

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7858 HOUSE JUDICIARY

Notes

1. The authors acknowledge that men rape lesbians as well as heterosexual women, and that the consequences of rape itself and the encounter with the criminal justice system may be particularly devastating for lesbians. Men also assault other men and our discussion of survivors' needs is relevant to all survivors.

2. Factors which affect the risk of HIV transmission to the survivor include the survivor's general health status, any existing genital ulcers, and the violence of the attack and the injuries it causes.

3. There has been very little evidence that AZT prophylaxis can prevent seroconversion in individuals exposed to HIV. There is a high incidence of severe reactions to and side effects from AZT use. The drug is toxic and is not universally tolerated by individuals who do choose to use it.

4. In the Senate of the State of New York, Senate Bill 3681 introduced on March 5, 1991 by Senators Saland, Hannon, Holland, Levy, Padavan, Skelos and Tully, takes this approach.

5. In the context of AIDS, the terms "at risk" and "high risk" stigmatize sexual orientation, ethnicity, economic class or culture. "High risk behaviors" is the preferred terminology because it describes behavior, such as intravenous drug use, that increases the chance of HIV transmission.

6. All newborns of HIV infected women carry passively acquired maternal antibodies which may persist up to 15 months of age, but only approximately 30 percent of these infants are actually infected with HIV. See Committee on Prenatal and Newborns Screening for HIV Infection, "HIV Screening of Pregnant Women and Newborns," (1991): 26.

7. Senator Bob Dole (R-KA) introduced in the United States Senate, S.B. 472, the "Women's Equal Opportunity Act of 1991", on February 21, 1991. This bill mandates HIV testing of alleged rapists at the request of the survivor and provides for enhanced sentences if the rapist "knew or had reason to know that he was infected with the human immunodeficiency virus, except where the offender did not engage or attempt to engage in conduct creating a risk of transmission of the virus to the victim."

8. For example, the National Coalition Against Sexual Assault (NCASA) formally voted to oppose all forms of mandatory HIV testing. NCASA also voted to stress the importance of the availability of free, anonymous or confidential HIV testing and counseling for survivors (Mooney, 1990).

The following organizations expressed their opposition to mandatory HIV testing of convicted rapists in a letter sent to members of the United States Congress on October 16, 1990: Center

for Women Policy Studies, American Civil Liberties Union, B'nai B'rith Women, National Organization for Women, National Women's Health Network, National Women's Political Caucus, Older Women's League, and Sex Information and Education Council of the United States.

The following organizations expressed their opposition to mandatory HIV testing of alleged rapists in a letter sent to the members of the United States Senate on June 18, 1991: Center for Women Policy Studies, B'nai B'rith Women, NOW Legal Defense and Education Fund, National Women's Health Network, National Women's Law Center, Older Women's League, National Association of Commissions on Women, Sex Information and Education Council of the United States, National Association of Protection and Advocacy Systems, National Association of Social Workers, National Association of State Alcohol and Drug Abuse Directors.

References

- Alexander, N.J. (1990). Sexual transmission of human immunodeficiency virus: Virus entry into the male and female genital tract. Fertility and Sterility, 54, 1-18.
- American Civil Liberties Union AIDS Project. (1991). Questions and answers about HIV and rape (pp. 1-4). New York, NY: ACLU.
- Americans for a Sound AIDS Policy. (1988). Testimony before the President's Commission on the HIV Epidemic. Washington, DC: ASAP.
- American Public Health Association. (1989). HIV antibody testing: A report of the special initiative on AIDS of the American Public Health Association (pp. 1-13). Washington, DC: APHA.
- Baker, T.C., Burgess, A.W., Brickman, E. & Davis, R.C. (1990). Rape victims' concerns about possible exposure to HIV infection. Journal of Interpersonal Violence, 5, 49-59.
- Bart, P. in Salholz, E. (1990, July). A frightening aftermath: Concern about AIDS adds to the trauma of rape. Newsweek, 116, 53.
- Brownworth, V. (1990, December). HIV testing of rapists raises new ethical questions. The Advocate, 565, 48-50.
- Burgess, A.W., Jacobsen, B., Thompson, J.E., Baker, T. & Grant, C.A. (1990). HIV testing of sexual assault populations: Ethical and legal issues. Journal of Emergency Nursing, 16, 331-338.
- Centers for Disease Control. (1987, August). Public Health Service guidelines for counseling and antibody testing to prevent HIV infection and AIDS. Morbidity and Mortality Weekly Report, 36, 512.
- Centers for Disease Control. (1989, September). 1989 sexually transmitted disease treatment guidelines. Morbidity and Mortality Weekly Report, 38, 1, 40.
- Centers for Disease Control. (1989, September). The impact of HIV and AIDS on women. Unpublished manuscript.
- Cohen, J., Alexander, P. & Wofsy, C. (1988). Prostitutes and AIDS: Public policy issues. AIDS and Public Policy Journal, 3(2), 16-22.

