ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990

5872 HOUSE JUDICIARY

8672

276

The states which have already implemented agency disclosure laws are finding that buyers generally welcome the early explanation of how this process works. Discussion by the agent of the agency issue early in a working relationship is a key factor in its acceptance by both buyers and sellers. Hence, section (a) of SB 425 would require that written disclosure of an agent's relationship to a seller be made as soon as that agent begins to provide specific services to a prospective buyer (i.e. locating properties to show which meet that buyer's specific criteria). However, it would not, for instance, require a written disclosure for every person stopping by an open house while out for a Sunday drive.

Section (b) of SB 425 specifies that an agent representing a buyer would be required to disclose the agency relationship with the buyer to a seller or his listing agent at the time of the initial request to show a property. This section also provides that any agency relationship which a seller may have established be recognized, and that any arrangements for compensation for the services of the buyer's agent are clearly understood by all parties.

Section (c) of SB 425 allows an agent to act in a dual role, representing both the buyer and the seller, provided both are informed and agree in writing to the agent's doing so.

Section (d) of SB 425 provides that, if the agency relationship is altered during the course of a transaction, all parties be apprised of the change as soon as possible after it becomes effective.

It is the position of the department, on behalf of the Real Estate Commission, that the establishment of mandatory disclosure laws, as proposed in SB 425, would decrease litigation and significantly increase both agent and consumer understanding of the agency relationship. We, therefore, urge passage of SB 425.

Larry Mercullieff, Commissioner

Date: 2/12/90

LM/LW/dgl6289D
2990a
Attachments

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CS SB 425 (L&C)
PUBLISH DATE: 2/22/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to disclosure of agency by holders of real estate licenses; . . .
Sponsor: Sen. Sturgulewski
Requestor: Senate Labor & Commerce

Agency Affected: Commerce & Economic Dev.
BRU: Occupational Licensing
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

The bill requires real estate licensees to disclose the licensee's agency relationship with the seller to each prospective buyer; and when a licensee acts as an agent for a prospective buyer, to disclose the relationship with the buyer to a prospective seller of real estate. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Officer
Phone: 465-2144
Division: Occupational Licensing
Date: 2/2/90

Approved by Commissioner: Larry Merculieff
Date: 2/7/90
Agency: Department of Commerce & Economic Development

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

Changes in CSSB425 (L&C) have no fiscal impact. This fiscal note is appropriate.

JS/dg16241D/2290a

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465-3800

MEMORANDUM February 1, 1990

SUBJECT: Sectional analysis of SB 425

TO: Senator Arliss Sturgulewski

FROM: John B. Gaguine JBG
Legislative Counsel

At your request, here is a sectional analysis of SB 425, for an act relating to disclosure of agency by holders of real estate licenses.

Section 1 would enact a new section, AS 08.88.396, imposing a duty to disclose agency relationship on the holders of real estate licensees (brokers, associate brokers and salespersons). Subsection (a) would require a licensee acting as the agent for a seller of real estate to disclose that fact to a prospective buyer when the licensee begins to provide assistance to the buyer, and would require the licensee to obtain from the buyer written acknowledgement that the buyer is aware of the relationship. Subsection (b) would require a licensee acting as the agent for a real estate buyer to disclose that fact to a prospective seller, to present offers only through the seller's agent if there is an unexpired exclusive listing contract, and obtain the written consent of all parties to a transaction if the licensee's compensation is being paid by anyone other than the buyer. Subsection (c) would forbid a licensee from acting as agent for both buyer and seller unless the licensee has written consent from both. Subsection (d) would require a licensee to update prior written disclosures if there are changes in the licensee's agency status during a transaction.

Section 2 would make it a class A misdemeanor for a licensee to violate a provision of AS 08.88.396, enacted by section 1. Violation of certain other provisions of the real estate licensing chapter is already a class A misdemeanor.

Section 3 establishes an effective date for this act of January 1, 1991.

JBG:pl
WKP1/081

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 2800

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Section 3 establishes an effective date for this act of January 1, 1991.

JBG:pl
WKP1/081

AGENCY DISCLOSURE LAWS - 10/87

CALIFORNIA	Effective January 1, 1988, broker must provide seller and buyer with a prescribed disclosure form "as soon as practicable" and confirm agency relationship on the contract. Mandates 3-hour course on agency.
COLORADO	Regulations E-31 - E-35 require oral and written disclosure to sellers and buyers.
FLORIDA	Law requires disclosure in sales contract that selling broker is agent of, and will be paid by, seller if such is the fact.
GEORGIA	Written disclosure of who broker represents and who will pay the broker; made at time of or before written offer.
GUAM	Violation to act for more than one party without knowledge or consent.
HAWAII	Law and regulations requiring oral or written disclosure at least once prior to contract, and confirmation on the contract.
IDAHO	Pending regulations requiring oral or written disclosure as early as possible, confirmation on contract and re-affirmation at closing.
MAINE	Written disclosure to buyer prior to showing; if buyer's agent, notice to seller at initial contact.
MINNESOTA	Written disclosure in contract prior to offer being made or accepted by buyer.
MISSISSIPPI	Every contract must reflect whom the broker represents by a statement over the parties' signatures.
MISSOURI	Presumed to be seller's agent unless written agreement to the contrary. New rules are pending.
NEBRASKA	Written disclosure that licensee represents seller unless a contract with buyer and notice to seller of buyer agency.
NEW YORK	Broker shall make it clear for which party acting.
NORTH DAKOTA	Rules and regulations pending.
OHIO	Statute that licensee is agent of owner unless agreement to contrary disclosed to all.

OREGON	Pending agency disclosure bill combining oral and written disclosure.
PENNSYLVANIA	Law requires broker to disclose that broker is agent of seller, not buyer.
SOUTH CAROLINA	Licensee must disclose on mandatory disclosure form for which party he is acting.
TEXAS	Must make clear for which party broker is acting; new rules and approved form.
UTAH	Rule requiring early disclosure of agency relationship, at least once prior to confirmation on contract.
VERMONT	Licensee must disclose to buyer, no later than offer, that licensee represents seller, unless there is a buyer agency agreement.
WASHINGTON	Oral or written disclosure at least once prior to contract, with confirmation on contract.
WISCONSIN	Pending rules requiring the agent of one party to make written disclosure at the first meeting.
WYOMING	Violation to act for more than one party without knowledge of all parties.

AGENCY DISCLOSURE

Seller's Agent

_____ has disclosed that he/she as
(Name of Licensee)

(Check one) _____ the listing broker
_____ licensee in listing broker's office
_____ sub-agent through cooperating broker
is an agent of the seller. The seller is the only principal for this agent.

_____ _____
Date Acknowledgement of Seller

_____ _____
Date Acknowledgement of Prospective Buyer
****

Buyer's Agent

_____ has disclosed that he/she is
(Name of Licensee)

working as an agent of the buyer. The buyer is the only principal for this agent.

_____ _____
Date (Acknowledgement of Seller)

_____ _____
Date (Acknowledgement of Prospective Buyer)
****

REVISED DISCLOSURE STATEMENT

The disclosure dated _____ is revised to

disclose that _____ is now
(Name of Licensee)
(Check one) _____ a seller's agent, exclusively.
_____ a buyer's agent, exclusively.
_____ an agent for both the buyer and the seller.
(Acknowledgement by both principals below constitutes express written consent as required for dual agency representation.)

_____ _____
Date (Acknowledgement by Seller)

_____ _____
Date (Acknowledgement by Prospective Buyer)

_____ _____
Date (Acknowledgement of revised status by Broker of Named Licensee

AGENCY DISCLOSURE

All licensees have affirmative obligations to both parties of a transaction which include:

1. Diligent exercise of reasonable skill and care in performance of the agent's duties.
2. A duty of honesty, fair dealing and good faith.
3. A duty to be both truthful and informed whenever he/she undertakes to make a representation.

When entering into an agency relationship, both buyers and sellers have a responsibility to carefully read all agreements and understand the type of representation they are to receive.

AGENT'S DUTY TO A PRINCIPAL

The duties that an agent and subagent owe to a principal are:

1. Good faith and fidelity.
2. To exercise reasonable care, skill and judgment in securing the best price and terms possible for the principal.
3. To avoid representing any interest contrary to that of the principal without the express written consent of the principal.
4. To make full, fair, and timely disclosure to the principal of all facts which are or may be material to his/her interest or influence his/her actions.

Under a listing agreement with a seller (principal) an agency relationship is created with the seller. Other licensees in the same office or in a cooperating broker's office are subagents of the seller with all of the duties listed above.

A licensee can agree to act as an agent for the buyer only. In this instance, the agent owes the same duties to the buyer as his principal. When acting in this capacity, the agent is not the seller's agent even if all parties agree that the compensation for services rendered is to be paid from the seller's proceeds of sale.

Any offers to purchase a currently listed property will be presented through the listing agent.

DUAL AGENCY

An agent can legally be the agent of both the seller and the buyer in a transaction, BUT ONLY WITH THE KNOWLEDGE AND CONSENT OF BOTH PRINCIPALS. The agent then owes all of the above listed duties to both buyer and seller, and both are principals for the agent. Both parties must be informed and consent to any compensation paid to the agent by the other party.

NARELLO

Agency/Subagency Committee Report

Submitted by David W. Johnson, Chairman

(5)

RESPONSES TO AGENCY/SUBAGENCY QUESTIONNAIRE
LAST REVISED SEPTEMBER 14, 1987

1. STATES WITH NO SPECIFIC AGENCY DISCLOSURE LAWS AND NONE PENDING:

Alabama
Alaska
Alberta
Arizona
Arkansas
British Columbia
Connecticut
Illinois
Kansas
Kentucky
Louisiana
Maryland
Michigan
Montana
Nevada
New Jersey
New Mexico
North Carolina
Oklahoma
Ontario
Quebec
South Dakota
Tennessee
Virginia
West Virginia

2. STATES WITH STATUTES OR RULES PENDING ON AGENCY DISCLOSURE:

North Dakota - A committee will be meeting in August to draft an administrative rule on agency disclosure. Plans to have the rule in effect by January 1, 1988.

Wisconsin - is ready to begin the formal rulemaking process with disclosure rule.

Iowa - A proposed bill supported by Iowa Association of *Realtors* died in Committee. This bill will probably be reintroduced at the next legislative session.

Rhode Island - Real Estate Commission will be reviewing a proposal on September 17, 1987.

Delaware - Delaware Association of *Realtors* is looking at a standardized disclosure form for all of its membership. The New Castle County Board of Realtors have already adopted a form for use in agency disclosure. The Delaware Real Estate Commission will be looking at this issue at its next meeting in October - 1987.

Idaho - Is is the process of rulemaking. Anticipate effective date of new rule to be 1-1-88 or 7-1-88.

Oregon - Has proposed legislation for introduction in the 1989 Legislative Session.

(2)

3. STATES WITH AGENCY DISCLOSURE LAWS:

California	Minnesota	Saskatchewan*
Colorado	Mississippi	South Carolina
District of Columbia*	Missouri	Texas**
Florida	Nebraska	Utah
Georgia	New Brunswick*	Vermont
Guam*	New Hampshire	Washington
Hawaii	New York	Wyoming*
Indiana	Ohio	Massachusetts*
Maine	Pennsylvania	

*NOTE: The statutes in these states/provinces do not have specific agency disclosure language. However, they do provide that it is a licensing violation to represent more than one party in a real estate transaction without the knowledge and consent of the other party. Accordingly, agency disclosure is an implicit obligation of that provision.

**NOTE: Texas has deferred (as of September 14, 1987) final action on its proposed rules for another 120 days to further evaluate industry input.

4. ENFORCEMENT OF AGENCY DISCLOSURE LAW:

The overwhelming majority of states are enforcing or anticipate enforcement through two basic approachs: (1) include compliance with agency disclosure rule as an element of a routine audit of broker records; and (2) look for agency disclosure as an issue when reviewing all consumer complaints.

5. OBSERVATIONS FOR IMPLEMENTING NEW AGENCY DISCLOSURE LAW:

Colorado - (Comments quoted directly from Michael B. Gorham, Director, Colorado Real Estate Commission) - (1) Did not give sufficient enough lead time before implementing agency dislosure rule. The rule went into effect before most licensees were aware of it, consequently, there was a need for a Declaratory Order implementing the rule. Suggest any jurisdiction considering such a rule give a six-month or one-year period for education; (2) Even though the rule provides for both oral and written disclosure, Colorado feels that many agents do not make the oral disclosure and instead rely on preprinted contract disclosure. This, however, is

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 2, 1990 FURTHER REFERRALS:

JUDICIARY

Date of Committee Action: 4/3/90

The LABOR & COMMERCE Committee considered: CSSB 425(LABOR & COMMERCE)

CS SB NO. 425 (L&C) DISCLOSURE OF AGENCY BY REALTORS

"An Act relating to disclosure of agency by holders of real estate licenses; and providing for an effective date."

RECOMMENDATIONS:

[ ] be replaced with _____ [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact_____

[ ] zero fiscal note_____

[ ] zero with analysis_____

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) _____

[✓] zero fiscal note(s) Com+Econ Dev.

[ ] zero fn/analysis _____

SIGNING DO PASS:

Donley

Boyer

Finkelstein

Boucher

Greenberg

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Lemon		✓	
Collins		✓	

Donley

Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 425 (L&C)
PUBLISH DATE: 2/22/90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to disclosure of agency by holders of real estate licenses; . . .
Sponsor: Sen. Sturgulewski
Requestor: Senate Labor & Commerce

Agency Affected: Commerce & Economic Dev.
BRU: Occupational Licensing
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

The bill requires real estate licensees to disclose the licensee's agency relationship with the seller to each prospective buyer; and when a licensee acts as an agent for a prospective buyer, to disclose the relationship with the buyer to a prospective seller of real estate. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Officer
Phone: 465-2144
Division: Occupational Licensing
Date: 2/2/90

Approved by Commissioner: Larry Merculieff
Date: 2/7/90
Agency: Department of Commerce & Economic Development

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

Changes in CSSB425 (L&C) have no fiscal impact. This fiscal note is appropriate.

