SB 524

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

7th FLOOR FRONTIER BLDG.
3601 C STREET, SUITE 740
ANCHORAGE, ALASKA 99503-5934
PHONE: (907) 562-3626

January 4, 1990

Southern Region Emergency
Medical Services Council
6130 Tuttle Place, Suite 2
Anchorage, Alaska 99507-2041

Dear Mr. Scott:

Acting Director Jordan has asked me to respond to your letter of December 11, 1989 in which you requested this Division's opinion as to compliance with Title 21 of Alaska Statutes dealing with insurance of your proposed ambulance service membership program.

Based upon review of the information provided in your letter and follow up package, it is the opinion of the Division that your organization's ambulance service membership program would be required to comply with Chapter 87 of the Alaskan insurance statutes. Specifically, AS 21.87.010 requires any organization "...engaging... in the provision of all or a part of a health care service as defined in AS 21.87.330, for its subscribers in exchange for periodic prepayments in identifiable amount by or as to subscribers" to adhere to AS 21.87.

Accordingly, your attention is directed to the enclosures and in particular AS 21.87.070 to .090 for the procedures you should follow in applying for a certificate of authority. Our licensing officer, Jan Clemetson, who is located in Juneau can be contacted for the necessary forms and further information.

Very truly yours,

Eugene W. Furman, CPA
Insurance Financial Examiner

Enclosures

EF/sh
2661R

DIV OF INSURANCE
(DEC) ltr to EMS 1/4/90

6130 Tuttle Place, Suite 2 • Anchorage, Alaska 99507-2041 • (907) 562-6449

Southern Region
EMERGENCY
Medical Services Council, Inc.

February 5, 1990

Honorable Pat Rodey
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Pat:

A problem has come up which we need the legislature's help on. I would like to get your advice about how best to solve the problem.

On January 1, 1990 Ninilchik Community Ambulance Association, the volunteer ambulance service in Ninilchik, raised their rates from $50 per call to $200 per call. At the same time they offered the residents of this unincorporated area the option of purchasing a membership for $50 per year. The membership covers the uninsured portion of the ambulance bill for the member and his family.

The Association started this membership program to help offset hard feelings in the community about such a dramatic rate increase. At the same time the rate increase is needed so that the association can continue to offer ambulance service. The annual Memorial Day Pancake Feed and $50 for 40 ambulance calls per year does not cover the cost of training, equipment, insurance, heated storage, gasoline and maintenance.

I assisted Ninilchik with formulating their program so that it would meet the insurance company requirements. I also asked the Division of Insurance to review the contract to assure that it complied with Alaska law. Unfortunately, the Division pointed out that the services provided by Ninilchik fall within the definition of prepaid health care services and therefore must comply with the requirements of AS 21.87.

In reading this statute it is clear that the intent of the Legislature was to regulate prepaid health care that is comprehensive in nature, e.g. health maintenance organizations and preferred provider organizations. The need to offer protection to the consumer is that these services are both expensive to the customer and represent a very large contingent liability for the provider. I think you will agree that these ambulance service membership programs bear little resemblance to these types of plans in terms of cost, contingent liability of the provider and even basic structure.

The following language is intended to exempt municipal and non-profit ambulance services which choose to provide any form of prepaid ambulance service from regulation under the state insurance statutes.

The assumption is that only Section 21.87 applies. It has not been determined if any other portion of the insurance statutes would apply to such schemes. If so, we would like to see language included that would exempt them from that as well.

Section 21.87.010 (b) is amended by adding the following:

(5) municipalities, fire service areas, emergency medical service areas and private non-profit corporations which provide emergency medical services certified by the Department of Health and Social Services under AS 27.08.080 that either individually or jointly accept prepayment from persons within their service areas for ambulance and emergency medical services, but not for other health services.

This statute would also allow two or more providers to join together to provide such services. This would be useful where adjacent service areas want to conduct a joint marketing campaign, so that if their members are hurt in the neighboring jurisdiction that they are covered.

This is modeled on the Oregon statute, which is attached.

OREGON

withstanding this subsection, an association of employes described in this subsection may elect to be subject to the Insurance Code by a majority vote of its members residing in Oregon.

(2) A doctor contracting to furnish health care services to an association of employes described in subsection (1) of this section.

(3) An association of grade schools, high schools, colleges or universities that:

(a) Provides health care services to students of member institutions; and

(b) Does not compensate anyone for procuring new members.

(4) A patrons of husbandry association, fraternal fire insurance association, fraternal life insurance association, or religious organization providing fire insurance for its members or churches, that was continuously active in this state for 15 years prior to January 1, 1957, and was not required to have a certificate of authority on that date.

(5) A fraternal benefit society that:

(a) Admits to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business; and

(b) Insures only its own members and their families, and its ladies' societies or ladies auxiliaries.

(6) An air ambulance service which is operated by a nonprofit corporation, if the majority of the group of persons vested with the management of the affairs of the corporation are not employes of the corporation.

(7) An association of the members of a workers' productive cooperative, which cooperative has been organized under ORS chapter 62 and is engaged primarily in reforestation, if the association insures only the members of the cooperative and their families for health insurance. [1967 c.359 §7; 1971 c.69 §1; 1971 c.536 §1; 1979 c.848 §1]

731.036 Persons completely exempt from application of Insurance Code. The Insurance Code does not apply to any of the following to the extent of the subject matter of the exemption:

(1) A bail bondsman, other than a corporate surety and its agents;

(2) A fraternal benefit society that has maintained lodges in this state and other states for 50 years prior to January 1, 1961, and for which a certificate of authority was not required on that date;

(3) A religious organization providing insurance benefits only to its employes, which organization is in existence and exempt from taxation under section 501 (c) (3) of the federal Internal Revenue Code on September 13, 1975;

(4) Public bodies, as defined in ORS 30.260, that either individually or jointly establish a self-insurance fund for tort liability in accordance with ORS 30.282;

(5) Public bodies, as defined in ORS 30.260, that either individually or jointly establish a self-insurance fund for property damage;

(6) Cities and counties that either individually or jointly insure for health insurance coverage, excluding disability insurance, their employes or retired employes, or their dependents, or combination of employes and dependents, with or without employe contributions, if all of the following conditions are met:

(a) The scope of the program meets the following minimum requirement:

(A) In the case of an individual public body program, the number of covered employes and retired employes aggregates at least 1,000 individuals; and

(B) In the case of a joint program of two or more public bodies, the number of covered employes and retired employes aggregates at least 1,000 individuals, or the annual contributions to the program aggregate at least $500,000;

(b) The health insurance includes all coverages and benefits required of group health insurance policies under ORS chapter 743;

(c) The public body, or the program administrator in the case of a joint insurance program of two or more public bodies, files with the Director of the Department of Insurance and Finance copies of all documents creating and governing the program, all forms used to communicate the coverage to beneficiaries, the schedule of payments established to support the program and, annually, a financial report showing the total incurred cost of the program for the preceding year. A copy of the annual audit required by ORS 297.425 may be used to satisfy the financial report filing requirement; and

(d) Each public body in a joint insurance program is liable only to its own employes and no others for benefits under the program in the event, and to the extent, that no further funds, including funds from insurance policies obtained by the pool, are available in the joint insurance pool; or

(7) Cities, rural fire protection districts and rural ambulance districts providing transport

6130 Tuttle Place, Suite 2 • Anchorage, Alaska 99507-2041 • (907) 562-6449

Southern Region
EMERGENCY
Medical Services Council, Inc.

December 11, 1989

Jim Jordan, Acting Director
Division of Insurance
3301 C Street, Suite 740
Anchorage, AK 99503-5990

Dear Mr. Jordan:

I would like to get the Division's opinion whether or not ambulance service membership programs are in compliance with the State's insurance laws and regulations. Specifically, I would like your opinion regarding the attached contract to be used by the Ninilchik Community Ambulance Association.

An ambulance service membership program, also known as a subscription program, has the following characteristics:

1. Member pays an annual fee, e.g. $50.00 per family.
2. Fee covers out-of-pocket expenses for medically necessary ambulance service.
3. The ambulance service bills all third party payors who provide coverage to member.
4. Contract clearly states that this is not an insurance contract.

These type programs are rapidly expanding throughout the lower 48. There is increasing interest in them here in Alaska. Ambulance services have been heavily subsidized by local and state government. With the decline in support from those quarters they now see the need to begin charging their patients the real cost of providing the service. They want to be able to offer an option to the members in the community that mitigates the impact of increasing fees.

For your information I have enclosed a Medicare letter ruling on membership programs and the section from the Medicare manual dealing with these programs. I have also enclosed an article on the programs by Jack Stout, a leading national consultant on implementing these programs.

Other states where these programs currently operate include Arizona, Oregon, Texas, Oklahoma, and Michigan.

The Ninilchik Community Ambulance Association intends to begin selling memberships on January 1, 1990. The contract is modeled on the contract used by Medstar in Fort Worth, Texas. They have agreed to refund all of the

EMS letter 12/11/89
to Div. of Insurance

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administrat

6325 Security Boulevard
Baltimore, MD 21207

JUN 3 1996

Mr. David M. Werfel
1320 Stony Brook Road
Suite 213
Stony Brook, New York 11790

Dear Mr. Werfel:

This is in reply to your recent letter asking whether an ambulance company commits a criminal violation of the bribe, kickback and rebate provisions of section 1877(b) of the Social Security Act if it furnishes services under an annual subscription agreement, accepts assignment for all Medicare covered services furnished to agreement subscribers, and routinely does not bill the subscribers for applicable deductible and coinsurance amounts.

Services furnished by an ambulance company under a subscription agreement calling for payment of an annual membership fee may be covered under Medicare only if the agreement explicitly or by clear implication authorizes the company to charge, except for applicable deductible and coinsurance, to the extent of the available Medicare or other coverage of the services. Under this type of agreement, the subscription fees for subscribers who have Medicare or other coverage become, in effect, premiums for coverage by the ambulance company of deductible and coinsurance amounts. Thus, the actual charge and customary charge reductions imposed under Medicare Carriers Manual section 5220 for routine waiver of deductible and coinsurance do not apply. There is no requirement, moreover, that subscription fees be uniform for all subscribers nor is there any requirement that fees be different for those subscribers who have Medicare or other insurance than for those subscribers who have no insurance.

In accepting Medicare assignments from subscribers and treating annual fees under subscription agreements as premiums for deductible and coinsurance coverage, ambulance companies function in a manner similar to group practice prepayment plans.

We have discussed above the Medicare reimbursement implications of ambulance company subscription agreements. These civil implications of the agreements under the Social Security Act are in the jurisdiction of the Health Care Financing Administration. The question of whether these agreements involve any criminal

Jack Stout

INTERFACE

Why Subscription Programs?

Several weeks ago I was discussing with my philosophical arch-rival, Dennis Murphy, author of *jems'* "Public Forum" column, the legal subtleties of ambulance subscription programs. At the end of our discussion, Dennis suggested that, because this issue is so deceptively complex and poorly understood, I should devote an "Interface" column to subscription programs. Here it is.

What Are They? Ambulance subscription programs fall into two major categories: those which involve the actual sale of ambulance services on a prepaid basis (i.e., for purposes of this discussion, Type I programs); and those which allow subscribers to fix-price and prepay the uninsured portions of ambulance bills (i.e., Type II programs). Legally and financially, these two types of programs are profoundly different.

If the subscription agreement (sometimes called a "membership agreement") entitles the subscriber to "free ambulance services" for a defined period of time in exchange for a subscription or membership fee, then the program involves the actual sale of ambulance services on a prepaid basis and is, therefore, a Type I program. But if the subscription agreement merely allows the subscriber to prepay at a fixed price set by the company the uninsured portions of ambulance bills, then the contract is *not* for the sale of ambulance services, but is instead an agreement between the customer and the provider to alter the method of payment of uninsured portions of ambulance bills—i.e., a Type II program.

The most important difference between Type I and Type II subscription programs is that, under a Type II program, the provider may (with certain restrictions) collect and retain third party reimbursements for services rendered to subscribers. Under a Type I program, monies collected from third party payors technically belong to the subscriber, and in some cases, it may be unlawful for third party bills to exceed the amount of annual subscription fee.

In practice, subscription agreements and promotional materials are often so poorly drafted that it is impossible to determine what is actually being sold—ambulance services versus an altered method of paying uninsured costs. That uncertainty carries great financial risk for the provider who bills third party payors, especially Medicare, for services received by subscribers.

Why Subscription Programs? For most providers, public and private, a subscription program is primarily a political safety value. If it didn't raise a dollar, the program would still be worth having for some providers.

Since about 1970 the ambulance industry has experienced tremendous clinical and technological progress. In about half of our communities, this progress has been heavily financed by local tax subsidies, with user fees remaining at token levels a fraction of production costs. But in other communities, progress has either been limited or financed through substantial increases in user fees. In addition, many local governments which were able to afford large ambulance subsidies in the easy-money fiscal years of the 1970s must now choose between higher user fees versus allowing a deterioration in quality of ambulance services.

For reasons detailed in depth in previous "Interface" articles, poor EMS at any price is false economy, and there are serious disadvantages to local tax financing of health care services, including EMS. Thus, assuming reasonable levels of efficiency, it is good public policy to finance quality ambulance services by raising ambulance fees to cover full production costs. It's good public policy, but it can also sting.

When ambulance rates go up dramatically, either to finance better service or to offset a subsidy reduction, the wisdom of the action may be less than widely recognized by the public at large. Here's why.

In some insurance policies, the level of maximum reimbursement for ambulance service was established back when teenaged ambulance jockeys roared through the streets in barely modified Cadillac hearses loosely called ambulances. Furthermore, Medicare's method of changing its "allowable charges" for ambulance services incorporates an 18-month delay from the time the rates are raised. And if your community is surrounded by heavily subsidized providers, your neighbor's token rates will, because of Medicare's method, forever depress your own reimbursement levels.

The bottom line: When you raise

Jack Stout has been at the forefront of innovations in the design and implementation of EMS systems for the past dozen years. If you have a question, a problem, or a solution related to the public/private interface in prehospital care, address your letter to "Interface" jems, P.O. Box 1026, Solana Beach, CA 92075.

subscriber because, under a Type I subscription plan, he has already paid you for services in advance.

The solution to this problem is simple: If you intend to collect money from third party payors for services rendered to subscribers, just be sure your subscription contract and promotional materials make it very clear that yours is a Type II subscription program.

Deductibles and Coinsurance. Even for Type II subscription programs, there have remained questions regarding whether the subscription fees can count toward the subscriber's deductible, and whether the provider is at risk for failing to attempt to collect "coinsurance" amounts as required by Medicare law.

Attorney David Werfel, consultant to the American Ambulance Association, recently succeeded in obtaining from the Health Care Financing Administration (HCFA) clarification of policy regarding these issues. Quoting from HCFA's June 3, 1986 response to Mr. Werfel's letter:

"Services furnished by an ambulance company under a subscription agreement calling for payment of an annual membership fee may be covered under Medicare only if the agreement explicitly or by clear implication authorizes the company to charge, except for applicable deductible and coinsurance, to the extent of the available Medicare or other coverages of the services. Under this type of agreement, the subscription fees for subscribers who have Medicare or other coverage become, in effect, premiums for coverage by the ambulance company of deductible and coinsurance amounts. Thus, the actual charge and customary charge reductions imposed under *Medicare Carriers Manual* section 5220 for routine waiver of deductible and coinsurance do not apply. There is no requirement, moreover, that subscription fees be uniform for all subscribers nor is there any requirement that fees be different for those subscribers who have Medicare or other insurance than for those subscribers who have no insurance."

That's about as clear-cut a statement of policy as you'll ever get out of HCFA, and what's more, it's a policy our industry and our customers can live with. This happy outcome is, I believe, partly the result of Mr. Werfel's careful drafting of the letter requesting the opinion. (How you ask a question can greatly affect the answer you get.) Mr. Werfel is clearly earning his fee.

The Plot Thickens. Mr. Werfel's letter also asked for an opinion on whether subscription programs might violate the anti-kickback provisions of the Social Security Act—i.e., Section 1877(b). He didn't get it.

HCFA's response: "The question of whether these (subscription) agreements involve any criminal conduct under section 1877(b) of the Social Security Act is in the jurisdiction of the Department's Office of Inspector General (OIG). . . . We understand that the OIG does not give advisory opinions on the effect of criminal statutes." Thus, we seem to be left, for the moment, in a sort of awkward situation.

Pricing Subscription Fees. Most subscription programs employ a uniform price per "household." However, you may wish to consider setting the subscription fee for Medicare subscribers separately. Here's why.

When you accept assignment, as you will do for all Medicare-eligible subscribers, you agree to accept Medicare's reimbursement as payment in full for the balance which would otherwise be owed by the customer. The subscription fee already paid by the subscriber satisfies the customer's obligation to pay any deductible and coinsurance which would otherwise be owed. Okay so far.

But what if, at the end of a fiscal year, it turns out that your revenues from subscription fees paid by Medicare-eligible subscribers, when added to the Medicare payments received for services rendered to those same patients, exceeds the combined "allowable charges" for all of those services? You *could* be found guilty of overcharging for services to Medicare patients on whom you have accepted assignment.

Readers already familiar with how Medicare works will immediately see the problem. For the rest of you (whose lives are obviously filled with more interesting stuff to think about), just understand that when you "accept assignment" on a Medicare patient, you are agreeing to charge Medicare no more than 80% of its "allowable charge" for that service (which may be far less than your standard rate), and you are agreeing to collect from the patient the remaining 20% and not one cent more. That's the law.

Steve Williamson, Executive Director of the Tulsa system, and manager of an unusually successful urban subscription program, has a solution to this problem that should satisfy the law. Every year, before setting the following year's subscription fees, Steve compiles

loss program may be risky. Two reasons: first, if you sell subscriptions limited to non-emergency services only, you may be inadvertently encouraging patients who should call 911 to call your number instead, and you may end up embroiled in a messy ad[illegible]

Second, [illegible] subscription [illegible] ambulance [illegible] nearest ambulance to a subscriber's emergency. The subscriber will die, and you will be trying to convince the court that there's nothing wrong with making a buck by luring customers away from the 911 system. (Don't call me as your expert witness on that one.)