- Congressional Caucus on Women's Issues. (1990, July). Violence against women. Washington, DC: CCWI.
- Cooper, E. (1991, March 1). [Telephone interview with E. Cooper, Staff Counsel of the American Civil Liberties Union AIDS Project].
- Harlow, C.W. (1991, January). Female victims of violent crime. (NCJ-126826, pp. 8-9). Washington, DC: U.S. Department of Justice, Office of Justice Programs, Justice Statistics.
- Hearst, N. & Hulley, S.B. (1988). Preventing the heterosexual spread of AIDS: Are we giving our patients the best advice? Journal of the American Medical Association, 259, 2428-2432.
- Holmberg, S.D., Horsburgh, C.R., Jr., Ward, J.W. & Jaffe, H.W. (1989). Biologic factors in the sexual transmission of human immunodeficiency virus. The Journal of Infectious Diseases, 160, 116-125.
- Hunter, N. (1987). AIDS prevention and civil liberties: The false security of mandatory testing. New York, NY: American Civil Liberties Union.
- Institute of Medicine, Committee on Prenatal and Newborns Screening for HIV Infection. (1991). HIV screening of pregnant women and newborns (p. 46). Washington, D.C: National Academy Press.
- Jenny, C., Hooton, T.M., Bowers, A., Copass, M.K., Krieger, J.N, Hillier, S.L., Kiviat, L.C., Stamm, W.E., & Holmes, K.K. (1990). Sexually transmitted disease in victims of rape. The New England Journal of Medicine, 322, 713-716.
- Koss, M.P., Woodruff, W.V., & Koss, P. (1990, August). A criminological study: Statistics on sexual violence against women. Unpublished manuscript.
- Kurtz, H. (1988, May 14). AIDS prisoners in N.Y. harassed, ostracized. The Washington Post, p. A4a.
- Largen, M.A. (1991, June). AIDS and sexual assault. Arlington, VA: National Network of Victims of Sexual Assault.
- Levine, C. and Bayer, R. (1989). The ethics of screening for early intervention in HIV disease. The American Journal of Public Health, 79, 1661-1667.
- Martin, L. (1990, September). [Letter to Congress of the United States]. Unpublished letter, Washington, DC.

- McGiffert, L. (1991, February 22). [Telephone interview with L. McGiffert, Counsel, Texas Senate Committee on Health and Human Services].
- Minden, P. (1989). The victim care service: A program for victims of sexual assault. Archives of Psychiatric Nursing, 3, 41-46.
- Mooney, S. (1990, November). [Letter to Subcommittee on HIV Testing]. Oakland, CA: National Coalition Against Sexual Assault. Unpublished letter.
- National Research Council. (1990). AIDS -- The second decade (p. 255). Washington, DC: National Academy Press.
- Padian, N., Marquis, L., Francis, D., Anderson, R.E., Rutherford, G.W., O'Malley, P.M. & Winkelstein, W. (1987). Male-to-female transmission of human immunodeficiency virus. Journal of the American Medical Association, 258, 788-790.
- Padian, N., Wiley, J. & Winkelstein, W. (1987, June 1-5). Male-to-female transmission of human immunodeficiency virus (HIV): Current results, infectivity rates, and San Francisco population seroprevalence estimates, (Abstract T.H.P. 48). Paper presented at the Third International Conference on AIDS, Washington, DC.
- Peterman, T.A., Stoneburner, R.L., Allen, J.R., Jaffe, H.W., & Curran, J.W. (1988). Risk of human immunodeficiency virus transmission from heterosexual adults with transfusion-associated infection. Journal of the American Medical Association, 259, 55-58.
- Presidential Commission on the HIV Epidemic. (1988). Report of the Presidential Commission on the HIV Epidemic (Report No. 1988 0-214-701:QL3, pp. 131-134). Washington, DC: U.S. Government Printing Office.
- Rosenberg, M. (1990, December). HIV testing subcommittee report. New York, NY: Lambda Legal Defense and Education Fund, Inc.
- Salholz, E. (1990, July 23). A frightening aftermath: Concern about AIDS adds to the trauma of rape. Newsweek, 116, 53.
- Schwarcz, S.K. & Whittington, W.L. (1990). Sexual assault and sexually transmitted diseases: Detection and management in adults and children. Reviews of Infectious Diseases, 12, S6, S-682-S690.
- Seidlin, M., Krasinski, K., Bebenroth, D., Itri, V., Paolino, A.M. & Valentine, F. (1988). Prevalence of HIV infection in New York call girls. Journal of Acquired Immune Deficiency Syndromes, 1, 150-154.