JS/dg16241D/2290a

Original sponsor(s): SEN. STURGULEWSKI

IN THE SENATE BY THE LABOR & COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 425 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to disclosure of agency by holders of real estate licenses; and providing for an effective date."

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

* Section 1. AS 08.88 is amended by adding a new section to read:

Sec. 08.88.396. DISCLOSURE OF AGENCY. (a) A person holding a license under this chapter shall, when acting as an agent for a prospective seller of real estate,

(1) disclose in writing the person's agency relationship with the seller to each prospective buyer at the time that the person begins to provide specific assistance to locate or acquire real estate for the buyer, and obtain from each prospective buyer a signed acknowledgement that the buyer is aware of the agency relationship between the person licensed under this chapter and the seller; and

(2) include in the purchase agreement a statement of the agency relationship between the person licensed under this chapter and the seller.

(b) A person holding a license under this chapter shall, when acting as an agent for a prospective buyer of real estate,

(1) disclose the person's relationship with the buyer to a prospective seller of real estate, or to the seller's agent, at the time of the initial contact between the person licensed under this chapter and the prospective seller or the seller's agent, and confirm the relationship in writing as soon as possible after the initial

contact;

(2) include in the purchase agreement a statement of the agency relationship between the person licensed under this chapter and the buyer;

(3) if the prospective seller has an unexpired exclusive listing contract for a property, present an offer to purchase that property to the seller's agent; and

(4) disclose in writing to all parties to a transaction when the person's compensation as agent for the buyer is to be paid by anyone other than the buyer being represented by the person.

(c) A person licensed under this chapter may not act as an agent for both a prospective seller and a prospective buyer of real estate unless the person informs both the seller and the buyer and obtains written consent to the joint agency from both.

(d) When a change occurs during a transaction that makes a prior written disclosure required by this section incomplete, misleading, or inaccurate, the person licensed under this chapter shall make a revised disclosure, in writing, to all parties to the transaction as soon as possible. The revised disclosure must include the date of the revision and shall be acknowledged in writing by all the parties.

* Sec. 2. AS 08.88.401(d) is amended to read:

(d) A person who violates a provision of this section, [OR OF] AS 08.88.161, or AS 08.88.396 is guilty of a class A misdemeanor.

* Sec. 3. This Act takes effect January 1, 1991.

SB

450

HOUSE COMMITTEE REPORT

(7)
Date Referred: April 20, 1990 FURTHER REFERRALS:

Date of Committee Action: 5-2-90

The JUDICIARY Committee considered: CSSB 450(JUDICIARY)am

CS SB NO. 450 (Judiciary) am CHILD ABUSE REPORTING

"An Act relating to reporting and investigation of child abuse and neglect; relating to training of persons required to report child abuse or neglect; and amending the definition of 'child abuse or neglect'."

RECOMMENDATIONS:
[X] be replaced with HCS CS SB 450 (JUD) [X] the same title [ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)	APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal impact _____	[ ] fiscal note(s) DPS 2/12/90
[ ] zero fiscal note _____	[X] zero fiscal note(s) DHSS 2/13/90
[ ] zero with analysis _____	[ ] zero fn/analysis _____

SIGNING DO PASS:

Goll

Gruenberg

Davis

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Miller			✓
Martin		✓	

Co-Chairman's Signature
Goll Gruenberg

Original sponsor(s): Judiciary Committee

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 450 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to reporting and investigation of child abuse and neglect; relating to training of persons required to report child abuse or neglect; and amending the definition of 'child abuse or neglect'."

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

* Section 1. AS 47.17.010 is amended to read:

Sec. 47.17.010. PURPOSE. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical <u>injury</u> [ABUSE] or neglect<u>, mental injury,</u> [OR] sexual abuse<u>,</u> [OR] sexual exploitation, <u>or maltreatment,</u> the legislature requires the reporting of these cases by practitioners of the healing arts and others to the <u>department. It is not the intent of the legislature that persons required to report suspected child abuse or neglect under this chapter investigate the suspected child abuse or neglect before they make the required report to the department. Reports must be made when there is a reasonable cause to suspect child abuse or neglect in order to make state investigative and social services available in a wider range of cases at an earlier point in time, to make sure that investigations regarding child abuse and neglect are conducted by trained investigators, and to avoid subjecting a child to multiple interviews about the abuse or neglect</u> [APPROPRIATE PUBLIC AUTHORITIES]. It is the intent of the legislature that, as a result of these reports, protective

services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible.

* Sec. 2. AS 47.17.020(a) is amended to read:

(a) The following persons who, in the performance of their occupational duties, have reasonable cause to suspect [CAUSE TO BELIEVE] that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

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

(8) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol.

* Sec. 3. AS 47.17.020(b) is amended to read:

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect [CAUSE TO BELIEVE] is a result of child abuse or neglect. These

reports shall be made to the nearest office of the department.

* Sec. 4. AS 47.17.020(c) is amended to read:

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

* Sec. 5. AS 47.17.020(e) is repealed and reenacted to read:

(e) The department shall immediately notify the nearest law enforcement agency if the department

(1) concludes that the harm was caused by a person who is not responsible for the child's welfare;

(2) is unable to determine

(A) who caused the harm to the child; or

(B) whether the person who is believed to have caused the harm has responsibility for the child's welfare; or

(3) concludes that the report involves

(A) possible criminal conduct under AS 11.41.410 - 11.41.455; or

(B) abuse or neglect that results in the need for medical treatment of the child.

* Sec. 6. AS 47.17.020 is amended by adding new subsections to read:

(f) If a law enforcement agency determines that a child has been abused or neglected and that (1) the harm was caused by a teacher or other person employed by the school or school district in which the child is enrolled as a student, (2) the harm occurred during an activity sponsored by the school or school district in which the child is

enrolled as a student, or (3) the harm occurred on the premises of the school in which the child is enrolled as a student or on the premises of a school within the district in which the child is enrolled as a student, the law enforcement agency shall notify the chief administrative officer of the school or district in which the child is enrolled immediately after the agency determines that a child has been abused or neglected under the circumstances set out in this section, except that if the person about whom the report has been made is the chief administrative officer or a member of the chief administrative officer's immediate family, the law enforcement agency shall notify the commissioner of education that the child has been abused or neglected under the circumstances set out in this section. The notification must set out the factual basis for the law enforcement agency's determination. If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification to the Professional Teaching Practices Commission.

(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

* Sec. 7. AS 47.17.022 is amended to read:

Sec. 47.17.022. TRAINING. (a) A person employed by the state <u>or by a school district</u> who is required under this chapter to report abuse or neglect of children shall receive training on the recognition and reporting of child abuse and neglect.

(b) Each department of the state <u>and school district</u> that employs persons required to report abuse or neglect of children shall

provide

(1) initial training required by this section to each new employee during the employee's first six months of employment, and to any existing employee who has not received equivalent training; and

(2) at least once every five years, appropriate in-service training required by this section as determined by the department or school district.

(c) Each department and school district that must comply with (b) of this section shall develop a training curriculum that acquaints its employees with

(1) laws relating to child abuse and neglect;

(2) techniques for recognition and detection of child abuse and neglect;

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; [AND]

(4) procedures for required notification of suspected abuse or neglect;

(5) the role of a person required to report child abuse or neglect and the employing agency after the report has been made; and

(6) a brief description of the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies after a report of suspected abuse or neglect.

(d) Each department and school district that must comply with (b) of this section shall file a current copy of its training curriculum and materials [,] with the Council on Domestic Violence and Sexual Assault. A department or school district may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program.

* Sec. 8. AS 47.17.023 is amended to read:

Sec. 47.17.023. REPORTS REGARDING CHILD PORNOGRAPHY. A person who, in the course of processing or producing visual or printed matter, either privately or commercially, has reasonable cause to suspect [REASON TO BELIEVE] that the matter visually depicts a child engaged in conduct described in AS 11.41.455(a) shall immediately [PROMPTLY] report this to the nearest law enforcement agency, and provide the law enforcement agency with all information known about the nature and origin of the matter.

* Sec. 9. AS 47.17 is amended by adding a new section to read:

Sec. 47.17.027. DUTIES OF SCHOOL OFFICIALS. (a) If the department or a law enforcement agency provides written certification to the child's school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected by a person responsible for the child's welfare or as a result of conditions created by a person responsible for the child's welfare; (2) an interview at school is a necessary part of an investigation to determine whether the child has been abused or neglected; and (3) the interview at school is in the best interests of the child, school officials shall permit the child to be interviewed at school by the department or a law enforcement agency before notification of, or receiving permission from, the child's parent, guardian, or custodian. A school official shall be present during an interview at the school unless the child objects or the department or law enforcement agency determines that the presence of the school official will interfere with the investigation. Immediately after conducting an interview authorized under this section, and after informing the child of the intention to notify the child's parent, guardian, or custodian, the department or agency shall make every reasonable effort to notify the child's parent, guardian, or

custodian that the interview occurred unless it appears to the department or agency that notifying the child's parent, guardian, or custodian would endanger the child.

(b) A school official who, with criminal negligence, discloses information learned during an interview conducted under (a) of this section is guilty of a class B misdemeanor.

* Sec. 10. AS 47.17.040(b) is amended to read:

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside the state [ALASKA], in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who with criminal negligence makes public information contained in confidential reports is guilty of a class B misdemeanor.

* Sec. 11. AS 47.17.050 is amended to read:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or [WHO] participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed for making the report or permitting the interview, except that a person who knowingly makes an untimely report is not immune from civil or criminal liability based on the delay in making the report.

* Sec. 12. AS 47.17.050 is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this section, a person accused of

committing the child abuse or neglect is not immune from civil or criminal liability for the child abuse or neglect as a result of reporting the child abuse or neglect.

* Sec. 13. AS 47.17.064(a) is amended to read:

(a) The department or a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take the following actions with regard to a child who the department or practitioner has reasonable cause to suspect has [BELIEVED TO HAVE] suffered physical harm as a result of child abuse or neglect:

(1) take or have taken photographs of the areas of trauma visible on the child; and

(2) if medically indicated, have a medical or radiological examination of the child performed by a person who is licensed to administer the [A RADIOLOGICAL] examination.

* Sec. 14. AS 47.17.068 is amended to read:

Sec. 47.17.068. PENALTY FOR FAILURE TO REPORT. A person who [KNOWINGLY] fails to comply with the provisions of [OR REFUSES TO REPORT AS REQUIRED UNDER] AS 47.17.020 or 47.17.023 and who knew or should have known that the circumstances gave rise to the need for a report, is guilty of a class B misdemeanor.

* Sec. 15. AS 47.17.070(2) is amended to read:

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person [WHO IS RESPONSIBLE FOR THE CHILD'S WELFARE] under circumstances that [WHICH] indicate that the child's health or welfare is harmed or threatened thereby;

* Sec. 16. AS 47.17.070(3) is amended to read:

(3) "child care provider" means an adult individual, including a foster parent or an employee of an organization, who

provides care and supervision to a child for compensation or reimbursement;

* Sec. 17. AS 47.17.070(6) is amended to read:

(6) "neglect" means the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child;

* Sec. 18. AS 47.17.070(9) is amended to read:

(9) "practitioner of the healing arts" includes chiropractors, mental health counselors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, acupuncturists, and surgeons;

* Sec. 19. AS 47.17.070 is amended by adding new paragraphs to read:

(11) "criminal negligence" has the meaning given in AS 11.-81.900;

(12) "immediately" means as soon as is reasonably possible, and no later than 24 hours;

(13) "maltreatment" means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.-010(a)(2), except that, for purposes of this chapter, the act or omission need not have been committed by the child's parent, custodian, or guardian;

(14) "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as

evidenced by an observa and substantial impairment in the child's ability to function;

(15) "reasonable cause to suspect" means cause, based on all the facts and circumstances known to the person, that would lead a reasonable person to believe that something might be the case;

(16) "school district" means a city or borough school district or regional educational attendance area.

BILL NO: SB 450 DATE: February 12, 1990

TITLE: An Act relating to child abuse and neglect CONTACT: Barbara Miklos 465-4356

The Council on Domestic Violence and Sexual Assault supports SB 450, which clarifies and strengthens the child abuse reporting statute. We believe that this legislation will be instrumental in protecting children in Alaska.

Among the provisions which the Council particularly supports is clarification that persons who report are not intended to conduct investigations prior to making reports; rather, reports are required when there is a reasonable suspicion of child abuse or neglect. This is clarified in the purpose section, as well as by changing "reasonable cause to believe" to "reasonable cause to suspect".

The Council supports adding paid employees of substance abuse treatment or prevention programs and mental health counselors to the list of mandatory reporters. There is a high correlation between substance abuse and family violence; therefore, employees of substance abuse programs are likely to have cause to suspect child abuse or neglect. Now that federal confidentiality requirements for substance abuse treatment providers have been changed to allow the reporting of child abuse or neglect, the barrier to adding them to the list of reporters has been removed.

The Council supports making all reports to the Department of Health and Social Services, and requiring the Department to refer to law enforcement agencies cases that do not involve family members, where criminal conduct is involved, or where abuse or neglect results in the need for medical treatment of the child. We know that the previous requirement that some reports be made to law enforcement officials was confusing for some people. This section also clarifies the cases that the Department of Health and Social Services must refer to law enforcement agencies for their investigation.

Another important provision of this bill is the proposed new section, "Duties of School Officials" (proposed AS 47.17.027) which requires school officials to permit the child to be interviewed at school without prior notification of, or permission from, the child's parent, guardian or custodian. We know that the lack of such authority has impeded the investigation of reports, and caused unnecessary friction between school officials and investigators.

In summary, the Council believes the proposed amendments to the Child Abuse Reporting Law strengthen and improve protections for children. We urge the passage of this bill.

Arthur English
Commissioner

DEPARTMENT OF PUBLIC SAFETY

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSSB 450 (JUD) (a)
PUBLISH DATE: 2/23/90

FISCAL NOTE

REQUEST:

Revision Date: 2/8/90
Title: An Act Relating to Child Abuse and Neglect
Sponsor: Judiciary
Requestor:

Agency Affected: DHSS, DFYS
BRU: Social Service
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary) FY 90 fiscal impact is "0".