Ingredients for Success. Today's most successful, big system subscription programs generally have several features in common. All are full service programs offered by the area's primary and often exclusive provider. Many are offered by all ALS, full-service, single provider systems. In nearly every case, quality of service is well above average, the local reputation of the provider is good, fee [illegible] are set at or near full prevailing rates, efforts to collect from non-subscribers are professional and aggressive. (Why buy a subscription when the provider always accepts assignment anyway, or when the user fees are heavily subsidized, or when nothing much happens when you don't pay your bill?)

Nearly every successful subscription program includes a serious marketing and advertising budget, a limited annual enrollment period, and employs easy access for signing up (e.g., area business, senior citizen centers, pharmacies, etc.). In later years, most programs enjoy high rates of renewal by existing subscribers, and must actively use their billing/collection [illegible] to stimulate renewals, and to recruit new subscribers.

Conclusion. Any [illegible] subscription programs [illegible] and crucial [illegible] upgrade the [illegible] the unequal [illegible] reimbursement [illegible] However, [illegible] be appropriate [illegible] suspect it [illegible] industry's [illegible] that program [illegible] of our [illegible] provider.

NINILCHIK COMMUNITY AMBULANCE ASSOCIATION (NCAA)
MEMBERSHIP APPLICATION AND CONTRACT

Description of Membership and Fee: I understand the annual fee for my Ninilchik Community Ambulance Association, hereinafter known as NCAA, Membership limits my out-of-pocket expenses for the uninsured portion of bill(s) for ambulance services provided by NCAA for medically necessary ambulance transportation originating and terminating in NCAA's Primary Service Area and to or from a medical facility. This year's fee is $50 for NCAA Primary Service Area residents.

Who Is Eligible for NCAA Membership?: NCAA Membership is available to legal residents of NCAA's Primary Service Area, which includes: Mile 121 to mile 145 of the Sterling Highway and the roads which are connected to the Sterling Highway between those mile markers. NCAA does not solicit memberships from Medicaid eligible recipients and such membership constitutes a voluntary contribution only.

Who In My Home Is Covered by This Program?: The NCAA Membership covers a husband and wife, or single parent, and their children 18 years and younger living at the same address, or a single individual in a household.

Where am I Covered: The NCAA Membership is good throughout NCAA's Primary Service Area. The Membership does not cover ambulance service outside the Primary Service Area, or services provided by companies other than NCAA.

What Is Medically Necessary?: I understand that NCAA Membership ambulance services are restricted to the "medically necessary", defined as the specific need for ambulance service transportation to or from a health care facility (hospital, nursing home, etc.) where use of alternative forms of transportation (private car, taxi, etc.) would be medically inappropriate given the patient's condition. NCAA reserves the right to require physician certification of medical necessity in cases of suspected abuse. If abuse is found to exist, then I understand my membership can be terminated. If my insurance company denies my NCAA claim on grounds that my transport by ambulance was not medically necessary, I will be responsible to NCAA for the full amount of the bill.

If I Have Insurance*, Who Receives Claim Payments?: I understand that my NCAA Membership is not insurance and that NCAA will receive payments from my insurer or third party agency (e.g. Medicare, Blue Cross, etc.). To help process authorized claims, I authorize release of any medical information necessary to process a claim to both my insurer and to NCAA, and I further authorize such payment to be made directly to NCAA. I further agree to forward to NCAA any payments made by my insurer to me for services provided by NCAA.

*Note: I understand that if it is the policy of my insurance company that my NCAA Membership voids its responsibility for payment of claims, this contract may be cancelled and full amount of my membership fee refunded to me.

Effective Dates: I understand that my membership is effective upon receipt of full payment and signed membership application and contract, through December 31, 1990.

Signature _____ Date _____

Spouse's Signature _____ Date _____

Membership contract must be signed by the Insurance Policy Holder or Authorized Person if uninsured.
Membership is non-transferable and non-refundable except as described above.

If you have questions or have trouble understanding this contract, please call 567-3342.

When you have completed the Member Information and signed the Contract, please mail it to:

NCAA Membership Program
P.O. Box 39351
Ninilchik, AK 99639

If you are paying by check or money order, please make it payable to:
Ninilchik Community Ambulance Association

Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

Effect of amendments. — The 1982 amendment added paragraph (2).

Editor's notes. — "Health systems agencies," referred to in (10) of this section, are further described in 42 U.S.C. 300*l*-1.

NOTES TO DECISIONS

Health care facility. — Federal law defines a skilled nursing facility in a manner which includes such facilities when they are contained in larger institutions such as pioneer homes (42 C.F.R. § 100.102(e)(4) (1979)). Alaska state law was meant to be no less comprehensive. South Cent. Health Planning & Dev., Inc. v. Commissioner of Dep't of Admin., Sup. Ct. Op. No. 2359 (File No. 5633), 628 P.2d 551 (1981).

Chapter 08. Emergency Medical Services.

Collateral references. — 39 Am. Jur. 2d, Health, §§ 9-18.

39A C.J.S., Health and Environment, §§ 3-17.

Sec. 18.08.010. Administration. The department is responsible for the development, implementation and maintenance of a statewide comprehensive emergency medical services system and, accordingly, shall

(1) coordinate public and private agencies engaged in the planning and delivery of emergency medical services to plan an emergency medical services system;

(2) assist public and private agencies to deliver emergency medical services through the award of grants in aid. (§ 1 ch 100 SLA 1977)

Sec. 18.08.020. Advisory Council on Emergency Medical Services. There is established in the department an Advisory Council on Emergency Medical Services. The council shall

(1) advise the commissioner with regard to the planning and implementation of a statewide emergency medical services system;

(2) assist the Statewide Health Coordinating Council in performing its duties under AS 18.07.011 relating to emergency medical services. (§ 1 ch 100 SLA 1977)

Sec. 18.08.030. Composition. The council consists of 11 members appointed by the governor. Four of the members must be consumers of emergency medical services, and one from each judicial district in the state. (§ 1 ch 100 SLA 1977)

Sec. 18.08.040. Term of office. (a) Members of the council shall be appointed for staggered terms of four years.

(b) Each year the governor shall appoint a consumer to one of the staggered terms on the council that expire during that year.

(c) A vacancy occurring in the membership of the council shall be filled by appointment by the governor in the same manner as original appointments, and when a seat is vacated before expiration of a term, the vacancy shall be filled for the unexpired portion of the vacated term. (§ 1 ch 100 SLA 1977; am §§ 25, 26 ch 37 SLA 1986)

Effect of amendments. — The 1986 amendment substituted "staggered" for "overlapping" in subsection (a) and rewrote subsection (b).

Sec. 18.08.050. Compensation and per diem. Members of the council receive no salary, but are entitled to per diem, reimbursement for travel, and other expenses authorized by law for boards and commissions. (§ 1 ch 100 SLA 1977)

Cross references. — For provisions relating to per diem, travel and other expenses for members of boards and commissions, see AS 39.20.180.

Sec. 18.08.060. Meetings. The council shall meet at the call of the chairman not less frequently than twice a year. A majority of members constitutes a quorum. (§ 1 ch 100 SLA 1977)

Sec. 18.08.070. Special committees. The council may create special committees or task forces outside its membership and may appoint persons who are not members of the council to serve as advisors or consultants to any committee created to carry out the purposes of the council. (§ 1 ch 100 SLA 1977)

Sec. 18.08.080. Regulations. The department shall adopt, with the concurrence of the Department of Public Safety, regulations establishing standards and procedures for the issuance, renewal, reissuance, revocation, and suspension of certificates required under AS 18.08.084, as well as other regulations necessary to carry out the purposes of this chapter. (§ 1 ch 100 SLA 1977; am § 1 ch 78 SLA 1978)

Sec. 18.08.082. Issuance of certificates. (a) The department shall prescribe by regulation a course of training or other requirements prerequisite to the issuance of certificates that provide for the following:

(1) certifies that a person meets the training and other requirements as an emergency medical technician;

(2) authorizes an emergency medical technician certified under this chapter to provide under the written or oral direction of a physician the advanced life support services enumerated on the certificate;

(3) certifies that a person, organization, or government agency that provides an emergency medical service meets the minimum operating standards prescribed by the department; and

(4) authorizes an emergency medical service certified under this chapter to provide under the written or oral direction of a physician the advanced life support services enumerated on the certificate.

(b) The department is the central certifying agency for personnel certified under (a)(1) and (2) of this section and under regulations adopted under AS 18.08.080. (§ 2 ch 78 SLA 1978)

Sec. 18.08.084. Certificate required. (a) One may not represent oneself, nor may an agency or business represent an agent or employee of that agency or business, as an emergency medical technician certified by the state unless the person represented is certified as an emergency medical technician under AS 18.08.082.

(b) A person, organization, or government agency may not represent itself as an emergency medical service or ambulance service certified by the state unless the person, organization, or government agency is certified as an emergency medical service under AS 18.08.082.

(c) A person may not provide, offer, or advertise to provide advanced life support services outside a hospital unless authorized by law.

(d) A person, organization, or government agency that provides, offers, or advertises to provide an emergency medical service may not provide advanced life support services unless authorized under AS 18.08.082. (§ 2 ch 78 SLA 1978)

Sec. 18.08.086. Immunity from liability. (a) A person certified under AS 18.08.082, or a person or public agency that employs, sponsors or controls the activities of persons certified under AS 18.08.082, who administers emergency medical services to an injured or sick person is not liable for civil damages as a result of an act or omission in administering those services, if done in good faith and if the injured or sick person is in immediate danger of serious harm or death. This

subsection does not preclude liability for civil damages that are the proximate result of gross negligence or intentional misconduct, nor preclude imposition of liability on a person or public agency that employs, sponsors, or controls the activities of persons certified under AS 18.08.082 if the act or omission is a proximate result of a breach of duty to act created under this chapter. For the purposes of this subsection, "gross negligence" means reckless, wilful, or wanton misconduct.

(b) A physician who in good faith arranges for, requests, recommends, or initiates the transfer of a patient from a hospital to another hospital is not liable for civil damages as a result of arranging, requesting, recommending, or initiating the transfer if

(1) in the exercise of that degree of knowledge or skill possessed, or that degree of care ordinarily exercised by physicians practicing the same specialty in the same or similar communities to that in which the physician is practicing, the physician determines that treatment of the patient's medical condition is beyond the capability of the transferring hospital or the medical community in which the hospital is located;

(2) the physician has confirmed that the receiving facility is more capable of treating the patient; and

(3) the physician has secured a prior agreement from the receiving facility to accept and render the necessary treatment to the patient.

(c) A registered nurse or licensed practical nurse who escorts a patient in a means of conveyance not equipped as an ambulance is not liable for civil damages as a result of an act or omission in administering patient care services, if done in good faith and if the life of the injured or sick person is in danger. This subsection does not preclude liability for civil damages that are the result of gross negligence or intentional misconduct. (§ 2 ch 78 SLA 1978; am § 2 ch 122 SLA 1986)

Cross references. — For liability for services rendered by a physician-trained mobile intensive care paramedic, see AS 08.64.366.

For civil liability for emergency aid, see AS 09.65.090.

Effect of amendments. — The 1986 amendment substituted "if done in good faith and if the injured or sick person is in immediate danger of serious harm or death" for "if done in good faith and if the life of the injured or sick person is in danger" at the end of the first sentence in subsection (a) and made minor grammatical changes.

Collateral references. — Liability of hospital operating ambulance for personal injuries to person being transported. 21 ALR2d 915.

Hospital's liability as to diagnosis and care of patients brought to emergency ward. 72 ALR2d 396.

Application of rule of strict liability in tort to person or entity rendering medical services. 100 ALR3d 1205.

Sec. 18.08.088. Penalty. A person who violates a provision of this chapter is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000, or by imprisonment for not more than 90 days, or by both. Each violation is a separate offense. (§ 2 ch 78 SLA 1978)

Cross references. — For sentences for misdemeanors, see AS 12.55.135.

Sec. 18.08.090. Definitions. In this chapter,

(1) "advanced life support" means emergency care techniques provided under the written or oral orders of a physician that include, but are not limited to, electric cardiac defibrillation, administration of antiarrhythmic agents, intravenous therapy, intramuscular therapy, or use of endotracheal intubation devices;

(2) "ambulance" means any publicly or privately owned means of conveyance intended to be used and maintained or operated for the transportation of persons who are sick, injured, wounded, or otherwise helpless;

(3) "commissioner" means the commissioner of health and social services;

(4) "consumer of emergency medical services" means a person who is not a provider of emergency medical services as defined in this section;

(5) "department" means the Department of Health and Social Services;

(6) "emergency medical care" means the services utilized in responding to the perceived individual needs for immediate medical care in order to prevent loss of life or aggravation of physiological or psychological illness or injury;

(7) "emergency medical service" means the provision of emergency medical care and transportation of the sick and injured;

(8) "emergency medical services system" means a system that provides for the arrangement of personnel, facilities and equipment for the effective and coordinated delivery of health care services under emergency conditions, occurring either as a result of the patient's condition or of natural disasters or similar situations, and that is administered by a statewide network that has the authority and resources to provide effective administration of the system;

(9) "emergency medical technician" means a person trained in emegency medical care and certified in accordance with the regulations prescribed under AS 18.08.080;

(10) "provider of emergency medical services" means a person whose occupation or profession is, or has been, the delivery or administration of emergency medical services; a person who has a fiduciary position with, or has a fiduciary interest in, a health activity, facility

or other health agency, or a legal or financial interest in the rendering of any component of emergency medical services;

(11) "Statewide Health Coordinating Council" means the council created under AS 18.07.011. (§ 1 ch 100 SLA 1977; am § 3 ch 78 SLA 1978)

Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

Chapter 10. Health Units and Districts.

Collateral references. — 39 Am. Jur. 2d, Health, §§ 4-7.

39A C.J.S., Health and Environment, §§ 7-15.

Delegation to board or officer of police power to require vacation, destruction, or repair of individual building deemed by such officer or board unsafe or unsanitary, apart from noncompliance with specific regulations. 114 A.L.R. 446.

Extension of police power of municipal corporation beyond territorial limits. 14 ALR2d 103.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Sec. 18.10.010. Local health unit and health board. Each community or settlement outside an incorporated city is a health unit. In each health unit there shall be a board of health composed of the president of the school board and two citizens of the unit selected by the school board. At least one of the members of the health board must, where practicable, be a licensed physician. In a health unit where there is no school board, the commissioner of the department shall appoint three residents of the unit to the local board of health, at least one member of which must, where practicable, be a licensed physician. (§ 1 ch 118 SLA 1949)

Cross references. — For transitional measures as to local governments, see Alaska Const., art. XV, § 3.

Sec. 18.10.020. Health unit in incorporated city. AS 18.10.010 applies to an incorporated city unless the city otherwise provides for the establishment and maintenance of a local board of health or a health officer. (§ 1 ch 118 SLA 1949)

former paragraphs (7) and (8) into present paragraph (7), added "and" at the end of paragraph (7), redesignated former paragraphs (9) and (10) as present paragraphs (8) and (9), respectively, and made internal reference changes in paragraphs (5) and (6).

Chapter 87. Hospital and Medical Service Corporations.

Collateral references. — 44 Am. Jur. 2d, Insurance, § 1842 et seq.; 61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, §§ 153, 156.

44 C.J.S., Insurance, § 15.

Validity and nature of group medical and hospital service plans, 167 ALR 322.

Sec. 21.87.010. Applicability. (a) This chapter applies to every individual, person, firm, corporation, association, or organization of any kind hereafter engaging or purporting to engage in the provision of all or part of a health care service as defined in AS 21.87.330, for its subscribers in exchange for periodic prepayments in identifiable amount by or as to the subscribers.

(b) This chapter does not apply to

(1) insurers or fraternal benefit societies authorized to transact the kind of insurance involved under other chapters of this title;

(2) fraternal and other organizations exempted from AS 21.24;

(3) health care services provided by an employer to employees and their dependents, with or without contribution to the costs thereof by the employees, through health care service facilities owned, employed, or controlled by the employer;

(4) infrequent instances of prepayment by or for the patient direct to the physician or hospital for specific services thereafter rendered to the patient by the physician or hospital. (§ 1 ch 120 SLA 1966)

Sec. 21.87.020. Purpose and interpretation. (a) It is the purpose of this chapter to regulate in the public interest the formation and operation of prepaid health care service organizations, in order that the services may be made available upon a basis of fair and equitable contracts through state-licensed nonprofit organizations meeting reasonable standards as to administration, reserves, and financial soundness.

(b) This chapter shall be liberally interpreted to effectuate the purpose declared in (a) of this section. (§ 1 ch 120 SLA 1966)

Sec. 21.87.030. Provisions exclusive. A provision of this title does not apply to a health care service corporation unless contained or referred to in this chapter. (§ 1 ch 120 SLA 1966)

Sec. 21.87.040. Incorporation and certificate of authority required. A person otherwise subject to this chapter may not engage or purport to engage in the provision of any part or all of a health care service for its subscribers in exchange for periodic prepayments in identifiable amount unless it is a service corporation incorporated under the laws of Alaska, and currently authorized as such a service corporation under a certificate of authority issued by the director under this chapter. (§ 1 ch 120 SLA 1966)

Sec. 21.87.050. Incorporation, approval of articles and amendments. (a) A service corporation shall be formed as a nonprofit, nonstock medical service corporation, or hospital service corporation, or a combination medical and hospital service corporation, consistent with the applicable requirements of this chapter under the statutes of Alaska governing the formation of nonprofit, nonstock corporations in general.

(b) Before the articles of incorporation of the proposed corporation formed after July 1, 1966, are filed with the commissioner of commerce and economic development, they shall be submitted to the director, and the commissioner may not file the articles unless the director's approval is endorsed thereon. The director shall approve the articles unless the director finds that they do not comply with law. If not approved, the director shall return the proposed articles of incorporation to the incorporators together with a written statement of particulars of the reasons for nonapproval.

