domestic Violence, before the committee. She stated that the Network was in support of CSSB 547.

Senator Ray moved that CSSB 547, as amended, be moved from committee. There was no objection and the bill was signed from committee.

Chairman Rodey next brought CSSB 485 before the committee for reconsideration. Senator Ray moved that on Pg. 1, Line 16, the word "under" be added before the word "16" and "or younger" between the words "age" and "at" be deleted. There was no objection to the amendment and it was adopted.

Senator Ray moved that CSSB 485, as amended, be passed from committee. There was no objection and the bill was passed.

The last item on the agenda was CSSB 535.

Testimony was heard from Barry Stern, representing the Department of Law. He relayed to the committee the Department's recommendations.

After having discussion on the bill, Chairman Rodey held CSSB 535 over and adjourned the meeting at 2:35 P.M.

Should Minor's Testimony Be Secret?

# Court Faces Rape Victim Privacy Issue

By DAVID LAUTER  
National Law Journal Staff Reporter

WASHINGTON — The issue of how much privacy to give the victims of rape — one of the most onerous questions a newspaper editor faces — has been placed before the Supreme Court.

The court has agreed to hear a challenge to a Massachusetts law that mandates closed courts during the testimony of rape victims who are minors. The case gives the court an opportunity to clear up what many lawyers consider serious contradictions between two earlier press freedom cases.

As interpreted by the Massachusetts Supreme Judicial Court, the commonwealth's law mandates closure of the court to press and public during testimony of a minor in rape cases and gives the trial judge discre-

that the two decisions are hard to reconcile.

Although *Gannett* concerned only pretrial proceedings, many reporters and attorneys have concluded that the court's ruling eliminated any hope that the press could sustain a Sixth Amendment claim of access to trials. But *Globe* attorney James F. McHugh of Boston's Bingham, Dana & Gould, said he disagreed with that impression, and the *Globe* has pressed both First and Sixth Amendment claims.

Press attorney Floyd Abrams of New York's Cahill Gordon & Reindel agreed with Mr. McHugh's decision. "The jurisprudential underpinnings of *Gannett* have been so eroded by *Richmond* that I think it was a sound decision," Mr. Abrams said.

Mr. Abrams ascribed the apparent

contradictions in the court's opinions to the lack of "a perfect fit under either the Sixth Amendment or the First Amendment." On the other hand, he said, the justices appear to agree that "the notion that courts may routinely be closed is anathema to our history and is unacceptable in practical terms."

The nature of the *Globe's* arguments should allay the fears of many in the press that in appealing to the current Supreme Court the *Globe* may be jeopardizing the rights the press already has established, Mr. Abrams said.

The *Globe* has not challenged a judge's right to close rape trials in some cases, but has concentrated its argument on the mandatory nature of

the Massachusetts law, arguing that the law must at least provide for a hearing to consider whether other methods short of closing the court could be used to protect victims' privacy and further the state's interest in encouraging rape victims to testify.

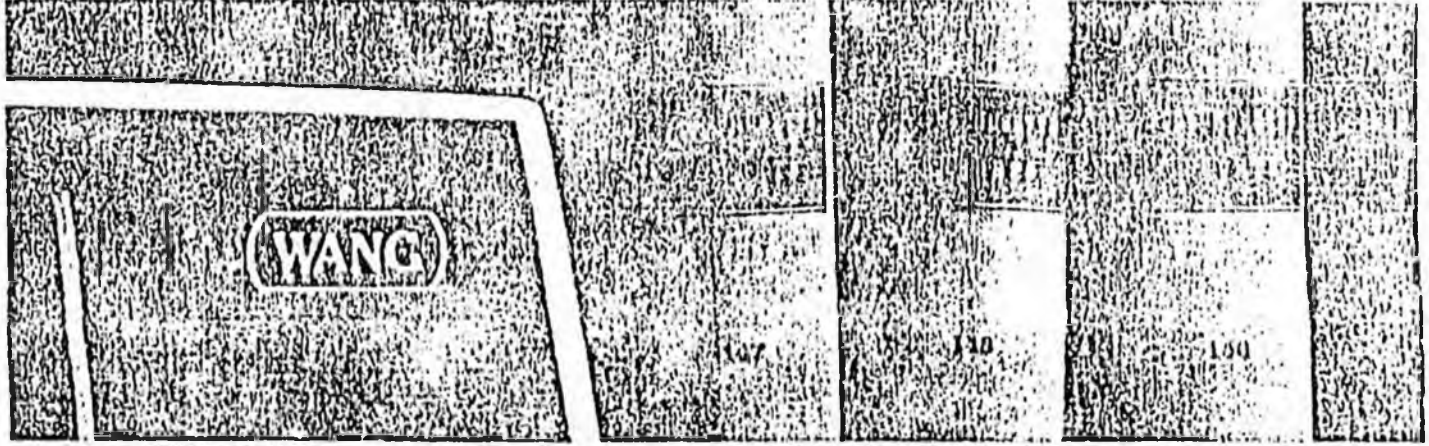
The Massachusetts high court accepted state arguments that hearings inevitably would become detailed "side trials" that would subject the potential witnesses to exactly the sort of pressure the law was designed to avoid. The *Globe* has argued that such extensive hearings would not be required in all cases. Mr. McHugh conceded that the nature of the hearings the *Globe* would consider sufficient will need more clarification.

More Supreme Court News:  
See Page 20

on to see the rest of the trial and to all the trial transcript. The Supreme court has agreed to take jurisdiction on an appeal by the *Globe Newspaper Co.*, publisher of the *Boston Globe*, from a decision by the Massachusetts high court upholding the constitutionality of the law. *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 81-611.

In two recent cases, the Supreme court has ruled that the Sixth Amendment does not guarantee press access to pretrial hearings but that the First Amendment may guarantee access to trials. The *Globe* maintains that both amendments should be read to forbid law that orders courts closed without hearing arguments of what

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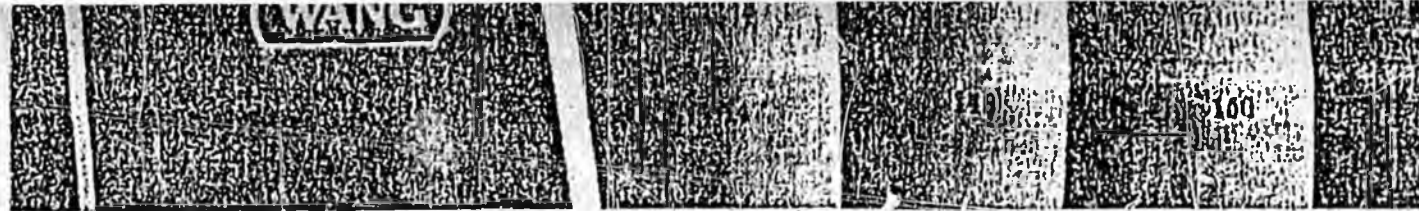
County of Norfolk, 81-611.  
 In two recent cases, the Supreme Court has ruled that the Sixth Amendment does not guarantee press access to pretrial hearings, but that the First Amendment may guarantee access to trials. The Globe maintains that both amendments should be read to forbid a law that orders courts closed without a hearing regardless of whether the defendant or the victim desires closure. Attorneys for both the Globe and the state agree that the mandatory aspect of the Massachusetts law appears to be unique.

In the case that gave rise to the Globe's challenge, Albert T. Aladjem Jr. was charged with raping and sodomying three high school girls, aged 15, 16 and 17, in Wellesley, Mass. *Commonwealth v. Aladjem*, 73102-9. The entire trial, in which Mr. Aladjem was acquitted, was closed by Judge Robert V. Mulken. Defense counsel noted exceptions to the judge's order excluding the public, and the district attorney in the case said, after consulting with the alleged victims, that the state would waive its rights to exclude the press.

**A Personal Right**

Exactly what rights the press and public have to attend trials has remained unclear despite two previous Supreme Court rulings. In 1979, in *Gannett v. DePasquale*, 443 U.S. 368, the court held that the Sixth Amendment's guarantee of a "public trial" is a personal right of the defendant that can be waived and that the press cannot invoke to gain access to pretrial hearings. But in 1980, in *Richmond Newspapers v. Virginia*, 448 U.S. 555, the court ruled that the right to attend criminal trials was, at least in most cases, guaranteed by the First Amendment.

No opinion commanded a majority in the Richmond case, and the court did not clarify the circumstances under which a judge could close a trial. Moreover, although *Richmond*, which concerned trials, did not overrule *Gannett*, which concerned pretrial hearings, many press attorneys find



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# Alaska Network on Domestic Violence and Sexual Assault

P.O. Box 3356, ANCHORAGE, ALASKA 99510

## POSITION PAPER: Senate Bills 547 and 485

The Alaska Network on Domestic Violence and Sexual Assault is a non-profit corporation composed of 17 domestic violence, sexual assault, and adult crisis intervention programs throughout the State. Network programs are funded in part through grants and contracts awarded by the recently established Council on Domestic Violence and Sexual Assault in the Department of Public Safety.

Network programs have had extensive experience dealing with the issue of sexual assault: programs are usually contacted directly by the victim after an assault, and program counselors and advocates participate in the entire reporting and judicial process. Additionally, some programs have established court monitoring programs in order to evaluate both judges' sentencing practices and convictions by jurors. Network programs also provide services to victims who choose not to report sexual assaults.

Based on experience with the issue and concern for the treatment of sexual assault victims and experience with the criminal justice system, the Network offers the following remarks regarding SB 547 and SB 485.

### A. SB 547

1. The Network supports the purpose and principle of SB 547 to protect young victims of sexual assault or sexual abuse of a minor from the emotional distress of repeated or public testimony regarding the crime committed against her or him for the following reasons:
  - a. Legislation of this kind protects a young victim of sexual assault from having to repeatedly re-live the experience of the sexual assault;
  - b. This type of legislation protects the victim from suffering the initial feelings of shock experienced after the assault;
  - c. Legislation of this kind generally mitigates the increased suffering from rape trauma syndrome which occurs as a result of the telling and re-telling of the story of the assault; and
  - d. This kind of legislation makes the criminal proceedings less of a public humiliation and ordeal for the victim.
2. The Network also believes that such legislation fairly and intelligently balances the rights of the defendant and the rights of the victim. It offers a degree of protection to the victim of the assault, while leaving intact the defendant's rights to cross-examine and confront the victim.
3. This legislation will facilitate reporting and prosecution of sexual assault by providing the victim with necessary protection and lessening the trauma associated with criminal proceedings.
4. The Network believes that SB 547 is timely legislation which will be found to be constitutional. Other states have enacted similar legislation:


- i. New Mexico
- ii. Florida; and
- iii. Massachusetts

Although the Massachusetts statute is presently being constitutionally challenged, SB 547 is distinguishable since it does not require mandatory closed hearings as the Massachusetts statute does.