The Division receives over 10,000 reports of harm to children each year. Many of these reports concern harm caused by persons who are not responsible for the welfare of the child victim. These are forwarded to law enforcement agencies. The precise number of these cannot be estimated nor is it possible to estimate the increased number which will result from passage of SB450. It

Prepared by: Russell Webb — Phone: 465-3170
Division: Family & Youth Services — Date: 2/13/90

Approved by Commissioner: Myra M. Munson, Commissioner — Date: 2/13/90
Agency: Department of Health and Social Services

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

Changes in CS SB 450 (JUD) have no fiscal impact. This fiscal note is appropriate.

CK

ANALYSIS:

is expected that the increase will be small and can be absorbed with existing resources.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CS SB 450 (JUD) (b)
PUBLISH DATE: 2/23/90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to child abuse and neglect
Sponsor: Senate Judiciary
Requestor: Senate Judiciary

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

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
CAPITAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
REVENUE	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

SB 450 requires that school districts file copies of their training curricula with the Council on Domestic Violence and Sexual Assault and may seek technical assistance of the Council. The Council would be pleased to provide assistance but, without additional funding, it will have to be by mail or phone.

Prepared by: Barbara Miklos, Executive Director
Division: Council on Domestic Violence and Sexual Assault
Approved by Commissioner: Arthur English
Agency: Department of Public Safety

Phone: 465-4356
Date: 2/12/90
Date: 2-12-90

2/12/90

Page 1 of 1

Changes in CS SB 450 (JUD) have no fiscal impact. This fiscal note is appropriate.

SB

475

HOUSE COMMITTEE REPORT

(7)
Date Referred: March 30, 1990 FURTHER REFERRALS:

Date of Committee Action: 4/29/90

The JUDICIARY Committee considered: SB 475

SENATE BILL NO. 475 PAYMENT OF COURT COSTS/ATTY FEES

"An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

RECOMMENDATIONS:
[ ] be replaced with HCS SB 475 (Judiciary) [ ] the same title [X] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[X] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) OoA Pub Def. 2/22/90
[X] zero fiscal note(s) CH System 3/2/90
[ ] zero fn/analysis _____

SIGNING DO PASS:

Mack Thomas
Terry Martin

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Pete Jones		X	
Mike Davis		X	
Jerry Ellis		X	

Mack Thomas / Pete Jones
Chairman's Signature

Original sponsor(s): SEN. FAIKS

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR SENATE BILL NO. 475 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency, the office of public advocacy, and court-appointed counsel."

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

* Section 1. AS 18.85.120(c) is repealed and reenacted to read:

(c) Upon the person's conviction, the court may enter a judgment that a person for whom counsel is appointed pay for the necessary services and facilities of representation and court costs, but execution of the judgment may not commence until three years after release of the defendant from incarceration unless for good cause shown, the court considers it appropriate to execute earlier. Upon a showing of financial hardship, the court shall allow a person subject to a judgment entered under this subsection to make payments under a payment schedule. Payments made under this subsection shall be paid into the state general fund.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 475 (a)
PUBLISH DATE: 3/2/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to payment of legal services by indigent persons ..."
Sponsor: Senator Faiks
Requestor: Senate Judiciary

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary) FY90 impact is zero.
This bill represents a positive emphasis on mitigating the public cost for an increasingly expensive criminal justice system. There is no fiscal impact on the Public Defender system, nor does the executive branch keep data which would enable a prediction of revenue.

Prepared by: Jim Ford for John B. Salemi, Public Defender — Phone: 279-7541
Division: Public Defender Agency — Date: 2/21/90

Approved by Commissioner: Frank S. Baxter — Date: 2/22/90
Agency: Department of Administration

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : SB 475
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title : "An Act relating to payment of legal services by indigent persons ..."
Sponsor : Senator Faiks
Requestor : Senate Judiciary

Agency Affected : Dept. of Administration
BRU : Public Defender Agency
Components : Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary) FY90 impact is zero.
This bill represents a positive emphasis on mitigating the public cost for an increasingly expensive criminal justice system. There is no fiscal impact on the Public Defender system, nor does the executive branch keep data which would enable a prediction of revenue.

Prepared by : John B. Salemi, Public Defender — Phone : 279-7541
Division : Public Defender Agency — Date : 2/21/90
Approved by Commissioner : Frank S. Baxter — Date : 2/22/90
Agency : Department of Administration

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: SB 475
Publish Date: 2/12/90

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act relating to payment of legal services and related costs...
BRU: Trial Courts
Sponsor: Falks
Components:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Stranderg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/21/90

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 02/21/90
Agency: Alaska Court System

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: SB 475 (b)
Publish Date: 3/2/90

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act relating to payment of legal services and related costs...
BRU: Trial Courts
Sponsor: Falks
Components:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/21/90

Approved by: Arthur H. Snowden, II, Administrative Director FOR
Date: 02/21/90
Agency: Alaska Court System

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

ALASKA CHAPTER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS

8923 Tanis Drive
Juneau, Alaska 99801
(907) 789-7099

Executive Director
William Diebels, ACSW

April 25, 1990

The Honorable Max Gruenberg, Co-Chair
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Gruenberg,

The Alaska Chapter of the National Association of Social Workers strongly supports the House HESS CS SB 450. We believe that this bill, in its current version, will help protect Alaskan children by clarifying and strengthening the requirements for reporting the maltreatment of children.

The National Association of Social Workers represents more than 300 professional social workers throughout the state. Our statewide Social Action Committee voted unanimously to support this bill.

We urge you to support House HESS CS SB 450 soon to ensure its passage. Thank you for your time.

Sincerely,

Theresa Tanoury LCSW

Theresa Tanoury, LCSW
Chair, Social Action Committee

Teratology

BIAS AGAINST THE NULL HYPOTHESIS: THE REPRODUCTIVE HAZARDS OF COCAINE

GIDEON KOREN KAREN GRAHAM
HEATHER SHEAR TOM EINARSON

Motherisk Programme, Department of Pediatrics, Division of Clinical Pharmacology; Research Institute and Faculty of Pharmacy; and Departments of Pediatrics and Pharmacology, University of Toronto, Toronto, Ontario, Canada

Summary To examine whether studies showing no adverse effects of cocaine in pregnancy have a different likelihood of being accepted for presentation by a large scientific meeting, all abstracts submitted to the Society of Pediatric Research between 1980 and 1989 were analysed. There were 58 abstracts on fetal outcome after gestational exposure to cocaine. Of the 9 negative abstracts (showing no adverse effect) only 1 (11%) was accepted, whereas 28 of the 49 positive abstracts were accepted (57%). This difference was significant. Negative studies tended to verify cocaine use more often and to have more cocaine and control cases. Of the 8 rejected negative studies and the 21 rejected positive studies, significantly more negative studies verified cocaine use, and predominantly reported cocaine use rather than use of other drugs. This bias against the null hypothesis may lead to distorted estimation of the teratogenic risk of cocaine and thus cause women to terminate their pregnancy unjustifiably.

INTRODUCTION

IN biomedical research it can be hard to publish negative results in peer reviewed journals. Although such studies may be perceived as "not news", how can we quantify this impression when the data languish unpublished? Under-reporting of safe use of drugs and chemicals in pregnancy may be detrimental. Pregnant women exposed to non-teratogens perceive their teratogenic risk to be in the range of 25%, which is similar to that of thalidomide.[1] After the Chernobyl disaster it was estimated that half of the pregnant women in Greece terminated their pregnancy due to erroneous perception of teratogenic risk.[2]

TABLE I—FETAL OUTCOME MEASUREMENTS*

Outcome measurement	No of studies	Outcome measurement	No of studies
Birth weight and/or length	24	Necrotising enterocolitis	3
Gestational age	20	Apgar score	3
Head circumference	11	Cardiovascular changes	2
Malformations	9	Auditory response	2
Intracranial haemorrhage	8	Spontaneous abortions	2
Neonatal neurobehavioural examination	6	Pneumogram pattern	2
		Apnoea	2
SIDS	6	Sepsis	2
Neurological abnormalities	5	Death	2
Bayley scale of infants development	3	Obstetric complications	2

*A study could report on more than one variable.
Placental haemorrhage, fetal breathing, neonatal withdrawal, eye vascularity, caesarean section, meconium staining, central-nervous-system structural damage, urinary tract infection, increased cerebral blood flow, pneumothorax, and hyaline membrane disease—1 each.
SIDS = sudden infant death syndrome.

Because young fecund adults are the greatest recreational users of cocaine, the drug's hazards to the fetus are of concern. The extent and potential severity of such adverse effects are controversial. Intrauterine growth retardation,[3,4] abruptio placenta,[5,6] prematurity,[7,3] sudden infant death syndrome,[8] and neonatal behavioural abnormalities[6,9] have been reported. Interpretation of these results is hampered by clustering of other risk factors in pregnant women who use cocaine, such as use of other drugs of abuse, cigarettes, and alcohol and socioeconomic status.

When counselling pregnant women who have used cocaine we often reveal an unrealistically high perception of teratogenic risk, which often leads to requests for termination. Whilst many of our patients "know" that cocaine use is a serious risk to pregnancy, they are not aware of the controversy and of the many negative reports. We have investigated whether studies showing no adverse effects of cocaine in pregnancy have a different likelihood of being reported by a large scientific organisation than do studies showing adverse effects.

METHODS

All abstracts submitted to the annual meeting of the Society for Pediatric Research are published in the April issue of *Pediatric Research*. Unaccepted abstracts are also published, with those selected for presentation marked with a symbol. We identified all abstracts on cocaine in pregnancy submitted to the meeting between

T. CALANDRA AND OTHERS: REFERENCES—*continued*

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TABLE II—ABSTRACTS ON FETAL OUTCOME AFTER COCAINE EXPOSURE IN PREGNANCY

Fetal outcome	Accepted	Not accepted	Totals
Adverse	28	21	49
Not adverse	1	8	9
Total	29	29	58

TABLE III—COMPARISON OF ABSTRACTS SHOWING ADVERSE OUTCOME WITH THOSE SHOWING NO ADVERSE OUTCOME

—	Adverse (n = 49)	Non-adverse (n = 9)
Cocaine users		
Predominantly cocaine use	42 (86%)	9 (100%)
Verification of cocaine use	19 (39%)	6 (67%)
Sample size	105·5 (288·8)*	199·2 (184·7)
Controls		
Used controls	39 (80%)	8 (89%)
Matched for variables	17 (35%)	2 (22%)
Sample size	91·1 (198·4)	1767·6 (3622·9)†

*Mean (SD).
†1 abstract contained 8235 controls; without this abstract the mean sample size and standard deviation for the control non-adverse group would be 150·6 and 269·2, respectively.

1980 and 1989. The abstracts were evaluated by a reader who was blinded to the title and to the acceptance symbol. Abstracts that omitted measurements of pregnancy outcome were excluded.

The following items were extracted from each abstract: no effect or adverse pregnancy outcome; verification of cocaine use by history and/or urine analysis; involvement of polydrug users compared with cocaine users only; and inclusion of comparison groups and their size. Accepted and rejected abstracts showing adverse effects (positive) were compared with those showing no adverse effects (negative) by Fisher's exact or *t* tests for unpaired results as appropriate.

RESULTS

No abstracts on cocaine in pregnancy were submitted before 1985. From a total of 68 abstracts on cocaine use during pregnancy 10 did not report pregnancy outcome measurements (4 were epidemiological, 4 were animal studies, and 2 were analytical). The 58 studies reported various end-points (table I). 49 abstracts were positive and 9 were negative. 28 of the positive abstracts (57%) but only 1 of the negative abstracts (11%) were accepted ($p = 0.013$) (table II).

To examine whether the quality of the negative abstracts was poorer, thus leading to more frequent rejection, we compared them with the positive abstracts (table III). The two groups did not differ significantly in involvement of polydrug users, inclusion of control groups or matched controls, and inclusion of socioeconomic status. Negative studies tended to verify cocaine use in pregnancy more often, although not significantly so. Similarly such studies tended to have more cocaine and control cases.

We also compared the 8 rejected negative with the 21 rejected positive abstracts (table IV). Significantly more negative studies verified cocaine use ($p = 0.01$). The negative studies tended to be larger in numbers of cocaine-exposed patients, although not significantly so. Similarly almost all negative studies (7/8) had control groups whereas only 14/21 of the positive rejected studies were controlled (not significant).

TABLE IV—COMPARISON OF POSITIVE AND NEGATIVE ABSTRACTS NOT ACCEPTED

—	Adverse (n = 21)	Non-adverse (n = 8)
Cocaine users		
Predominantly cocaine use	16 (76%)	8 (100%)*
Verification of cocaine use	4 (19%)	6 (75%)†
Sample size	69·5 (148·4)	222·9 (269·0)
Controls		
Used controls	14 (67%)	7 (88%)
Matched for variables	7 (33%)	2 (25%)
Sample size	68·8 (124·5)	270 (25·9)‡

Adverse vs non-adverse: *$p = 0.08$, †$p = 0.01$, and ‡$p < 0.001$.

DISCUSSION

Cocaine has gained a wide public reputation of being an "evil drug", because of its link with many illegal activities. The drug is almost "expected" to have adverse effects on the fetus. Indeed, published studies have stressed various adverse fetal outcome measurements.[3-9] However, these effects occurred in women dependent on cocaine and who had a cluster of risk factors, including use of other illicit drugs, heavy alcohol and cigarette consumption, and poor medical follow-up. Attempts to control for these factors are difficult because cocaine users tend to consume more cigarettes and alcohol than those who abuse other drugs.[10,11] Findings from this group have been widely publicised as being applicable to the mild, recreational user of cocaine, who often discontinues use during pregnancy. For example, a newspaper article in Toronto warned women that even one dose of cocaine in pregnancy can harm the baby.[12] Counselling women exposed to cocaine in early pregnancy in Greater Toronto led us to suspect that there is substantial distortion of medical information, which has led many women to terminations even when they were exposed briefly and mildly in early pregnancy.