(c) An amend
ration may not
mitted to and
approval endors
unless the direc
articles of inco
approved, the d
corporation toge
reasons for nona

Sec. 21.87.06(
not have or use a
"insurance," "ca
other terms desc
corporation may
corporation trans
tion was formed t
ch 120 SLA 196(

Sec. 21.87.07(
director may not
or act as a servic
following qualifi

(1) it must be
medical service c
a combined medi

(2) it must int
as a nonprofit co

(3) if a hospita
while so authori
located in the ar
location and suf
furnish the hospi
corporation to its

(4) if a medica
agreements with
subscribers' resid
bers and facilities
vices provided or
subscribers;

(5) if a newly fo
working funds to
new business and
or medical servic
following the date
or $100,000, whic

amount unless it is a service corporation incorporated under the laws of Alaska, and currently authorized as such a service corporation under a certificate of authority issued by the director under this chapter.

History.—§ 1, ch. 120, SLA 1966.

§ 21.87.050 Applicability of nonprofit corporation statutes; filing and approval of articles of incorporation

(a) A service corporation shall be formed as a nonprofit, nonstock medical service corporation, or hospital service corporation, or a combination medical and hospital service corporation, consistent with the applicable requirements of this chapter under the statutes of Alaska governing the formation of nonprofit, nonstock corporations in general.

(b) Before the articles of incorporation of the proposed corporation formed after July 1, 1966, are filed with the commissioner of commerce and economic development, they shall be submitted to the director, and the commissioner may not file the articles unless the director's approval is endorsed thereon. The director shall approve the articles unless the director finds that they do not comply with law. If not approved, the director shall return the proposed articles of incorporation to the incorporators together with a written statement of particulars of the reasons for nonapproval.

(c) An amendment of the articles of incorporation of a service corporation may not be filed with the commissioner unless it is first submitted to and approved by the director, and bears the director's approval endorsed on it. The director shall approve the amendment unless the director finds that it was not lawfully adopted or that the articles of incorporation as amended would be unlawful. If not approved, the director shall return the proposed amendment to the corporation together with a written statement of the particulars of the reasons for nonapproval.

History.—§ 1, ch. 120, SLA 1966.

§ 21.87.060 Corporate name

A service corporation may not have or use a corporate or business name which includes the words "insurance," "casualty," "surety," "health and accident," "mutual," or other terms descriptive of an insurer or insurance business. A service corporation may not have or use a name so similar to that of another corporation transacting business in

this state when the service corporation was formed that it would tend to confuse or mislead the public.

History.—§ 1, ch. 120, SLA 1966.

§ 21.87.070 Qualifications for certificate of authority

The director may not issue or permit to exist a certificate of authority to be or act as a service corporation to a corporation which does not fulfill the following qualifications:

(1) it must be incorporated as provided in AS 21.87.050, as either a medical service corporation, or as a hospital service corporation, or as a combined medical and hospital service corporation;

(2) it must intend to and actually conduct its business in good faith as a nonprofit corporation;

(3) if a hospital service corporation, it must have in force at all times while so authorized, service agreements with participant hospitals located in the areas of the subscribers' residences, convenient as to location and sufficient as to capacity and facilities reasonably to furnish the hospital services provided or proposed to be provided by the corporation to its subscribers;

(4) if a medical service corporation, it must have in force service agreements with participant providers located in the areas of the subscribers' residences convenient as to location and sufficient in numbers and facilities reasonably to furnish the medical and surgical services provided or proposed to be provided by the corporation to its subscribers;

(5) If a newly formed corporation, it must possess sufficient available working funds to pay all reasonably anticipated cost of acquisition of new business and operating expenses, other than payment for hospital or medical services, for a period of not less than the six months following the date of issuance of the certificate of authority, if issued, or $100,000, whichever amount is greater;

(6) it must fulfill all other applicable requirements of this chapter.

History.—§ 1, ch. 120, SLA 1966; § 3, ch. 40, SLA 1981.

§ 21.87.080 Application for certificate

(a) Application for a certificate of authority to transact business as a

service corporation shall be made to the director, on forms as prepared and furnished by the director and requiring the information relative to the applicant, its directors, officers, and affairs as the director may reasonably require consistent with this chapter.

(b) The application shall be accompanied by the following documents which are not already on file with the director:

(1) one copy of the applicant's articles of incorporation and of all amendments, certified by the commissioner;

(2) one copy of the applicant's bylaws, certified by its corporate secretary;

(3) if a medical service corporation, a copy of each form of service agreement entered into or proposed to be entered into with participant providers, together with a list showing the name, residence and office addresses, and date of execution of the service agreement by each participant provider;

(4) if a hospital service corporation, a copy of each service agreement entered into with participant hospitals certified by the applicant's corporate secretary;

(5) a copy of each form of subscribers' contract proposed to be offered;

(6) a schedule of the rates proposed to be charged subscribers;

(7) a financial statement of the applicant as of a date not more than 30 days before the filing of the application, showing among other things the amount of working funds available to the applicant, the source of the funds, and accompanied by a copy of the agreement under which the funds were contributed to or provided for the applicant;

(8) a copy of any other relevant document reasonably requested by the director.

(c) At the time of filing the application the applicant shall pay to the director the application fee and the fee for issuance of the certificate of authority set under AS 21.06.250.

History.—§ 1, ch. 120, SLA 1966; § 4, ch. 40, SLA 1981; § 26, ch. 26, SLA 1985.

§ 21.87.090 Issuance or refusal of certificate

(a) If, after the application for certificate of authority is completed,

the director finds that the applicant is fully qualified for a certificate of authority in accordance with this chapter, and that the service agreements, subscribers contracts, schedule of rates are in compliance with the applicable provisions of this chapter, the director shall issue to the applicant a certificate of authority as a medical service corporation or as a hospital service corporation, or as a combined medical and hospital service corporation, as the case may be.

(b) If the director does not so find, the director shall refuse to issue a certificate of authority and shall give the applicant written notice setting out the particulars of the reasons for the refusal, accompanied by return of the fee tendered for issuance of the certificate of authority.

(c) The director shall either issue or refuse to issue the certificate of authority within a reasonable time after the filing and completion of application.

History.—§ 1, ch. 120, SLA 1966.

§ 21.87.100 Continuance or expiration of certificate

(a) A certificate of authority issued to a service corporation shall continue in force as long as the corporation is entitled to it under this chapter, and until suspended or revoked by the director or terminated at the request of the corporation; subject, however, to continuance of the certificate by the corporation each year by

(1) payment, before June 30, of the continuation fee set under AS 21.06.250;

(2) filing by the insurer of its annual statement for the preceding calendar year as required under AS 21.87.240.

(b) If not continued by the service corporation, its certificate of authority shall expire at midnight on the June 30 following the failure of the insurer to continue it in force. The director shall promptly notify the insurer of the occurrence of a failure resulting in impending expiration of its certificate of authority.

History.—§ 1, ch. 120, SLA 1966; § 27, ch. 26, SLA 1985.

§ 21.87.110 Suspension or revocation of certificate

(a) The director shall suspend or revoke the certificate of authority of a service corporation that the director finds, after a hearing, is no longer qualified under this chapter.

MEMORANDUM State of Alaska

TO: Parties interested in starting a new domestic insurer

DATE: Updated July 31, 1989

FILE NO:

TELEPHONE NO:

THRU:

SUBJECT: Relevant Laws

FROM: Eugene W. Furman CPA
Insurance Financial Examiner

From time to time the Department of Commerce and Economic Development, Division of Insurance, is approached by parties interested in starting a new domestic insurer. This memorandum is a non-exhaustive outline of the more important laws dealing with the start up of a domestic insurer.

This memorandum is not intended to substitute for competent legal advice or feasibility studies and economic research normal to the start up of any new business endeavor. There are risk elements in any new business, many of which are magnified for a new domestic insurer due to the size of Alaska's population, lack of a domestically available insurer management pool, lack of a pool of trained insurer employees and many other factors. Perceived high cost of current insurance, tightness in one or more lines of available insurance coverage or enthusiasm by independent promoters and/or insurance sales people should not be considered to represent an available economic opportunity.

As a newly organized entity a new domestic insurer has no operating history. It is likely that there will be no secondary market for its shares or other securities. Accordingly, the securities of a newly formed domestic insurer are likely to be illiquid. Certain provisions of Alaskan law will operate to impair the newly formed domestic insurer's ability to realize the full value of its assets in the event of a voluntary or involuntary liquidation of its assets. An investment in a newly formed domestic insurer is not appropriate for all investors and no assurances can be given that the objectives of the newly formed domestic insurer can be achieved.

This memorandum is intended for the personal use of the organizers of domestic insurers for their informational purposes only. There are other requirements of Alaskan law not contained in the statutes dealing with insurance such as the anti-fraud and disclosure rules of the securities laws which organizers need to consider.

THERE CAN BE NO ASSURANCES BY THE STATE OF ALASKA, ITS EMPLOYEES OR ITS AGENTS AS TO THE ACHIEVEMENT OF THE OBJECTIVES OF THE ORGANIZERS OF A DOMESTIC INSURER. THERE IS NO APPROVAL OR DISAPPROVAL OF ANY PROSPECTUS OR OFFERING CIRCULAR PREPARED USING THIS MEMORANDUM AS A GUIDELINE. FURTHER, THERE IS NO APPROVAL OR DISAPPROVAL OF ANY SECURITIES OFFERED THRU USE OF THIS MEMORANDUM AS A GUIDELINE BY ORGANIZERS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE GOVERNED BY VARIOUS FEDERAL SECURITIES LAWS.

Scope of Insurance Laws

All persons transacting a business of insurance in Alaska, or relative to a subject resident, located or to be performed in Alaska, shall comply with the applicable provisions of Alaskan law, namely, Title 21 - Insurance. (AS 21.03.010) The activity performed by a domestic insurer is considered the transaction of the business of insurance in Alaska. Accordingly, Title 21 applies as do many of the provisions of Title 10, Chapter 05 Alaska Business Corporation Act dated July 1, 1989.

Specifically with respect to Title 21 a person may not act as an insurer and an insurer may not transact insurance in Alaska except as authorized by a valid certificate of authority issued by the director of the Division of Insurance. (AS 21.09.010) Domestic insurers may be incorporated stock insurers, incorporated mutual insurers or reciprocal insurers. (AS 21.09.040) Domestic stock insurers should refer to AS 21.09, while domestic mutual insurers and domestic reciprocal insurers should refer respectively to AS 21.69 and AS 21.75 in addition to AS 21.09.

Application Process

To apply for an original certificate of authority an insurer shall file with the director its application (accompanied by the applicable fees set under AS 21.06.250) showing the information and including the documents called for in AS 21.09.110. A forms packet is available from the Division's Licensing Supervisor in Juneau, (907) 465-2545. Additionally, it is the policy of the division to require complete biographical histories and a listing of business activities of organizers and proposed directors and investigate same under AS 21.09.100 and other provisions of Alaskan Insurance Laws.

Before organizers may advertize, solicit funds, make agreements or generally take any action with respect to organizing a domestic insurer a solicitation permit must be applied for and received form the director. The rules for this process are covered in AS 21.60.060 thru .260. There is a surety bond or cash deposit requirement of the organizers contained in AS 21.60.140. During the organization process and afterwards the director must be appointed as a domestic insurer's attorney to receive service of legal process issued against it in Alaska. (AS 21.09.180 and .190) It is strongly suggested that organizers be very familiar with AS 21.69 which covers organization, corporate procedures and the important concept of bulk reinsurance in sections .610 and .620. Further attention is directed to AS 21.36.360 (c), fraudulent insurance acts associated with forming an insurer and the requirement for pre-approval of insurance contract forms in AS 21.42.120.

If the director finds that the applicant has met the requirements for and is entitled to a certificate of authority under Alaskan Insurance Law, the director will issue a proper certificate specifying the kinds of insurance the

insurer is authorized to transact. This certificate remains at all times the property of the State. If the director does not find that the requirements have been met, the director will issue an order refusing the certificate. (AS 21.09.120)

It would also be important for the organizer to understand the concepts of continuation, amendment and termination of the certificate of authority. These concepts are covered in AS 21.09.130 to .180.

Required Capital

A domestic corporate insurer issuing capital stock applying for its original certificate of authority is required to possess the basic minimum paid-in-capital stock and additional funds in surplus as outlined in AS 21.09.070. In addition to the rules in AS 21.09.070, the required initial minimum surplus for a domestic mutual insurer is governed by AS 21.09, primarily section .220, while the required initial minimum surplus for a domestic reciprocal insurer is governed by AS 21.75, primarily AS 21.75.050 and .055. The amount of surplus is controlled by the types of insurance to be written. Generally, $1,000,000 of basic capital or surplus and additional surplus for a total of $2,000,000 is required for a life and disability insurer with $1,500,000 of basic capital or surplus and additional surplus for a total of $3,000,000 being required for a property and casualty insurer. Higher initial amounts of additional surplus is a subject which organizers should be prepared to discuss. Generally, organizers should concern themselves with capital in addition to the minimum requirements whenever their business plan filed with the application calls for the new domestic insurer to accept the risk of loss on any single occurrence in excess of $50,000 to $100,000.

Organizers should note that a business plan is an item of additional information that the director requires under AS 21.09.110. Domestic insurers desiring to assume reinsurance liabilities should be thinking in terms of $20,000,000 or greater total initial surplus. Finally, on the subject of initial minimum surplus, there is an important prohibition in AS 21.12.110 requiring any insurer to not retain a risk on any one subject of insurance in an amount exceeding 10% of its surplus to policyholders.

Trust Deposits

All insurers other than title insurers are generally required to have a trust deposit of at least $300,000 deposited with the director under AS 21.24.030.

Additional Items

The following additional items are a partial list of the concepts with which organizers should become familiar before committing to a decision concerning organizing a domestic insurer:

Additional Items (Cont.)

SUBJECT	REFERENCE
Reports - Annual Statement	AS 21.09.200
- Premium Tax Report	AS 21.09.210
Records	AS 21.69.390 and .400
Limit of Risk	AS 21.12.010
Reinsurance	AS 21.12.020
Definitions of Coverages	AS 21.12.040 to .110
Assets and Liabilities	AS 21.18, particularly Sections .010 and .030
Investments	AS 21.20, particularly Sections .020, .050, .250, .300 and .321
Holding Companies	AS 21.22, particularly Sections .010, .020 and .060
Insider Trading	AS 21.40
Dividends	AS 21.22.100, AS 21.09.080 (b) AS 21.69.480 to .510 and AS 21.75.240 and.250
Trade Practices	AS 21.36 Particularly Sections .090, .100, .120, .130, .190 and .360
Rates	AS 21.39
Insurance Contracts	AS 21.42 and AS 21.09.110 (9)
Unauthorized Business	AS 21.09.250
Stock of Subsidiaries	AS 21.21.180
Investments Prohibitions	AS 21.21.250 and .321

Addresses and Phone numbers

Juneau - State of Alaska
Department of Commerce and Economic Development
Division of Insurance
P. O. Box D
Juneau, Alaska 99811

(907) 465-2515
(907) 465-3041 (fax)

Delivery address: 333 Willoughby Street
Juneau, Alaska 99801

Anchorage - State of Alaska
Department of Commerce and Economic Development
Division of Insurance
3601 C Street, Room 740
Anchorage, Alaska 99503

(907) 562-3626
(907) 562-0048 (fax)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 524
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to ambulance and emergency medical services provided by municipalities . . . .
Sponsor: Labor & Commerce Committee
Requestor: Senate Judiciary Committee

Agency Affected: Commerce & Economic Dev.
BRU: Insurance
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)

No impact in FY 90

Prepared by: Joan Brown, Administrative Officer
Phone: 465-2597
Division: Insurance
Date: 3/27/90

Approved by Commissioner: Larry Merculieff (Jim Baltar)
Date: 3/27/90
Agency: Department of Commerce & Economic Development

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

JB/dg16598D
32790a

working capital to the corporation, the payment to be prorated on a uniform basis among all the outstanding contributions; or

(3) to reduce the rates thereafter to be charged subscribers, or to expand the services or benefits thereafter to be provided under subscription contracts.

History.—§ 1, ch. 120, SLA 1966; §§ 18, 19, ch. 40, SLA 1981.

§ 21.87.310 Fidelity bonds

Each service corporation shall procure and maintain in force a fidelity bond or bonds, with authorized corporate surety, covering every officer or employee entrusted with the handling of its funds, in an amount, but not less than $5,000, which may be fixed by its board of directors.

History.—§ 1, ch. 120, SLA 1966.

§ 21.87.320 Repealed. § 30, ch. 26, SLA 1985

§ 21.87.330 Definitions

In this chapter

(1) "health care service" means a service rendered to an individual for diagnosis, relief, or treatment of an injury, ailment or bodily condition;

(2) "hospital service corporation" means a service corporation that principally provides hospital services;

(3) "medical service corporation" means a service corporation that principally provides medical or surgical services;

(4) "nurse midwife" means a registered professional nurse who is certified as an advanced nurse practitioner under AS 08.68.410(1) and authorized to practice as a nurse midwife under regulations adopted in accordance with AS 08.68;

(5) "participant hospital" is one which has entered into a service agreement with a service corporation;

(6) "participant provider" means a provider who has entered into a service agreement with a service corporation;

(7) "physician" includes also "surgeon";

(8) "provider" means a physician, dentist, osteopath, optometrist, chiropractor, nurse midwife, or other licensed health care practitioner;

(9) "service agreement" is a contract between a service corporation and a provider or hospital under which the provider or hospital agrees to render all or part of one or more health care services to subscribers of the service corporation;

(10) "service corporation" means a corporation providing all or part of one or more health care services for subscribers in exchange for periodic prepayments in identifiable amount by or as to the subscribers;

(11) "subscriber's contract" is that between the service corporation and its subscriber under which all or part of one or more health care services is to be rendered to or on behalf of the subscriber by a participant provider or hospital that has entered into a service agreement with the corporation covering the services.