Weissman, G. (1991, May-June). Working with pregnant women at high risk for HIV infection: Outreach and prevention. Bulletin of the New York Academy of Medicine, 67(3), 291.

Working Group on HIV Testing of Pregnant Women and Newborns. (1990). HIV infection, pregnant women and newborns. Journal of the American Medical Association, 264, 2416-2420.

MANDATORY TESTING OF RAPE DEFENDANTS

The ACLU opposes involuntary testing and disclosure of HIV information in all cases, including those involving an alleged rape. The violation of the privacy rights and interests of the person from whom the information is sought is not outweighed by a benefit to the rape victim. The results of an HIV test are, on close examination, virtually irrelevant to the person who has to decide whether or not to seek immediate treatment to prevent infection after exposure.

In cases of rape, the person arrested or even indicted may not, in fact, be the rapist. In such a case, testing the defendant not only violates his entitlement to the presumption of innocence as well as his privacy rights, but also misleads the victim. Consider the possibility that the defendant may test negative and not be the rapist after all. The real rapist may have been infected and the victim exposed. An innocent defendant's negative test will lure the victim into believing she is safe when she should seek further information or treatment.

Even assuming for the sake of argument that the person indicted is the rapist, there remains the very real possibility of a false negative, which, of course, also exists in cases of occupational injury. Given that possibility, the rape victim or the injured worker cannot rely on a negative test in making a decision about immediate treatment. Under the circumstances, it is of little, if any, value to know for certain that the person tested positive.

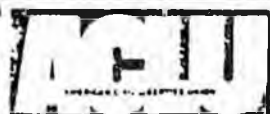
When the rights of victims and defendants conflict, there must be a careful and sensitive balancing of the constitutional concerns involved in a particular situation. However, there is no conflict in this situation. There is no need to balance here. The victim's health is not advanced by trampling a defendant's rights.

A variety of provisions to mitigate the harm to the person involuntarily tested have been suggested but do not achieve the goal. For example, giving the person tested the option not to learn the results is cruel. It is, at best, more difficult and may be impossible to resist learning the known than to keep the information unknown in the first place. Moreover, imagine the situation of someone who elects not to be informed of the results only to have them revealed in the press. Because the press can neither be liable for publishing the truth nor compelled to reveal confidential sources, there may be no way to punish or inhibit public disclosure of this kind.

In sum, we believe measures providing for involuntary testing of people accused of rape are both dangerous and unnecessary.

*Note - This Statement is being revised slightly.
We will be issuing a revised Statement on
the issue shortly*

- Feb. 12, 1991



AIDS PROJECT

QUESTIONS AND ANSWERS ABOUT HIV AND RAPE

1. Can the HIV virus be transmitted during a rape or sexual assault?

HIV can be transmitted through the exchange of blood or other bodily fluids, including semen. As it is possible for HIV to be transmitted during consensual sexual intercourse (vaginal, anal, or to a lesser extent, oral), it also is possible for HIV to be transmitted during a rape or a sexual assault that involves the exchange of bodily fluids. Note, however, that although the virus occasionally has been found in tears and saliva, no cases of AIDS have been traced to a transmission involving these fluids. If the virus has been transmitted, that means you are infected with the HIV virus.

2. What is the likelihood that HIV will be transmitted during a rape?

The epidemiology branch of the AIDS Program at the Centers for Disease Control has estimated that the likelihood of male to female transmission of HIV is of the order of less than or equal to 0.2% per episode if the male is HIV infected. It is thought that the rate of transmission in the context of a rape may be somewhat higher; because of the involuntary nature of a rape, the woman's vaginal tract may suffer trauma, thereby creating small tears that would facilitate transmission of the virus and other microorganisms. Medical researchers stress that the estimated figure of 0.2% may change as additional data are collected.