In the present study we used the rare opportunity created by the Society for Pediatric Research, which publishes not only accepted but also rejected abstracts. Our analysis revealed that the likelihood of a negative study being selected for presentation was negligible, whereas a positive study was likely to be accepted in 57% of cases. It is generally assumed that studies are selected for presentation or publication based on objective scientific criteria. In selecting criteria for this assessment we tried to identify those elements in an abstract that reviewers are likely to use. The data indicated that negative abstracts were similar to or better than positive abstracts. In particular negative abstracts tended to verify cocaine use more frequently, which is probably the most important independent variable in such studies.

The positive abstracts, being a substantially larger group than the negative, are likely to include both scientifically sound and flawed papers. In a comparison of the 21 rejected positive with the 8 rejected negative abstracts, we found the negative studies to be superior in almost every variable studied. This strengthens the suggestion that most negative studies were not rejected because of scientific flaws, but rather because of bias against their non-adverse message. The subconscious message may be that if a study did not detect an adverse effect of cocaine when the common knowledge is that this is a "bad drug", then the study must be flawed.

To study the impact of this bias, consider the association between cocaine use and SIDS. There are published studies to suggest higher rates of SIDS with gestational use of cocaine,[8] although some investigators could not detect such a relation.[13] We found 6 abstracts on SIDS; 3 claimed association with cocaine use and 3 did not. 2 of the positive

abstracts but none of the negative abstracts were accepted for presentation.

We were recently consulted about a case that highlighted a detrimental effect of this reporting bias. Foster parents brought to the Motherisk Clinic a baby exposed in utero to cocaine, to find out whether he needs to continue to be monitored for apnoea. At birth the attending physician told the natural mother, who was unmarried but [illegible]ed to keep the child, that there is a high risk for SIDS and therefore the baby should be monitored during sleep for apnoea. Neighbours had complained to a childrens' aid group that the "monitor goes on too frequently", and the child was taken from the natural mother against her will. The history revealed that the child had never had apnoea and was healthy. 1 of the negative abstracts had actually detected a lower frequency of respiratory distress syndrome in children exposed in utero to cocaine than in controls.[14] This paper was not accepted for presentation.

Bias by journals, scientific societies, and funding agencies against negative results may have far-reaching detrimental effects: scientists, realising their slim chance of having such data acknowledged, may be thus discouraged from submitting negative results. Rosenthal[15] identified a tendency of psychology journals to publish only significant findings—the file drawer problem. Even more alarming, this bias may lead scientists to massage or misrepresent data to obtain positive results.[16]

It is the duty of editorial boards, scientific committees, and funding agencies to acknowledge this serious bias and to indicate clearly that research results are not more important if they are positive. Rather importance should be dictated by the relevance of the scientific questions and by the ways they are answered.

This study was supported in part by a grant from Health and Welfare Canada. G. K. is a career scientist of Ontario Ministry of Health and K. G. receives an Ontario Graduate Studies award.

Correspondence should be addressed to G. K., Division of Clinical Pharmacology, Hospital for Sick Children, 555 University Avenue, Toronto, M5G 1X8 Ontario, Canada

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Screening

ANTENATAL TESTING FOR HUMAN IMMUNODEFICIENCY VIRUS

Results from the Royal College of Obstetricians and Gynaecologists' National Study of HIV Infection in Pregnancy

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C. N. HUDSON[2] C. S. PECKHAM[1]

Department of Paediatric Epidemiology, Institute of Child Health, London WC1;[1] and Department of Obstetrics and Gynaecology, St Bartholomew's Hospital, London EC1[2]

Summary Current policies on antenatal testing for human immunodeficiency virus (HIV) in the main obstetric units of the United Kingdom and the Republic of Ireland were surveyed by postal questionnaire; 294 of 299 units responded. HIV testing was available at 192 (65%) of the 294 units that responded. 414 HIV-positive pregnancies in 386 women were reported from 74 (25%) units. Most were from Scotland, the four Thames Regions, and Ireland. In 46% of the HIV-positive women the infection was identified by antenatal testing; the remainder had been tested previously and knew that they were infected. The findings support the view that selective antenatal testing should be established in areas where no testing is offered at present and possibly that testing should be offered to all pregnant women in high-prevalence areas.

INTRODUCTION

By July, 1989, in the United Kingdom 82 cases of acquired immunodeficiency syndrome (AIDS) in women had been reported to the Communicable Disease Surveillance Centre or Communicable Diseases (Scotland) Unit, and there had been 1087 laboratory reports of women seropositive for human immunodeficiency virus (HIV).[1] However, it is not known how many of these women were pregnant at the time of reporting. In addition, 316 children under 15 years were known to be positive for HIV antibody by July, 1989.[1] 126 were children of infected mothers; since at least 99 of the children were younger than 18 months, the number infected remains unknown because maternal antibody can persist until this age.[2]

Of 558 cases of AIDS in children reported from the European Community, Finland, Sweden, and Switzerland to the World Health Organisation AIDS centre in Paris, 76% had acquired infection from their mothers. Of these 426 women, 48% were intravenous drug users, 33% were partners of HIV-positive men, 3% were blood transfusion recipients, and the risk category for transmission in the remainder was either a combination of the above or unknown.[3]

This study was set up under the auspices of the Royal College of Obstetricians and Gynaecologists (RCOG) to collect confidential information on the numbers and geographical distribution of HIV-positive pregnant women seen antenatally and to record antenatal testing policies.

METHODS

299 obstetric units in the UK and the Republic of Ireland were identified from the Joint Planning Advisory Committee Census,

North Slope Borough School District

April 27, 1990

Representative Peter Goll
Representative Max Gruenberg
Co-Chairmen, House Judiciary Committee
Alaska State Legislature
Box V
Juneau, Alaska 99811

Dear Representative Goll and Representative Gruenberg:

The North Slope Borough School District has been a strong advocate of child protection services as you can see in the enclosed Policies JHG, JHG-R and JHG-E, related to child abuse and neglect. We have reviewed SB 450 regarding Child Abuse and Neglect, and while we appreciate the intent of this bill, the proposed amendments and additions cause some concern which may deter a faster response method from other agencies in dealing with child abuse cases that the District reports to other agencies.

- This bill would require teachers to report directly to an investigating agency (i.e., Health and Social Services or Public Safety Officers). Many of our teachers are relieved of this responsibility by reporting first to their direct supervisor, which is our standard operating procedure.

- This bill targets school districts as the main reporters of child abuse cases, and its requirements intensify teachers' responsibilities as "social workers". It is another State program that will chip away important instructional time.

- What needs to be addressed in this Legislation is the obvious lack of human resources for Health and Social Services agencies and the Public Safety Officers to investigate and intervene AFTER a report has been made in a time-efficient manner.

- The bill also requires school districts to provide specialized training to all new employees and to all personnel on a five-year cycle. No State funding is mentioned for support of this requirement which can be very costly in a District like ours whose eight villages are widespread over 88,000 square miles.

- The expected results of intensifying child abuse reporting by school districts are that, there will probably be a large increase in the number of reports made in order to protect employees against the possibility of criminal penalties. These penalties might include charges of reporting in an untimely manner or "should have known that the circumstances gave rise to the need for a report" (class B misdemeanor).

- SB 450 does not include any provision for funding an increase in resources to investigate these reports, nor does it address the need to speed up investigations once teachers report child abuse cases. For example, it took over a month for social service agencies, who are undermanned, to respond to District child abuse reports, coupled with the problem that most Public Safety Officers are undertrained in this subject and understaffed as well.

- The addition of "mental injury" as a form of child abuse is very loosely defined and requires that reporters make very subjective decisions about their observations.

In closing, I appreciate the efforts of the Legislature to strengthen child protection services. I would appreciate your serious consideration to address our concerns stated above before passing the bill. As a suggestion, if HCR 46, the establishment of an Interagency Coordinating Committee is passed, perhaps SB 450 can be reviewed by this Committee to help resolve our concerns; then make recommendations to the Legislature on another version of SB 450 to better meet the needs of our students and teachers.

Sincerely,

Patsy Aamodt
Superintendent

Enclosure

cc: Senator Al Adams
Representative Eileen MacLean
NSBSD Lobbyist, Ashley Reed

CHILD ABUSE AND NEGLECT

Students have the right to live in an environment which will enable them to develop into emotionally and physically healthy, productive adults. District employees are regarded as having an ethical and legal responsibility to report all suspected cases of child abuse (including sexual abuse) or neglect in accordance with provisions of law.

Adopted: 09/10/84
Reviewed: 12/85

FILE: JHG-R

CHILD ABUSE REPORTING PROCEDURES

1. In compliance with AS 46.17.020., any teacher, nurse, or administrator who, in the performance of his/her professional duties, has cause to believe that a child has suffered harm as a result of abuse or neglect shall report the suspected abuse or neglect to the office of the Department of Health and Social Services in Barrow (852-3397), to the North Slope Borough Department of Public Safety, to his/her superior, and to the superintendent or designee by telephone.

2. Whether or not the Department of Health and Social Services has been contacted by telephone or whether or not a peace officer has been notified, the teacher, nurse, or administrator will complete form AD700-12D and submit it to the superintendent.

3. Upon contact by the Department of Health and Social Services the reporting person and supervisors will cooperate fully with the Department staff investigating the alleged abuse or neglect, and make available all necessary information in the possession of the district. The child may be interviewed at school by the social worker without prior permission of the parent or guardian. An appointed staff member may attend the interview.

Effective: 09/10/84
Reviewed: 7/16/86
Revised: 8/11/87

SB
450

Frank H. Wasmer
P.O. Box 231
Skagway, Alaska 99840

907-983-2131

March 26, 1990

Representative Peter Goll
Alaska State Legislature
Pouch V, (MS3100)
Juneau, Alaska 99811

Dear Peter,

I have reviewed SB 450, Child Abuse Reporting, and have a point or two that I would like to share with you and the other members of the House Judiciary Committee.

Although the intent of the bill seems to be to correct problems of delayed reporting, as in the incident in Anchorage involving Mr. Carlson, the obvious result will be a dramatically increased level of reporting. If you will review the audit of DFYS activities in southeastern Alaska, (OMB Audit, March 1989) there is some question of investigative skills of department personnel. I would suggest you pay particular attention to orientation and continuation training. That, coupled with the fact that the system is saturated, raises questions in my mind concerning the capability of the state to <u>properly</u> investigate and respond to increased reporting. I was speaking with teachers from the lower Kuskoquim area some weeks ago. They relate a total inability of DFYS and Public Safety to respond in their area. They tell me that when they report child abuse that nothing happens. They work with the children and try their best to help them.

Another concern is the provision for interviews held in the school without parental permission. Unless total immunity is granted the school district, a potential liability is incurred with every report. In my view, permission to interview under such terms should only be allowed by court order. I would think that it would be similar to obtaining a search warrant. If the state can show cause, the court would approve the action. This would shield the districts while reducing the number of frivolous investigations. In any case, there must be a better way than that contained in SB-450.

In situations involving school personnel, the administration should be notified of allegations whether they occur at school or not. The current bill has language to the extent that reports are limited to schools in which the child is enrolled. This should be broadened to be all inclusive. If a school employee is involved in an incident of child abuse, particularly of a criminal nature, the school administration should be made aware.

It is my understanding that the current statute was written with foster parents primarily in mind. As you know, I believe that foster parents should be held to a higher standard and have never had any objection to being held accountable. I must confess disappointment that Mr. Carlson was not held to the same standard.

For the moment, I believe the current statute satisfactory. It does need attention but should be well thought out and considered rather than the result of over zealous pursuit of the Satch Carlson's of the world. I am deeply concerned that the investigative capabilities of the workers assigned to the Division of Family and Youth Services are far from acceptable and that many families will suffer intrusion that they do not deserve while others who should be investigated are not.

Sincerely,

Frank H. Wasmer

Frank H. Wasmer

AMENDMENT #1

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ". Upon a showing of financial hardship, the court shall allow a person subject to an order entered under this subsection to make payments under a payment schedule. ~~The payment schedule may not exceed five years.~~ Payments made under this subsection shall"

Page 1, lines 15 - 16:

Delete "]. The payments shall"

Insert ". THE PAYMENTS SHALL]"

AMENDMENT #2

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 11, after "(c)":

Delete "The"

Insert "Upon the person's conviction, the"

6-2174Ae
Chenoweth

AMENDMENT #3

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ", but execution may not commence until three years after release of the defendant from incarceration unless, for good cause shown, the court considers it appropriate to execute earlier"

4/25/90

Alaska State Legislature

Senate Judiciary Committee

MEMORANDUM

April 24, 1990

TO: Representative Max Gruenberg, Co-Chairman
Representative Peter Goll, Co-Chairman

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 475 "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

SB 475 was introduced at the suggestion of the Alaska Court System. This bill streamlines the manner in which indigent persons are ordered to pay legal costs when represented by the Public Defender.

As you know, the state is constitutionally obligated to provide attorneys to indigent defendants in criminal prosecutions. Currently, the law provides that an indigent person may be ordered to repay the legal expenses and court costs incurred by the state to the extent that the person is able to do so. The courts have interpreted this to mean that a hearing must be held before an indigent person can be ordered to pay any expenses; calculating the value of the representation is difficult, and the ability of the court to fully consider future income is also questionable. Experience has shown that this system simply does not work. Legal costs are virtually never recovered from persons represented by the Public Defender, regardless of the person's ability to pay some of the expenses at the time of the representation or in the future.

SB 475 has the effect of eliminating the need for a hearing, and allowing a defendant's future ability to pay to be taken into account. If passed, the supreme court intends to adopt a schedule of fees for various offenses (a copy of this schedule can be found in proposed Criminal Rule 39, which you will find attached). An indigent person who received services from the Public Defender would automatically be assessed a fee depending on the type of service provided. At the end of a

criminal proceeding, a civil judgement in that amount would be entered against the defendant. During the ten year period in which a civil judgement is enforceable, the state could pursue the judgement if the defendant had the ability to pay some of the fees at the time of the representation, or in the event that the defendant ever obtained a financial windfall in the future. Obviously, the state could not enforce the judgement in cases where the defendant was truly indigent and remained so.