History.—§ 1, ch. 120, SLA 1966; §§ 20—23, ch. 40, SLA 1981.

§ 21.87.340 Applicability of other provisions

In addition to the provisions contained or referred to previously in this chapter the following chapters and provisions of this title also apply with respect to service corporations to the extent applicable and not in conflict with the express provisions of this chapter and the reasonable implications of the express provisions, and for the purposes of the application the corporations shall be considered to be mutual "insurers":

(1) AS 21.03

(2) AS 21.06

(3) AS 21.09, except AS 21.09.090

(4) AS 21.18.010

(5) AS 21.18.030

(6) AS 21.18.040

(7) AS 21.18.120

(8) AS 21.21.321

(9) AS 21.36

(10) AS 21.69.400

SB 549

NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

Don Oberg, President

Mary Lou Brent
Vice-President
Box 80074
Fairbanks, Alaska 99708

Judy Salo
NEA Director
4540 Kenai Cove Court
Kenai, Alaska 99611

Paul Jarvi
Region I Director
PO Box 5870
Ketchikan, Alaska 99901

Deedie Sorenson
Region I Director
6903 Sunny Dr
Juneau, Alaska 99801

Beverly Goad
Region II Director
Box 343
Copper Center, Alaska 99573

DeWayne Craig
Region III Director
406 So Forest Dr #3A
Kenai, Alaska 99611

Myra Poage
Region IV Director
Box 973
Nome, Alaska 99762

Marilyn Rosene
Region IV Director
Box 1170
Dillingham, Alaska 99576

Mike Warme
Region IV Director
PO Box 72
Noorvik, Alaska 99763

Claudia Douglas
Region V Director
PO Box 74837
Fairbanks, Alaska 99707

Gayle Harbo
Region V Director
Box 80522
College, Alaska 99708

Loretta B. Christie
Region VI Director
2220 Yorkshire Lane
Anchorage, Alaska 99504

Don Hadley
Region VI Director
3259 Weslyan Dr
Anchorage, Alaska 99508

Richard Kronberg
Region VI Director
3511 Chinook Bay Dr
Anchorage, Alaska 99515

Leona Mounds
Region VI Director
5816 Winding Way
Anchorage, Alaska 99504

Pamela Reynolds
Region VI Director
1510 Elcadore Dr #35
Anchorage, Alaska 99507

Carolyn Tolson
Region VII Director
Box 873933
Wasilla, Alaska 99687

Hank Harrison
Region R Director
Box 110325 S. Station
Anchorage, Alaska 99511

ANCHORAGE REGIONAL OFFICE
1411 W. 33RD AVENUE
ANCHORAGE, ALASKA 99503
(907) 274-0536
FAX: (907) 274-0561

JUNEAU OFFICE
105 MUNICIPAL WAY, SUITE 302
JUNEAU, ALASKA 99801
(907) 586-3090
FAX: (907) 586-2744

FAIRBANKS REGIONAL OFFICE
2118 CUSHMAN STREET
FAIRBANKS, ALASKA 99701
(907) 456-4435
FAX: (907) 456-2159

April 20, 1990

TO: **Senator Jan Faiks, Chair, and members of the Senate Judiciary Committee.**

FROM: **Bob Manners, Executive Secretary**

RE: **SB 549; "An Act relating to renewal of a teacher's or administrator's certificate; and providing for an effective date"**

NEA-Alaska strongly supports and urges your favorable action on SB 549. We are very appreciative of the willingness of legislators to correct the many problems that have resulted from one portion of the new statute requiring the fingerprinting of teachers.

The original intent of HB 52 was to provide background checks for certification for initial hires and to make the Department of Education, through the Certification Division, the responsible party for such action.

When a person is initially hired and/or licensed to teach in the State of Alaska they must answer in writing the question: "*Have you ever been convicted of a felony?*" The new legislation serves to validate the answer to that question and is perhaps its most important function.

When the bill was extended to all practicing teachers the logistical problems became enormous, but even more importantly the purpose becomes much more cloudy.

NEA-Alaska is very concerned about the unworkability of the new statute and the varied problems that teachers throughout the state are encountering, but we also believe that you need to address the substantive issues as follows:

> **Are the protections currently in place regarding the screening of convicted felons from the teaching profession adequate to protect Alaska's youth?**

We believe that the answer is yes. Even without fingerprinting each of Alaska's practicing teachers, school districts under AS 12.62.065. are defined as an interested party and authorized to access criminal background information on persons they employ.

> **Does the fingerprinting of all Alaska's currently practicing teachers enhance the safety factor or accomplish the public interest intent of the legislation?**

We believe that it is very unlikely. Even if you take the view that there are convicted felons who have lied on their initial certification application, and employment application, and slipped into Alaska to teach school, the methodology of the fingerprinting on such a massive scale throughout the state indicates that there are no guarantees of the viability of the prints themselves. (We are attempting to kill a mouse with an elephant gun--with a high degree of likelihood that we are going to miss the mouse!)

Finally, it must be asked if the cost and burden of this fingerprint screening is appropriately placed?

When initially being licensed to practice in the state an applicant is forewarned about what the requirements for that license are and given a choice about whether or not to meet those requirements and pay the costs. That choice is somewhat different for those individuals who are currently practicing and there has traditionally been resistance to increasing the requirements, costs, and burdens to recertify. Given the nature of fingerprinting, and the implication that one might be a convicted felon, that resistance is only intensified.

Because Section 4 of HB 52 created the most unworkable part of the legislation, because the public interest is otherwise protected, and because the fingerprinting of all of Alaska's teaching force is likely to produce little if anything in the way of enhancing public interest, we urge you to support the repeal of Section 4 of HB 52.

Thank you for your consideration of our position.

Effect of amendments. — The 1985 amendment substituted "under AS 12.30" for ", including the right to arrest the defendant as provided in AS 12.30.020" and "by law" for "therein."

Chapter 62. Criminal Justice Information Systems Security and Privacy.

Section
35. Access to certain crime information
70. Definitions

Sec. 12.62.035. Access to certain crime information. (a) Notwithstanding any other provision of law, an interested person as defined in (e) of this section may request from the commission records of all convictions involving contributing to the delinquency of a minor and any sex crimes of a person who holds or applies for a position in which the person has or would have supervisory or disciplinary power over a minor. The commission shall authorize the disclosure of the information to the requesting interested person and shall provide a copy of the information to the person who is the subject of the request.

(b) A request for records under (a) of this section shall include within it the fingerprints of the person who is the subject of the request and any other data specified in regulations adopted by the commission. The request shall be on a form approved by the commission, and the commission may charge a fee to be paid by the requesting interested person for the actual cost of processing the request. The commission shall destroy an application within six months after the requested information is sent to the requesting interested person and the person who is the subject of the request.

(c) The commission shall adopt regulations to implement the provisions of this section.

(d) If an individual is denied employment as a result of the disclosure of inaccurate or incomplete records under this section, an action may be brought against the state. No other action may be brought against the state, or an agency or employee of the state, as a result of disclosing or failing to disclose criminal justice information.

(e) As used in this section

(1) "contributing to the delinquency of a minor" means a conviction for a violation or attempted violations of AS 11.51.130(a)(1), (3), or (5); former AS 11.40.130; or the laws of another jurisdiction if the offense would have been a crime in this state under AS 11.51.130(a)(1), (3), or (5) or former AS 11.40.130 if committed in the state;

(2) "interested person" means a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person, that employs or solicits the employment of a person to serve with or without compensation in a position in which the person has or would have supervisory or disciplinary power over a minor;

(3) "sex crime" means a conviction for a violation or attempted violation of AS 11.41.410 — 11.41.470, AS 11.61.110(a)(7), or AS 11.66.100 — 11.66.130; former AS 11.15.120, 11.15.134, or 11.15.160; former AS 11.40.080, 11.40.110, 11.40.130, or 11.40.200 — 11.40.420; or the laws of another jurisdiction if the offense would have been a crime in this state under one of the sections listed in this paragraph if committed in the state. (§ 2 ch 66 SLA 1983; am § 44 ch 6 SLA 1984)

Editor's notes. — This section is set out above to correct a typographical error in the main pamphlet.

Sec. 12.62.070. Definitions. In this chapter

(1) "commission" means the Governor's Commission on the Administration of Justice established under AS 44.19.110 — 44.19.122;

(2) "criminal justice information" means information concerning an individual in a criminal justice information system and indexed under the individual's name, or retrievable by reference to the individual by name or otherwise and which is collected or stored in a criminal justice information system;

(3) "criminal justice information system" means a system, including the equipment, facilities, procedures, agreements, and organizations related to the system funded in whole or in part by the Law Enforcement Assistance Administration, for the collection, processing, or dissemination of criminal justice information;

(4) "intelligence information" means information concerning the background, activities or associations of an individual or group collected or obtained by a law-enforcement agency for preventive, precautionary or general investigative purposes not directly connected with the investigation of a specific crime which has been committed nor with the apprehension of a specific person in connection with the commission of a particular crime;

(5) "interstate systems" means agreements, arrangements and systems for the interstate transmission and exchange of criminal justice information, but does not include record keeping systems in the state maintained or controlled by a state or local agency, or a group of agencies, even if the agency receives information through, or otherwise participates in, systems for the interstate exchange of criminal justice information;

(6) "law enforcement" means any activity relating to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control or reduce crime or to apprehend criminals, activities of criminal prosecution, courts, public defender, corrections, probation or parole authorities;

(7) "law enforcement agency" means a public agency which performs as one of its principal functions activities pertaining to law

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 549
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: Renewal of Teachers' or Administrators' Certificates
Sponsor: HESS Committee
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: DPS Statewide Support
Component: AK Criminal Records & ID

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						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: M.J. Clemens
Division: Administrative Services
Phone: 465-4336
Date: 4/25/90

Approved by Commissioner: J.A.H. for Arthur English
Agency: Department of Public Safety
Date: 4-26-90

This bill repeals Section 4 of HB 52, which passed earlier this session (Chapter 7, SLA 1990). The effect of this is that the Department of Education would no longer be required to request criminal history records checks of persons applying to renew an Alaska teacher's certificate. DOE estimates that there are approximately 2,000 applications for recertification a year.

The fiscal note which accompanied HB 52 (not yet "authorized") allocated 55.4 in inter-agency receipts to DPS. These receipts are to come from fees paid by the applicatns, and will be used to fund one full-time and one part-time Clerk IV to process the criminal history records checks. The 55.4 figure was based on an estimated 4,000 records checks a year (2,000 initial and 2,000 renewals).

Based on the number of certification applications now being received by DOE, it appears that the original estimate of the number of applications for initial certification was too low. It now appears that there will be 3,000 to 4,000 of these a year. In addition, we are finding that it takes longer than initially estimated to perform the research necessary to report only those convictions allowed to be reported. Records from other states show the charge for which a person was convicted, but generally do not indicate whether the charge is a felony or misdemeanor. This requires that DPS staff contact the other state to find out if the conviction was for a felony or a misdemeanor under that state's laws at the time.

Because the estimates of the number of applications for initial certification and required research time was too low, passage of SB 549 would leave DPS at "status quo"--processing approximately 4,000 additional fingerprint cards and criminal history records checks a year.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 549
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Renewal of a teacher's or administrator's certificate
Sponsor: Senate HESS
Requestor: Senate Judiciary

Agency Affected: Education
BRU: Education Finance and Support Services
Components: District Support
Teacher Certification Unit

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						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Mary Hakala
Division: Commissioner's Office
Phone: 465-2800
Date: 4/25/90

Approved by Commissioner: William G. Demmert
Agency: Education
Date: 4/25/90

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

DEPARTMENT OF EDUCATION
April 26, 1990

FISCAL NOTE ANALYSIS
SB 549: Renewal of a teacher's or administrator's certificate

Although the number of background checks processed by the Department of Education would be reduced by enactment of SB 549, program receipt authorization is necessary. This cost is reflected in the two fiscal notes submitted by the Department of Education for HB 52 (Chapter 7, SLA 90). Since these two fiscal notes assume program receipt revenues generated by applicant fees, any excess in budgeted authority will be restricted; only those revenues realized will be available for expenditure in implementing Chapter 7, SLA 90. Therefore the Department is not submitting any revision to these fiscal notes at this time.

S J R

1

Alaska State Legislature

Chairman
(907) 465-4523

Jan Faiks
Post Office Box V
Juneau, Alaska 99811

Senate Judiciary Committee

April 4, 1989

MEMORANDUM

TO: Judiciary Committee Members

FROM: C.S. Christensen
Committee Counsel

SUBJECT: Appropriate state of mind for SJR 1

The question is what state of mind to require for a violation of the open meetings amendment. The state of mind used in CSSJR1 (SA) is "wilful." The state of mind in the proposed Judiciary CS is "intentional."

As has already been noted, the term "wilful" is not specific. In North State Tel. Co., Inc. v. Alaska Public Util. Com'n, 522 P.2d 711 (Alaska 1974), the Alaska Supreme Court stated that the term wilful was not a word of art or a technical term. Instead, it has many different meanings depending on the context in which it is used.

A quick review of the definition of the term found in several law dictionaries shows the various meanings which courts have used, depending on the circumstances. These include behavior that is intentional, knowing, voluntary, stubborn, obstinate, perverse, inflexible, having a bad or evil purpose, or deliberate as opposed to voluntary.

If the committee wishes to pass out a resolution which clearly states what type of behavior is prohibited, then the term wilful should not be used, since the courts will have a tremendous amount of latitude in interpreting the word. Instead, one of the states of mind that is specifically defined in AS 11.81.900 should be used.

"Intentional" behavior is defined in the criminal code.

An application of this definition to SJR 1 would be as follows:

> A person acts "intentionally" when the person's conscious objective is to cause the prohibited result. The prohibited result in this case is to exclude the public from the decision making process.

An alternative state of mind defined in the criminal code that the committee may wish to consider involves "knowing" behavior. An application of this definition to SJR 1 would be as follows:

> A person acts "knowingly" when the person is aware that the conduct is of a certain nature or that certain circumstances exist. In this case, the conduct and circumstances would be holding a discussion, in private.

A simple way to distinguish between these two states of mind is that a person behaves intentionally when the person's purpose is to cause a harmful result (exclude the public from the process), and a person behaves knowingly when the person is aware that circumstances exist that make this harmful result substantially certain to occur.

In either case, the violation would not be limited to the persons who actually planned the meeting, as opposed to those who merely attended it. Any person who intentionally or knowingly participated in a closed meeting would be guilty of the violation.

ıp; a procurer.

a village; a castle.

:r, as in the alteration of a high-ligh § 107.

f single status because of the id. A woman who survives the was married at the time of his affen, 201 NY 205, 94 NE 626.

sband has died and who has not McArthur, 210 Cal 439, 292 P

a woman who has lost her hus-has no application to a divorced / O'Malley, 46 Mont 549, 129

/ which holds that the term, as s, may be applied to a woman ceased husband, although she his death. Re McArthur, 210 . 72 A.L.R. 1318.

n for wrongful death given by ft of a widow for the death of ivested by her subsequent mar-)th § 67.

idow of an insured to the bal-national service life insurance h of the named insured, under n giving the "widow" a prefer-nd sisters of the insured, is not rriage. Riley v United States 2d 692, 44 ALR2d 1132.

term under the Federal Long-rbor Workers' Compensation . Ed 740.

ıre to which a widow is entitled deceased husband, exclusive of

ıgle status because of the death

e statutes of descent, the word an one who has been reduced he ordinary and usual vicissi-one who, by felonious act, has e condition. Perry v Straw-. 108 SW 641.

n allowance made the widow r the laws of some states, for l support.

terest in the estate nor some-her by descent, but is a pre-the estate and is a part of the ration. Grover v Clover, 69

vidow's apparel and the furni-ber, which were given to her ndon. See 4 Bl Comm 518.

ee quarantine.

The widow's third, a widow's

A widow's right of dower.

extent of a highway laterally y prescription, or by the pro-e highway, was established. 5.

indicates that the land upon n the exclusive possession of

wife. A married woman. The spouse of a man. A woman who has a husband living. Names v State, 20 Ind App 168, 50 NE 401.

As the word is used in designating a beneficiary in a will, it is descriptive of the person of a particular individual, and unless there is something in the will indicating the contrary, a gift to the wife of a designated married man is a gift to the person who was his wife at the time when the will was made and not to a wife whom he has subsequently married. See 57 Am J1st Wills § 1385.

As a designation of the beneficiary of life insurance:—descriptio personae, so that the fact that one who otherwise answers the description does not, or did not at the inception of the insurance, have the legal status of wife of the insured does not prevent her from taking as beneficiary, if it is otherwise clear that she is the person intended, assuming that she is eligible to designation as beneficiary and that the misdescription of her as "wife" does not amount to a breach of warranty or misrepresentation avoiding the insurance. 29A Am J Rev ed Ins § 1660.

wife and children. Sometimes a designation of beneficiaries of a life insurance policy.

While some courts hold that a policy payable to the wife of the insured and "their children" includes children by another wife, the prevailing view is that the beneficiaries are limited to children common to both. 29A Am J Rev ed Ins § 1658.

wife-beating. See whipping wife.

wife's equity to a settlement. See equity for a settlement.

wife's right of survivorship. The title of a surviving wife at common law, arising upon the death of her husband, to choses in action which belonged to her at the time of the marriage or came to her during coverture, and were not reduced to possession by the husband. 26 Am J1st H & W § 59.

wife's separate equitable estate. See separate estate of wife.

wife's separate estate. See separate estate of wife.

wife's society. See society of wife.