5. Although the Network supports the concept behind SB 547, there are certain specific areas requiring further legislative attention. These include:
- a. The crime of Incest (AS 11.41.450), a class C felony, is not included in either the videotaping or the exclusion of the public sections of the bill. Incest victims are often children and they should be afforded the same protection as sexual assault and sexual abuse of a minor victim.
  - b. SB 547 uses, as part of the standard for exclusion of the public or for videotaping testimony, the age of the child at the time of the assault. The Network suggests that the age of the victim at the time of testimony at the criminal proceedings be determinative, since this is the time when the victim will be subjected to the trauma and invasion of privacy associated with testimony. Further, we recommend that the age limit should be 18 years of age, rather than 16 years, since 18 years is the age of majority.
  - c. The Network would like to see a definition of "severe emotional distress" included in SB 547 since this is an amorphous concept and is used as part of the standard for both exclusion of the public and for videotaping testimony and we would be happy to work with committee staff to develop such a definition, if you so desire.
  - d. The presumption in Secs. 12.45.047 (a) (2) and 12.45.048 (a) (2) that a child who is under age 16 will suffer severe emotional distress if required to testify in open court should be omitted. Instead, the decision should be within the judge's discretion. This will lessen the possibility of constitutional challenges and still protect the victim.
  - e. Sec. 12.45.047 (a) (2) concerns videotaping, yet it appears that it also deals with exclusion of the public (page 1, line 27). Is there a dual purpose in this section? Does the bill give the judge the flexibility to order videotaping plus a closed courtroom or simply videotaping a victim's testimony which will be shown later in an open courtroom? The Network suggests the following persons be present during the videotaping and trial:
    - i. Judge;
    - ii. Defendant and counsel;
    - iii. Counsel for the state;
    - iv. Advocate for the child (i.e., victim-witness assistance person, attorney or rape crisis center staff person);
    - v. Parents or guardian of child; and
    - vi. Court personnel essential for taking of the testimony.

VII. JURY

TASK W. ADV. REVIEW OF STATUTE 11.

- f. Because SB 547 may be subject to a successful constitutional challenge, the Network advocates addition of a severability clause to the bill, which would provide that if one section of the statute were found unconstitutional, it could be eliminated, while the rest of the statute would remain in effect. The severability clause is especially important if the presumption language in Secs. 12.45.047 (a) (2) and 12.45.048 (a) (2) is retained.
  
- g. Regarding Sec. 12.45.048 Exclusion of Public, (b) on line 25. The Network suggests that the definition of "public" be expanded to include the advocate for the child as stated earlier in this testimony regarding videotaping. We believe it is especially important for child victims of sexual assault to have emotional support throughout the criminal proceedings. Their advocates from rape crisis centers or victim-witness assistance programs who have worked with them throughout the crisis should be present during the proceedings. This is very important in incest situations where the non-offending parent is often suffering from tremendous personal stress and trauma and may be unable to adequately support their child.
  
-  h. Concern has been expressed within the Network over disposition of the videotape. To mitigate the invasion of privacy the victim suffers, we recommend that the tape be transcribed into a written record and be destroyed after the defendant has exhausted the appeals process; or that the tape be ordered sealed by the judge.

1. The comments regarding SB 547 are applicable to SB 485, the only difference in the bills being that the exclusion factor is not present in SB 485.

### 30-9-16. Testimony; limitations; in camera hearing.

Section is not unconstitutional on its face. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The fact that this section attempts to regulate practice and procedure in district courts in regard to a victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section not in conflict with rules. — The procedures in this section do not conflict, but rather are consistent, with Rule 36, N.M.R. Crim. P., regarding pretrial hearings. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The balancing approach to be applied in admitting evidence concerning past sexual conduct under this section does not conflict, but rather is consistent, with Rule 403, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. is to be applied in determining admissibility.

*State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

There is no conflict between this section and Rule 405, N.M.R. Evid., regarding methods of proving character, because the balancing approach of Rule 403, N.M.R. Evid. is also applicable to evidence admissible under Rule 405, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section is not limited to sex by consent; rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *State v. Montoya*, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Victim's past sexual conduct in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

### 30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act [this section].

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: 1953 Comp., § 40A-9-27, enacted by Laws 1978, ch. 98, § 1.

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TRIALS

and provided further, that the defendant in such trial by a written statement waives his right to a public trial for those portions from which spectators are so excluded. Added by St.1978, c. 316.

1978 Enactment. St.1978, c. 316, was approved June 30, 1978.

Library References Criminal Law § 635. C.J.S.Criminal Law § 963.

§ 17. Repealed by St.1979, c. 344, § 43B

St.1979, c. 344, § 43B, an emergency act, repealing this section, was approved June 30, 1979, and by section 51 made effective July 1, 1979.

Prior to repeal, this section was amended by St.1978, c. 478, § 361. See, now, c. 277, § 47A; Mass.R.Crim.P. Rule 13.

§ 18. Appeals in criminal cases to jury-of-six sessions; recognizance

Whoever is found guilty of a crime before a justice in a district court, or in the municipal court of the city of Boston, having filed the written waiver of trial by jury in the first instance provided by section twenty-six A of chapter two hundred and eighteen, may appeal the finding of guilty or the sentence imposed thereon to a jury-of-six session in accordance with section twenty-seven A of chapter two hundred and eighteen, and at the time of such finding of guilty or sentencing shall be notified of his right to take such appeal. The case shall be entered in the jury-of-six session on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at said jury session on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case only for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance costs upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant after a finding of guilty, jury-waived, in a district court, or the municipal court of the city of Boston, may appeal therefrom and shall thereafter be entitled to a trial de novo in a jury-of-six session in accordance with said section twenty-seven A.

Amended by St.1973, c. 657; St.1974, c. 107; St.1978, c. 478, § 302.

1973 Amendment. St.1973, c. 657, approved Aug. 20, 1973, in the first sentence, inserted "the finding of guilty or the sentence imposed thereon" and "or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen"; in the second sentence, substituted "released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter

two hundred seventy-six" for "committed to abide the sentence of said court"; in the third sentence, inserted "is not released on personal recognizance and"; deleted the former fourth sentence; and added the last sentence.

1974 Amendment. St.1974, c. 161, approved May 2, 1974, substituted "found guilty" for "convicted" and "such finding of guilt" or sentencing" for "conviction" in the first sentence.

SB 577

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Superior Court (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

5. Public trial

In prosecution for four counts of rape of a child under 16 years of age, where defendant claimed that he was denied his right to public trial because judge excluded public from his entire trial, burden was on defendant to demonstrate that public was excluded from trial after minor victims testified, but defendant was not obligated to demonstrate that he was prejudiced by closing of balance of his trial. *Com. v. Williams* (1980) 401 N.E.2d 376, 1980 Mass. Adv. Sh. 515.

Defendant did not demonstrate his trial on four counts of rape of a child under 16 years of age was improperly closed, but remand was necessary for a determination of extent to which trial was closed to public, and, if it was, for consideration whether defendant properly waived his right to public trial, through his actions or actions of his counsel. *Id.*

7. Stages of proceedings

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 mandatorily requires closure of trial during victim's testimony. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

In sex offenses involving minors under age of 18, Commonwealth bears burden of showing necessity for a closure of parts of trial other than victim's testimony or foreclosure of entire trial. *Id.*

In case in which this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 applies, Commonwealth may move for closure of parts of trial other than victim's testimony or foreclosure of entire trial. *Id.*

This section providing for exclusion of public from trial for sex offenses involving minors under age of 18 relates to closure of trial only during victim's testimony. *Id.*

8. Objections

Public need not receive prior notice of closure hearing for sex offenses involving minors under age of 18; however, court should hear a person who in timely fashion informs court of his desire to object to closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

Any person to be excluded from the trial of sex offenses involving minors under age of 18 other than during victim's testimony should have opportunity to state objections to order; such person need not file formal motion to intervene. *Id.*

9. Findings

On conclusion of hearing requesting exclusion of public from trial for sex offenses involving minors under age of 18 during other than victim's testimony, judge should make findings of fact as appropriate and should rule on necessity for closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

§ 16B. Exclusion of public from trial of criminal proceeding involving husband and wife

1. In general

Only in most extreme situations, if at all, may state court constitutionally forbid newspaper or anyone else to report or comment on happenings in and about proceedings which have been held in open court; a similar rule applies to court files otherwise unrestricted. *Ottaway Newspapers, Inc. v. Appeals Court* (1977) 362 N.E.2d 1189, 372 Mass. 539.

"General principle of publicity" is applicable in regard to record in a case; it is only in a clearly meritorious case that impoundment can be contemplated. *Id.*

Statutes which limit or authorize limitation of access to court proceedings and official records do not preclude exercise by judges of a sound discretion to impose reasonable closure, including impoundment, in other cases when found necessary. *Id.*

§ 16C. Exclusion of public from trial involving crime of incest or rape

To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testimony is to be presented; provided, that either of the parties requests that all spectators be so excluded at the trial or portions thereof;

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dicts finding defendant guilty of murder in the second degree and not guilty of armed robbery were not inconsistent. *Id.*

#### 12.5 Instructions

Evidence in prosecution for armed robbery, did not require instruction on issue of defendants' guilt of lesser included offenses of unarmed robbery, larceny, or assault. *Com. v. Hogg* (1974) 311 N.E.2d 63, 365 Mass. 290.

Evidence in prosecution for, *inter alia*, larceny of a motor vehicle did not require instruction on issue of defendant's guilt of

lesser included offense of use of motor vehicle without authority. *Id.*

Where defendant was charged with forcible rape of female under 16, but judge considered that evidence would have permitted finding either of forcible rape or of statutory rape as lesser included offense and instructed accordingly, he should have further instructed jury to specify offense should they find defendant guilty. *Com. v. Franks* (1974) 309 N.E.2d 879, 365 Mass. 74, appeal after remand 341 N.E.2d 660, 369 Mass. 608, appeal after remand 362 N.E.2d 895, 372 Mass. 866.

### § 16A. Exclusion of public from trial for sex offenses involving minors under age of eighteen

#### Supplementary Index to Notes

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#### 2. In general

If closing all or part of trial for sex offenses involving minors under age of 18 were necessary to assure availability of evidence of fresh complaint, judge would be justified in ordering closure. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

Although this section providing for exclusion of public from trial for sex offenses involving minors under age of 18 is mandatory only as to victim's testimony, it is possible that trial judge might close other parts of trial; such decision to close any part of trial other than victim's testimony or to close entire trial is matter within judge's sound discretion. *Id.*

Because of the policy favoring publicity, an agreement between prosecution and defense to close a trial should not justify closure or even be relevant to judge's determination of necessity for a closure of trial for sex offenses involving minors under age of 18. *Id.*

Issue at a hearing on Commonwealth's motion to close parts or all of trial for sex offenses involving minors under age of 18 shall be whether such closure is necessary to preserve evidence required for just conviction. *Id.*

Only in most extreme situations, if at all, may state court constitutionally forbid newspaper or anyone else to report or comment on happenings in and about proceedings which have been held in open court; a similar rule applies to court files otherwise unrestricted. *Ottaway Newspapers, Inc. v.*

*Appeals Court* (1977) 362 N.E.2d 1199, 378 Mass. 539.

"General principle of publicity" is applicable in regard to record in a case; it is only in a clearly meritorious case that impoundment can be contemplated. *Id.*

Statutes which limit or authorize limitation of access to court proceedings and official records do not preclude exercise by judges of a sound discretion to impose reasonable closure, including impoundment, in other cases when found necessary. *Id.*

#### 2.5 Purpose of law

Main purpose of this section, which provides for exclusion of general public from courtroom in trials involving sex crimes if the victim is under 18 years of age, is to assure that Commonwealth's case will not be destroyed by reason of witnesses' reluctance to testify before a miscellaneous audience. *Com. v. Leo* (1979) 393 N.E.2d 410, 1979 Mass. Adv. Sh. 2245.

Defendant, who was convicted of committing sexual offenses against 14-year-old girl, could not complain of an alleged violation of this section, in light of fact that such statute was not intended to benefit criminal defendants. *Id.*

#### 3. Requisites of proceedings

Judge should hold hearing before entering order closing parts of trial other than victim's testimony under this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. *Globe Newspaper Co. v. Superior Court* (1980) 401 N.E.2d 360, 1980 Mass. Adv. Sh. 485.