This method of fee collection has been endorsed by both the Department of Law and the Public Defender, because it fulfills the government's responsibility to indigent persons, while ensuring that resources available to indigent persons ultimately go to people who really are in need. I urge your support.

Proposed

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Criminal Rule 39 concerning appointment of counsel for indigents.

IT IS ORDERED:

Criminal Rule 39 is amended to provide:

Criminal Rule 39: Appointment of Counsel.

(a) Informing Defendant of Right to Counsel. The court shall advise a defendant who appears for arraignment or trial without counsel of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(b) Appointment of Counsel for Persons Financially Unable to Employ Counsel.

(1) If the defendant desires the aid of counsel but claims a financial inability to employ counsel, the court shall inquire of the defendant under oath as to his or her financial status in order to determine whether the defendant is an "indigent person," as defined by statute. The court shall advise the

defendant that a judgment will* be issued against the defendant to cover the costs of an appointed counsel. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court. The court also may require the defendant to sign an assignment of the defendant's permanent fund dividend check to the state and may enter such orders as appear reasonably necessary to prevent the defendant from fraudulently dissipating assets to avoid a repayment order.

(2) Information provided by the defendant concerning eligibility for appointed counsel may not be used against the defendant in any criminal proceedings, except that such information may be used in a prosecution for perjury or at a hearing for determining the defendant's ability to pay a fine or make restitution. Upon request, the defendant must be allowed to present the requested financial information in a confidential setting, outside the presence of the prosecuting attorney. The court may have the financial inquiry conducted by pretrial services.

(3) If the court determines that the defendant is an "indigent person," the

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* The alternative draft, under which the court would hold an "ability to pay" hearing if requested before imposing costs, would substitute "may" for "will" here.

court shall appoint counsel pursuant to Administrative Rule 12 and notify counsel of the appointment. The court may require the defendant to attempt to arrange private representation before making a final decision on indigency.

(4) In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies the defendant's request for appointed counsel, the defendant may request review of this decision by the presiding judge of the judicial district by filing a motion with the trial court within three days of the trial court's denial of representation. The trial court shall forward the motion, relevant materials from the court file and a cassette tape of any relevant proceedings to the presiding judge. The presiding judge or his or her designee shall issue a decision within three days of receipt of these materials.

(c) Cost of Counsel.

(1) At the conclusion of the criminal proceedings in the trial court, the court or the clerk shall issue a judgement against a defendant represented by appointed

counsel for the cost of representation. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e).**

(2) The court may require payment in installments or in any manner which the court finds is reasonable. The judgment of repayment must be in writing and a copy must be provided to the defendant.

(3) All proceedings to enforce a repayment judgment are civil in nature. The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution. The judgment is not enforceable by contempt, nor may repayment be made a condition

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** The alternative draft would replace this subparagraph with two subparagraphs which would provide:

(1) At the beginning or conclusion of the criminal proceedings in the trial court, the court may order a defendant represented by appointed counsel to pay all or part of the costs of representation in an amount not to exceed the defendant's ability to pay for these costs. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e). A defendant with only a partial ability to pay costs may be ordered to pay one-half of the amount specified in the fee schedule.

(2) Prior to entering an order of repayment, the court shall advise the defendant that he or she may present testimonial and documentary evidence concerning an ability to pay for representation.

of a defendant's probation. Default or failure to make repayment may not affect or reduce the rendering of services on appeal or any other phase of the defendant's case in any way. The defendant does not have a right to be represented by appointed counsel in connection with any repayment proceeding.

(d) Appointment in the Interest of Justice. The court may appoint counsel for a criminal defendant in any case in which appointment best serves the interest of justice.

(e) Cost of Representation Schedule. The following schedules govern the assessment of the cost of representation under subparagraph (c)(1):

Misdemeanors

Trial	$ 500.00
Change of plea	200.00
Dismissal after substantive motion	200.00
Dismissal without substantive motion	50.00

Proposed

Felonies

Final Disposition	Class B & C	Class A and Unclassified (Except Murder)	Murder in the 1st and 2nd Degrees
Trial	1,500	2,500	5,000
Change of plea after substantive motion work and hearing	1,000	1,500	2,500
Dismissal after substantive motion work and hearing	500	1,000	2,000
Change of plea post-indictment but prior to substantive motion work and hearing	500	1,000	2,000
Change of plea prior to indictment	300		
Dismissal without substantive motion	200		

DATED: _____

EFFECTIVE DATE: _____

_____
Chief Justice Matthews

_____
Justice Rabinowitz

_____
Justice Burke

_____
Justice Compton

_____
Justice Moore

Proposed

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Appellate Rule 209(b) concerning appointment of counsel for indigents in criminal appeals.

IT IS ORDERED:

Appellate Rule 209(b) is amended to provide:

(b) Criminal Matters.

(1) In criminal matters the trial court shall authorize appeals by appointed counsel in accordance with Criminal Rule 39 and Administrative Rule 12 [AT PUBLIC EXPENSE ON BEHALF OF PERSONS FINANCIALLY UNABLE TO PAY THE COSTS OF APPEAL IN ACCORDANCE WITH THE RULES AND DECISIONS OF THE APPELLATE COURTS OF ALASKA AND WHERE SUCH APPEALS ARE REQUIRED TO BE PROVIDED BY STATE COURTS BY DECISIONS OF THE SUPREME COURT OF THE UNITED STATES]. Where such appeals are authorized [BY THE TRIAL COURT] the costs which shall be borne at public expense [BY THE STATE SHALL] include those of providing counsel and of preparing a transcript and briefs. [CRIMINAL RULE 39 SHALL BE FOLLOWED IN MAKING THE DETERMINATION OF FINANCIAL INABILITY.]

(2) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to proceed at public expense on appeal.

(3) The action of the trial court in authorizing or declining to authorize an appeal at public expense is reviewable by a motion in the appellate court, ancillary to the appeal.

(4) Counsel appointed to represent the defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this subdivision and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. In addition, an attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent the defendant on appeal. If an appeal is to be taken, in no event will trial counsel be permitted to withdraw until the notice of appeal and the documents required to be filed therewith by Rule 204(b) have been accepted for filing by the clerk of the trial courts [COMPELLING REASONS].

(5)* At the conclusion of the appellate proceeding, the Appellate clerk shall issue a judgment against a defendant represented by appointed counsel for the cost of representation on appeal. The cost of

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* This paragraph would be deleted in the alternative version.

representation will be determined based on the following schedule:

Type of Appellate Proceeding	Misdemeanor	Felony
Sentence Appeal	250	500
Merit Appeal	750	1,500
Combined Merit and Sentence Appeal	1,000	2,000
Other Appellate Actions (Petition for Review, Petition for Hearing, etc.)	500	1,000

DATED: _____

EFFECTIVE DATE: _____

_____
Chief Justice Matthews

_____
Justice Rabinowitz

_____
Justice Burke

_____
Justice Compton

_____
Justice Moore

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

December 14, 1989

The Honorable Warren Matthews
Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Dear Chief Justice Matthews:

We understand that the Supreme Court will soon consider a proposal to amend Criminal Rule 39 that would allow the recovery of some of the costs of defense services to indigent citizens.

We support this concept, especially where the charges are directly related to the level of service provided to clients by the Alaska Public Defender's Agency and the Office of Public Advocacy. The fee schedule contained in the proposed amendment accomplishes this goal by setting out charges that are generally proportionate to the professional work required in individual cases.

We are particularly concerned that any recovery system include provisions designed to streamline the administrative and legal process for collection of these funds. The creation of an efficient and effective system holds the promise of recovering a significant portion of the high costs of defense services.

Finally, it is clear that the current mechanism of cost recovery has not worked. We applaud your efforts to develop a fair and effective recovery plan.

Respectfully submitted,

CRIMINAL JUSTICE WORKING GROUP

Douglas B. Baily — Date
Attorney General

Grant McGee, Director — Date
Office of Public Advocacy
Department of Administration

03-C32LH

John Salemi, Director Date
Public Defender Agency
Department of Administration

Myra Munson Dec 14, 1989
Myra Munson, Commissioner Date
Department of Health and Social Services

Susan Humphrey-Barnett 12/27/89
Susan Humphrey-Barnett, Commissioner Date
Department of Corrections

12-14-89
Art English, Commissioner Date
Department of Public Safety

12-20-89
Duane Udland, Representative Date
Alaska Association of Chiefs of Police

BM/gh

The Alaska School Nurse Association does not support Senate Bill 450 regarding reporting and investigation of child abuse and neglect. This bill does not encourage cooperation between school districts, law enforcement agencies, and social services agencies. These agencies need to work closely together to benefit and protect students.

Senate Bill 450 does not improve the clarity of definitions and still needs more revision. The following terms need to be defined: immediately, maltreatment, investigations. The social service agency needs school nurses who are trained to identify child abuse and neglect to conduct appropriate and effective investigations to gather the facts to report to the Division of Family and Youth Services. If school nurses were not available to gather this information then DFYS would be even more overwhelmed than they are today. Now school nurses are talking to answering machines because they cannot get an intake screener and sometimes must wait two days to get a call back. Teachers cannot wait for DFYS to call back when they must be in class with 30 students.

Please reconsider better definitions for this important Senate Bill.

"reasonable cause to suspect" - dr see 1945 46

that a "high degree of certainty" is a significantly stricter standard than the proposed "substantial certainty," it fails to cite convincing or binding authority for this assertion. Before we can find misdirection of the jury, we must be convinced from the entire record that the trial's result would probably have differed. *See Bohlman v. American Family Mutual Insurance Co.*, 61 Wis.2d 718, 729, 214 N.W.2d 52, 58–59 (1974). Because we determine that the difference, if any, between the two standards would have had no effect on the trial's outcome, we uphold the trial court's version of the intent instruction.

Judgment and order affirmed.

135 Wis.2d 266

STATE of Wisconsin, Plaintiff-Respondent,

v.

Richard HURD, Defendant-Appellant.

No. 86–0558–CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Aug. 1, 1986.

Opinion Released Nov. 18, 1986.

Opinion Filed Nov. 18, 1986.

Defendant was convicted in the Circuit Court, Trempealeau County, Robert W. Radcliffe, J., of failing to report suspected child abuse, and his motion for postconviction relief was denied. Defendant appealed. The Court of Appeals, Myse, J., held that: (1) statute prohibiting failure to report suspected child abuse is not unconstitutionally vague; (2) failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, thus denying defendant due process so as to require new trial; but (3) whether defendant wilfully failed to report suspected child abuse was question for jury.

Reversed and remanded.

1. Constitutional Law ⇐48(1)

There is strong presumption favoring constitutionality of statute, and, if possible, reviewing court will interpret statute to preserve it.

2. Constitutional Law ⇐258(2)

Due process mandates that criminal statute be sufficiently definite to give person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law ⇐13.1(1)

To avoid being impermissibly vague, statute need not define with absolute clarity and precision what is and what is not unlawful.

4. Criminal Law ⇐13.1(1)

Statute is not void for vagueness simply because there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease; it is enough if statute alerts person of ordinary intelligence to type of conduct, active or passive, that is proscribed.

5. Infants ⇐13

Reasonable cause requirement, under statute requiring person who has reasonable cause to suspect child abuse to report suspected abuse, examines totality of facts and circumstances actually known to, and is viewed from standpoint of, person possessing suspicion; thus, test becomes whether prudent person would have reasonable cause to suspect child abuse if presented with same totality of circumstances as that acquired and viewed by defendant. U.S.C.A. Const.Amends. 5, 14; W.S.A. 48.981.

6. Infants ⇐12

Use of reasonableness standard under statute requiring reporting of child abuse

by person having reasonable cause to suspect that child has been abused or neglected does not itself render statute unconstitutionally vague. W.S.A. 48.981.

7. Infants ⇐12

Use of term "suspicion" in statute requiring reporting facts and circumstances contributing to suspicion of child abuse does not itself create unconstitutionally vague statute. W.S.A. 48.981.

8. Infants ⇐12

Phrase 'reasonable cause to suspect" in statute requiring reporting of child abuse by person who has reasonable cause to suspect abuse is readily ascertainable and understandable standard involving belief that ordinary person would reach as to existence of abuse, and thus, statute sufficiently alerts person of ordinary intelligence as to what conduct is required so that statute is not unconstitutionally vague. W.S.A. 48.981.

9. Criminal Law ⇐847

Objection to jury instructions is not waived where instructions misstate law.

10. Criminal Law ⇐1038.1(2)

Notwithstanding waiver of objection to instruction, reviewing court in its discretion may consider whether error is so plain or fundamental that it affects defendant's substantial rights and so mandates reversal. W.S.A. 901.03(4).

11. Criminal Law ⇐1165(1)

Reviewing court may find error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that error contributed to conviction.

12. Constitutional Law ⇐266(7)

Due process clause protects against conviction except upon proof beyond reasonable doubt of all elements of charged offense.

13. Infants ⇐20

To convict defendant of failing to report child abuse that defendant had reasonable cause to suspect, State is required to prove beyond reasonable doubt that defendant not only failed to report suspected child abuse, but that defendant did so wilfully. W.S.A. 48.981.

14. Constitutional Law ⇐268(11)
Criminal Law ⇐1038.2
Infants ⇐20

Failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, allowing jury to convict defendant simply because he failed to report abuse, thus denying defendant due process and affecting substantial right so as to require remand for new trial, even though defendant failed to object to lack of instruction. U.S.C.A. Const.Amends. 5, 14; W.S.A. 48.981.

15. Statutes ⇐176

Interpretation of statutory words is question of law.

16. Statutes ⇐181(1)

Primary goal of statutory interpretation is to ascertain and give effect to legislature's intent.

17. Statutes ⇐208

"Wilfully" must be defined within context of statute in which it was used.