Wigglesworth Mortality Table. A life expectancy table once recognized as standard. 29 Am J2d Ev § 895.

wild animal. An animal ferae naturae; an animal wild by nature. 4 Am J2d Ani § 2. An animal such as a deer in the forest, a quail in the air, or a fish in public waters. Fleet v Hegeman (NY) 14 Wend 42, 45.

wild beast test. The test of insanity, as a defense in a criminal case, according to whether or not the defendant was wholly deprived of understanding and memory. Anno: 44 ALR 584.

wildcat engine. A railroad locomotive running "wild"; that is, without an engineer or other attendant. Mars v Delaware & Hudson Canal Co. (Sup) 8 NYS 104, 105.

wildcat leases. Oil and gas leases secured on lands situated in undeveloped territory in the hope that oil or gas will be found there. Germer v Donaldson (CA3 Pa) 18 F2d 697.

wildcat strike. A strike of laborers not authorized by the union which represents them.

wild fowl. Birds wild by nature, especially game birds such as ducks, geese, or pheasants. 4 Am J2d Ani § 2.

wild grass. A grass plant growing without cultivation, valuable in use for forage.

wild land. Land in a state of nature, never having been cultivated. Conner v Shepherd, 15 Mass 164.

Wild's Case. See first resolution in Wild's Case; second resolution in Wild's Case.

wild train. A railroad train which is run as an extra train or without any reference to the regular schedule time. Larson v St. Paul, Minneapolis & Manitoba Railway Co. 43 Minn 423, 424, 45 NW 722.

See wildcat engine.

wild well. An oil or gas well that is producing oil or gas but which has not been brought under control so that the product can be captured for use.

wilful. A word of several meanings, the meaning in the particular case often being influenced by the context. Spies v United States, 317 US 492, 87 L Ed 418, 63 S Ct 364. Voluntary, as distinguished from accidental. 21 Am J2d Crim L § 87. Intentional or deliberate, yet not necessarily with an evil purpose in mind. Fulton v Wilmington Star Mining Co. (CA7 Ill) 133 F 193; Kite v Hamblen, 192 Tenn 643, 241 SW2d 601. Stubborn, obstinate, perverse. United States v Murdock, 290 US 389, 78 L Ed 381, 54 S Ct 223. Inflexible. Refractory. Wick v Gunn, 66 Okla 316, 169 P 1087, 4 ALR 107. Intentional and with a bad purpose. State v Clifton, 152 NC 800, 67 SE 751. Having a bad purpose, evil intent, or legal malice. Caldwell v State, 55 Tex Crim 164, 115 SW 597.

The word wilful as used in a statute which denies compensation to an employee for an injury sustained when due to a wilful failure or refusal to perform a duty required by statute imports, not only the mere exercise of the will in failing to comply with the statute, but also an intention to do an act that he knows, or ought to know, is wrongful or forbidden by law, and involves the idea of premeditation and determination to do such act. 58 Am J1st Workm Comp § 203.

It has been said that "wilfulness", as used in the Federal internal revenue statutes imposing criminal penalties, includes some element of evil motive and want of justification in view of the financial circumstances of the taxpayer, and as used in statutes imposing civil penalties it may, while often connoting a bad purpose, be used to characterize an act which is intentional, or knowing, or voluntary, as distinguished from accidental. Paddock v Siemonet, 147 Tex 571, 218 SW2d 428, 7 ALR2d 1062.

wilful act. An act done intentionally, or on purpose, and not accidentally. Leicester v Hoadley, 66 Kan 172, 71 P 318.

See wilful.

wilful and malicious act. See malicious act; wilful act.

wilful and malicious injury. An injury to property inflicted intentionally and in disregard of duty. Re Dixon (DC NY) 21 F2d 565. Within the meaning of the exception of certain liabilities from discharge in bankruptcy: injury to person or property inflicted intentionally and deliberately without cause or excuse and with no regard for the legal rights of the injured one. An injury inflicted by an act against good morals and wrongful in itself, committed with indifference to the safety of the injured person, and without just cause or excuse. Anno: 13 ALR2d 170; 9 Am J2d Bankr § 786.

A misappropriation of partnership funds by a

intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons.

Living will. A living will is a short document that basically states: "If the situation should arise in which there is not reasonable expectation of my recovery from physical or mental disability, I request that I be allowed to die and not be kept alive by artificial means or heroic measures." A living will is not considered a legal document in the majority of states.

Mutual and reciprocal will. See *Joint and mutual will, supra;* also *Mutual will, infra.*

Mutual will. One in which two or more persons make mutual or reciprocal provisions in favor of each other. "Mutual wills" are the separate wills of two persons which are reciprocal in their provisions, and such a will may be both joint and mutual. Sometimes called a "reciprocal," "double," or "counter" will. See also *Joint and mutual will,* above.

Mystic will. See Testament.

Non-intervention will. In some jurisdictions, one authorizing the executor to act without bond and to manage, control, and settle the estate without the intervention of any court whatsoever.

Nuncupative will. See that title.

Reciprocal will. One in which two or more persons make mutual or reciprocal provisions in favor of each other. Also known as a "mutual," "double," or "counter" will. See *Joint and mutual will; Mutual will, supra.*

Renunciation of will. See Renunciation.

Self-proved wills. A will which eliminates some of the formalities of proof by execution in compliance with statute. It is made self-proved by affidavit of attesting witnesses in the form prescribed by statute. Most statutes provide that, unless contested, such a will may be admitted to probate without testimony of subscribing witnesses. See *e.g.* Uniform Probate Code, § 2–504.

Statute of will. See Wills Act, *infra.*

Unofficious will. In the civil law, *testamentum inofficium.* One made in disregard of natural obligations as to inheritance. 2 Bl.Comm. 502. It has no place in the common law.

Criminal Law

The power of the mind which directs the action of a man. See Intent; Motive; Willful and wanton act.

Willa /wílə/. In Hindu law, the relation between a master or patron and his freedman, and the relation between two persons who had made a reciprocal testamentary contract.

Will contest. A proceeding sui generis, a suit in rem, having for its purpose determination of questions of construction of will or whether there is or is not a will. McCrary v. Michael, 233 Mo.App. 797, 109 S.W.2d 50, 51. Any kind of litigated controversy concerning the eligibility of an instrument to probate as distinguished from validity of the contents of the will. In re Hesse's Estate, 62 Ariz. 273, 157 P.2d 347, 349. Will contests are commonly governed by state statutes; *e.g.* Uniform Probate Code § 3–407, burden of proof.

Willful. Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Willful is a word of many meanings, its construction often influenced by its context. Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. United States v. Murdock, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381.

Whatever the grade of the offense the presence of the word "willful" in the definition will carry with it the implication that for guilt the act must have been done willingly rather than under compulsion and, if something is required to be done by statute, the implication that a punishable omission must be by one having the ability and means to perform. In re Trombley, 31 Cal.2d 801, 807, 193 P.2d 734, 739.

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

Willful and malicious injury. For such to exist there must be an intent to commit a wrong either through actual malice or from which malice will be implied. Such an injury does not necessarily involve hatred or ill will, as a state of mind, but arises from intentional wrong committed without just cause or excuse. In re Wernecke, D.C. N.Y., 1 F.Supp. 127, 168. It may involve merely a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally.

Willful and wanton act. In order to constitute "willful and wanton" misconduct, act or omission must be not only negligent, but exhibit conscious disregard for safety of others. Turner v. Commonwealth Edison Co., 35 Ill.App.3d 331, 341 N.E.2d 488, 493.

Willful and wanton
act producing inju
intentionally comm
stances evincing r
son injured

Willful indifference t
intentional lack of
others, or an inte
knowledge that se
People v. Murray,
391.

Willfully and knowin
knowingly when th
the nature of the

Willful misconduct o
pensation Acts, p
more than mere r
intentional doing of
is likely to result in
disregard of its pro
conduct" disqualif
compensation invol
gard of employer's
rules, (3) disregard
employer can right
(4) negligence whic
intent, evil design,
regard for employ
duties and obligatic
ment Compensation
314, 225 A.2d 500,

Willful murder. The
another without exc
See also Murder; P

Willful neglect. The i
manifest duty, in the
or the person injure
Willful neglect su
known negligence—
Puget Sound Painte
P.2d 302, 303. Wit
that is intentional, c
or excuse. In re Ac
S.W.2d 360, 363.

Willful negligence. Se

Willfulness. See Willf

Willful or wanton misc
nary care to prevent
ly known to be or r
the range of a dang
Power Co. v. Deese,
728. Conduct which
ted under circumsta
gard for the safety c
knowledge of an im
nary care to preven
dangers through rec
could have been dis
nary care. Lewandc
335 N.E.2d 572, 574
gence, differing in c
ordinary lack of ca

Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

sion of law defining an offense when his *conscious objective is to cause that result;* [Emphasis added.]

In the Commentary to AS 11.81.900(a)(1), the legislature indicated:

> When a statute in the Code provides that a defendant must intentionally cause a result, *the state must prove that it was the defendant's conscious objective to cause that result.* This culpable mental state is comparable to the existing form of culpability commonly referred to as "specific intent." Bribery, for example, requires that the defendant confer a benefit upon a public servant with intent to influence him; *the state must prove that it was the conscious objective of the defendant to cause the public servant to be influenced.*

Commentary on the Alaska Revised Criminal Code, Senate J. Supp. No. 47, at 140–41, 1978 Senate J. (emphasis added). When we read the strict definition of intentionally into the attempt statute, we conclude that for the state to prove the crime of attempted murder it must show that the defendant intended to commit the crime of murder in the sense that the defendant must intend to kill. He must intend to commit *that* crime —murder.

[4–6] When we apply that analysis to the instructions which were given in this case, we believe that it is clear that Huitt's conviction for attempted second-degree murder was not proper. Judge Schulz charged the jury that:

> Murder in the Second Degree is defined, in pertinent part, in AS 11.41.-110(a)(1) as follows:
>
> (a) A person commits the crime of Murder in the Second Degree if (1) ... knowing that his conduct is substantially certain to cause death or serious physical injury to another person, he causes the death of any person.

Under those instructions the jurors could convict Huitt of attempted second-degree murder if they merely found that Huitt performed certain acts knowing that his conduct was substantially certain to cause serious physical injury to another person. This flaw in the instructions alone would require a reversal of Huitt's conviction. *See People v. Harris,* 72 Ill.2d 16, 17 Ill. Dec. 838, 841–843, 377 N.E.2d 28, 31–33 (1978). In our view the only substantial question is whether a person can be convicted of attempted second-degree murder if he acted "knowing that his conduct was substantially certain to cause death."[3] However, given our interpretation of the revised code that to be convicted of attempted murder a person must intend to kill, we conclude that Huitt cannot be convicted of attempted second-degree murder even under this section of the second-degree murder statute.[4] A defendant who

3. At common law intent-to-kill murders included those situations where the defendant either subjectively intended death, or performed an act or acts which he knew were substantially certain to result in death. W. LaFave & A. Scott, *Criminal Law,* § 68 at 535 (1972). But as LaFave points out:

> [T]he modern view is to limit "intent" to instances where it is the actor's purpose to cause the harmful result, and the word "knowledge" is used to cover instances where the actor knows that the harmful result is substantially certain to occur. In a criminal code utilizing such definitions, what is here called intent-to-kill murder may be described as intentionally or knowingly killing another.

Id. at 535 n. 3. The "modern view" has been adopted in Alaska. *See* AS 11.81.900(a)(1) defining intent and AS 11.81.900(a)(2) defining knowledge.

4. We note that the language of former AS 11.31.-100 may be indicative of the legislature's original intent to apply criminal attempt to second-degree murder.

Former AS 11.31.100(d)(1) provides:

> (d) An attempt is a
>
> (1) class A felony if the crime attempted is *murder in any degree* or kidnapping. [Emphasis added.]

This would in fact have been compatible with the definition of "intentionally" proposed in the Tentative Draft to the Revised Code which reads in pertinent part:

> *Definitions.* (a) For purposes of this title, unless the context otherwise requires,
>
> (1) a person acts "intentionally" with respect to a *result or to conduct* described by a provision of law defining an offense when his conscious objective is to cause that result or to engage in the conduct;

Alaska Criminal Code Revision Part II, at 5 (Tent. Draft 1977) (Commentary to AS 11.11.-

Patrick M. Rodey
Senator

Alaska State Legislature

Senate

311 C. St., Suite 510
Anchorage, Alaska 99503
(907) 561-7618

During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

March 13, 1989

TO : Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Pat Rodey

RE : CSSJR 1 (State Affairs) - proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

This will confirm my recommendation to propose a committee substitute for the above-referenced resolution.

Attached is a copy of the memo which addresses the proposal to change the work "wilful" to "intentional" (page 1, line 21). I have discussed this change with the sponsor, Senator Sturgulewski, and it meets with her approval.

In an effort to expedite discussion of this resolution, I respectfully request that it be scheduled for committee consideration as soon as possible.

Attachment

COMMITTEE FOR AN OPEN LEGISLATURE
c/o League of Women Voters of Alaska, 3605 Arctic Blvd., Suite 797, Anchorage, AK 99503

March 13, 1989

Sen. Tim Kelly
Senate President
Rep. Sam Cotten
Speaker of the House
Members, 16th Alaska Legislature
Box V
Juneau, AK 99811

Dear Sen. Kelly, Rep. Cotten, Legislators:

As you know, the Committee for an Open Legislature has been aggressively pursuing an amendment to the state constitution that would require all substantive business of the legislature to be conducted publicly. The Committee, which includes the Alaska Public Interest Research Group; the League of Women Voters of Alaska; the Alaska Press Club and the Anchorage Daily News is far more broadly representative than some have asserted. Not only do we want to correct any false impressions you may have about the participants in this effort, but we also want to clarify our escalating problems with HJR 1 and SJR 1.

As we expressed during our testimony to the House and Senate State Affairs committees, we have extreme reservations about anything that does not make a good faith attempt to embrace the substantive activities of sub-committees and, if somehow possible, of "ad hoc" groups of influential leaders (such as the leadership of either body).

We are also extremely concerned at the move to eliminate the public interest provisions for attorneys' fees contained in the companion legislation. And finally, we believe that the most meaningful enforcement mechanism is to maintain the option of judicial voidability. Otherwise, the public, even when found to have been truly wronged by a violation, will have no recourse to undo the damage. We believe that the court is the appropriate place to determine whether or not voiding the relevant action is the proper remedy.

We have taken no position on the feature of ensuring government representation for legislators. However, the notion that legislators should be financially shielded from costs of representation while at the same time taking away the public interest provisions for attorneys' fees in meritorious public interest suits is unacceptable. Further, it tips the balance unfairly against the citizens whose rights these measures are designed to protect. The idea that lawsuit upon lawsuit will be filed is just not supported by the historical facts. Few lawsuits have been filed against any governing bodies since the Open Meetings Act was adopted and further, there is already provision for the dismissal of frivolous suits.

We are generally sympathetic to your concerns about how the amendment would apply to sub-committees (especially those with four or fewer members where two members meeting randomly would constitute a quorum). But first and foremost we are defending the public's right of access. We maintain that it is appropriate to explicitly provide, within the resolution, for meaningful one-on-one discussions while still clearly including sub-committees otherwise. Remember, we are not seeking major changes in notice requirements. We are only expecting that the meetings be adequately noticed locally (within the capitol) and that they be open to anyone who wants to attend. That seems neither onerous nor unreasonable.

It is important to remember a fundamental point. Until the question was raised through the League of Women Voters of Alaska/Anchorage Daily News lawsuit, there was universal assumption by the public that the current Open Meetings statute applied fully to the legislature. The fact that the law proved not to be enforceable against the legislature does not change the long-standing public perception that you should be conducting the public's business in public. The public expects you to be providing a constitutional equivalent of the statute that will eliminate the problem of its non-justiciability. We do not expect you to be offering anything less.

The resolutions in their current form are a far cry from the clear treatment found in the statute. They appear to provide constitutional protection for the abuses which have lead to the visibility of this issue. The Committee will continue its efforts to achieve a meaningful amendment and to respond to the separate actions of the legislature. However, we view legislative "progress" at this point as negative, not positive. Current language retreats substantially from the strong and positive effort undertaken by Rep. Kay Brown and Sen. Arliss Sturgulewski during the 1988 session.

We sincerely hope that HJR 1 and SJR 1 can be revamped to include the important provisions cited above. To that end and to the principle of keeping "the public's business public," we pledge to work cooperatively with you.

Sincerely,

Jeff Bohman, Exec. Director
Alaska Public Interest
Research Group

Jeff Bohman

Carol Murkowski Sturgulewski
Pres., Alaska Press Club

Carol J. Murkowski Sturgulewski

Cheryl D. Anderson
League of Women Voters
of Alaska

Cheryl D. Anderson

Rosemary Shinohara
Anchorage Daily News

Rosemary Shinohara

Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

Moreover, the chairman of the Commission stated at the outset of the hearing:

> "The Commission's opening case will be presented by Mr. Louis Agi, Assistant Attorney General and legal counsel for Alaska Public Utilities Commission. To the extent of any contested factual issues that will develop in this hearing, the *burden* will be on the Commission to establish its contentions unless otherwise indicated." [Emphasis added]

To us the real issue is who, in fact, had the burden, not the nature of the order to show cause.

As to what constitutes "good cause" to revoke a certificate, the Alaska Public Utilities Commission Act provides in AS 42.05.271

> ". . . . Good cause for amendment, modification, suspension or revocation of a certificate includes. . . .
>
> (4) wilful failure to comply with the provision of this chapter or the rules, regulations or orders of the commission;
>
> (5) wilful failure to comply with a term, condition, or limitation of the certificate."

The Commission found North State in wilful violation of the conditions of the certificate under the following definition:

> "These circumstances also establish the basis for a finding that the failure was "wilful" under AS 42.05.271(4) and (5), which the commission *construes as requiring only a showing that the failure to comply was with knowledge of the consequences of such failure.* [Emphasis added]

North State argues that by adopting this construction, a "presumption of wilfullness" was established merely by a showing that there was a failure and knowledge that sanctions would follow. Thus, it maintains that "the burden of attempting to justify its conduct was then shifted to the utility."

North State also buttresses this by various references to the Commission's discussion of the failure to show such justification.