#### 4. Persons with a direct interest

The press does not have a sufficiently "direct interest" to be exempt from this section providing for exclusion of public from trial for sex offenses involving minors under age of 18. *Globe Newspaper Co. v.*

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under 15 years of age, quoted phrase must be interpreted broadly and is not limited to parties, but includes counsel, witnesses, stenographers and usual court attendants; and it does not exclude a parent, husband, wife or guardian of defendant, or even a friend, whose presence defendant desires and who might give him legitimate assistance or comfort without interfering with trial. *Com. v. Blondin* (1949) 87 N.E.2d 435, 324 Mass. 564.

#### 5. Public trial

The guarantee to an accused of "public trial" is a safeguard against any attempt to employ courts as instruments of persecution, and knowledge that every criminal trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power. In *re Oliver* (1948) 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

Defendant whose counsel had requested that witnesses be sequestered and who had not asked his counsel to arrange to have particular available per-

sons, friends, or relatives present at trial was not entitled to new trial on theory that he had been denied right to public trial. *Com. v. Wells* (1971) 374 N.E.2d 452, — Mass. —.

Excluding mother, sister, brother, and friend of defendant during trial for sex crimes was violation of Sixth Amendment which provides that in all criminal prosecutions accused shall enjoy the right to a speedy and public trial. *Com. v. Marshall* (1969) 258 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 848.

Under Fourteenth Amendment, Sixth Amendment right to a public trial was applicable to defendant's trial for sex crimes in state court. *Id.*

#### 6. Habeas corpus

On petition for writ of habeas corpus brought by a petitioner who had been convicted in Massachusetts court of rape and carnal abuse of a female child, evidence did not establish that commonwealth prevented petitioner's wife from testifying in behalf of petitioner at petitioner's trial. *Melanson v. O'Brien* (C.A.1953) 203 F.2d 934.

### § 16B. Exclusion of public from trial of criminal proceeding involving husband and wife

The presiding justice of a district court may exclude the general public from the court room during the trial of any criminal proceeding involving husband and wife.

Added by St.1949, c. 302.

#### Library References

Criminal Law ¶ 635.  
C.J.S. Criminal Law § 963.  
Comments.

Exclusion of the public from certain trials, see M.P.S. vol. 30, Smith, § 1031.

Sequestration of witnesses, see M. P.S. vol. 10, Hughes, § 109.

#### Notes of Decisions

##### 1. In general

Section 16A of this chapter providing that court may exclude general public admitting only such persons as may

have a direct interest in trial, is to be strictly construed in favor of general principle of publicity. *Com. v. Blondin* (1949) 87 N.E.2d 435, 324 Mass. 564.

278 § 16A PROCEEDINGS IN CRIMINAL CASES

§ 16A. Exclusion of public from trial for sex offenses involving minors under age of eighteen

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Historical Note

St.1923 c. 251.

St.1931 c. 205.

Law Review Commentaries

Right to public trial. 17 Annual Survey of Mass. Law, Boston College, p. 263 (1970).

Library References

Criminal Law § 635.  
C.J.S. Criminal Law § 903.  
Comments.

Exclusion of public from certain trials, M.P.S. vol. 30, Smith, § 1031.

Sequestration of witnesses, see M. P.S. vol. 19, Hughes, § 109.

Notes of Decisions

In general 2  
Habeas corpus 6  
Persons with a direct interest 4  
Public trial 5  
Requisites of proceedings 3  
Validity 1

ty. Com. v. Marshall (1969) 253 N.E.2d 333, 356 Mass. 432, 39 A.L.R.3d 843;  
Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

3. Requisites of proceedings

Trial in chambers of three defendants for rape and abuse of female child under 10 years of age, by jury, with testimony taken in their presence and complete stenographic record available to them and without exclusion of any person whom any defendant desired to have present did not deny defendants any rights under the state constitution. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

4. Persons with a direct interest

Under this section providing that court may exclude general public, admitting only such persons as may have a "direct interest" in trial for crime involving sex, committed against minor

1. Validity

This section does not violate due process of law clause of federal Constitution. U.S.C.A. Const. Amend. 14. Melanson v. O'Brien (C.A.1951) 191 F.2d 963.

This section does not violate the provision of the state constitution prohibiting defendant from being deprived of his life, liberty or estate but by law of the land. Com. v. Blondin (1949) 87 N.E.2d 455, 324 Mass. 564.

2. In general

This section is to be strictly construed in favor of general principle of public

(1) It is unlawful for any person, knowing that a criminal trial, an official proceeding, or an investigation by a duly constituted prosecuting authority, a law enforcement agency, a grand jury or legislative committee, or the Judicial Qualifications Commission of this state is pending or knowing that such is about to be instituted, to endeavor or attempt to induce or otherwise cause a witness to:

- (a) Testify or inform falsely; or
(b) Withhold any testimony, information, document, or thing.
Amended by Laws 1976, c. 75-208, § 44, eff. Oct. 1, 1976.

[See main volume for text of (2) and (3)]

Laws 1971, c. 75-298, rewrote subsec. (1).

Index to Notes

In general 1
Indictment and information 2

1. In general
There was no such crime as attempted tampering with a witness. Hester v. State, App., 383 So.2d 26 (1978).
Witnesses have personal right to either invoke or not invoke Fifth Amendment and may waive such right. Lawley v. State, App., 336 So.2d 784 (1976).
Coercing two codefendants as part of plea bargain, to invoke Fifth Amendment rights and not give testimony, which might have been exculpatory, if subpoenaed by defendant under threat of imposition of greater sentences by court in pending cases against codefendants and under threat of prosecution for other crimes if they testified

amounted to suppression of evidence by State and required reversal of defendant's conviction and defendant's discharge since improper plea bargain would infect new trial to same degree that it infected first one. Id.
2. Indictment and information
Charge of causing witness to be placed in fear was not sufficient to allege that defendant knew that trial proceeding or investigation was pending but was defective for failure to allege that defendant knew that victim was a witness and to allege some connection between defendant's actions and victim's status as witness. State v. Murray, App., 349 So.2d 707 (1977).
Information charging conspiracy to tamper with witness was not insufficient because alleged material time was period between September 9 and September 23, nor because nature and description of the "official proceeding or investigation" in which named witness was to testify were not set forth. State v. Murkett, App., 344 So.2d 868 (1977).

918.15 Repealed by Laws 1980, c. 80-75, § 4, eff. July 1, 1980.

Laws 1980, c. 80-75, § 4, repealed provisions designated in Fla.St.1979 as § 918.16(4) as well as Fla.St.1979, § 918.6 as amended by Laws 1979, c. 79-320 and c. 79-400. Section 918.15 was added by Laws 1977, c. 77-312, § 4.

For provisions pertaining to mental competency to stand trial, see, now, § 910.12.

918.10 Sex offenses; testimony of person under age 16; courtroom cleared; exceptions

In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.
Laws 1977, c. 77-312, § 24, eff. July 1, 1977.

Law Review Commentaries
Raising issue of competency to stand trial: Procedures and consequences. Marshall D. Kapp, 62 Fla.Bar J. 49 (1978).

Library References
Criminal Law § 638.
C.J.S. Criminal Law § 964.

918.17 Sexual battery or child abuse case; videotaping of testimony of victims under age 12 permitted

(1) Upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape out of open court the testimony of a child 11 years of age or younger who has been the victim of a sexual battery under s. 794.011 or to videotape the testimony of a child 11 years of age or younger who has been the victim of aggravated child abuse under s.

827.03 or child abuse under s. 827.04. The court may grant an order to videotape testimony as provided herein only if it finds that:

- (a) The victim of the offense is a child 11 years of age or younger; and
(b) There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.
(2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.

(3) The application referred to in subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

Laws 1979, c. 79-69, §§ 1 to 3, eff. May 22, 1979.

Laws 1979, c. 79-69, § 3, provides: "Rule 3.190(j), Florida Rules of Criminal Procedure, is hereby repealed insofar as it is inconsistent with the provisions of this act."

Cross References
Motion to take deposition to perpetuate testimony, see Criminal Procedure Rule 3.190(j).

CHAPTER 919. CONDUCT OF JURY

919.01 to 919.22 Repealed by Laws 1970, c. 70-339, § 180

For superseding provisions contained in 1974 Florida Rules of Criminal Procedure, see, now, Rules 3.376, 3.381 et seq.

CHAPTER 921. SENTENCE

- Sec. 921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement [New].
Sec. 921.241 Felony judgments; fingerprints required in record [New].

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 776.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

FLORIDA STATUTES

'918.17 Sexual battery or child abuse cases; videotaping of testimony of victims under age 12 permitted.—

(1) Upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape out of open court the testimony of a child 11 years of age or younger who has been the victim of a sexual battery under s. 794.011 or to videotape the testimony of a child 11 years of age or younger who has been the victim of aggravated child abuse under s. 827.03 or child abuse under s. 827.04. The court may grant an order to videotape testimony as provided herein only if it finds that:

(a) The victim of the offense is a child 11 years of age or younger; and

(b) There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.

(2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.

(3) The application referred to in subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

History.—s. 1, 2, ch. 79-69.

Note.—Section 3, ch. 79-69, repeals Rule 3.190(f), Florida Rules of Criminal Procedure, "... insofar as it is inconsistent with the provisions of this. . . ." section.

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. Senate Bill No. 547  
 Title Videotaping of Testimony of Young Victims of Sexual Assault  
 Requested by Senators Parr and Fischer Date 4/20/81

II. FISCAL DETAIL

Agency Affected Department of Public Safety  
 Program Category Affected Administration of Justice  
 BRU, Program, or Subprogram(s) Affected Detachment and CIB  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES		.1	.1	.1	.1	.2
500 EQUIPMENT		36.0				10.0
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
<b>TOTAL</b>		<b>36.1</b>	<b>.1</b>	<b>.1</b>	<b>.1</b>	<b>10.2</b>

FUNDING (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
GENERAL FUND		36.1	.1	.1	.1	10.2
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

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

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The Division's review of the potential impact of this Bill upon its operations indicates the need to provide videotape equipment in each of the five Alaska State Trooper detachments located throughout the State. Each location would require a portable color camera and recorder plus accessories totalling approximately \$7,200.00. Partial replacement of the equipment would be estimated to be needed by FY'86 assuming the bill became effective in FY'82. The commodities noted above would cover the estimated cost of the video cassette tapes.

MSG 82-00002152 PRY 1 01/19/82 16:42:53 ORIG: LA00 IN= 0023 OUT= 0152  
FROM: CINDY, ANCH TO: JUNEAU INFO  
TARGET: LJH2 SUBJ: POM PAGE 0001

TO: SENATORS RODEY, BENNETT, HOHMAN, FARR AND RAY  
FROM: ANGELA RINALDO, EXECUTIVE DIRECTOR, S.T.A.R, P.O. BOX 3356, ANCH.  
995L0 (276-7279)

SENATE BILL 547, WHILE RECOGNIZING THE RIGHTS OF DEFENDANTS, WILL PROTECT THE MINOR VICTIM OF SEXUAL ASSAULT FROM THE TRAUMA OF TESTIFYING IN OPEN COURT.

THIS BILL WILL ALSO: REDUCE INDIVIDUAL'S RELUCTANCE TO REPORT THE SEXUAL ASSAULT TO AUTHORITIES AND FACILITATE PROSECUTION.