18. Infants ⇐13

"Wilfully" requirement for conviction of failing to report suspected child abuse allows defendant to raise defenses such as mistake, neglect, or misadventure that caused failure to report, but does not allow defense that defendant was unaware of statutory duty to report child abuse. W.S.A. 48.981, 48.981(6), 939.23(3, 5), 939.43.

See publication Words and Phrases for other judicial constructions and definitions.

19. Infants ⇐20

Evidence that counselor at youth ranch told defendant, the administrator at ranch, on several occasions that another employee was making "advances" toward boys and that defendant had previously expressed his low opinion of competency of law en-

forcement and social service agencies raised jury question as to whether defendant wilfully failed to report suspected child abuse. W.S.A. 48.981.

Richard Hurd, Glenn L. Cushing, asst. state public defender, Madison, for defendant-appellant.

LaVerne Michalak, dist. atty., Whitehall, for plaintiff-respondent, State of Wisconsin.

Before CANE, P.J., LaROCQUE and MYSE, JJ.[1]

MYSE, Judge.

Richard Hurd appeals from a judgment convicting him of failing to report suspected child abuse and from an order denying his motion for postconviction relief. Hurd argues that the charging statute is unconstitutionally vague, that the trial court erred by failing to instruct the jury on an element of the offense, and that there was insufficient evidence to convict. We conclude that the challenged statute is constitutional and that there was sufficient evidence to convict. However, because the trial court's error in failing to instruct on an element of the offense violated Hurd's constitutional right to due process, the judgment and order are reversed and the cause remanded for a new trial.

Richard Hurd is the administrator of the Berean Christian Ranch and the Berean School. In 1984, six boys resided at the youth ranch with ages ranging from seven to nineteen. Also residing at the ranch were two adults, Kenneth Murray, a young counselor, and Tom Chrystal. Chrystal was convicted of sexually assaulting certain boys at the youth ranch. Hurd was charged with failing to report suspected child abuse contrary to sec. 48.981, Stats.

At Hurd's trial, Murray testified that he had informed Hurd several times that Chrystal was making "advances" toward the boys. Murray stated further that after witnessing an incident in which Chrystal was lying on top of one of the boys with his pants down, he told Hurd that he had personally observed one of the "advances" and that he wanted something done about it. One of the boys also testified that he had informed Hurd of a sexual assault by Chrystal. The jury convicted Hurd of the offense.

Hurd first challenges the constitutionality of the charging statute, sec. 48.981. He claims that the statute's undefined phrase "reasonable cause to suspect" is ambiguous and vague.[2] As a result, he argues that the statute fails to notify a person of ordinary intelligence of the conduct required by the statute. We disagree.

[1, 2] There is a strong presumption favoring the constitutionality of a statute, and if possible, a reviewing court will interpret a statute to preserve it. *State v. Popanz*, 112 Wis.2d 166, 172, 332 N.W.2d 750, 753 (1983). Nevertheless, due process mandates that a "criminal statute must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of the conduct required or prohibited." *Id.* at 173, 332 N.W.2d at 754. The proper test for determining whether a statute is impermissibly vague was recently set forth by our supreme court in *Popanz:*

> Before a court can invalidate a statute on grounds of vagueness, it must conclude that "some ambiguity or uncertainty in the gross outlines of the duty im-

1. Upon order of the Chief Judge, this has been issued as a three-judge opinion pursuant to sec. 809.41(3), Stats.

2. Hurd challenges the constitutionality of sec. 48.981 on other grounds. He claims that the statute's undefined phrase "reason to believe" is also vague and fails to notify a person of ordinary intelligence of the conduct required by the statute. The statute's use of "reason to believe" is distinctly tied to those circumstances in which it is probable a child is threatened with abuse. Section 48.981(2), (3)(a), Stats. Hurd was neither charged nor convicted under this aspect of sec. 48.981. Consequently, this issue need not be addressed. *See State v. Courtney*, 74 Wis.2d 705, 713, 247 N.W.2d 714, 719–20 (1976); *see also State ex rel. Deisinger v. Treffert*, 85 Wis.2d 257, 271, 270 N.W.2d 402, 409 (1978).

posed or conduct prohibited" appears in the statutes, "such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule."

Id. (quoting *State v. Courtney*, 74 Wis.2d 705, 711, 247 N.W.2d 714, 719 (1976)).

[3, 4] Section 48.981 states in part:

(2) [A]n ... administrator ... *having reasonable cause to suspect* that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with an injury and that abuse of the child will occur shall report as provided in sub. (3)....

(3)(a) Referral of report of suspected child abuse or neglect. Persons required to report ... shall immediately contact, ... and shall inform the agency or department of the fact and circumstances contributing to a *suspicion of child abuse* or neglect or to a belief that abuse will occur.... [Emphasis added.]

It is true that the statute does not define "reasonable cause to suspect." However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Courtney*, 74 Wis.2d at 710, 247 N.W.2d at 718. A statute is not void for vagueness simply because "there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease." *Id.* at 711, 247 N.W.2d at 719. It is enough if the statute alerts a person of ordinary intelligence to the type of conduct, active or passive, that is proscribed. *Id.* at 713, 247 N.W.2d 719.

Section 48.981's use of the phrase "reasonable cause to suspect" fairly notifies a person of ordinary intelligence that if there is a reasonable basis to suspect that child abuse has occurred, that person must make a report to the appropriate agency. Whether a person possesses a reasonable suspicion that child abuse has occurred is not subject to misunderstanding. This requirement examines the totality of the facts and circumstances actually known to, and as viewed from the standpoint of, that person.[3] *See, e.g., State v. Lossman*, 118 Wis.2d 526, 543, 348 N.W.2d 159, 167 (1984). Thus, the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse.

[5] The use of the standard of reasonableness does not in itself render sec. 48.981 unconstitutionally vague. This standard is employed in a number of statutes including disorderly conduct (unreasonably loud), refusing to aid an officer (reasonable excuse), arrest without warrant (reasonable grounds to believe), and the statutory definition of "reasonably believes." *See* secs. 947.01, 946.40, 800.02(6), and 939.22(32), Stats. Testing information actually possessed by a defendant against the standard of reasonableness is not so ambiguous or vague as to preclude a citizen from conforming his conduct to that required by the law.

[6] Nor does use of the term "suspicion" create an unconstitutionally vague statute. This is a nontechnical term commonly used and understood by the general populace. It is not a term of art that requires legal expertise to comprehend its meaning. Absent statutory definition, the common and approved meaning of a nontechnical word may be ascertained by reference to a recognized dictionary. *State v. Ehlenfeldt*, 94 Wis.2d 347, 350, 288 N.W.2d

3. A similar analysis has been applied in other contexts. *See State v. Wilks*, 117 Wis.2d 495, 501–02, 345 N.W.2d 498, 501 (Ct.App.1984), *cert. denied*, 471 U.S. 1067, 105 S.Ct. 2144, 85 L.Ed.2d 501 (1985); *State v. Boggess*, 115 Wis.2d 443, 445–56, 340 N.W.2d 516, 519–21 (1983).

786, 790 (1980); *see also* sec. 990.01(1), Stats. "Suspicion" is defined as a "belief or opinion based upon facts or circumstances which do not amount to proof." Black's Law Dictionary 1298 (5th ed. 1981); *see also Gordon v. Gordon*, 270 Wis. 332, 343, 71 N.W.2d 386, 392 (1955). It is a concept dealing with the degree of certainty with which one holds a belief or opinion.

[7] The phrase "reasonable cause to suspect" is a readily ascertainable and understandable standard that involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse. Therefore, sec. 48.981 sufficiently alerts a person of ordinary intelligence as to what conduct is required. *See Courtney*, 74 Wis.2d at 713, 247 N.W.2d at 719.

Next, Hurd argues that the trial court erred by failing to instruct the jury on the element of "wilfully." The penalty provision of sec. 48.981 states:

> (6) Penalty. Whoever *wilfully* violates this section by failure to report as required may be fined not more than $1,000 or imprisoned not more than 6 months or both. [Emphasis added.]

The state concedes that "wilfully" is an element of the offense of failing to report suspected child abuse under sec. 48.981. However, the state argues that Hurd has waived this error by failing to timely object at trial to the jury instructions as given. *See* secs. 972.10(3) and 805.13(3), Stats. Alternatively, the state claims that this error was harmless.

[8–11] A trial court has broad discretion in instructing the jury. *State v. Danforth*, 125 Wis.2d 293, 297, 371 N.W.2d 411, 414 (Ct.App.1985). Nevertheless, instructions should fully and fairly state the law that applies to the case. *Id.* It is well established that an objection to jury instructions is not waived where the instructions misstate the law. *State v. Moriarty*, 107 Wis.2d 622, 630, 321 N.W.2d 324, 329 (Ct.App.1982). Moreover, notwithstanding waiver, a reviewing court in its discretion may consider whether an error in instruction is so plain or fundamental that it affects a defendant's substantial rights and so mandates reversal. *Id.*; sec. 901.03(4), Stats. A reviewing court may find an error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 542, 370 N.W.2d 222, 231-32 (1985).

[12–14] The due process clause of the United States Constitution protects against conviction except upon proof beyond a reasonable doubt of all elements of the charged offense. *State v. Ivy*, 119 Wis.2d 591, 608, 350 N.W.2d 622, 631 (1984). Here, the state was required to prove beyond a reasonable doubt that Hurd had not only failed to report suspected child abuse, but that he had done so wilfully. Under the instructions given by the trial court, the state was relieved of the latter burden. *See Moriarty*, 107 Wis.2d at 631, 321 N.W.2d at 329. Thus, the jury was allowed to convict Hurd simply because he had failed to report. This is neither the offense with which he was charged nor the legislature's intent in enacting sec. 48.981 as indicated by the inclusion of "wilfully" within the statute. Hurd was denied an opportunity to present defenses negating the wilfulness element because the jury was not advised that this was an element of the offense. The error in instruction violated Hurd's right to due process and so affected his substantial rights. *Id.*; *see also Morissette v. United States*, 342 U.S. 246, 274–76, 72 S.Ct. 240, 255–56, 96 L.Ed. 288 (1952). Accordingly, we conclude that there is a reasonable possibility that the error in instruction contributed to Hurd's conviction. Hurd is therefore entitled to a new trial.

[15, 16] Having determined that the trial court erred by failing to instruct on the wilful element, this court must next address the meaning of this term within the context of sec. 48.981. The interpretation of statutory words is a question of law. *State ex rel. Brockway v. Milwaukee County Circuit Court*, 105 Wis.2d 341, 344, 313 N.W.2d 845, 847 (Ct.App.1981). The primary goal of statutory interpreta-

tion is to ascertain and give effect to the legislature's intent. *Id.*

Hurd contends that "wilfully" should be construed to mean that a defendant intentionally violated a known legal duty. It is well established that ignorance of the law is no defense to a violation thereof. *State v. Kemp*, 106 Wis.2d 697, 712, 318 N.W.2d 13, 21 (1982); *State v. Britzke*, 108 Wis.2d 675, 683, 324 N.W.2d 289, 292 (Ct.App. 1982). If the legislature had wished to make ignorance of the law a defense to a crime, it would have done so more clearly and less ambiguously than simply using the term "wilfully." Rules of common law are not to be changed by doubtful implication and to give such effect to a statute, the language must be clear and preemptory. *Rose v. Schantz*, 56 Wis.2d 222, 227, 201 N.W.2d 593, 597 (1972); *see also* sec. 939.10, Stats.

[17] "Wilfully" must be defined within the context of the statute in which it is used. *State v. Cissell*, 127 Wis.2d 205, 210–13, 378 N.W.2d 691, 694 (1985), *cert. denied*, — U.S. —, 106 S.Ct. 1651, 90 L.Ed.2d 194 (1986). Section 48.981 creates an offense for certain individuals who fail to report possible child abuse if they have reason to suspect that such child abuse has occurred. By adding the term "wilfully," the legislature made the offense punishable only if such individuals "wilfully violate this section by failure to report as required...." Section 48.981(6), Stats.

[18] "[W]ilfully" as used in sec. 48.981(6) means "intentionally" as defined in sec. 939.23(3).[4] *See Cissell*, 127 Wis.2d at 210–13, 378 N.W.2d at 694; *see also* Black's Law Dictionary 1434 (5th ed. 1981); Webster's New World Dictionary 1627 (2d ed. 1980). Section 939.23(3) defines "intentionally" as: "[T]he actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result." Thus, a defendant charged under sec. 48.981 may raise defenses such as mistake, neglect, or misadventure that caused the failure to report. *See* sec. 939.43, Stats. It is not a defense to this offense, however, that the defendant was unaware of the statutory duty to report suspected child abuse. *Id.*; *see also* sec. 939.23(5), Stats.

Such a construction of sec. 48.981 is consistent with the legislature's intent. When created in 1965, sec. 48.981(6) originally stated, "Anyone knowingly and wilfully violating this section by failing to report...." Laws of 1965, ch. 333, sec. 3 at 584. In the statute's 1977 revision, the legislature deleted "knowingly." Laws of 1977, ch. 355, sec. 4 at 1412. Additionally, the legislature stated that sec. 48.981 was intended to "protect the health and welfare of children by encouraging the reporting of suspected child abuse and child neglect...." *Id.*, sec. 1 at 1409. The legislature's deletion of "knowingly" and the stated purpose of sec. 48.981, indicate that the legislature did not intend ignorance of the statute to be a defense. Rather, this demonstrates that the legislature intended to hold accountable those persons who reasonably suspect child abuse and intentionally fail to notify the appropriate agencies.