> "The Commission is of the opinion that North State *has not demonstrated* a quality of management and performance under regulations sufficient to overcome its responsibility for failure to provide service as required under the Order Granting Certificate. [Emphasis added]. *North State has not presented* sufficient excuse to be released from failure to comply with ordering paragraph (2) of the Order Granting Certificate. [Emphasis added]
>
> Any failure by North State to introduce evidence of immediate and substantial exchange need may be properly considered against it at this point."

North State neglects to state, however, that the Commission's definition of "wilful" was followed by a statement that the Commission would waive noncompliance if there were "sufficient excuse for non-compliance" and that "an excuse will be acceptable if based on factors beyond the control or responsibility of the party seeking relief". The Commission went on to add that such discretionary determinations as to "control" or "responsibility" were to be made in "accordance with the standard of conduct expected of a reasonably prudent businessman under similar conditions", the "quality of performance under regulation", and the "public interest". And the three quotations cited by North State merely refer to the fact that North State had failed in its attempt to "demonstrate" or "present" evidence on the issues, not that it carried the ultimate burden of doing so.

Thus, the Commission was not saying that North State suffered the burden of showing justification but was simply stating what it would consider as a justification so as to make the failure "excusable". In this regard, it seems to have been well within the accepted meaning of "wilful" in interpreting administrative statutes. The term itself is not a "word of art" or a "technical term". It has many different

meanings, depending upon the context in which it is used. In Spies v. United States, 317 U.S. 492, 497–498, 63 S.Ct. 364, 367, 87 L.Ed. 418, 422 (1943), the U. S. Supreme Court stated:

> "Willful, as we have said, is a word of many meanings, its construction often being influenced by its context."

In Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961), the court stated:

> "We think it clear that if a person (1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or (2) *acts with careless disregard* of statutory requirements, the violation is wilful."

In holding that the actions of petitioner in violating the Commodities Exchange Act by failing to file some required reports and holding a speculative position in futures in excess of a prescribed maximum were "wilful", and thus deserved sanction by the Department of Agriculture, the *Goodman* court rejected petitioner's argument that he did not know the reports had not been filed and that he had incorrect information from a broker. The court went on to say:

> "The *responsibility* for making the reports was on the petitioner. Admittedly, he made no effort to determine whether the reports were being filed. It is immaterial whether a mistake was made by the secretary. The fact is, the reports were not made, and it was the *responsibility of the petitioner* that the regulations be carried out." [Emphasis added]

A similar definition of "wilful failure" was adopted in Union Transfer Co. v. Beeline Motor Freight, 150 Neb. 280, 34 N.W.2d 363 (1948), in holding that a carrier's failure to provide service to a certain route over three years was "wilful failure" even though the carrier maintained that it was owing to a lack of personnel, equipment and business.

> "The word 'willful' like many other words in our language has varied meanings which are dependent upon the nature of the subject under discussion. The word often denotes an act which is voluntary, knowingly or permissively done as distinguished from one which is accidental or otherwise beyond the control of the person to be charged. The general notion that a willful act implies a bad purpose is derived from criminal statutes. It has no such meaning when used in a statute to denounce an act not in itself wrong. 'Willful failure' as used in Section 75–238, R.S.1943, is such behavior through acts of commission *or omission* which justifies a belief that there was an intent entering into and characterizing the failure complained of. *A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform.* . . . The willful failure or refusal of a carrier to obtain permission from the railway commission to discontinue in whole or in part the service authorized under a certificate of convenience and necessity constitutes sufficient grounds to suspend, change, or revoke the certificate under general rules adopted by the railway commission." [Emphasis added]

[6] At the outset of the hearing, the Commission clearly stated that the burden of proof was to be on it. Contrary to North State's contention, the Commission's definition of "wilful" in finding that there was a "wilful failure" to meet the condition in the certificate, i. e., "good cause", did not shift the burden of justification to North State. The concept of wilfulness, i. e., failure to meet responsibility and exercise control, which was utilized by the Commission is in accordance with case law. Goodman v. Benson, *supra*; Union Transfer Co. v. Beeline Motor Freight, *supra*. Rather than stating that North State had the duty of proving justification for the failure, the Commission was merely delineating the nature of what would be reasonable justification, so as to render a failure to meet the condition non-wilful and, thus, the nature of the case that had to be made out by the evidence. We find no error.

Stanley NEITZEL, Appellant,

v.

STATE of Alaska, Appellee.

No. 6243.

Court of Appeals of Alaska.

Nov. 19, 1982.

Defendant was convicted in the Superior Court, Third Judicial District, Seaborn J. Buckalew, Jr., J., of second-degree murder, and he appealed. The Court of Appeals, Singleton, J., held that: (1) intoxication was not a defense to second-degree murder; (2) insofar as second-degree murder statute precluded consideration of intoxication in determining recklessness, it was not so irrational as to violate due process; (3) reckless murder was sufficiently distinguished from reckless manslaughter to satisfy equal protection; and (4) any error arising from trial court's failure to instruct on diminished capacity was harmless beyond a reasonable doubt.

Affirmed.

1. Homicide ⇐9, 28

Word "intentionally," as used in statute providing that to be guilty of second-degree murder defendant must intentionally perform an act, does not mean intent to cause a result; rather, it means knowingly; therefore, intoxication is not a defense to second-degree murder. AS 11.41.110(a)(2), 11.81.900(a)(2).

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

2. Homicide ⇐23(1)

Second-degree murder statute requires that the actor must knowingly engage in conduct causing the death of another which in light of the circumstances is reckless to the point that it manifests an extreme indifference to the value of human life. AS 11.41.110(a)(2).

3. Homicide ⇐23(1)

To be guilty of second-degree murder, defendant had to know he was firing a gun and being reckless regarding the circumstances, i.e., the location of the victim, her vulnerability, the direction in which he was shooting, and the result, i.e., her death. AS 11.41.110(a)(2).

4. Homicide ⇐74

Recklessness regarding the consequences is the required culpable mental state for reckless murder. AS 11.41.110(a)(2).

5. Constitutional Law ⇐258(3)
Homicide ⇐8

Insofar as second-degree murder statute precludes consideration of intoxication in determining recklessness, it is not so irrational as to violate due process. AS 11.41.110(a)(2); U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law ⇐250.1(2)

Reckless murder is sufficiently distinguished from reckless manslaughter to satisfy equal protection. AS 11.41.110(a)(2); U.S.C.A. Const.Amends. 5, 14.

7. Criminal Law ⇐1173.2(3)

In prosecution in which defendant was convicted of second-degree murder, any error arising from trial court's failure to instruct on diminished capacity was harmless beyond reasonable doubt. AS 11.41.110(a)(2).

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

William H. Hawley, and Elizabeth Sheley, Asst. Attys. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

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

OPINION

SINGLETON, Judge.

Stanley Neitzel shot his girlfriend, Irene Reedy, in the head causing her death. The

undisputed evidence establishes that Neitzel fired a number of shots directly at Reedy while she sat on the ground. Many of these earlier bullets struck the ground within an inch of Ms. Reedy before the fatal shot entered her head. Eyewitnesses were unsure of whether Neitzel fired at Reedy to discipline her for drinking vodka which belonged to him, to frighten her, to demonstrate his marksmanship by seeing how close he could come without hitting her, or to just have fun with his rifle. Neitzel denied any recollection of the incident. Two hours after the shooting his blood alcohol level was .15%. The state offered expert testimony suggesting that Neitzel's blood alcohol level could have been as high as .18% at the time of the crime. Neitzel was convicted of second degree murder in violation of AS 11.41.110(a)(2), which provides in relevant part:

> *Murder in the Second Degree.* (a) A person commits the crime of murder in the second degree if
>
> ....
>
> (2) he intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life ....

The trial court held that this statute did not require a specific intent and consequently Neitzel's intoxication at the time of Reedy's death was not a defense. Neitzel raises a number of objections in his appeal, but it is clear that these objections simply restate the propositions that he could only be convicted if (1) he intended to shoot *at Reedy*, and (2) he was reckless in evaluating the circumstances, *i.e.*, knew that shooting at Reedy endangered her life. According to the first prong of Neitzel's argument, he was entitled to an instruction that required the jury to consider his intoxication in determining whether he intended to shoot at Reedy. The trial court instructed the jury that intoxication was not a defense. According to the second prong of his argument, he was entitled to an instruction telling the jury that he personally must have known of the danger to Reedy before he could be convicted. In other words, a jury determination that the reasonably prudent person similarly situated would have been aware of the risk to Reedy was insufficient for conviction. We reject the first prong of Neitzel's argument but accept in part the second prong. We determine, nevertheless, that any error was harmless beyond reasonable doubt and therefore affirm the decision of the trial court.

To be guilty of second degree murder, the defendant must *inter alia* "intentionally" perform an act, such as intentionally shooting a gun. AS 11.81.900 provides in relevant part:

> (a) for purposes of this title, unless the context requires otherwise,
>
> (1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when his conscious objective is to cause that result ....

[1] After carefully reviewing the code and considering the history of its enactment, we are convinced that the word "intentionally" in AS 11.41.110(a)(2) was not used "with respect to a result" and therefore was not governed by AS 11.81.900(a)(1). We conclude it should be given the meaning assigned to "knowingly" in the code definitions. "Knowingly" is defined as follows:

> [A] person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when he is aware that his conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist; a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance
>
> ....

AS 11.81.900(a)(2).

In order to understand the legislature's intentions in enacting AS 11.41.110(a)(2), it

is necessary to briefly trace the evolution of what can best be described as reckless murder through the common law, the Model Penal Code, upon which our current statutes are modeled, the tentative draft prepared by the Alaska Code Revision Commission, Subcommission on Criminal Law (hereafter referred to as the Tentative Draft), and the Alaska Revised Criminal Code ultimately enacted by the legislature (hereafter referred to as the Revised Code). When such a study is completed, we believe the legislature's intent is clear.

At common law, murder was homicide committed with "malice aforethought." R. Perkins, *Criminal Law* § 1, at 34 (2d ed. 1969). "Aforethought" suggests planning but this term fell into disuse leaving "malice" the significant term differentiating murder from other forms of culpable homicide. *Id.* at 34–35. Malice was primarily defined to mean an intent to kill in the absence of (1) justification, (2) excuse, or (3) mitigation. *Id.* at 35.

This definition was subject to an exception which is central to the issue before us. Common law courts permitted a jury to find malice in the absence of a specific intent to kill where "in the absence of any circumstance of exculpation or mitigation an act [was] done with such heedless disregard of a harmful result, foreseen as a likely possibility, that it differs little in the scale of moral blameworthiness from an actual intent to cause such harm." *Id.* at 768. To distinguish such a crime from intentional murder, it is useful to call it "reckless murder," and to distinguish its *mens rea* from an intent to kill by calling it "constructive malice."

Typical examples of this kind of murder are: shooting, regardless of the consequences, into a home, room, train, or automobile in which others are known to be or might be. *Id.* at 36. Perkins calls the mental state accompanying such an act "a man-endangering-state-of-mind." *Id.* at 759.

The Tentative Draft prepared by the Subcommission on Criminal Law was based on a number of recent state codifications of criminal law. These codes in turn were substantially derived from the New York Revised Penal Code of 1965 which was based on the Model Penal Code.

A number of common law concepts underwent substantial modification in the American Law Institute's Model Penal Code (proposed official draft) which was published in 1962 (hereafter referred to as Model Penal Code). The Model Penal Code in turn underwent modification in the enactment of the New York Penal Code of 1965, at the hands of the Subcommission on Criminal Law which published its Tentative Draft in 1977, in the Revised Code enacted in 1978, and in the additional amendments added to our code in 1980. Nevertheless, the Model Penal Code is the foundation upon which our code rests and a researcher interested in discovering the meaning of a given Alaskan criminal statute must begin with the Model Penal Code and its comments and follow the evolution of the statute in question through the New York Penal Code of 1965 and the Alaska Tentative Draft to its place in the Revised Code. Having completed such a study, we are satisfied that the legislature intended to retain "reckless murder" essentially as it existed at common law. As always with statutory construction, what the legislature altered, modified, or eliminated from the Model Penal Code is often as important as what was retained. But, in evaluating modifications and comparing corresponding sections, it is wise to remember that the arrangement of sections and subsections sometimes differs between the Model Penal Code and its successors even though the substance remains the same. It is therefore necessary to review the code as a whole to make certain that what appears to be a substantial change in the Revised Code is not merely a minor variation in phrasing.

In this case we must review three Model Penal Code concepts: (1) culpable mental states; (2) the Model Penal Code definition of reckless murder (particularly the differences between reckless murder, as conceived by the drafters of the Model Penal Code, and manslaughter); and (3) finally, the treatment of intoxication as a defense

in the Model Penal Code, the Tentative Draft, and our Revised Code. Such a review will clarify the legislature's intent in defining reckless murder and the part intoxication plays in defending against a charge of reckless murder.

CULPABLE MENTAL STATES

The Model Penal Code provides that with the exception of violations and other strict liability offenses, with which we are not here concerned, a person is not guilty of an offense unless "he acted purposefully, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02. This requirement is also found in the Tentative Draft, proposed AS 11.11.100 and .110, and in the Revised Code, AS 11.81.600 and .610.[1]

The Model Penal Code, the Tentative Draft, and the Revised Code segregate ma-

1. AS 11.81.600 and .610 as originally enacted provided:

Sec. 11.81.600. *General requirements of culpability.*

(a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that

(1) no culpable mental state must be proved with respect to any element of an offense if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability";

(2) no culpable mental state must be proved with respect to a particular element of the offense if an intent to dispense with the culpable mental state requirement for that element clearly appears.

Sec. 11.81.610. *Construction of statutes with respect to culpability.*

(a) When only one culpable mental state appears in a provision of law defining an offense, it is rebuttably presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

(b) Except as provided in § 600(b) of this chapter, if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally. These sections were amended in 1980 to provide:

Sec. 11.81.600. *General requirements of culpability.*

(a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state, except that no culpable mental state must be proved

(1) if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability"; or

(2) if a legislative intent to dispense with the culpable mental state requirement is present.

Sec. 11.81.610. *Construction of statutes with respect to culpability.*

(a) Repealed by § 44 ch 102 SLA 1980.

(b) Except as provided in AS 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

In explaining the amendments to AS 11.81.-600, the responsible legislative committee stated:

terial elements of offenses into three categories: (1) the nature of the conduct; (2) the circumstances surrounding the conduct; and (3) the results of the conduct. The Senate Committee Report which accompanied the enactment of the Revised Code describes these terms as follows:

> The Code distinguishes between three elements of offenses to which the culpable mental states apply
>
> . . . .
>
> The first element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Kidnapping, for example, requires that one person restrain another. The conduct might be the locking of the only door to a windowless room. Knowingly is the culpable mental state applicable to conduct. The second element, circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Kidnapping requires that the person inside the room not consent to being restrained. Lack of consent is an example of a circumstance surrounding the actor's conduct, and is an element of the crime. Knowingly, recklessly, and criminal negligence are the culpable mental states associated with the existence of circumstances. The result of the actor's conduct constitutes the final element. Kidnapping can occur if the victim is exposed to a substantial risk of serious physical injury. Intentionally, recklessly and criminal negligence are the culpable mental states associated with results.

2 Senate Journal Supplement No. 47, at 140 (June 12, 1978). *See* Tentative Draft Part 2, at 14–15 (1977).

The culpable mental states referred to in the Tentative Draft are essentially the same as those mentioned in the Model Penal Code: purposefully, knowingly, recklessly, or negligently. *Compare* Model Penal Code § 2.02 *with* Tentative Draft 11.11.110 (the Tentative Draft substitutes the word "intentionally" for the word "purposefully"). The Tentative Draft defines "intentionally" using almost the same words that the Model Penal Code uses to define "purposefully," except that "purposefully" in the Model Penal Code can relate to the surrounding circumstances while the Tentative Draft restricts "intentionally" to conduct and results. *Compare* Model Penal Code § 2.02(a) *with* Tentative Draft 11.11.140(a)(1), which is substantially identical to New York Penal

> This amendment makes two changes regarding the code's general rules on culpability. The first is to clarify the general rule concerning culpability and to make clear that, with certain specified exceptions, a culpable mental state *must* be proven for every crime. For example, to commit Burglary in the Second Degree the state must establish that the defendant entered or remained unlawfully in a building with intent to commit a crime. The culpable mental state in this case is the intent to commit a crime. If the state establishes a voluntary act by the defendant in entering or remaining in a building, and in addition shows he acted with the intent to commit a crime, the crime of Burglary in the Second Degree has been established.
>
> The second change provides that culpability need not be established if a legislative intent to dispense with the culpability requirement appears. While the decision to eliminate the culpable mental state requirement must comport with constitutional due process guarantees, the courts should be specifically authorized to consider the legislature's intent (and most importantly, the commentary accompanying passage of the code) in determining whether the legislature intended to dispense with the culpability requirement in a particular statute.

2 Senate Journal Supplement No. 44, at 18–19 (May 29, 1980).

The amendment to AS 11.81.610 was explained as follows:

> The second amendment repeals AS 11.81.610(a) which provides that the use of one culpable mental state in a statute rebuttably presumes that the mental state applies to all elements of the crime. This rule is inappropriately broad and ignores the fact that, by definition, particular mental states only apply to particular elements of a crime. For example, "intentionally" only applies to elements of crimes that can be classified as "results" as opposed to "circumstances" or "conduct" to which the culpable mental state "knowingly" applies. Because of the requirement set forth in AS 11.81.600(b) . . . that ordinarily only one culpable mental state is required to be established for each crime, this section is superfluous and misleading.

2 Senate Journal Supplement No. 44, at 28 (May 29, 1980).

These amendments and the state's arguments based upon them will be discussed hereafter.

Code § 15.05(1). "Knowingly" is defined similarly in the Model Penal Code and the Tentative Draft except that the Tentative Draft limits "knowingly" to conduct and circumstances while the Model Penal Code permits "knowingly" to govern a result. *Compare* Model Penal Code § 2.02(2)(b) *with* Tentative Draft 11.11.140(a)(2).