"STANDING TOGETHER AGAINST RAPE" SUPPORTS SB 547

"An Act permitting the videotaping of, or the exclusion of the public during, testimony of young victims of sexual assault or sexual abuse of a minor; and changing Rule 804, Alaska Rules of Evidence relating to exceptions to the hearsay rule."

Senate Bill No. 547 provides that a child 16 years of age or younger who is a victim of sexual assault or sexual abuse could provide testimony by videotape rather than having to appear in open court. The Bill provides a presumption that a child under the age of 16 will suffer severe emotional distress if required to testify in open court. The judge presides at the videotaping proceeding and rules on all questions as if at trial, and the defendant has the right to an attorney and to confront and cross-examine the witness. In addition, this Bill provides that the public may be excluded from the courtroom while the testimony of a child is taken.

The Department has seen an increase in reporting of sexual abuse cases over the last year, including a 300% increase in Anchorage and a 240% increase in Fairbanks. Cases of sexual assault often have sensational aspects which bring curiosity-seekers and the press to the courtroom. To testify before a crowded courtroom can be emotionally harmful to a child who has already suffered trauma from the assault or abuse. This Bill would provide protection for the child from some of the more harmful aspects of such testimony. Therefore, the Department is in full support of Senate Bill No. 547. However, the following recommendations are made:

1. the Department recommends raising the age to 18 to be consistent with age of majority; and
2. including incest and sexual exploitation to the crimes for which this option applies.

RECOMMENDED BY: John R. Pugh  
John R. Pugh, Director  
Division of Family and  
Youth Services

DATE: 5/13/81

APPROVED BY: Helen D. Beirne  
Helen D. Beirne  
Commissioner

DATE: 5/19/81

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SENATE BILL NO. 547  
 Title videotaping testimony of young victims of sexual assault/abuse, changing Rule 804...  
 Requested by \_\_\_\_\_ Date \_\_\_\_\_

II. FISCAL DETAIL

Agency Affected Department of Health and Social Services  
 Program Category Affected \_\_\_\_\_  
 BRU, Program, or Subprogram(s) Affected \_\_\_\_\_

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Fund Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

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

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Senate Bill No. 547 has no fiscal impact on the Department of Health and Social Services.

IV. DATE 5/13/81 PREPARED BY John R. Pugh John R. Pugh, Director  
 AGENCY Division of Family and Youth Services  
 PHONE 465-3170

Original: Legislative Finance  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named) M&B Approval [Signature] Date 5/18/81

918.17 Sexual battery or child abuse cases; videotaping of testimony of victims under age 12 permitted.—

(1) Upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape out of open court the testimony of a child 11 years of age or younger who has been the victim of a sexual battery under s. 794.011 or to videotape the testimony of a child 11 years of age or younger who has been the victim of aggravated child abuse under s. 827.03 or child abuse under s. 827.04. The court may grant an order to videotape testimony as provided herein only if it finds that:

(a) The victim of the offense is a child 11 years of age or younger; and

(b) There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.

(2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.

(3) The application referred to in subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

History.—s. 1, 2, ch. 79-69.

\*Note.—Section 3, ch. 79-69 repeals Rule 3.190(j), Florida Rules of Criminal Procedure, . . . insofar as it is inconsistent with the provisions of this . . . section.

\*KIM DIRECT STATEMENT SEE BELOW)

BENOY - GIVES CASE EXAMPLE OF PROBLEM w/ 14 YEAR OLD  
DETAILS DIFFERENCE

RAY - HAS QUESTION IN SEC 048  
ASKS AGE OF 16 YEARS AS TECHNICAL DEFECT.  
STEEN REPLIES

FARE - GIVES OVERVIEW OF BILL - HISTORY OF BILL  
EXPLAINS DIFFERENCES BETWEEN BILLS

RAY - SEEMS WE COULD EXTEND TO ALL VICTIMS

STEEN - SPEAKS TO PUBLIC EXCLUSION - GLOBE NEWSPAPER CASE

- 1.) VIDEOTAPING - SHOULD BE AUTOMATIC STORRIS
- 2.) SPEAKS ONLY TO ASSAULT - SHOULD SPEAK TO ANY PERPETRATOR
3. EXPANDING TO YOUNG WITNESSES

RAY - HERE ~~IS~~ AT TESTIMONY IS GOOD IDEA

PRINCE - CALLS ATTENTION TO May 8 1981 MEMO  
QUESTIONS WHETHER THE VIDEOTAPING OF WITNESSES  
WOULD NOT BE OPEN TO ATTACK

RAY - WHAT ABOUT CALLING VICTIM BACK FOR MORE TESTIMONY

BENOY - PRIORITY OF SEXUAL CASES IN COURT

JIM STECHING - APDEA - 100% IN SUPPORT  
WOULD LIKE TO SEE THIS PROVISION APPLIED TO ALL PERSONS.

DEBORAH KELLER - PARENT OF ABUSED CHILD

WANTS TO ELIMINATE PRESENCE OF PERPETRATOR  
DID NOT PROSECUTE OWN RAPIST BECAUSE OF COURT DIFFICULTY

JOHN JOBIT - ASS. - SUPPORTS BOTH BILLS - LIKES EXCLUSION PROVISION  
DENYATE WHO CAN BE IN ROOM DURING VIDEOTAPING

FARE - DON'T TRIBE JUDGE DECIDE WHO SITS IN VIDEOTAPE SESSION

\*RAY - SHOULDN'T THE CHILD BE ABLE TO TELL HIS OWN STORY WITHOUT  
INTERUPTIONS.

SARA FELIX - AWARE ATTORNEY - ATTACKED FORMER PAPER

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COMMITTEE REPORT

SENATE

6/3/81

FURTHER: None

Date: MARCH 22, 1981

Mr. President:

The Committee on JUDICIARY has had SB 592

parents of delinquent minors and children in need of aid have the right to counsel in certain proceedings under AS 47.10

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for \_\_\_\_\_ [ ] same title [X] new title

and recommends \_\_\_\_\_

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

\_\_\_\_\_  
Walter B. Anderson / No Pass  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CHAIRMAN



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

MARCH 22, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

#### Legislation Before Committee:

- SB 845 - "An Act to provide for reinstatement of certain dissolved Alaska Native Claims Settlement Act village corporations to corporate status."
- SB 592 - "An Act providing that the parents of delinquent minors and children in need of aid have the right to counsel in certain proceedings under AS 47.10."
- SB 473 - "An Act relating to urban renewal and development projects of municipalities; and providing for an effective date."
- HB 640 - "An Act relating to games of chance and contests of skill; and providing for an effective date."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:35 P.M. Committee members present were: Senators Rodey, Ray, Parr, and Anderson. Senator Bennett was absent.

003 - Chairman Rodey called the meeting to order.

005 - The first item of business, SB 845, was brought before the committee.

015 - James Kohler, Department of Community and Regional Affairs, testified in favor of the bill, stating that several corporations were dissolved at no fault of their own.

209 - Mr. Kirkpatrick, Director of Banking Securities Corporations, testified stating neither support nor opposition. He only wanted to see clarification of fees due.

443 - Senator Anderson moved that the bill be passed with individual recommendations. There was no objection and the bill was passed with Senators Anderson, Parr, and Rodey signing do pass, Senator Ray signed no recommendation.

463 - Next Chairman Rodey brought HB 640 before the committee.

470 - Chairman Rodey gave the amendments made to the bill.

552 - Chairman Rodey suggested moving the bill from committee and directed staff to prepare a committee substitute to include the new amendments previously adopted by the committee. There was no objection and the committee substitute was passed with Senators Parr, Ray, and Anderson signing do pass. Senator Rodey signed no recommendation.

650 - Chairman Rodey brought SB 473 before the committee.

727 - After discussion, Senator Ray moved that the committee substitute be passed with individual recommendations. There was no objection and the bill was passed with Senators Parr, Rodey, and Anderson signing do pass. Senator Ray signed no recommendation.

730 - The last item on the agenda was SB 592.

745 - Francis Still, representing herself, testified in favor of SB 592.

780 - Senator Parr moved that on Page 1, Line 12, the following be deleted: [to transfer custody, or to appoint a person other than the parent of a child as guardian of the child,]. There was no objection.

795 - Senator Parr moved that the committee pass SB 592 with a committee substitute to be drafted to include the new amendment. There was no objection and the bill was passed with Senator Parr signing do pass. Senators Ray, Rodey, and Anderson signed no recommendation.

802 - Chairman Rodey adjourned the meeting at 2:20 P.M.

STATE OF ALASKA  
THE LEGISLATURE  
LEGISLATIVE AFFAIRS AGENCY

SRS 592 file  
(my bill)

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

MEMORANDUM

June 8, 1981

SUBJECT: Appointment of counsel  
(Work Order No. 12-1840)

TO: Senator Charles H. Parr

FROM: Thomas A. Sofo, <sup>TAS</sup>  
Legislative Counsel

Since drafting Work Order No. 12-1840 concerning appointment of counsel in parental termination cases, I ran across a very recent decision of the United States Supreme Court which I have attached for your information. Apparently, they have held that, at least in the absence of a statute, there is not necessarily a constitutionally recognized right to such representation.

TAS:ljb

Attachment



## SUMMARY AND ANALYSIS

### Supreme Court Limits District Courts' Discretion In Class Action Gag Orders

A unanimous Supreme Court finds court-ordered limits on communications between named class action plaintiffs or their counsel and potential class members, when entered without a record and specific findings of need, to be an abuse of discretion. The opinion, written by Justice Powell, declines to reach First Amendment issues posed by such orders. (*Gulf Oil Co. v. Bernard*, 6/1/81)

The order before the Court barred any contacts directly or indirectly, orally or in writing, "without the consent and approval of the proposed communication and proposed addressees" by the court. It contained several exceptions, including communications between attorney and client, communications between attorney and prospective client when initiated by the prospective client, and communications in the regular course of business. It also required post-communication filing with the court of any communication asserted to be constitutionally protected. The lower court apparently adopted in toto a model order suggested by the Manual for Complex Litigation, a publication widely used by federal judges.

Justice Powell says that any communications ban "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. \*\*\*In addition, such a weighing — identifying the potential abuses being addressed — should result in a carefully drawn order that limits speech as little as possible\*\*\*." Because the district court in this case failed to provide any record or findings at all, Justice Powell concludes, it abused its discretion. (Page 4604)

### Indigents Not Always Entitled To Lawyer In Parental Termination Cases

Appointment of counsel on an ad hoc basis is revived by the U.S. Supreme Court as it holds, 5-4, that the Constitution does not require the appointment of counsel for indigent parents in every parental

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status termination proceeding. (*Lassiter v. Department of Social Services of Durham County, N.C.*, 6/1/81)

*Mathews v. Eldridge*, 424 U.S. 319 (1976), propounds three elements to be used in determining what due process requires. Justice Stewart, writing for the Court, applies these factors to the present case: The mother's interest is an extremely important one; the state has an interest in a correct decision, a relatively weak pecuniary interest, and possibly a stronger interest in informal procedures; and the complexity of the proceedings and the incapacity of the uncounseled parent could be great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

If the parent's interests were at their strongest, the state's interests were at their weakest, and the risks of error were at their peak, the *Eldridge* factors would overcome the presumption — derived from the Court's own cases — that there is a right to appointed counsel only for the indigent who may lose his personal freedom. However, since the *Eldridge* factors will not always be so distributed, the Court says that the appointment of counsel for indigent parents in termination proceedings must be answered in the first instance by the trial court, subject to appellate review.