Finally, Hurd argues that the evidence adduced at trial was insufficient to support his conviction. He asserts that the state failed to prove an element of the offense, that is, that he willfully failed to report suspected child abuse. *See Ivy*, 119 Wis.2d at 607, 350 N.W.2d at 631. This argument rests on Hurd's erroneous definition of "wilfully," as an intentional violation of a known legal duty. Nevertheless, because this argument raises a double jeopardy issue, this court must determine whether under the correct definition of "wilfully," there was sufficient evidence to convict. *Id.*

The test for sufficiency of the evidence is whether a reviewing court can conclude that a reasonable trier of fact could be convinced of a defendant's guilt beyond a reasonable doubt by the evidence that it had a right to believe and accept as true. *State v. Wyss*, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Evidence is to be considered in a light most favorable to the

4. The legislature has recently deleted the term "wilfully" from sec. 48.981(6) and inserted the term "intentionally." 1985 Wis. Act 29, sec. 926 at 237.

state and the conviction. *Id.* The credibility of the witnesses and the weight of the evidence is exclusively for the trier of fact to determine. *Id.*

[19] The evidence adduced at Hurd's trial was sufficient to prove that he had a reasonable cause to suspect child abuse and that he willfully failed to report this suspicion. At trial, Murray testified that he had told Hurd on several occasions that Chrystal was making "advances" toward the boys. One of the boys testified that he had told Hurd of a sexual assault by Chrystal. Chrystal testified that Hurd had stated that he had heard Chrystal was sexually abusing the boys. Additionally, Murray testified that Hurd had previously expressed his low opinion of the competency of law enforcement and social service agencies. From this testimony, the jury could have reasonably inferred that Hurd had wilfully failed to report suspected child abuse.[5]

Judgment and order reversed and cause remanded for a new trial.

135 Wis.2d 280

In re the PATERNITY OF J.S.C.

B.A.C., Petitioner-Respondent,

v.

T.L.G., Respondent-Appellant.

No. 85-2343.

Court of Appeals of Wisconsin.

Argued Oct. 2, 1986.

Opinion Released Nov. 19, 1986.

Opinion Filed Nov. 19, 1986.

Review Denied.

Paternity action was brought. The Circuit Court, Waukesha County, Patrick L. Snyder, J.[1], declared alleged father to be father of child whose paternity was in dispute, and alleged father appealed. The Court of Appeals, Nettesheim, J., held that: (1) testimony of mother was sufficient to establish that conceptive period occurring during period of sexual activity between mother and alleged father, even though statutory presumptive period of conception did not apply due to low birth weight of child; (2) statute governing admissibility of expert testimony relating to blood test results in paternity case did not contemplate or require technicians who assisted in blood testing process to be experts in examining genetic markers; and (3) evidence was sufficient to render it improbable that blood test samples were exchanged, contaminated, or tampered with, so expert's testimony and report relating to probability of paternity of alleged father were properly admitted.

Affirmed.

1. Children Out-of-Wedlock ⇐53

Proof of conceptive period of child is essential element of paternity case.

2. Children Out-of-Wedlock ⇐53

If child who is subject of paternity proceeding is not full-term child, conceptive period must be established by competent evidence other than statutory presumption as to conceptive period, but it is not essential that exact date of conception be proven. W.S.A. 891.395.

3. Children Out-of-Wedlock ⇐53

Testimony of mother of child who was subject of paternity proceeding that she experienced her last menstrual period prior to birth of child before she met alleged

5. Hurd also argues that he is entitled to a new trial in the interest of justice pursuant to sec. 752.35, Stats. Because Hurd is entitled to a new trial on other grounds, this court need not address this issue. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

1. Judge Snyder presided over all the hearings in this case and his rulings form the basis for the issues raised upon appeal. Judge Marianne Becker, however, signed the judgment.

"reasonable cause" to suspect ok
see pgs. 412-413

172 Mich.App. 706

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Alfred CAVAIANI, also known as Lambert Cavaiani, Defendant-Appellee.

Docket No. 101942.

Court of Appeals of Michigan.

Submitted June 21, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

A psychologist was charged with failing to comply with statute requiring him to report suspected child abuse. The 52nd District Court refused psychologist's motion to quash complaint and warrant. The Oakland Circuit Court, Fred M. Mester, J., granted the psychologist leave to appeal and reversed. After granting the State leave to appeal, the Court of Appeals, Kaufman, J., held that: (1) statute requiring reporting of suspected child abuse was not overbroad or vague; (2) section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege; and (3) abuse reporting requirement did not violate any party's Fourth or Fifth Amendment rights.

Reversed and remanded.

1. Constitutional Law ⇐48(3)

Where a statutory provision would otherwise be unconstitutional, it is court's duty to give statute narrow construction so as to render it constitutional if such construction is possible without doing violence to legislature's interest in enacting statute.

2. Constitutional Law ⇐82(4)

A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on First Amendment right of others impinged upon by statute, even though under a narrower, properly drawn statute, his own behavior could be punished because it is not so protected. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.1(1)

To support an overbreadth challenge, overbreadth of statute must not only be real, but substantial as well, judged in relation to statute's plainly legitimate sweep where conduct and not merely speech is involved. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐82(10)
Infants ⇐12

Section of statute requiring psychologists and family therapists to report suspected child abuse was a constitutionally permissible invasion of a family's First Amendment right of privacy since a family did not have a protected First Amendment right to seek treatment for offender. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐42.2(1)

A person generally lacks standing to challenge overbreadth of statute where his own conduct is clearly within contemplation of statute, even where some marginal application of statute might infringe on First Amendment activities. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇐42.2(1)

Defendant has standing to raise vagueness challenge to statute only if statute is vague as applied to his conduct. U.S.C.A. Const.Amend. 14.

7. Constitutional Law ⇐48(4)

Even though statute may be susceptible to impermissible interpretations, reversal is not required if statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and defendant's conduct falls within that prescribed by the properly construed statute. U.S.C.A. Const.Amend. 14.

8. Statutes ⇐47

A statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, common law, dictionaries, treatises, or even the words themselves, if they possess a common and generally ac-

cepted meaning. U.S.C.A. Const.Amend. 14.

9. Infants ⇐12

Words "reasonable cause to suspect" in statute requiring psychologists to report suspected child abuse provided psychologist fair notice of conduct expected and, therefore, were not vague, in light of fact that psychologist was told by his patient that her father was fondling her breasts. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 14.

10. Statutes ⇐142

Section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege. M.C.L.A. Const. Art. 4, § 25; M.C.L.A. §§ 330.1750, 722.631.

11. Infants ⇐12

Statute requiring psychologist to report suspected child abuse did not violate psychologist's asserted Fourth Amendment right to privacy from unreasonable seizure of oral evidence. M.C.L.A. §§ 772.623, 722.633(2); U.S.C.A. Const.Amend. 4.

12. Witnesses ⇐306

Psychologist convicted of violating statute requiring reporting of suspected child abuse had no standing to assert a Fifth Amendment privilege. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const. Amend. 5.

13. Criminal Law ⇐393(1)

Any information a patient chose to divulge to psychologist convicted of violating statute requiring him to report suspected child abuse was not protected by the Fifth Amendment, since psychologist was not agent of government. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 5.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., L. Brooks Patterson, Pros. Atty., Robert C. Williams, Chief, Appellate Div., and Paul J. Fischer, Asst. Pros. Atty., for the People.

Mueckenheim & Mueckenheim, P.C., by Robert C. Mueckenheim, Detroit, for defendant-appellee.

James Gregard by Jerold Schrotenboer, Jackson, for amicus curiae Pros. Attys. Ass'n of Michigan.

Tom Downs, Lansing, for amicus curiae Michigan Society for Psychoanalytic Psychology.

Colleen V. Ronayne, Pontiac, amicus curiae Guardian ad Litem.

Before WAHLS, P.J., and HOOD, and KAUFMAN,* JJ.

KAUFMAN, Judge.

We granted the people leave to appeal from the circuit court's order declaring M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2) unconstitutional and dismissing the complaint and warrant charging that defendant failed to report an instance of suspected child abuse, a misdemeanor.

Originally charged in the 52nd District Court with failing to report as required by § 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), defendant moved to quash the complaint and warrant on the grounds that the statute was unconstitutionally vague, overbroad, and that it violated Const.1963, art. 4, § 25. After the district court denied defendant's motion, the Oakland Circuit Court granted defendant leave to appeal and reversed. In turn, this Court granted the people leave to appeal on February 11, 1988, and we reverse the order of the circuit court.

The victim's mother initiated family therapy with defendant after suspecting that her husband had sexually molested their 9-year-old daughter. Defendant, a psychologist and family therapist, rendered therapy and treatment to the victim, the victim's mother and the victim's father.

During individual therapy sessions in early 1986, the victim told defendant about

* NATHAN J. KAUFMAN, former Court of Appeals judge, sitting on the Court of Appeals by assignment.

recurring incidents in which her father fondled her breasts. When defendant questioned the victim's father about these allegations at a therapy session, defendant claims that the victim's father made it clear to defendant that if he had touched the victim, such touchings were completely accidental and not done for the purpose of sexual arousal or gratification.

The victim herself later reported her father's conduct to a school counselor, who reported the incident to Protective Services. A petition based on the victim's allegations of sexual abuse was filed in the probate court. Contending that defendant had reasonable cause to suspect that the victim had been molested but had failed to report the suspected child abuse as required by M.C.L. § 722.623; M.S.A. § 25.248(3) of the Child Protection Law, the county prosecuting attorney's office brought the disputed misdemeanor charge of failure to report, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), against defendant.

Section 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), requires that

> "(1) A physician, coroner, dentist, medical examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, family therapist, certified social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or duly regulated child care provider who has reasonable cause to suspect child abuse or neglect immediately, by telephone or otherwise, shall make ... [a] report ... of the suspected child abuse or neglect to the department....
>
> "(2) The ... report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age. The report shall contain other information available to the reporting person which might establish the cause of the abuse or neglect and the manner in which the abuse or neglect occurred.
>
> • • • • • •
>
> "(4) The ... report required in this section shall be mailed or otherwise transmitted to the county department of social services of the county in which the child suspected of being abused or neglected is found.
>
> "(5) Upon receipt of a ... report of suspected child abuse or neglect, the department may provide copies to the prosecuting attorney and the probate court of the counties where the child suspected of being abused or neglected resides and is found.
>
> "(6) If the report indicates a violation of section ... 750.145c of the Michigan Compiled Laws, and the department believes that the report has basis in fact, the department shall transmit a copy of the ... report to the prosecuting attorney of the counties in which the child resides and is found."

Section 3 of the Child Protection Law was amended by 1984 P.A. 418, § 1 to require psychologists and family therapists to report. Prior to March 29, 1985, the effective date of this amendment, practitioners such as defendant were under no statutorily imposed duty to report.

Section 13 of the Child Protection Law, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), provides:

> "A person required to report an instance of suspected child abuse or neglect who knowingly fails to do so is guilty of a misdemeanor."

Defendant first claims, as he did below, that the Child Protection Law, M.C.L. § 722.621 *et seq.*; M.S.A. § 25.248(1) *et seq.*, is unconstitutionally overbroad because it violates defendant's First Amendment rights to associate in legal endeavors and invades the privacy of the family and those in association to cure private family problems. Defendant argues that there is no compelling state interest in "suspicious" behavior, whether or not the suspicion is reasonable.

[1] Legislative enactments are cloaked with a presumption of constitutionality. Where a statutory provision would otherwise be unconstitutional, it is the Court's duty to give the statute a narrow construction so as to render it constitutional if such a construction is possible without doing violence to the Legislature's interest in enacting the statute. *People v. O'Donnell*, 127 Mich.App. 749, 757, 339 N.W.2d 540 (1983).

[2] The doctrine of overbreadth is primarily applied to First Amendment cases where an overbroad statute prohibits constitutionally protected conduct. *People v. McCumby*, 130 Mich.App. 710, 714, 344 N.W.2d 338 (1983), lv. den. 419 Mich. 911 (1984). A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on the First Amendment right of others impinged upon by the statute although under a narrower, properly drawn statute, his own behavior could be punished because it is not so protected.

[3] However, not every First Amendment right supports an overbreadth challenge. *Woll v. Attorney General*, 409 Mich. 500, 534–535, 297 N.W.2d 578 (1980). The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep where conduct and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 614–615, 93 S.Ct. 2908, 2917–2918, 37 L.Ed.2d 830 (1973).

[4] While § 3 does not prevent a psychologist or family therapist from treating those of his patients who have engaged in child abuse, there is little doubt that it places such a patient at greater risk that her or his misconduct will be discovered and prosecution will follow. In the context of a family, § 3 invades its privacy to the extent that the family members' collective desire to seek treatment for the offender and risk the continued abuse of the victim rather than initiating criminal proceedings may not be honored. However, we do not believe that this invasion constitutes a constitutionally impermissible violation of a family's First Amendment right of privacy. A family does not have a protected First Amendment right to undertake a course of action which may do little or nothing to protect the child victim from continued abuse.

The United States Supreme Court has long recognized that a state has an interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might prevent their growth into free and independent well-developed citizens. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Even assuming that the reporting requirement does invade the protected rights of defendant and his patients, the state has the constitutional power to regulate for the well-being of its children. 390 U.S. at 637–639, 88 S.Ct. at 1279–1280.

We distinguish the cases cited by defendant in support of his overbreadth argument from the issue presented here. Rather, we find this case to be analogous to *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), where physicians and patients challenged the constitutionality of New York statutes requiring that the state be provided with the names and addresses of all persons obtaining certain prescription drugs. The United States Supreme Court found that the statutes did not deprive individuals of their right to seek medical advice from their physician and obtain needed medication. Accordingly, the Court held that the patient-identification requirements did not invade any of the plaintiffs' constitutional rights or liberties.

[5] Further, a person generally lacks standing to challenge overbreadth where his own conduct is clearly within the contemplation of the statute. This is so even where there is some marginal application which might infringe on First Amendment activities. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). In this case, the victim told defendant, and the victim's father did not deny, that the abuse occurred. Therefore, defendant had more than a "reasonable suspicion" of its occurrence. The Legislature intentionally used "reasonable cause to suspect" as the

threshhold for requiring a report in the belief that public policy is better served by investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. Such an interpretation is consistent with the remedial history of the statute, which the Legislature amended to include psychologists and family therapists following the Attorney General's suggestion that these professionals were not covered by the terms or the original statute. See OAG 1979–1980, No 5815, p 1075.