"Recklessly" and "negligently" are defined in essentially the same way in both the Tentative Draft and the Model Penal Code. *Compare* Model Penal Code § 2.02(2)(c) *with* Tentative Draft 11.11.140(a)(3) and Model Penal Code § 2.02(2)(d) *with* Tentative Draft 11.11.140(4). As we shall see, both the Model Penal Code and the Tentative Draft require knowledge of the risk presented by the actor's conduct before he can be found to have acted "recklessly," but both preclude consideration of "intoxication" in determining whether he had the requisite knowledge. *Accord* New York Penal Code § 15.05(3).

The foregoing provisions were incorporated into the Alaska Revised Code with only minor stylistic changes. The code retains from the Tentative Draft the three-fold division of elements of an offense into conduct, surrounding circumstances, and results. It also retains the four culpable mental states: intentionally, knowingly, recklessly, and criminal negligence. Knowingly, recklessly, and criminal negligence are defined as in the Tentative Draft. *Compare* AS 11.81.900(a)(1), (2), and (3) *with* Tentative Draft 11.11.140(a)(1), (2), and (3). The Revised Code, however, limits the scope of the term "intentionally" to govern only results while the Tentative Draft allows "intentionally" to govern conduct and results and the Model Penal Code uses the synonymous term "purposefully" to govern conduct, circumstances, and results. *Compare* Model Penal Code § 2.02(2)(a) *with* Tentative Draft 11.11.140(a)(1) and AS 11.81.900(a)(1).

For our present purposes, the primary difference between the Model Penal Code, the Tentative Draft, and the Revised Code (if we reserve for later discussion their respective treatment of intoxication) lies in the progressive narrowing of the scope of the term "intentionally." With this background we can now undertake an analysis of the code's treatment of "intoxication" as a defense.

INTOXICATION

The Model Penal Code contains the following provision regarding intoxication:

> (1) Except as provided in Subsection (4) of this Section [relating to involuntary intoxication], intoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

Model Penal Code § 2.08. The Tentative Draft is substantially the same. It provides:

> (a) Voluntary intoxication or drug use does not, as such, constitute a defense to a criminal charge, but in a prosecution for an offense, evidence that the defendant used drugs or was intoxicated may be offered whenever it is relevant to negate an element of the crime that requires a culpable mental state.
>
> (b) When recklessness establishes an element of the offense, if the defendant, due to voluntary intoxication or drug use, is unaware of a risk of which he would have been aware had he not been intoxicated or not using drugs, that unawareness is immaterial.

Tentative Draft 11.11.130. The defense is substantially narrowed in the Revised Code. AS 11.81.630 provides in relevant part:

> Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.

Thus, in the Tentative Draft, as in the Model Penal Code, intoxication is relevant

with regard to any offense that requires knowledge or intent as the culpable mental element. Only where the culpable mental element is recklessness do these codes preclude jury consideration of intoxication. It should be noted that the Model Penal Code commentary makes it clear that the rule barring evidence of intoxication is a rule of substantive law, not of evidence. Thus, the drafters of the Model Penal Code recognized that as a matter of evidence intoxication is relevant wherever a mental state including recklessness is an issue. What the drafters have done is resolve, as a matter of policy, to define offenses to exclude consideration of intoxication. The reasons for this decision will be discussed later in connection with Neitzel's contention that such a determination violates due process of law. It is important to recognize that the Revised Code went beyond the Tentative Draft and the Model Penal Code in excluding evidence of intoxication where an offense required that the offender act "knowingly." Thus, under the Revised Code, evidence of intoxication is only admissible where the offense requires that a person act "intentionally" as defined in AS 11.81.-900(a)(1). In conclusion, the Model Penal Code and the Tentative Draft provide that recklessness may be found despite unawareness of a risk where intoxication accounts for the failure to perceive the risk. Model Penal Code § 2.08(2); Tentative Draft 11.-11.130(b). This provision is also found in the Revised Code. AS 11.81.900(a)(3). In addition, the Revised Code provides that "a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance." AS 11.81.900(a)(2). This provision which does not occur in either the Model Penal Code or the Tentative Draft reinforces the modification to what is now AS 11.81.630 in establishing a legislative determination that only intent to cause a result can be negated by evidence of intoxication.

RECKLESS MURDER

We may now proceed to review "constructive malice murder" as it progressed from the Model Penal Code through the Tentative Draft to the Revised Code. Since this form of murder is closely related to manslaughter, it is necessary to discuss that crime as well.

The Model Penal Code and the Tentative Draft establish one offense of murder which can be committed purposefully, knowingly, or, under limited circumstances, recklessly. The Tentative Draft differs from the Model Penal Code in substituting the word "intentionally" for "purposefully." *Compare* Model Penal Code § 210.2 *with* Tentative Draft 11.41.110. The Model Penal Code also differs from the Tentative Draft in requiring that felony murder be committed "recklessly" while the Tentative Draft permits an accidental felony murder. *Compare* Model Penal Code § 210.2(b) *with* Tentative Draft 11.41.110(a)(3). The Tentative Draft also follows the common law in making an act motivated by an intent to cause serious physical injury resulting in death sufficient for murder. Tentative Draft 11.41.110(a)(1). The Model Penal Code apparently treats this as a possible example of reckless murder. Model Penal Code § 210.2(b); A.L.I., *Model Penal Code and Commentaries,* Part II § 210.2, at 28–29 (1980).

The Model Penal Code and the Tentative Draft generally define manslaughter in the same way. *Compare* Model Penal Code § 210.3 *with* Tentative Draft 11.41.110(b) and 11.41.120. They include reckless homicide as well as intentional and knowing homicide where mitigated.

The Revised Code departs from both the Model Penal Code and the Tentative Draft in retaining two degrees of murder. Intentional murder (and inducing suicide) is first degree murder, AS 11.41.100, while homicide resulting from an intent to cause serious physical injury or knowledge that the actor's conduct is substantially certain to cause death or serious physical injury is second degree murder, AS 11.41.110(a)(1). Felony murder is carried over from the Tentative Draft into the Revised Code but

reduced to second degree murder, AS 11.41.110(a)(3).

In addition, the Revised Code contains, with some modifications, the reckless murder provision currently under consideration. The Model Penal Code states that, subject to mitigation to manslaughter, "criminal homicide constitutes murder when [*inter alia*] it is committed recklessly under circumstances manifesting extreme indifference to the value of human life ...." Model Penal Code § 210.2(1)(b). The Tentative Draft states that: "A person commits the crime of murder if ... he recklessly causes the death of another person under circumstances manifesting an extreme indifference to the value of human life ...." Tentative Draft 11.41.110.(a)(2). Finally, the Revised Code states: "A person commits the crime of murder in the second degree if ... he intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life ...." AS 11.41.110(a)(2).

Neitzel and the state both note the slight variation in language between the Model Penal Code and the Tentative Draft on the one hand and the Revised Code on the other. They infer substantial differences in legislative meaning.

Neitzel argues that the legislature intended to require a specific intent to do the act evidencing a "man-endangering-state-of-mind," such as shooting at Ms. Reedy, and that intoxication is relevant to negate this intent. The state counters that the intent mentioned in the murder statute refers to conduct, not to the result, rendering the statutory definition inapplicable. The state further argues that the legislature, in deleting a reference to recklessness regarding the surrounding circumstances, *i.e.*, the presence of Ms. Reedy and her vulnerability, wished an objective standard similar to negligence rather than a recklessness standard to apply to these circumstances.

The state relies primarily on the 1980 amendments to AS 11.81.600 which eliminate the requirement that a culpable mental state must be proved "with respect to each element of the offense" and the requirement that a legislative intent to dispense with a culpable mental state "clearly appear." The legislative history indicates that the legislature expected that most statutes would only require one mental state and that the courts should consider legislative history in determining the meaning of statutes whether the statutes themselves are clear or not. We note, however, that these amendments came two years after enactment of AS 11.41.110(a)(2) which establishes the elements of reckless murder, and consequently cannot be viewed as establishing the legislature's intent in 1978 when the code was originally adopted. *Wright v. State*, 651 P.2d 846 (Alaska App. 1982).

[2] While the positions of the parties are forcefully argued, we reject both. In so doing, we recognize that among the advantages of adopting a Model Penal Code provision is recourse to the commentary which accompanies it. The commentary is frequently an invaluable aid in statutory construction. Further, where identical statutes are adopted in a number of jurisdictions, judicial decisions in each jurisdiction are available to all, and where a common interpretation is given identical statutes, the public interest in certainty and predictability in the laws is advanced. Where, as here, minor modifications are made in the language of a model act, the parties understandably assume that the legislature intended major modifications in meaning. In the instant case, we find that assumption to be unsound and conclude that the legislature intended AS 11.41.110(a)(2) to have the same meaning as Model Penal Code § 210.2(b). In our view, the difference in terminology, *i.e.*, substituting "intentionally" for "recklessly" resulted from an attempt to consistently apply other changes which the legislature made in the scope of such Model Penal Code terms as "intentionally," "knowingly," and "recklessly." As we interpret it, AS 11.41.110(a)(2) requires that the actor must knowingly engage in conduct causing the death of another which in light of the circumstances is reckless to the

point that it manifests an extreme indifference to the value of human life. This is what we understand Model Penal Code § 210.2(1)(b) to mean as well.

We believe the Senate comment to this section, which we will discuss momentarily, viewed in the light of other sections of the Revised Code, compels this conclusion. As mentioned before, the Model Penal Code, the Tentative Draft, and the Revised Code divide elements of offenses into three categories: conduct, surrounding circumstances, and results. Applying this structure to AS 11.41.110(a)(2), we find:

1. *Conduct:* performing an act.
2. *Surrounding Circumstances:* under circumstances manifesting an extreme indifference to the value of human life.
3. *Result:* the death of another person.

It is to these elements that we must apply the culpable mental states described in the code. As we do so, we must bear in mind that the legislature, in enacting the Revised Code, departed from the Model Penal Code and the Tentative Draft in narrowing the scope of those culpable mental states. Thus, "intentionally" applies only to results, AS 11.81.900(a)(1), "knowingly" applies only to conduct and circumstances, AS 11.81.900(a)(2), and "recklessly" applies only to results and circumstances, AS 11.81.900(a)(3). *See* 2 Senate Journal Supplement No. 44, at 28 (May 29, 1980). Further, AS 11.81.610(b) provides:

> Except as provided in AS 11.81.600(b) [relating to violations and strict liability offenses], if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to
>
> (1) conduct is "knowingly"; and
>
> (2) a circumstance or a result is "recklessly."

In light of these provisions, the legislative comment to AS 11.41.110(a)(2) becomes clear:

> Subsection (a)(2) describes conduct that is very similar to the "substantially certain" clause in subsection (a)(1). Under this provision, however, the defendant need not necessarily know that his conduct is substantially certain to cause death or serious physical injury. An example of conduct covered by this provision would be shooting through a tent under circumstances where the defendant did not know a person was inside or persuading a person to play "russian [sic] roulette". The defendant is only required to intend to perform the act; there is no requirement that he intend to cause death or that he know that his conduct is substantially certain to cause death.

2 Senate Journal Supplement No. 47, at 10 (June 12, 1978).

[3] The Tentative Draft allowed "intentionally" to govern conduct as well as results. The Revised Code confines "intentionally" to results leaving conduct to be governed by "knowingly." Apparently overlooking this change in the scope of the culpable mental states, the legislature used the word "intentionally" in AS 11.41.110(a)(2) to govern conduct, *i.e.*, performing the act, when by the definitions adopted by the legislature only "knowingly" can govern conduct.[2] The comment makes it clear that "recklessness" rather than knowledge or intent was to govern the "surrounding circumstances" and "the result." No mental element is specifically established for the result ("death") and the surrounding circumstances ("under circumstances mani-

2. The Tentative Draft provided:

> (a) For purposes of this title, unless the context otherwise requires,
>
> (1) a person acts "intentionally" with respect to a result or to conduct described by a provision of law defining an offense when his conscious objective is to cause that result or to engage in the conduct ....

Tentative Draft 11.11.140.

This provision was based on New York Penal Code § 15.05(1) (1965). The reference to "intentionally" with respect to conduct was deleted when the Revised Code was enacted. *See* AS 11.81.900(a)(1). Thus, AS 11.81.900(a)(1) is distinguishable from the statutes which permit "intentionally" to govern conduct. *See People ex rel. Russel v. District Court*, 521 P.2d 1254, 1256-57 (Colo.1974) (analyzing Colorado Revised Statute 40-3-102(1)(d) (1963)).

festing extreme indifference to the value of human life") in AS 11.41.110(a)(2). Consequently, "recklessly" governs those elements. It is clear that if Neitzel fired at Ms. Reedy intending her death and killed her, he would be guilty of first degree murder, not second degree murder. *See* AS 11.41.100(a)(1). The victim's death is the only result mentioned in AS 11.41.110(a)(2). In conclusion, applying the statutory terminology as defined in the code, to be guilty of second degree murder Neitzel had to know he was firing a gun and be reckless regarding: (1) the circumstances, *i.e.*, the location of Ms. Reedy, her vulnerability, and the direction in which he was shooting; and (2) the result, *i.e.*, her death. Under the Revised Code, intoxication is not relevant in evaluating the culpable mental states of "knowingly," AS 11.81.900(a)(2), or "recklessly," AS 11.81.900(a)(3).

The state concedes that the word "intentionally" modifies conduct and not a result. It nevertheless argues that silence regarding the surrounding circumstances should be construed to establish either strict liability or an objective test similar to criminal negligence. We reject this argument. The Model Penal Code provides in substance that if one mental element is provided for an offense, it applies to all the material elements of the offense in the absence of a contrary purpose. *See* Model Penal Code § 2.02(4). This provision was carried over in the Tentative Draft and the Revised Code (*see* AS 11.81.610(a)), but was repealed in 1980. *See supra* note 1.

[4] AS 11.81.600(b) specifies that strict liability must be expressly designated. Further, in the commentary to AS 11.81.-610, the drafters stated:

> Under subsection (b), if a statute does not specify any culpable mental state, conduct is required to be engaged in "knowingly" and results and circumstances are required to be engaged in "recklessly." "Criminal negligence" will not apply unless the term is expressly included in the statute defining the offense.

2 Senate Journal Supplement No. 47, at 144 (June 12, 1978). Under these circumstances, we conclude that "recklessly" governs the surrounding circumstances and the result in reckless murder.

In addition to his statutory construction arguments, Neitzel objects to this analysis on two grounds. First, he contends that holding an intoxicated person to the same standard as a sober person deprives the intoxicated person of due process of law. He relies upon *Kimoktoak v. State*, 534 P.2d 25, 33–35 (Alaska 1978). Secondly, he contends that reckless murder is insufficiently distinguished from reckless manslaughter so that his conviction deprives him of the equal protection of the law. He relies, *inter alia*, on *Keith v. State*, 612 P.2d 977, 986 n. 31 (Alaska 1980).

Kimoktoak is inapposite. There the court interpreted former AS 11.70.030 to permit evidence of intoxication to negate knowledge where knowledge was an element of an offense. The court relied on cases from California similarly interpreting California Penal Code § 22, which at that time was identical to former AS 11.70.030. The court did not base its holding on the constitution. Current Alaska law expressly precludes this result with regard to offenses established in the Revised Code. *See* AS 11.81.630, .640 and .900(a)(2).

[5] Neitzel does not dispute his ability to know he was firing a gun. The focus of his due process attack is on the claim that he recklessly disregarded the surrounding circumstances. In this regard, the Revised Code follows the Model Penal Code in precluding evidence of intoxication on the issue of recklessness. *See* Model Penal Code § 2.08(2). We do not consider the legislative judgment to preclude consideration of intoxication in determining recklessness so irrational that it violates due process. *Cf. Morgan v. Municipality of Anchorage*, 643 P.2d 691, 692 (Alaska App.1982) (city need not prove that person prosecuted for driving while intoxicated knew his driving was impaired). The commentary to the Model Penal Code sets out the arguments for considering intoxication on the issue of recklessness and then explains its reasons for rejecting those arguments as follows:

> The case thus made is worthy of respect, but there are strong considerations on the other side. We mention first the weight of the prevailing law which here, more clearly than in England, has tended towards a special rule for drunkenness. Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence. These considerations lead us to propose, on balance, that the Code declare that unawareness of a risk of which the actor would have been aware had he been sober be declared immaterial.

A.L.I. Model Penal Code, Tentative Draft No. 9 § 2.08 at 8–9 (1959). We find these considerations persuasive. *Accord State v. Ramos,* 648 P.2d 119, 120–22 (Ariz.1982); *People v. LeGrand,* 61 A.D.2d 815, 402 N.Y.S.2d 209, 211, *cert. denied,* 439 U.S. 835, 99 S.Ct. 117, 58 L.Ed.2d 130 (1978).

Neitzel's equal protection argument is also unfounded. Neitzel argues that reckless murder, as we define it, is conceptually indistinguishable from reckless manslaughter. *See* B. Gegan, *A Case of Depraved Mind Murder,* 49 St. John's L.Rev. 417, 440–50 (1974) (criticizing the comparable New York statute on this ground). If intoxication is held to be a defense to murder but not manslaughter, Neitzel concludes the two offenses are kept separate and the equal protection problem disappears.

[6] We reject this argument because even without allowing intoxication as a defense to murder, the two offenses are sufficiently distinct to avoid equal protection problems. The Revised Code simply follows the Model Penal Code in distinguishing reckless murder from reckless manslaughter. The drafters of the Model Penal Code suggest the following reasons:

> Section 210.2(1)(b) also provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." This provision reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.
>
> Recklessness, as defined in Section 2.02(2)(c), presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness may be found and where it should be assimilated to purpose or knowledge for purposes of grading. Under the Model Code, this judgment must be made in terms of whether the actor's conscious disregard of the risk, given the circumstances of the case, so far departs from acceptable behavior that it constitutes a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Ordinary recklessness in this sense is made sufficient for a conviction of manslaughter under Section 210.3(1)(a). In a prosecution for murder, however, the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provo-

cation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life. Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.