In this case, several factors convince the Court that denial of counsel to the indigent mother did not deny her due process. The petition to terminate her parental rights contained no allegations of neglect or abuse upon which criminal charges could be based; no expert witness testified; the case presented no specially troublesome points of law; counsel could not have made a determinative difference for her; she expressly declined to appear at an earlier child custody hearing; and her failure to contest the present termination proceeding was without cause.

Justice Blackmun is joined in dissent by Justices Brennan and Marshall; Justice Stevens dissents separately. (Page 4586)

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July 16, 1981

Andrew E. Hoge, Esq.  
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Re: Administrative Law Committee - Draft APA

Dear Andy:

You will find enclosed a draft of APA sections regarding adjudicatory actions and judicial review in the format agreed upon at our last meeting. In connection with this draft I wish to bring to your attention the following considerations:

(1) Section .330 - This section has been rewritten to make the adjudicatory sections of the Act mandatory upon all state agencies except as any agency may be specifically exempted by the legislature, through statutory enactment, from the provisions of the same. The section has further been reworked to provide a substantive statutory foundation for the right to adjudication. As the draft comment to the section reflects, this section becomes in effect "the provision of law" which vouch saves adjudicatory proceedings, including hearing to a respondent/applicant. I believe such a statutory prescription to be consistent with the mandatory nature of the procedure. The section further reflects the existence of a subcategory of non-adjudicative actions which are provided for in the subsequent section .340. These sections taken together are intended to address the matter of, for example, the application and rejection thereof for a driver's license, which transaction does not warrant in the initial processing adjudicatory proceedings conducted under the provisions of this section. As this and subsequent sections make clear, however, review of such initial actions may fall within the scope of these statutory provisions;

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(2) Section .340 - This section has been taken from the model APA and made consistent with the redrafted section .330. As indicated above, the section deals with specific actions which are sub-adjudicatory in nature and provides administrative agencies within the state substantial leeway in promulgating individual forms and formats for dealing with such matters -- all below the threshold of administrative adjudication. In this way a balance is maintained between the needs of administrative agencies for expedited and efficient processing of initial applications while yet preserving to applicants those due process rights and guarantees appropriately theirs. Further, in this regard, the subsequent section, .350, is also consistent with the initial section .330, the former being a particular subcategory of those activities referred to in the latter;

(3) Section .370 - This section has been rewritten to harmonize parts of the existing statute with those which have been derived from the model APA in the manner indicated both in the section itself and in the comments attendant thereupon;

(4) Section .380 - In this section and in subsequent sections dealing with or appertaining to the subject, the term "presiding officer" has been reestablished as the designation for the individual or individuals, in effect, "running" the procedural aspects of the hearing held under this section of the statute. Such a change appeared necessary because the mandatory requirement that the proceedings prescribed here be applied to all agencies; a number of agencies, such as the Alaska Public Utilities Commission, do not as a matter of practice employ hearing officers, but may identify a panel of commissioners to conduct hearings. From such a panel one commissioner may, in fact, run the hearings and thus should be subject to the requirements placed upon one occupying that position, that is, the presiding officer. Use of the term accommodates those circumstances contemplated in the existing statute as well as those which will now arise as a result of the engrafting of model APA sections into the law taking into account the functional realities of existing commissions within the state;

(5) Section .400 - (Accusation) and Section .410 (Statement of Issues) - These sections reflect held over provisions from the existing statute. I would draw to your attention the interrelationship between these sections and the proposed section .560, "Notice of Hearing" which is taken from

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the model APA. Although not necessarily inconsistent, the sections do not precisely delineate their collective inter-related scope. It is not clear, for example, the extent to which one must proceed by accusation as opposed to a more general mode of procedure up to and including individualized formats in particular agencies. The matter should be reviewed by the committee;

(6) Section .510 - This section contains emergency adjudication proceedings premised upon the procedure specified for stop orders issued by the Alaska Transportation Commission. The procedure contemplates an expedited initial proceeding which could be inaugurated by an ex parte order from the commission, followed by an immediate but potentially abbreviated hearing and a final emergency order of specified, limited duration. This format enables an agency to act expeditiously within an umbrella of time to deal with bona fide emergency problems while preserving minimal due process rights to respondents affected by such action. The agency is not relieved from the obligation to proceed more formally upon conclusion of the emergency procedures. Moreover, although the agency is granted latitude under the section to make provision in its regulations and rules for streamlined hearing procedures, the final emergency order of the commission is subject to other requirements of the section, including judicial review. Thus, the ongoing and more formal proceedings would not necessarily be a bar to legal challenge of the emergency order itself, though obviously a court may decide to hold in abeyance any decision on such an emergency order pending the outcome of such formal proceeding. As set forth in this section, the procedure for emergency orders would seem reasonably well delineated both in terms of scope and temporal applicability while yet achieving a balance between the needs of the agency representing the public at large and the rights of the individuals affected by such actions;

(7) Section .630 - The hearing officer/agency dichotomy presently embodied in AS 44.62.450 has been modified to reflect the concerns discussed in (4) above regarding "presiding officers". The present section makes clear that matters may be heard by the agency alone without the benefit of a hearing officer; in such hearing one of the agency members may himself (or herself) be designated as the presiding officer. Further, the word "decision" has been eliminated in favor of "order" to focus on the conceptual basis of the adjudicatory section, namely that agencies must act by orders and, under the

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initial section .330, may not issue orders except as prescribed in this chapter. The order is the repository for all findings of fact, conclusions of law and is the object of any further adjudicatory actions including reconsideration, and judicial review;

(8) Section .640 - This section has been substituted for the existing AS 44.62.510 which I believe is manifestly insufficient for the reasons set forth in the comments to and the text of the proposed section;

(9) Section .660 - This section is limited by implication to the accusation format. As such, it should be compared to the revised model APA section 4-208 which has broader implication and applies to the general range of parties to the proceeding. To some extent, the appropriateness of the one or the other section depends upon the policy determined upon in (5) above;

(10) Section .670 - To the extent that this section reflects the early days of Alaska history before the advent of the modern, not to say marvelous, long lines telecommunication system in this state, it might be appropriate to augment the statutory section to make allowance also for votes by telephone or teleconferencing;

(11) Section .700 - I would note that the draft does not define standing in the sense of who may seek review of administrative rulings made pursuant to the adjudicatory provisions of this chapter. The revised model APA section is 5-106; while not necessarily arguing in favor of such a section, the matter should, I believe, be noticed;

(12) Section .780 - When all sections of the draft have been melded, review should be undertaken for consistency of language and denominators and also to insure that the definition section is inclusive of all those matters warranting definitions. This would seem particularly desirable in the case of those words or phrases derived from the model APA which may not presently have such delineation in the existing definition section of the Alaska Statutes;

(13) I have reordered certain of the sections in an attempt to improve the cognitive flow of the chapter and to avoid misinterpretation or misimpression which might arise merely because of the juxtaposition of various sections.

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Obviously, the sections can and should be reordered where other committee members feel that such is desirable;

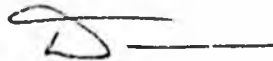
(14) The comments following each draft section represent my effort to distill and present the committee's collective wisdom on each section. In setting forth those comments, I have referred to my own notes of meetings, to prior committee drafts, and to the drafters notes accompanying the model Act. In certain cases, no comments are offered. Further, in certain cases there may be errors in the substance or the expression of such comments. I would accordingly recommend that each member of the committee take a few moments to review that material for any errors I may have inadvertently injected into it, since, of course, this is the committee's document;

(15) In a similar vein, I have attempted to reflect to the best of my knowledge the source of each draft section. Necessarily, that knowledge may also be imperfect and I would recommend review and supplementation or alteration of that material as warranted.

I recognize the tardiness of the submission under your inflexible schedule, and apologize for the same, but would submit by way of extenuation and mitigation that it is substantial in amount and reflects considerable effort on the part of the entire committee. If the legislature's consideration of it equals in depth our own, I am sure it will prove to be a truly model administrative procedure act. If I can be of further service in this matter, please call upon me.

Very truly yours,

ELY, GUESS & RUDD



Donn T. Wonnell

DTW:mr

Enclosure

RULEMAKING PROVISIONS AS 44.62.010-.300

SECTION-BY-SECTION COMMENTARY

Existing Section 010. The Committee proposed to delete this provision as superfluous. However, this proposed deletion should be reviewed carefully with the Revisor of Statutes in light of the Revisor's note published in the Michie codification.

A new Section 010 is proposed, which would represent an adaptation of existing section 280. The Committee felt that it would be most appropriate for this provision to appear at the beginning of the Act.

Existing Section 020. The Committee proposed deletion of existing section 020, for the reason that it appears to be superfluous.

A new Section 020 is proposed, the purpose of which is to state the requirement that any rule, regulation, order or standard meeting the definition of the term "regulation" be promulgated under the rulemaking provisions of the APA if it is to have legal effect. The committee's proposed Section 020 would also contain a definition of the term "regulation" for purposes of the APA. This is an adaptation of existing section 640(a)(2), where the important substantive standards as to what is a "regulation" subject to the rulemaking requirements lie hidden in a definition.

Existing Section 030, which deals with resolution of conflicts between regulations and statutes they are intended to implement or interpret, is proposed to be deleted. This provision merely restates a general rule of constitutional law and statutory construction. The provision of existing 060(b) to the effect that the Department of Law must approve proposed regulations for consistency with statutes, retained in the Committee's proposed draft as Section 030(b)(1) and (2), covers this point adequately.

Existing Section 040. The Committee felt that this provision, which deals with the question of when regulations must be filed with the Lt. Governor, as distinguished from when regulations must be promulgated under the rulemaking procedure of the APA, has been renumbered in the Committee's proposed revision of the Act as Section 095. As such, it would follow the provisions dealing with the rulemaking procedure, since submission of regulations to the Lt. Governor occurs after the adoption of the rule. The three listed exceptions to the submission requirement, set out in existing section 040(a), are proposed to be deleted. The Committee felt that some of these excepted cases do not meet the definition of the term "regulation" in the first place, and that the rest of the excepted matter should not be exempt from submission to the Lt.

Governor for filing. The question of whether any of that filed material should be excepted from the requirement of publication is a different issue taken up elsewhere in the draft. Subsection 040(b), requiring citation of specific statutory authority for each regulation, is retained in the Committee's proposal as new section 045 with minor modifications having no intended substantive effect.

Existing Section 050 has been retained and renumbered proposed Section 040. The Committee has left open the question of whether the responsibility for preparing and revising the drafting manual should remain with the Department of Law or should be transferred to another agency. Further, existing Section 050 has been modified to provide that the drafting manual prescribes the style and form for all regulations "promulgated" under the APA, rather than those "submitted".

Existing Section 060 is retained and renumbered in the Committee's draft as proposed Section 030 with minor editorial changes not intended to have substantive effect. Subsection (c) of existing Section 060, dealing with the Lt. Governor's acceptance of regulations and orders, has been eliminated. That subject is dealt with in a more comprehensive manner in Section 110 of the Committee's draft.

Existing Section 070, prohibiting the charging of fees for certification, submission or filing of regulations, is recommended for deletion. One state agency charging another for submission or filing of regulations is unlikely and is an internal executive branch matter for which no statute is required. As for individuals seeking to obtain certified copies of regulations or related materials, the Committee felt that the general rules under the public records statute were adequate, and in the interest of brevity recommended deleting this specific provision.