3. If I am infected with HIV, does that mean I have AIDS?

No. There are many stages between first being infected with HIV and developing full-blown AIDS. The vast majority of people infected with HIV will experience no symptoms of infection, or minor symptoms, for many years. After an average period of five to seven years, although perhaps significantly longer for others, people infected with HIV will begin to develop increasingly severe symptoms of infection, including the opportunistic infections that are the hallmark of an AIDS diagnosis. Current medical consensus refers to this full range of symptomatology as "HIV disease."

4. Is there a cure for HIV Infection or for AIDS?

At this point there is not. However, there is one drug, called AZT, that is available to help slow down the progress of the virus. There are two additional anti-virals that are expected to be approved for use in the very near future. Equally important, medical researchers have developed prophylactic drugs to help prevent or delay the development of opportunistic infections in a person infected with HIV; in addition, treatments now exist to help deal with such infections when they develop.

5. How do I know whether I have been infected with HIV?

There is a series of tests available that can determine whether you have developed antibodies to the HIV virus. It is widely acknowledged today that the presence of the antibodies indicates that the person who was tested is infected with the HIV virus. (This is not true, however, for a newborn, who may test positive for antibodies which he or she has received from his or her mother, but who may not be infected with the virus.) HIV antibodies tend to start appearing approximately four to six weeks after exposure, but may appear earlier.

6. When should I take a test for HIV antibodies?

You first should be tested immediately after you have been exposed. This is suggested for two reasons. First, the sooner you know about your HIV status, the earlier you can begin to take an active role in treatment to help keep up your health. Second, it will be useful to know whether the source of infection came from the sexual assault or rape or whether you were infected prior to the incident. As noted above, HIV antibodies tend to start appearing approximately four to six weeks after exposure, but may appear earlier; therefore, it is prudent to get a baseline test as soon after the incident as possible.

7. When will I know whether I have become infected as a result of the sexual assault or rape? Will there be a time when can I consider myself to be healthy?

You should be tested approximately every three months following the incident for six months to a year. The majority of people develop antibodies within three months of having been exposed to the virus; ninety percent develop antibodies within six months of exposure. The vast majority of the remaining ten percent will develop antibodies within

a year of exposure; beyond the one year point, some will still "sero-convert," but it is very rare to test negative and to be infected beyond one year.

8. If I think I have been exposed to HIV, are there any medical interventions available to help prevent my being infected with the virus?

Some medical experts suggest that the anti-viral drug, AZT, be administered to the patient within 48 hours of exposure and be continued for a period of approximately six weeks (although doctors may vary the duration of treatment by a couple of weeks). Although administering AZT immediately after exposure has not been proven to prevent infection, this often is the general course of treatment made available to health care workers who are exposed to the virus in an occupational setting. Animal studies examining whether AZT is effective in this setting are inconclusive; human studies are incomplete. Nevertheless, AZT has not yet been discounted as a viable prophylactic and is the only form of medical intervention available that may work.

9. Are there any side effects to taking AZT as a prophylactic for approximately six weeks?

In otherwise healthy people who are not already seropositive, doctors have found that taking AZT is not likely to result in the types of toxic side effects sometimes found in those who already are infected with HIV and are taking AZT to slow the progression of infection. Generally, toxic side effects have been found to be dose and duration related and reversible following discontinuation of treatment with the drug. A non-infected person taking a six week course of AZT may experience some insomnia, fatigue, and flu-like symptoms. Again, these effects would end upon discontinuation of treatment with the drug. The research on long term effects are not yet known. Some researchers have found that when given very high doses of AZT (well beyond the doses prescribed for humans), female mice may develop vaginal carcinomas. In addition, only very limited research has been performed on the effect of AZT on the male or female reproductive systems; as such, its mutagenic and teratogenic effects, if any, are not known. One might expect that these more long term side effects would not be found in persons who take AZT for the relatively short period of time suggested for those who have been exposed to the virus as the result of sexual assault or rape.

10. I understand that AZT loses its effectiveness in people who are seropositive after 12 to 18 months; if I am exposed, take AZT, but still become infected, will I be able to take advantage of AZT as a form of treatment later in my

illness?