Insofar as Subsection (1)(b) includes within the murder category cases of homicide caused by extreme recklessness, though without purpose to kill, it reflects both the common law and much pre-existing statutory treatment usually cast in terms of conduct evidencing a "depraved heart regardless of human life" or some similar words. Examples usually given include shooting into a crowd or into an occupied house or automobile, though they are not, of course, exhaustive.

Some indication of the content of this concept as a means of differentiating murder and manslaughter may be afforded by prior decisional law. One case involved a game of Russian roulette, where the defendant pointed a revolver loaded with a single cartridge at his friend. The weapon fired on the third try, and the fatal wound resulted. The court affirmed the conviction for murder, despite ample evidence that the defendant had not desired to kill his friend, with the statement that "malice in the sense of a wicked disposition is evidenced by the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others." In another case, the defendant's claimed intention was to shoot over his victim's head in order to scare him. The court held that, even crediting this assertion, the jury could find the defendant guilty of murder on the ground that his act showed "such a reckless disregard for human life as was the equivalent of a specific intent to kill." A third illustration involved a defendant who fired several shots into a house which he knew to be occupied by several persons. The court affirmed his conviction of murder because the defendant's conduct was "imminently dangerous" and "evinced a wicked and depraved mind regardless of human life." Other acts held to show sufficient recklessness to justify a conviction of murder include shooting into a moving automobile and throwing a heavy beer glass at a woman carrying a lighted oil lamp. The Model Code formulation would permit a jury to reach the same conclusion in each of these cases.

A.L.I., *Model Penal Code and Commentaries*, Part II § 210.2, at 21–23 (1980) (footnotes omitted). The commentator concludes:

> Given the Model Code definition of recklessness, the point involved is put adequately and succinctly by asking whether the recklessness rises to the level of "extreme indifference to the value of human life." As has been observed, it seems undesirable to suggest a more specific formulation. The variations referred to above [various formulations from modern codes discussed in the commentary] retain in some instances greater fidelity to the common-law phrasing but they do so at great cost in clarity. Equally obscure are the several attempts to depart from the common law to which reference has been made. The result of these formulations is that the method of defining reckless murder is impaired in its primary purpose of communicating to jurors in ordinary language the task expected of them. The virtue of the Model Penal Code language is that it is a simpler and more direct method by which this function can be performed.

Id. at 25–26 (footnotes omitted).

In conclusion, jurors asked to evaluate conduct resulting in death to determine whether it was negligent, reckless or malicious must weigh four factors:

(1) The social utility of the actor's conduct,

(2) the magnitude of the risk his conduct creates including both the nature of forseeable harm and the likelihood that the conduct will result in that harm;

(3) the actor's knowledge of the risk; and

(4) any precautions the actor takes to minimize the risk.

See G. Fletcher, *Rethinking Criminal Law* § 4.3, at 259–62 (1978) (Homicide by Excessive Risk Taking); W. LaFave and A. Scott, *Handbook on Criminal Law* § 70, at 541–45 (1972) (Depraved-Heart Murder). Under the Revised Code, negligent homicide and reckless manslaughter are satisfied by conduct creating a significant risk of death absent justification or excuse. They differ only in the actor's knowledge of the risk. In differentiating reckless murder from reckless manslaughter, the jury is asked to determine whether the recklessness manifests an extreme indifference to human life. In so doing, it might pay particular attention to the social utility of the defendant's conduct and the precautions he takes to minimize the apparent risks. In evaluating the social utility of the actor's conduct, the jury must of course consider defenses such as provocation, necessity, the defense of self and of others, if supported by the evidence. Shooting at someone, by itself, is devoid of social utility and consequently has been used by the commentators as the paradigm of extreme indifference to human life. Where, however, a gun is fired at an attacking lion in an attempt to rescue the victim and the bullet strikes the victim, the social utility of the conduct may excuse it despite the magnitude of the risk. *Cf. Lee v. State*, 490 P.2d 1206 (Alaska 1971) (a civil case where the victim was shot in the course of her rescue from a lioness; jury absolved defendant of gross negligence, case remanded for trial for ordinary negligence), *overruled on other grounds, Munroe v. City Council*, 545 P.2d 165, 170 n. 11, *modified on rehearing*, 547 P.2d 839 (Alaska 1976).

In addition, the jury may evaluate any precautions taken. Thus, a person may be reckless in the sense that he knowingly engages in conduct which creates a forseeable risk of death and amounts to a gross deviation from the standard of conduct that a reasonable person would observe in the sense that the social utility of his conduct does not warrant exposing another to the risk of death. He may, however, still not manifest an extreme indifference to the life of the person endangered if he takes substantial precautions to minimize the risk.

Finally, and most importantly, the jury must consider the nature and gravity of the risk, including the harm to be foreseen and the likelihood that it will occur. For both murder and manslaughter, the harm to be foreseen is a death. Therefore, the significant distinction is in the likelihood that a death will result from the defendant's act. Where the defendant's act has limited social utility, a very slight though significant and avoidable risk of death may make him guilty of manslaughter if his act causes death. Driving an automobile has some social utility although substantially reduced when the driver is intoxicated. The odds that a legally intoxicated person driving home after the bars close will hit and kill or seriously injure someone may be as low as one chance in a thousand and still qualify for manslaughter. Where murder is charged, however, an act must create a much greater risk that death or serious physical injury will result. This is the point, in the Model Penal Code commentary "that recklessness ... can fairly be assimilated to purpose or knowledge ...."

How likely death must be before murder can be charged is not susceptible to mathematical demonstration. An examination of the classic example given to distinguish murder from manslaughter—Russian roulette—gives some guidance. If a revolver had six chambers in its cylinder and only one contains a bullet and we assume no imperfection in the revolver, then the odds are one in six that a bullet will fall under the hammer when the cylinder is spun and the trigger is pulled. Stated otherwise a participant has a 16.7% chance of being killed or seriously injured and an 83.3% chance of not being killed or seriously injured in a game of Russian Roulette each

time he puts the gun to his temple and pulls the trigger. The act is so dangerous and so lacking in social utility, however, that it demonstrates extreme indifference to human life and serves to distinguish murder from manslaughter.

The commentary to the Model Penal Code suggests that all of these concepts are adequately conveyed to the jury in the single phrase "extreme indifference to the value of human life." We therefore hold that the Revised Code sufficiently distinguishes between reckless murder and reckless manslaughter to satisfy equal protection.[3]

[7] The trial court instructed the jury on second degree murder, manslaughter and negligent homicide. The jury was specifically informed that manslaughter and negligent homicide were lesser included offenses of second degree murder. The court defined recklessness for the jury. It did not tell the jury that murder was a strict liability offense or that negligence regarding the surrounding circumstances was sufficient to establish murder. While the parties debated distinctions between "objective" and "subjective" theories of extreme indifference murder out of the jury's presence in their arguments to the court regarding jury instructions, it does not appear that the instructions actually given the jury differed materially from what we find to be the controlling law. To the extent that the Revised Code would authorize additional instructions differentiating murder from manslaughter in terms of the social utility of Neitzel's conduct measured against the gravity of the risk that Neitzel's conduct presented to Ms. Reedy, a question we do not decide, no such instructions were requested. Neitzel would be hard-put to argue that his conduct had any social utility; his conduct closely approximates the examples frequently used in the common law and in the Model Penal Code to differentiate reckless murder from manslaughter.[4] While we hold that recklessness regarding the consequences was the required culpable mental state for reckless murder, we conclude that the instructions given adequately conveyed that idea to the jury. We find no evidence other than that relating to intoxication which would support an instruction on diminished capacity and, as we have seen, intoxication cannot be considered by the jury in determining the culpable mental states of "knowingly" and "recklessly" under the Revised Code. We therefore conclude that any error in the instructions was

3. Our decision is therefore compatible with *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (Colo.), *appeal dismissed*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977), and *People v. Poplis*, 30 N.Y.2d 85, 330 N.Y.S.2d 365, 281 N.E.2d 167 (1972), which distinguish reckless murder from reckless manslaughter under similar statutes thereby avoiding an equal protection challenge. *People v. Marcy*, 628 P.2d 69, 78–79 (Colo.1981), would support an argument that knowingly engaging in conduct "under circumstances manifesting an extreme indifference to the value of human life," AS 11.41.110(a)(2), is virtually indistinguishable from "knowing that his conduct is substantially certain to cause death or serious physical injury to another person," AS 11.41.110(a)(1). Neitzel does not make this argument and it would do him no good if he did since both subsections constitute second degree murder and intoxication would not be relevant to preclude a finding of the relevant mental state under either. Consequently, we do not decide whether AS 11.41.110(a)(2) reaches conduct which AS 11.41.110(a)(1) does not. We note however that a game of Russian roulette is not substantially certain to cause death or serious physical injury and the legislative report clearly views the two subsections as similar but distinct. *See* 2 Senate Journal Supplement No. 47, at 9–10 (June 12, 1978) (legislative commentary on AS 11.41.110(a)(2)).

Finally, we note that Neitzel does not argue that "extreme indifference" requires more than one potential victim and therefore we do not reach that issue. *See People v. Jones*, 193 Colo. 250, 565 P.2d 1333, *appeal dismissed*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977).

4. The common way to distinguish between two related concepts is to give examples. Most of the examples customarily given of conduct which exhibits "extreme indifference to human life" so closely parallel Neitzel's conduct that they would have been more favorable to the state than the instructions actually given. The United States Supreme Court for this reason rejected a demand for greater clarification on the issue of causation in connection with a prosecution under the similar New York statute. *See Henderson v. Kibbe*, 431 U.S. 145, 156 n. 16, 97 S.Ct. 1730, 1738 n. 16, 52 L.Ed.2d 203, 214 n. 16 (1977).

harmless beyond reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 (1967).

The judgment of the superior court is AFFIRMED.[5]

Joe KOGANALUK, Appellant,

v.

STATE of Alaska, Appellee.

No. 6531.

Court of Appeals of Alaska.

Nov. 26, 1982.

Defendant was convicted in the Superior Court, Second Judicial District, Barrow, Jay Hodges, J., of first-degree sexual assault, and he appealed from the imposition of a ten-year sentence of imprisonment. The Court of Appeals held that defendant's sentence was not excessive despite his contention that the sentence was equivalent to ten-year presumptive term prescribed for second-felony offender committing same class of offense and he was first-felony offender under presumptive sentencing provisions of revised criminal code where his previous convictions, although not the basis for sentencing defendant as a second or third offender, were relevant in determining appropriate sentence and defendant's conduct was among most serious within definition of offense.

Affirmed.

Rape ⇐64

Imposition of sentence of ten years' imprisonment on defendant convicted of first-degree sexual assault was not excessive despite defendant's contention that the sentence was equivalent to presumptive term prescribed for second-felony offender committing the same class of offense while he was first offender under presumptive sentencing provisions of revised criminal code where defendant's previous convictions, although not capable of being considered under sentencing provisions because more than seven years had elapsed since his unconditional discharge, were relevant to determination of sentence and where defendant's conduct was among most serious within definition of offense. AS 11.41.410(a)(1), 12.55.155(c)(5, 10).

Paul Canarsky, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Randy M. Olsen, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

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

5. We recognize that the state obtained a protective order against testimony of "diminished capacity" and that Neitzel in his discussions with the court mentioned that he had suffered prior head injuries, alcohol blackouts, and had been treated for mental illness. The record reflects however that the defense explored the possibility of an insanity defense and one based on involuntary intoxication and rejected them. Neitzel's argument to the trial court and to this court has been phrased in terms of intoxication as the factor which established his diminished capacity. When the issue of Post-Traumatic Syndrome was broached by Neitzel, the court indicated that it did not understand what evidence Neitzel intended to offer and Neitzel did not elaborate further. Under these circumstances we cannot find that Neitzel has sustained the burden he bears, under Alaska Rule of Evidence 103(b), of offering evidence which, if believed, would raise a reasonable doubt whether Neitzel's mental health was such that even if sober he would not have appreciated the risk his conduct posed to Ms. Reedy.

Our disposition of this appeal would not, however, preclude Neitzel from bringing a motion pursuant to Criminal Rule 35(c) and attempting to show that he was in possession of evidence of diminished capacity unrelated to intoxication, but failed to offer it in reasonable reliance on the trial court's prior rulings. Such a showing might warrant a new trial.

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Senate President Pro Tempore
Chairman, Senate Rules Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

M E M O R A N D U M February 17, 1989

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Arliss Sturgulewski, Chair
Senate Rules Committee

RE: CSSJR 1 (State Affairs) Proposing an amendment to the Constitution of State of Alaska relating to open meetings.

Thank you for your work on SJR 1 in the State Affairs Committee and your commitment to move the resolution through the Judiciary Committee. I have attached back up material to this memo which you may find helpful.

1 - a copy of CSSJR 1 (State Affairs)
2 - a sectional on CSSJR 1 (S.A.)
3 - a fiscal note for SJR 1 (F.N. for CSSJR 1 (S.A.), which you should have attached to the original bill, is identical - a one time expense of $2.2 thousand for the election)
4 - a series of commonly asked questions and answers on open meetings
5 - a briefing paper on the initiative process in regard to constitutional amendments
6 - a copy of the more restrictive wording preferred by the Coalition for an Open Legislature
7 - several papers prepared by House Research and Legal Services on open meeting statutes and constitutional provisions in other states
8 - a copy of the existing open meeting statute and Uniform Rule 22

My staff has additional material available and looks forward to working with Chris on this issue. Thank you for your help.

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Senate President Pro Tempore
Chairman, Senate Rules Committee

2937 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-1818

Senate

M E M O R A N D U M February 10, 1989

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Arliss Sturgulewski, Chair
Senate Rules Committee

RE: CSSJR 1 (State Affairs) Proposing an amendment to the Constitution of State of Alaska relating to open meetings.

SJR 1 is an important and balanced piece of legislation that will guarantee the public a reasonable right of access and openness in the legislative process.

The first words of the existing open meeting act (OMA) are; "All meetings of a legislative body . . . shall be open." In 1986 the League of Women voters sued after a series of closed meetings by the legislature. In that suit, the Superior Court found the legislature had violated the OMA and Uniform Rule 22, a fact the defense did not dispute, and that the OMA applied to the legislature.

When the Supreme Court reviewed the case, it held that though both the OMA and Uniform Rule 22 had been violated and were intended to apply to the legislature, this statute and rule fall within the legislature's rule making authority, and court could not enforce compliance. The matter was nonjusticiable.

The legislature is left in the position of requiring very stringent open meetings standards of other governmental bodies throughout the state, but being exempt from enforcement of any such requirements for the legislature. It can only be remedied by adoption of constitutional amendment which will provide a basis for judicial enforcement.

The standard for openness set in SJR 1 is reasonable and workable. It is the practice currently followed by the legislature in less ambiguous wording. Its presence in the constitution will establish a basis for enforcement of that standard.

SJR 1 is substantially the same as last year's Senate State Affairs committee substitute which was developed after a great deal of work. This year's State Affairs CS restructures Section 1 to further reduce any ambiguity of language.

The resolution is divided into three sections. Section 1 is the actual language that will be added to the constitution. Section 2 is legislative intent. Section 3 places the amendment before the voters at the next general election.

SECTION 1

Section 1(a) states that except for the executive sessions authorized in 1(b), private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house of the legislature or a committee is prohibited. This is the heart of the amendment.

Private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house or its committee is prohibited under all circumstances other than executive sessions, but this is the only thing that is prohibited.

The treatment of a caucuses has been a difficult issue in the drafting of this amendment. SJR 1 handles this problem successfully by making clear that a quorum of a committee or of a house is prohibited from holding substantive debate on a legislation under its jurisdiction in any private setting, whether that private setting is a caucus, an informal meeting in the chairman's office, or on the bench during a legislative softball game.

Any grouping of legislators that is not a quorum, however, may discuss anything they wish in private and a quorum of legislators may discuss anything in private except substantive discussion and debate on legislation under the jurisdiction of their particular committee or house.

Section 1 (b) allows the legislature or its committees to hold executive sessions to consider matters authorized by law.

Section 1 (c) specifies that a court may not prescribe rules or procedures for the conduct of the legislature nor may it invalidate legislation because of a violation of open meeting requirements.

Section 1(d) allows the court to impose civil fines (not civil damages) and other sanctions authorized by the legislature upon individual legislators for wilful violations. This section is a limited grant of authority to the courts. It grants them the authority to impose the sanctions authorized by law (civil fines), but prevents the imposition of any other sanctions.

The imposition of a civil fine on an individual legislator, the amount of which can be set by the legislature, is the only

intrusion by the court into the legislative process this amendment allows. This is less draconian than invalidation of legislation which is the penalty prescribed in the OMA and which this amendment prohibits.

Section 1(e) specifies that the legislature may implement this section. Implementing legislation would be the appropriate place if the legislature wished to define "legislation," "under its jurisdiction," or other terms, establish a specific fine amount, or require courts to delay consideration of any open meeting law suit filed during the legislative session until the end of the session.

SECTION 2

This section is legislative intent. It does not go into the constitution nor on the ballot but will be considered by the Legislative Affairs Agency in its preparation of the neutral summary which will be placed in the voter's pamphlet.

Section 2(a) states the purpose of the amendment is to make openness in government the rule and secrecy the exception and to ensure the public is not excluded during substantive deliberative and decision making stages of the budgetary and lawmaking process.

Section 2(b) states that the amendment provides a basis for judicial enforcement of the existing open meeting law to the extent it is consistent with this amendment, notwithstanding article II, section 6 (legislative immunity) or section 12 (rule making authority). The last sentence makes clear that if the legislature adopts a fine amount or schedule, the court must follow that schedule.

Section 2(c) states that the amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, site visitations, or social events.

Section 2(d) is instructions to the Legislative Affairs Agency.

Section 3 puts the amendment on the ballot at the next general election.

The constitutional amendment proposed in SJR 1 is balanced, workable, and needed. Thank you for your support.