Existing Section 080. This section has been deleted in favor of a more substantial provision regarding the Lt. Governor's duties in accepting a regulation or order of repeal for filing, set forth in the Committee's proposed Section 110. Whereas existing law requires only that the Lt. Governor receive and endorse regulations and orders of repeal, maintain a permanent file containing certified copies of them for inspection, and make sure that the Attorney General's written statement of approval accompanies the regulation, the Committee's proposal would prohibit the Lt. Governor from accepting a regulation or order of repeal for filing unless he has affirmatively determined that it is accompanied by all of the required supporting documents. This imposes a policing responsibility upon the Lt. Governor, and provides a focus for public objections which may arise as to the agency's compliance with the rulemaking procedure.

Section 090 was deleted in 1969.

Existing Section 100 is renumbered as Section 120 of the Committee's draft. No substantive changes have been made.

Existing Section 110, regarding publication, has been renumbered Section 140 in the Committee's proposed revision. The only change is addition of reference to the Alaska Administrative Code's Supplement.

Existing Section 120 provides for voluntary publication of a regulation which would be exempt (under proposed Section 020) from promulgation and publication under the APA. This provision has been modified and is included in the Committee's revision as proposed Section 100.

Existing Section 125 requiring appointment of a particular attorney within the Department of Law as the "Regulations Attorney" and detailing the Department's responsibilities to advise state agencies on regulations matters, is proposed by the Committee to be deleted. This statute was passed by the legislature in 1969 in an effort to force the Department of Law to take seriously its obligations to state agencies under the APA. The Committee felt that the statute has served its purpose and that since it adds no specific obligations to the Department that the Department does not have under other existing laws, it should be deleted.

Existing section 130. This provision regarding codification and publication of regulations has been renumbered Section 130 in the Committee's proposed draft. Modifications have been made to provide for an Alaska Administrative Code Supplement issued quarterly. In addition, under Section 065 of the Committee's proposed revision, an Alaska Administrative Journal would also be published. A bill to establish the Alaska Administrative Journal was proposed (passed?) in the legislative session which just ended. (CSSB 6).

Existing Section 140 is proposed to be deleted as superfluous.

Original Section 150 was repealed in 1974.

Existing Section 160, dealing with the quarterly Alaska Administrative Register, is proposed to be deleted. The quarterly Register, (which is now simply now a supplement to the codified Administrative Code) would be renamed the Alaska Administrative Code Supplement, and the Alaska Administrative Journal would also be published.

Original Section 170 was deleted in 1969.

Existing Section 180 is renumbered Section 160 in the proposed revision. Rather than becoming effective upon the 30th day after its filing with the Lt. Governor, as is the case under the existing statute, a regulation would only become effective on the 30th day after its publication in the Journal. The Committee was concerned that, without such a provision, it is possible for a regulation to become law before it is made available to the public. Matter which is not within the "regulation", but is submitted voluntarily by the agency for publication in the Code would not be subject to that effective date rule.

Existing Section 190, dealing with public notice of the proposed adoption of a regulation, is renumbered Section 050 in the Committee's revision. This renumbering, as most of the others, is intended to reorganize the statute so that its provisions proceed in a chronological sequence which matches the process of drafting, promulgating, filing and publishing a regulation. The Committee's proposed revision of existing section 190 would delete Subsection (a)(4), since the requirement of that provision is left entirely to "the judgment of the agency" anyway. Instead of that provision, the Committee's proposed Section 050(c) makes it clear that the agency has the authority to use additional measures to give notice, if it chooses to do so. Under the Committee's proposal, the published notice would appear not only in a newspaper of general statewide circulation, but would also appear in the next periodic issue of the Journal.

Existing Section 195, dealing with the fiscal note requirement, is contained in the Committee's proposed Section 070. A majority of the Committee members, over a strong dissent by the minority, favored a substantial amendment to the rulemaking provisions of the APA to require both fiscal notes and a "regulatory analysis" in conjunction with the promulgation of a new regulation whenever certain triggering requirements were met. Proposed Section 070 is self-explanatory in this respect. The dissenting minority on the Committee opposed both the fiscal notes and the regulatory analysis based upon two concerns: (1) that those requirements would make rulemaking, which is generally required of agencies by the legislature rather left to the discretion of the agency, more expensive and time consuming, and (2) that the requirements would invite obstructive litigation. The minority was concerned that, as with the environmental impact statement requirement of the National Environmental Policy Act, it is inherently impossible to establish to a certainty that an agency has complied with the regulatory analysis requirement by simply examining the documents; for that reason, the compliance issue is always open to litigation by an opponent of the regulations.

Existing Section 200 is retained and renumbered as proposed Section 060. Subsection (b) has been modified in an effort to clarify the degree and manner in which a proposed regulation can be changed after public notice without requiring a new notice. It should be noted that, in addition to the notice required under existing section 190, the contents of which are dealt with in this Section, a "concise summary of the regulatory analysis" must also be published to pursuant to proposed Section 070(c). Depending upon the timing of the publication of that summary, it may not be possible to include that summary with the general notice of the proposed rulemaking.

Existing Section 210 is renumbered Section 080 in the Committee's proposed revision.

Existing Section 220 is renumbered proposed Section 190. The initial limiting clause of that provision, which could give rise to unnecessary disputes as to the right to petition for adoption of a regulation, is proposed to be deleted.

Existing Section 230, dealing with the procedure to be followed by an agency upon receipt of a petition for a rulemaking, is revised and renumbered proposed Section 200. The only substantive change is to require that if the agency denies the petition, it must provide the petitioner with a written statement of reasons for denial.

Existing Section 240 is renumbered proposed Section 210, and is amended to include specific definitions of the term "legislative" and "interpretative" as those terms are used in the section.

Existing Section 250 is renumbered proposed Section 170. The final sentence of the existing statute has been rewritten to clarify the possible ambiguity between the statute's requirement that an agency must give notice within five days of the adoption of an emergency regulation if the agency wishes the regulation to continue in effect past the tenth day.

Existing Section 260 is renumbered proposed section 180. The period within which an emergency regulation may remain in effect pending promulgation of permanent regulations would be reduced from 120 days to 90 days.

Existing Section 270 is combined with existing Section 250, and appears as the final sentence of proposed Section 170. Existing Section 280 is modified and appears as Section 010 of the revision.

Existing Section 290 is deleted. Subsection (a) of that provision is inconsistent with the Committee's position that any matter falling within the definition of "regulation" must be promulgated and filed with the Lt. Governor. The Committee felt that Subsection (b)(1) creates a serious ambiguity as to whether agency rules establishing procedure in administrative tribunals, which are clearly within the definition of "regulation," are subject to the rule-making requirements of the APA.

In addition to the foregoing revision and reorganization of the existing sections of the rulemaking provisions of the APA, the Committee proposed the addition of several new sections. Proposed Section 090 would require that an agency adopting a regulation issue an "explanatory statement". This new requirement is an adaptation of Section 3-110 of the revised model Administrative Procedure Act. The Committee draft also includes a new provision dealing with the time and manner of adoption of regulations following the public comment period. This provision, proposed Section 085, is an adaptation of Section 3-106 of the revised model Administrative Procedure Act. Among other things, it would provide that the rulemaking procedure is terminated if the agency has not adopted a regulation within 180 days following the date of public notice or hearing. An agency wishing to promulgate a regulation after that time had run would be required to recommence the rulemaking procedure.

In general, the effect of this proposed revision of the rulemaking provisions of the APA is to eliminate superfluous or ambiguous provisions and to reorganize the sections so that they correspond to the chronological sequence followed in promulgating a regulation. The Committee hopes that this reorganization will make it easier for a stranger to the Act to read it from one end to the other and understand how the process is supposed to work.

Sec. 44.62.010. Purpose of §§ \_\_\_\_\_ of this Chapter. It is the purpose of §§ \_\_\_\_\_ of this chapter to establish minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Nothing in §§ \_\_\_\_\_ of this chapter repeals or diminishes additional requirements imposed by any statute.

COMMENT: Adaptation of A.S. 44.62.280.

Sec. 44.62.020. Regulations required.

(a) Subject to the exemption set forth in subsection (b), every rule, regulation, order or standard of general application adopted by a state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, is valid only if it is promulgated by the agency as a regulation under the procedures set forth in sections of this chapter. The term "regulation" includes manuals, policies, instructions, guides to enforcement, interpretative bulletins, interpretations and the like, which have the effect of rules, orders, regulations or standards of general application.

(b) The term "regulation" does not include (1) a rule or policy relating only to internal management of a state agency, or (2) a form prescribed by a state agency or instructions relating to the use of the form.

(c) The \_\_\_\_\_ may by regulation prescribe detailed rules to implement this section by describing what kinds of "internal policies" are exempt.

COMMENT: Adaptation of A.S. 44.62.640(a)(2), which is a "stuffed definition" of the term "regulation."

Sec. 44.62.030. Department of Law Review. (a) Every state agency which by statute possesses regulation-making authority shall work with the Department of Law in the preparation and revision of its regulations and shall adhere to the "Drafting Manual for Administrative Regulations" published pursuant to § 40 of this chapter.

(b) The Department of Law shall advise the agencies on legal matters relevant to the promulgation of regulations. In addition, the department shall prepare a written statement of approval or disapproval after each regulation has been reviewed in order to determine

(1) its legality, constitutionality and consistency with other regulations;

(2) the existence of statutory authority and the correctness of the required citation of statutory authority following each section;

(3) its clarity, simplicity of expression and absence of possibility of misapplication; and

(4) compliance with the Drafting Manual for Administrative Regulations.

COMMENT: Adaptation of A.S. 44.62.060.

Sec. 44.62.040. Drafting Manual. The shall prepare and shall revise when necessary a "Drafting Manual for Administrative Regulations" which prescribes the style and forms for regulations promulgated under this chapter.

COMMENT: Adaptation of A.S. 44.62.050.

Sec. 44.62.045. Statutory Authority. No regulation adopted under this chapter is valid unless both general statutory authority under which it is adopted and the specific statutory sections being implemented, interpreted or made clear by the regulation are cited immediately following its text.

COMMENT: Adaptation of A.S. 44.62.040(8).

Sec. 44.62.050. Notice of proposed action. (a) At least 30 days before the adoption, amendment or repeal of a regulation, notice of the proposed action shall be

(1) published in a newspaper of general statewide circulation and in the next periodic issue of the Alaska Administrative Journal;

(2) mailed to every person who has filed a request for notices of proposed regulations with the state agency;

(3) if the agency is within a department, mailed or delivered to the commissioner of the department; and

(4) furnished to all incumbent state legislators.

(b) If the form or manner of notice is prescribed by statute, in addition to the requirements of filing and mailing notice under this chapter, the notice shall be published, posted, mailed, filed or otherwise publicized as prescribed by the statute.

(c) In addition to the requirements set forth in subsections (a) and (b) of these sections, an agency may use additional measures to give notice of the proposed action.

(d) The failure to mail notice to a person as provided in paragraphs (2) - (4) of subsection (a) of this section does not invalidate an action taken by an agency under this chapter.

COMMENT: Adaptation of A.S. 44.62.190.

§44.62.070 - Fiscal notes and regulatory analysis. (a) If the adoption, amendment, or repeal of a regulation would require increased appropriations by the State, then, prior to giving notice of the proposed action under § .050, the department or agency affected shall prepare a fiscal note setting forth an estimate of the appropriation increase for the fiscal year following adoption, amendment, or repeal of the regulation and for at least two succeeding fiscal years. In the event the regulation as adopted varies from the original proposed regulation in such a manner as to make the original fiscal note inapplicable, an amended fiscal note addressed to the modified proposed regulation shall be prepared prior to its adoption.