[6, 7] Defendant next claims that the Child Protection Law is void for vagueness because it offers no reasonably precise standard to those charged with adhering to or enforcing the law. Defendant contends that the phrase "reasonable cause to suspect" is not clearly defined and does not give him fair notice of what conduct the statute prescribes. A vagueness challenge must be examined in light of the facts at hand. *People v. Harbour*, 76 Mich.App. 552, 558, 257 N.W.2d 165 (1977), lv. den. 402 Mich. 832 (1977). A defendant has standing to raise a vagueness challenge to a statute only if the statute is vague as applied to his conduct. *People v. Mitchell*, 131 Mich.App. 69, 74, 345 N.W.2d 611 (1983). Even though a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where defendant's conduct falls within that prescribed by the properly construed statute. *Harbour, supra.*

[8] A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *People v. Gilliam*, 108 Mich.App. 695, 699, 310 N.W. 2d 843 (1981); *People v. Herron*, 68 Mich. App. 381, 382, 242 N.W.2d 584 (1976). However, a statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning. *McCumby*, 130 Mich.App. at 714, 344 N.W.2d 338.

[9] We find that the words "reasonable cause to suspect" speak for themselves and provide fair notice of the conduct expected in reporting suspected child abuse. Based upon the fact that defendant was told by his patient, the victim, that her father was fondling her breasts, the § 3 reporting provisions are not vague.

In this case, the circuit court suggested that defendant, in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy. That hardly makes the statute vague or overbroad. Defendant had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to defendant's legal obligations under § 3, it was not for him to make this determination, but for the responsible investigative agencies, such as the Department of Social Services, to make. While defendant is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state. The state has different interests, and its sovereignty is offended by child abuse.

[10] Defendant next contends that § 11 of the Child Protection Law, M.C.L. § 722.631; M.S.A. § 25.248(11), which abrogates all legally recognized privileged communication except that between attorney and client for purposes of reports required to be made, or the admission of evidence in a civil child protection proceeding resulting from such a report, also amends by implication the psychologist-patient privilege, M.C. L. § 330.1750; M.S.A. § 14.800(750), in violation of our Michigan Constitution, Const. 1963, art. 4, § 25. This claim is without merit. Amendment by implication is not constitutionally prohibited in every instance, e.g., where, as here, an act is complete within itself. *People v. Stimer*, 248 Mich. 272, 292–293, 226 N.W. 899 (1929);

Wayne County Prosecutor v. Recorder's Court Judge, 92 Mich.App. 433, 444, 285 N.W.2d 318 (1979), lv. den. 408 Mich 905 (1980).

Defendant's last claim is that the Child Protection Law is unconstitutional because it violates his Fourth Amendment and Fifth Amendment rights, as well as those of his patients.

[11] The first prong of this argument is that defendant and his clients have a Fourth Amendment right to privacy from unreasonable seizure of oral evidence, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). However, this case is readily distinguishable from *Katz;* here, no governmental eavesdropping or intrusion or electronic surveillance was involved.

[12, 13] With regard to the second prong of the argument, we find the defendant has no standing to assert a Fifth Amendment privilege. *United States v. Goldfarb*, 328 F.2d 280, 281–282 (CA 6, 1964), cert. den. 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *Paramount Pictures Corp. v. Miskinis*, 418 Mich. 708, 715, 344 N.W.2d 788 (1984); *In re Moser*, 138 Mich. 302, 305, 101 N.W. 588 (1904). Moreover, defendant is not an agent of the government, therefore any information a patient chooses to divulge to him is not protected by the Fifth Amendment.

We are concerned with the difficulty pointed out by the circuit court of child abusers in need of psychological counseling who are dissuaded by the § 3 reporting provisions from obtaining unfettered access to psychiatric services due to the risk of prosecution for any abuse they have perpetrated. However, as noted by the United States Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the difficulty in analyzing this problem under the Fifth Amendment is that this approach fails to recognize the essential link between coercive activity of the state on the one hand and a resulting confession by a defendant on the other hand. In this regard, the *Connelly* Court held that the flaw in this constitutional argument is that it would expand the previous line of voluntariness cases into a far ranging requirement that courts must devine a defendant's motivation for speaking or acting as he did even though there is no claim that governmental conduct coerced his decision. 479 U.S. at 165, 107 S.Ct. at 521.

We congratulate the parties and amicus curiae on their excellent briefs.

REVERSED and REMANDED.

172 Mich.App. 718

Brian MONTGOMERY and Jill Montgomery Plaintiffs–Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES, Defendant–Appellee,

and

Department of Transportation, Defendant.

Docket No. 102480.

Court of Appeals of Michigan.

Submitted May 4, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

Snowmobile operator who was injured when snowmobile collided with motor vehicle at intersection of snowmobile trail and public roadway brought suit against state Natural Resources Department which provided funds to maintain snowmobile trail. The Court of Claims, John D. Payant, J., granted Department's motion for summary disposition based on defenses of governmental immunity and recreational use act. Driver appealed. The Court of Appeals, Weaver, J., held that: (1) Department was not grossly negligent and did not engage in willful and wanton misconduct, so as to remove it from protection of Recreational Use Act providing that landowner is not

STEVE COWPER, GOVERNOR

REPLY TO:

☑ CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

DEPARTMENT OF LAW

CRIMINAL DIVISION

March 28, 1990

The Honorable Johnny Ellis
Alaska State Representative
P.O. Box V
Juneau, Alaska 99811

Re: Proposed Amendments to SB 450

Dear Representative Ellis:

As you know, SB 450 was drafted by the Department of Law to address a number of perceived ambiguities in the child abuse reporting statute that were brought to light as a result of the well-publicized controversy between the Anchorage School District, the Anchorage Police Department, and the Department of Law. After SB 450 passed the Senate, a grand jury investigating the Anchorage controversy issued a report making a number of recommendations for amendments to the child abuse reporting statute.

Although most of the amendments recommended by the grand jury are already included in SB 450, an additional two amendments are necessary to fully comply with the grand jury recommendations. In addition, as a result of discussing the bill with representatives of several school districts, we recommend that an additional two amendments be made to SB 450.

We look forward to working with you on SB 450, and are hopeful that the House will act expeditiously on this important piece of legislation.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

Attachment

LHO:me-191

03-C31LH

AMENDMENTS TO SB 450
Proposed by the Department of Law
March 27, 1990

AMENDMENT #1

Reason for amendment: The proposed amendment was recommended in "Part I of Grand Jury Investigation Concerning Reporting of Sexual Abuse of School Children" in Section (B)(1)(e) on pages 8 - 9 of the grand jury report.

Page 3, line 23, following "adding":

Delete "a new section"

Insert "new subsections"

Page 4, following line 11:

Insert

(g) A person required to report child abuse or neglect under (a) of this section is not relieved of the obligation to make a report to the department by reporting the abuse or neglect to a job supervisor, or other individual working for the agency or organization that employs the person required to make a report of child abuse or neglect.

AMENDMENT #2

Reason for Amendment: The proposed amendment was recommended in "Part I of Grand Jury Investigation Concerning Reporting of Sexual Abuse of School Children" in Section (B)(2) on pages 11 - 12 of the grand jury report.

Page 4, line 5, following "mination." - line 11:

Delete all material.

Insert:

"If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall provide a copy of the notification required under this section to the Professional Teaching Practices Commission."

AMENDMENT #3

Reason for amendment: The amendment was requested by several school districts because the current wording of SB 450 limits the obligation of law enforcement agencies to report only those incidents of child abuse or neglect having a connection to the school in which the child is enrolled. The districts point out that harm to a student can occur in connection with activities conducted at district facilities other than the one the child attends, or by employees other than those employed at the particular school a child attends, and suggest expanding the scope of the section as set out in Amendment #3.

Page 3, line 26, following "school":

Insert "or district"

Page 3, line 28, following "school":

Insert "or district"

Page 4, line 1, following "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

AMENDMENT #4

Reason for Amendment: The proposed amendment was requested by several school districts in order to provide immunity for school officials who permit a child to be interviewed on school property without obtaining parental consent. In addition, the proposed amendment clears up several ambiguities in the immunity section that were identified by the school districts.

Page 7, lines 4 - 12:

Delete all material.

Insert:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview pursuant to AS 47.17.027. or who

participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, <u>except that a person who makes an untimely report is not immune from civil or criminal liability based on the delay in making the report.</u>

Page 7, line 16, following "liability":

Insert "for the child abuse or neglect"

ANCHORAGE SCHOOL DISTRICT'S ANALYSIS
AND COMMENTS ON SENATE BILL 450
AND PROPOSED CHANGES TO AS 47.17.010 ET SEQ.

The recently issued report from the grand jury which has been investigating the issues arising out of the Carlson incident in Anchorage contains two basic conclusions, both of which have been previously and consistently asserted by the Anchorage School District: (1) it is essential that there be inter-agency cooperation between school districts, law enforcement authorities, and social services agencies if the common goal of protecting children from abuse and neglect is to be realized, and (2) that the provisions of AS 47.17.010 et seq. are vague and confusing as presently written.

Unfortunately, Senate Bill 450 frustrates, instead of promotes, inter-agency cooperation. Instead of providing mechanisms which would encourage greater cooperation, the Bill resorts to imposing additional legal duties, pretty much unilaterally upon school districts. Instead of improving the clarity of existing legislation by providing clear definitions, the Bill uses more vague language and adds terms even more confusing than those already contained in the statute. The only clearly discernable intent of the proposals contained in Senate Bill 450 is the desire to increase and make easier the prosecution of persons who make judgment calls concerning when to report suspected abuse and neglect through second-guessing by police and prosecutors. The amendments do nothing to increase protection of children, nothing to facilitate cooperation between agencies, and nothing to assist

the persons required to report to better understand their obligations.

In the remainder of this Memorandum, the Anchorage School District presents its analysis of Senate Bill 450, and proposes, instead, provisions which would facilitate inter-agency cooperation and remove, rather than increase, uncertainty and confusion in the meaning of statutory terms.

SECTION 1 (AMENDMENT TO AS 47.17.010)

The purported expression of intent added to AS 47.17.010 which concerns the distinction between reporting and investigating child abuse and neglect requires further comment.[1] As drafted, the Senate Bill ignores the fact that school districts, as well as social services and law enforcement authorities, have lawful and legitimate needs to investigate suspected child abuse or neglect. In the case of school districts, it is imperative that as an employer, the District to be able to identify, substantiate, and provide a basis for action against any employees who may have committed reportable acts against students. Indeed, the school district's interest is even broader. As in the Carlson case, the District needs to be able to develop information which may appropriately be used to terminate employment status even though it may not constitute a criminal act or be otherwise reportable under Title 47. Teacher tenure statutes and procedures require that the school district, as employer, develop its own independent factual

[1] The inclusion in the purpose section of references to "mental injury" and to "maltreatment," will be addressed in the remarks pertaining to Section 20, below.

basis for taking personnel action. AS 14.20.180. These statutes place a heavy burden on school districts to prove misconduct in terminating a tenured teacher. The District also has an obligation to protect students.

The school district cannot legally rely upon investigations done by other agencies and have any hope of prevailing in contested employment proceedings. Accordingly, the implication in the Senate Bill that social services and law enforcement authorities are the only agencies which should be investigating child abuse or neglect does not accommodate a school district's important interest in removing an abuser from contact with students and terminating the employment relationship. Instead, school districts have vital interest in developing information which will enable them to take effective employment action to protect students. Hopefully, in cases involving criminal wrongdoing, such investigations can be done jointly with appropriate law enforcement agencies.

The suggestion that school districts are incapable of conducting appropriate and effective investigations in this area for purposes of successfully undertaking employment action is contradicted by Section 7 of the Bill which requires school districts to conduct training programs of their employees concerning the laws relating to abuse and neglect, techniques for recognizing and detecting abuse and neglect and other related subjects. Additionally, the school district has counselors, nurses, and administrators who have experience in and responsibility for investigating a range of matters that require

fair and effective interview techniques. In addition to employment matters, school district personnel must investigate student misconduct that might result in serious discipline or suspension.

It is clear that there is a distinction between the right and necessity of investigating on the one hand and the obligation to report on the other. This is the valid point which should be made clear in an Amendment to AS 47.17.010. Accordingly, that section should be amended to read as follows:

> [In lieu of the language in Senate Bill No. 450 beginning, "it is not the intent . . .", AS 47.17.010 should be amended to read as follows:
>
> The Legislature recognizes that social service agencies, law enforcement authorities, and school districts, all share the common goal of protecting children and all have different primary purposes whose achievement is designed to promote that common goal. The Legislature further recognizes that in achieving their primary purposes, social service agencies, law enforcement authorities, and school districts must be able to obtain accurate and reliable information concerning child abuse and neglect, and that such information frequently must be obtained from the same source or sources. It is the intent of the Legislature that all social service agencies, law enforcement authorities, and school districts should recognize the legitimacy of each others' functions, accept the commitment of each other to the common goal of protecting children, and do everything possible to facilitate a professional and cooperative working relationship among themselves. It is the intent of the Legislature that persons required to report under this Title shall make such reports after the earliest time at which they develop the basis and belief required by law that abuse or neglect has occurred. Thereafter, whatever investigations are necessary should be undertaken in a cooperative spirit and in the best interest of the children concerned.

SECTION 2 (AMENDMENT TO AS 47.17.020(a))

The "Cause to believe" standard contained in present AS 47.17.020(a) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" standard should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 3 (AMENDMENT TO AS 47.17.020(b))

The "Cause to believe" standard contained in present AS 47.17.020(b) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 4 (AMENDMENT AS 47.17.020(c))

No comment required.

SECTION 5 (REPEAL AND RE-ENACTMENT as 47.17.020(e))

No comment required.

SECTION 6 (AMENDMENT ADDING NEW SECTION (f) TO AS 47.17.020)

There are two major problems with this proposed subsection. First, if a law enforcement agency knows of school-related abuse or neglect of a child, no legislation should suggest that it is appropriate for the agency to wait until the conclusion of its investigation to notify the Chief Administrative Officer of the school or district in which the child is enrolled. Yet, that