(b) An agency shall issue a regulatory analysis with respect to the adoption, amendment or repeal of a regulation if, within 15 days after the published notice of adoption, amendment or repeal, a written request for the analysis is filed in the office of the Lieutenant Governor by the Governor, the Administrative Rules Review Committee or 50 Alaska citizens signing a single request. A certified copy of the filed request must be forwarded immediately by the Lieutenant Governor to the agency.

(1) Except to the extent the written request expressly waives any one or more of the following, the regulatory analysis must contain:

(A) A description of the classes of persons who will probably be directly affected by the proposed adoption, amendment or repeal, including those classes that will bear the

costs of the proposed adoption, amendment or repeal and those classes that will benefit from the proposed adoption, amendment or repeal;

(B) A description of the probable quantitative and qualitative impact of the proposed adoption, amendment or repeal, economic or otherwise, upon the affected classes of persons;

(C) The probable cost to any other agency for the implementation and enforcement of the proposed adoption, amendment or repeal and any anticipated affect on state revenues;

(D) An analysis comparing the probable cost and benefits of the proposed adoption, amendment or repeal to the probable cost and benefits of inaction;

(E) An analysis that determines whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed adoption, amendment or repeal; and

(F) A list of the alternative methods for achieving the purpose of the proposed adoption, amendment or repeal that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed adoption, amendment or repeal.

(c) A concise summary of the regulatory analysis must be published in an administrative journal or a newspaper of general circulation in the state at least 10 days before the earliest of:

(1) The end of the period during which persons may make written submissions on the proposed adoption, amendment or repeal; or

(2) The date of any required oral proceeding on the proposed adoption, amendment or repeal.

(d) The public summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and when, where and how persons may present their views on the proposed adoption, amendment or repeal.

(e) The sufficiency and accuracy of the contents of the regulatory analysis required by this section is not subject to judicial review.

Sec. 44.62.080. Public proceedings. (a) On the date and at the time and place designated in the notice the agency shall give each interested person or his authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally. The state agency shall consider all relevant matter presented to it before adopting, amending or repealing a regulation.

(b) At a hearing under this section the agency or its authorized representative may administer oaths or affirmations, and may continue or postpone the hearing to the time and place which it determines.

COMMENT: Adaptation of AS 44.62.210.

Sec. 44.62.060. "Contents of notice. (a) The notice of proposed adoption, amendment or repeal of a regulation shall include

(1) a statement of the time, place and nature of proceedings for adoption, amendment or repeal of the regulation;

(2) reference to the authority under which the regulation is proposed and a reference to the particular code section or other provisions of law which are being implemented, interpreted or made specific;

(3) an informative summary of the proposed subject of agency action;

(4) other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations; and

(5) a summary of the fiscal information required to be prepared under A.S. 44.62.070(a), if applicable.

(b) A regulation which is adopted, amended or repealed may vary in content from the informative summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the informative summary contained in the original notice was comprehensive of the regulation as finally adopted, so as reasonably to assure that members of the public are notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject.

COMMENT: Adaptation of A.S. 44.62.200.

Sec. 44.62.065. "Alaska Administrative Journal. [See  
CSSB 6 (3-9-81)].

Sec. .085. Time and Manner of Adoption of Regulations. (a) An agency may not adopt a regulation until the period for making written submissions and oral presentations thereon has expired.

(b) Within [180] days following (i) publication of the notice of proposed rule adoption, or (ii) the end of oral proceedings thereon, an agency shall either adopt a regulation pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Alaska Administrative Journal.

(c) Before the adoption of a regulation, an agency shall consider all written and oral submissions received pursuant to § 080 of this chapter.

(d) Within the scope of its delegated authority, an agency may utilize its own experience, technical competence, specialized knowledge and judgment in the adoption of a rule.

COMMENT: Adaptation of Revised Model APA § 3-106.

*Written or oral?*

Sec. 090. Explanatory Statement. (a) At the time it adopts a regulation, an agency shall also issue a concise explanatory statement containing:

(1) the principal reasons for and against the regulation considered by the agency;

(2) its reasons for adopting the regulation;

(3) its reasons for rejecting the arguments against adoption of the regulation; and

(4) an indication of any change between the text of the proposed regulation contained in the published notice of proposed adoption and the text of the regulation as finally adopted, with the reasons for any change.

(b) Upon judicial review of the lawfulness of an agency regulation, a court may not consider any reason for adopting the regulation that was not relied on by the agency in its explanatory statement, or any representations made by the agency that are inconsistent with the explanatory statement.

COMMENT: Adaptation of Revised Model APA § 3-110.

Sec. 44.62.095: Filing Regulations. Every state agency which by statute possesses regulation-making authority shall submit to the lieutenant governor for filing a certified original and one duplicate copy of every regulation or order of repeal adopted by it.

COMMENT: Adaptation of A.S. 44.62.040.

1  
Sec. 44.62.100. Voluntary Publication. A state agency may submit to the lieutenant governor for publication a regulation or order of repeal of a regulation which is subject to one of the exceptions set out in § 020 to the term "regulation."

COMMENT: Adaptation of A.S. 44.62.120.

Sec. 44.62.110. Endorsement and Filing. (a) The lieutenant governor may accept a regulation or order of repeal for filing only if it is accompanied by the following supporting documents:

- (1) Certified copy of the notice required under § \_\_\_\_\_;
  - (2) Affidavit of publication of notice;
  - (3) Affidavit of compliance with other notice requirements;
  - (4) Attorney general's statement of approval required by § \_\_\_\_\_;
  - (5) Fiscal note or, if applicable, amended fiscal note required by § \_\_\_\_\_;
  - (6) Regulatory analysis, if applicable, issued under § \_\_\_\_\_;
  - (7) Explanatory statement issued under § \_\_\_\_\_;
- and
- (8) Order of adoption executed by the official adopting the regulation or the order of repeal.

(b) Upon receipt of a regulation and supporting documentation, the lieutenant governor shall (1) endorse on each regulation or order of repeal and supporting document filed by him, the time and date of filing, and (2) maintain a permanent file of the certified copies of regulations, orders of repeal and supporting documentation for public inspection.

COMMENT: Adaptation of A.S. 44.62.080 and 060(c).

Sec. 44.62.120. Presumptions from filing. (a) The filing of a certified copy of a regulation or an order of repeal by the lieutenant governor raises the rebuttable presumptions that

(1) it was duly adopted;

(2) it was duly filed and made available for public inspection in the lieutenant governor's office at the day and hour endorsed on it;

(3) all requirements of this chapter and the regulations relative to the regulation have been complied with;

(4) the text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

(b) The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

COMMENT: This is an adaptatio. of AS 44.62.100.

Sec. 44.62.130. Codification and Publication. The lieutenant governor shall, provide for the continuing compilation, codification and publication, with quarterly supplements, of all regulations filed by his office, or of appropriate references to any regulations the printing of which he finds to be impractical, such as detailed schedules of forms otherwise available to the public, or which are of limited or particular application. The publication of compiled regulations is the Alaska Administrative Code. The quarterly supplements to it are the Alaska Administrative Code Supplements. All regulations which are filed by the first day of the month preceding publication shall be published in the Code Supplement for that quarter. If during quarter no regulation, amendment or order of repeal has been filed the regular quarterly Code Supplement shall be published reflecting that fact.

COMMENT: Adaptation of A.S. 44.62.130.

Sec. 44.62.140. Presumptions from publication.

(a) The publication of a regulation in the Alaska Administrative Code or Code Supplement raises a rebuttable presumption that the text of the regulation as so published is the text of the regulation adopted.

(b) The courts shall take judicial notice of the contents of each regulation or notice of the repeal of a regulation printed in the Alaska Administrative Code or Code Supplement.

COMMENT: This is an adaptation of AS 44.62.110.

Sec. 44.62.160. Effective Date. A regulation or an order of repeal filed by the lieutenant governor becomes effective on the 30th day after its publication in the Alaska Administrative Journal unless

(1) otherwise specifically provided by the statute under which the regulation or order of repeal is adopted, in which event it becomes effective on the day prescribed by the statute;

(2) it is outside the scope of the definition of the term "regulation" contained in § 020(a) of this chapter, in which event it becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal;

(3) it is an emergency regulation or order of repeal adopted under § 170 of this chapter, in which case the written finding required under that provision shall be submitted to the lieutenant governor, together with the emergency regulation or order of repeal, which, in that event only, becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal; and

(4) a later date is prescribed by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal.

COMMENT: Adaptation of A.S. 44.62.180.

Sec. 44.62.170. Emergency Regulations. A regulation or order of repeal may be adopted as an emergency regulation or order of repeal if a state agency makes a written finding, including a statement of the facts which constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety or general welfare. The requirements of §§ \_\_\_\_\_ of this chapter do not apply to the initial adoption of emergency regulations; however, upon adoption of an emergency regulation, the adopting agency shall immediately submit a copy of it to the lieutenant governor for filing and for publication in the Alaska Administrative Journal, and within five days after adoption, the agency shall give notice of the adoption in accordance with § \_\_\_\_\_ of this chapter. Failure to give the required notice within five days after adoption will result in automatic expiration of the regulation at the end of the tenth day after its adoption. It is the state policy that emergencies are held to a minimum and are rarely found to exist.

COMMENT: Adaptation of A.S. 44.62.250 and .270.

Sec. 44.62.180. Limitation on Effective Period of  
Emergency Regulations. (a) "No regulation adopted as an  
emergency regulation remains in effect more than 90 days unless  
the adopting agency complies with §§ \_\_\_\_\_ of this chapter  
during the 90-day period.

(b) Before the expiration of the 90-day period, the  
agency shall transmit to the lieutenant governor for filing a  
certification that §§ \_\_\_\_\_ and \_\_\_\_\_ of  
this chapter were complied with before submitting the  
regulation to the lieutenant governor, or that the agency  
complied with those sections within the 90-day period. Failure  
to so certify repeals the emergency regulation; it may not be  
renewed or refiled as an emergency regulation.

COMMENT: Adaptation of A.S. 44.62.260.

Sec. 44.62.190. Right to Petition. Any person may petition an agency for the adoption, amendment or repeal of a regulation. The petition shall state clearly and concisely

(1) the substance or nature of the regulation, amendment or repeal requested;

(2) the reasons for the request; and

(3) reference to the authority of the agency to take the action requested.

COMMENT: Adaptation of A.S. 44.62.220.

Sec. 44.62.200. Procedure on Petition. (a) Upon receipt of a petition requesting the adoption, amendment or repeal of a regulation, a state agency shall, within 30 days, either (1) deny the petition in writing, which shall include a statement of reasons for denial, or (2) initiate the procedures set forth in this chapter for the promulgation of a regulation.

(b) If the petition seeks promulgation of an emergency regulation or order of repeal, the agency shall, within 10 days, either (1) deny the petition in writing, which shall include a statement of the agency's reasons for denial, or (2) promulgate the emergency regulation or order of repeal pursuant to the procedure prescribed in § \_\_\_\_\_ of this chapter.

COMMENT: Adaptation of A.S. 44.62.230.

Sec. 44.62.210. Limitation on Retroactive Action.

(a) If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter which is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

(b) For purposes of this section,

(1) "legislative" means \_\_\_\_\_;

and

(2) "interpretative" means \_\_\_\_\_

COMMENT: Adaptation of A.S. 44.62.240.

(1) Proposed Section:

Sec. 44.62.330, Availability of adjudicative proceedings

(a) Unless expressly exempted by the Legislature, every state agency, in any matter other than a rule-making or a declaratory order proceeding, shall conduct adjudicative proceedings under §§.330-.790 of this chapter:

(1) prior to the formulation and issuance of an order; or

(2) upon request of a party, following exhaustion or waiver of any available pre-adjudicative processes, after the agency has

(i) issued a complaint, citation, response to an application, petition or request, or other preliminary determination, or

(ii) taken or indicated its intent to take final action affecting the substantial interests of the party.

(b) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties

(2) additional relief by injunction or restraining order

(3) penalty provisions relating to suspension, revocation, reissuance and other similar matters of licenses, permits, lease, concessions, and other similar matters

(4) related matters which in their context do not relate to procedure

(c) [Repealer of specific extent statutory exemptions from APA]

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

This section describes the circumstances in which an agency must undertake adjudicative proceedings. In essence, no agency may act through the device of making or issuing any "order", as defined by the statute, unless adjudicative proceedings are first invoked. Excepted from this requirement are non-adjudicative proceedings involving rule-making and declaratory proceedings. Also excepted are certain preadjudicative actions, including actions concerning complaints, citations, applications and preliminary decisions. This latter category of exceptions recognizes a threshold below which certain agency actions may occur which are not in themselves part of the adjudicative process. Such preadjudicative actions are covered by draft §.340. Parties

affected by such a preadjudicative action, nonetheless, are afforded the right to invoke adjudicative proceedings upon request following exhaustion or waiver of any available preadjudicative review process, thereby balancing the requirements of administrative efficiency with the due process rights of the party in interest.

Unlike the Revised Model State Administrative Procedure Act, 1980 ("Revised Model APA"), this section sets forth the general substantive basis in law granting the right to adjudicative proceedings. Whereas the Revised Model APA at §4-101 specifies commencement of adjudicative proceedings where "required by any provision of law", this section becomes, in effect, that "provision of law". This grant of substantive right is consistent with the mandatory general application of the adjudicative sections of the draft and with the repealer of all existing exemptions from the APA.

The mandatory application of §§.330-.790 reflects the Committee consensus favoring universal application of the procedures specified therein to all agencies unless expressly exempted from such by the Legislature. Because of the inherent qualities of the specified procedures, universal application will tend to diminish inequities or irregularities which individually derived agency regulations might, advertently or inadvertently, embody. Universal application will also facilitate administrative efficiency through uniformity of interpretation and practice under the specified procedures.

Such uniformity will further serve to increase and to enhance public awareness of and familiarity with the means and mode of agency decision-making, thereby increasing public confidence in the workings of government.

Where an individual agency can demonstrate a bona fide need for exemption from one or more requirements of this act, it may apply to the Legislature to obtain a specific exemption by statutory enactment.

(4) Source:

Administrative Committee Draft (July 1981)

**Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630.** (a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

- (1) Repealed by § 5 ch 159 SLA 1980.
- (2) Board of Chiropractic Examiners
- (3) Board of Dental Examiners
- (4) State Board of Registration for Architects, Engineers and Land Surveyors
- (5) Repealed by § 13 ch 218 SLA 1976.
- (6) Board of Examiners in Optometry
- (7) Repealed by § 5 ch 159 SLA 1980.
- (8) State Medical Board
- (9) Division of Lands under Alaska Land Act where applicable
- (10) Board of Nursing
- (11) Board of Pharmacy
- (12) Board of Public Accountancy
- (13) Department of Labor as to functions relating to employment security only as provided in (c) of this section
- (14) Real Estate Commission
- (15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act
- (16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications
- (17) Repealed by § 12 ch 131 SLA 1980.
- (18) Repealed by § 49 ch 94 SLA 1980.
- (19) Repealed by § 54 ch 169 SLA 1978.
- (20) Department of Revenue, under Cigarette Tax Act
- (21) Repealed by § 54 ch 169 SLA 1978.
- (22) Repealed by § 11 ch 181 SLA 1976.
- (23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490
- (24) Department of Health and Social Services, under AS 47.35.010 — 47.35.080, relating to boarding and foster homes for children
- (25) Deleted by § 60 ch 98 SLA 1966.
- (26) Repealed by § 4 ch 120 SLA 1971.
- (27) Department of Health and Social Services under Alaska Food, Drug, and Cosmetic Act (AS 17.20), and in connection with the licensing of embalmers under AS 03.44.010

(28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130

(29) Repealed by § 4 ch 120 SLA 1971.

(30) Department of Health and Social Services, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels

(31) Repealed by § 40 ch 206 SLA 1975.

(32) Repealed by § 4 ch 106 SLA 1970.

(33) Board of Marine Pilots

(34) Alaska Police Standards Council

(35) Guide Licensing and Control Board

(36) Board of Dispensing Opticians

(37) Alaska Pipeline Commission as to functions relating to common purchasers under AS 31.15

(38) Expired.

(39) Alaska Public Offices Commission

(40) Board of Fisheries

(41) Board of Game.

(42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4)

(43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits

(44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03

(45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40

(46) Department of Commerce and Economic Development concerning the fisheries enhancement loan program (AS 16.10.500 — 16.10.620)

(47) Board of Psychologist and Psychological Associate Examiners (AS 08.86.010)

(48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870

(49) Board of Veterinary Examiners (AS 08.98.010)

(50) Board of Nursing Home Administrators (AS 08.70.010)

(51) Board of Barbers and Hairdressers (AS 08.13.010).

(b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.

(c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in the Alaska Employment Security Act (AS 23.20). All other procedures of the Department of Labor relating to employment security shall be as provided in the Alaska Employment Security Act and the regulations under the Alaska Employment Security Act.

(d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties;

(2) additional relief by injunction or restraining order;

(3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;

(4) related matters which in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch S2 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980)

(1) Proposed Section

Sec. 44.62.340, Agency action on applications, petitions and requests

(a) An agency's initial processing of an application, petition, or request in any matter other than rule-making or a declaratory order is governed by this section. Further agency action after a response to an application, petition, or request is made shall be governed by the provision of §.330 of this chapter.

(b) In the case of an application for a license, benefit, contract, lease or other interest in property, ratemaking, or other agency action specifically addressed to the applicant:

(1) Within 60 days after receipt of the application, the agency shall examine the application, notify the applicant of any apparent errors or omissions, request any additional information that the agency is permitted by law to require, and notify the applicant of the name, official title, address and telephone number of an agency member or employee who may be contacted regarding the application,

(2) Within 120 days after receipt of the application or of the response to a timely request made by the agency pursuant to paragraph (1), the agency shall

(i) approve or deny the application, in whole or in part, on the basis of pre-adjudicative processes, if disposition of the application by the use of these processes is not precluded by any provision of law, or

(ii) commence an adjudicative proceeding in accordance with this chapter.

Any disposition that denies, in whole or in part, an application shall include a brief discussion of the issues involved in the reasons for such denial.

(3) Failure of the agency to act on any action provided for in subsection (2) above within the 120 day period specified therein shall be deemed an automatic approval of the application, petition or request in issue.

(c) An agency shall give prompt notice of the disposition in whole or in part of any written application, petition, or request not governed by (b) of this section or of any written petition or request. The notice must include a brief statement discussing the issues involved and the reasons for any disposition that denies, in whole or in part, an application, petition or request.

(d) When a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature that does not automatically expire by statute, the existing license does not expire until the agency

has taken final action upon the application for renewal, including proceedings under this chapter, or, in case the agency's action is unfavorable, until the last day for seeking judicial review of the agency's action or a later date fixed by the reviewing court.

(2) Current Section:

(None)

(3) Comments:

This section recognizes that initial agency responses to applications, petition, or requests are not part of the adjudicative process and are not subject to the procedural requirements embodied in the same. Agencies are thus free, within the confines of general due process considerations and statutory constraints arising elsewhere in the law, to formulate individualized procedures for the form, submission, and initial processing of applications, petitions and requests. Once initial action is taken upon such applications, petitions, or requests, however, subsequent agency action, if any, must be undertaken in conformity with the uniform adjudicative procedures provided by the draft. This section is consistent with and interrelates to §.330, specifically subsection (a)(2)(i).

While latitude is afforded under this section for individualized adjudicative procedures, certain minimal

requirements are imposed in the interests of efficiency and basic fairness. Agencies must give prompt notice of their disposition of any application, petition, or request, thereby discouraging the desuetudinous conduct which reflects adversely upon government in the public eye. Where such disposition involves a denial, in whole or in part, of an application, petition, or request, the agency must accompany its denial with a brief discussion of the issues and of the reasons involved in that denial. Such a discussion will tend to deter arbitrary denial made without review of the substance of the application, etc. Such a discussion will further apprise the applicant, etc., of the nature of any defects, omissions, errors, and so on in the applications, etc.; permitting possible correction of the same, or delineating and narrowing the areas which might warrant pursuit of the matter under formal adjudicative proceedings.

Further, in the case of particular types of applications, specific time limits are set forth within which initial agency action must be taken. These types of applications have as a common nexus the existence of a right or interest in property. The time requirements are a recognition that delay in the administrative process in such cases can work injury to property, contrary to the substantive due process requirements of the Constitutions of Alaska and the United States. The time limitations incorporated would not seem unduly burdensome to the agencies affected: simple matters

should be simply disposed of; more complicated matters should be determined upon the whole of the complications, which consideration tends toward the use of the hearing procedures provided for in the draft. The commencement of such formal adjudicative procedures is a course available to an agency which would comply with the temporal limitations of this section.

Subsection (c) makes clear that for licenses which have no statutory expiration date, where application for renewal is timely and well filed, no expiration occurs until all available legal process has been exhausted.

(4)

Source:

Administrative Law Committee Draft (July 1981)

Revised Model APA, §4-102.

(1) Proposed Section:

Sec. 44.62.350, Agency action against licensees

An agency may not revoke, suspend, modify, annul, withdraw or amend a license unless the agency first gives notice by accusation and affords an opportunity for an appropriate adjudicative proceeding under this chapter. This section does not preclude an agency from taking immediate action to protect the public interest under Section 44.62.510, or from adopting regulations pertaining to a class of licensees.

(2) Current Section:

(None)

(3) Comments:

See Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-103

(1) Proposed Section:

Sec. 44.62.360, Delegation of power by agencies

(a) An agency may delegate the power to act, to hear and to decide, unless expressly prohibited by law.

(b) Where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide.

(2) Current Section:

(Attach d at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.340

**Sec. 44.62.340. Delegation of power by agencies.** (a) An agency listed in AS 44.62.330 may delegate its power to act, to hear and to decide, unless expressly prohibited by law.

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (§ 1(1) (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.370, Hearing officers

(a) No person may be employed or assigned as a hearing officer unless he or she shall have been admitted to practice law for at least two years immediately before such employment or assignment.

(b) An agency may employ hearing officers on an unbiased and impartial basis within the particular agency and may prescribe additional qualifications.

(c) When an agency which does not have hearing officers available to it so requests, the lieutenant governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

This section permits individual agencies to employ hearing officers on a full-time or case-by-case basis, so long as such officers remain impartial and unbiased. Where, for reasons of economy or otherwise, an agency does not wish or is unable to directly employ hearing officers, it may request the

Lieutenant Governor to provide such. Because of the quasi-judicial nature of administrative adjudicative proceedings, a legal background is required of all hearing officers.

(4) Source:

AS 44.62.350