AZT loses its effectiveness when resistant strains of the virus develop in a person already infected with the virus. Such activity is not expected in a person who recently has been exposed to the virus; therefore, it is unlikely that use of AZT as a prophylactic immediately after exposure will affect a person's ability to use AZT later in the course of illness, if it becomes necessary.

11. Can I transmit the virus before I know whether I am infected?

If you are infected with the virus, you are capable of transmitting it; this is so even if your HIV antibody test comes back negative. Therefore, to protect your partner from infection, it is important, if you engage in sexual relations, that you use safer sex techniques throughout this period; in fact, unless you know for certain that neither you nor your partner are HIV-infected, you never should engage in unsafe sex. If you use intravenous drugs, you should avoid sharing works; if you do share works, always clean them with bleach and water following each use.

12. What else can I do during this waiting period?

The most important thing you can do is to take care of yourself. You may wish to seek counseling. It is important to seek support from your family, friends, and medical professionals. Also, this would be a good time to accomplish the elusive goals of eating better, getting more sleep, and relaxing more.

FIRST IN THE FIGHT
AGAINST AIDS



October 15, 1990

Judith I. Avner, Chairperson
Governor's Task Force on Rape and Sexual Assault
New York State Division of Women
Executive Chamber, State Capitol
Albany, New York 12224

Dear Ms. Avner:

The recent report of the Governor's Task Force on Rape and Sexual Abuse has recommended that procedures be implemented that would allow for the court-ordered HIV testing of persons suspected of rape or other sexually abusive crimes. Few issues in AIDS are as difficult as the possibility of transmission occurring through rape. The emotional and physical repercussions of the rape itself, coupled with the possibility of HIV infection, are devastating to the victim. However, GMHC believes that the mandatory HIV testing of suspects is inappropriate public health policy and urges that the Task Force recommendation be changed.

To determine if mandatory testing is appropriate in this instance, it is necessary to balance the effects that forced testing would have on both the suspect and public health policy against the benefits that the testing would provide to the victim. If a positive or negative test result could provide significant information about whether the victim has actually been infected and if there were steps that the victim could take to prevent seroconversion after exposure, then there would be no question that the interests of the victim would outweigh the privacy interests of the suspect and that the public health would be best served by requiring testing, with appropriate confidentiality protection for the suspect. However, given current limitations on medical knowledge, neither of those conditions are satisfied through this recommendation.

I. Forced HIV Testing of Suspects Will Not Preclude the Need for Victims to be Tested Themselves

If a suspect tests positive, it will be essential for the victim to also undergo HIV testing to learn if she or he has become infected. If the suspect tests negative, it is possible that the suspect is still infected, but has not yet developed antibodies for HIV. Even with a negative test result, the victim would still be at risk. Therefore, no matter what test result is received, the victim must be tested in order to obtain definitive knowledge of his or her HIV status.

Although it may appear as if knowing a suspect's HIV status can

offer a psychological comfort to the victim, such comfort is actually artificial and can be dangerous. A negative HIV-antibody test is not conclusive proof that a suspect is actually not infected because it takes time to develop antibodies. Therefore, revealing a suspect's status provides a false sense of security, which may deter a victim from testing.

Proper counseling services for the victim regarding the need to test, safer sex and needle-sharing practices and referrals for emotional and medical support must be provided. Testing should also be provided on a voluntary basis, along with appropriate counseling, to suspects. After counseling, the suspect may elect to disclose his or her test results to the victim, although, as noted, that information would have little actual value.

II. HIV Testing of Rape Suspects Does Not Provide Information that Will Help a Victim Make Informed Judgements About Medical Treatment

There has been some speculation that a person exposed to HIV may begin prophylaxis with AZT in order to prevent infection. However, this hypothesis has not been adequately tested, and there is, as yet, no evidence to support it. Preliminary reports show that the protocol is ineffective¹. According to the conditions of the protocol, it is believed that it is necessary to begin treatment within 24 hours of exposure at the latest, in order for the AZT to prevent seroconversion². Therefore, an individual who is interested in trying AZT as prophylaxis would not have time to wait for test results. In any case, there is little or no evidence of adverse side-effects from AZT in persons with healthy immune systems, so there is no reason why an individual who wishes to try immediate AZT therapy could not safely do so.

III. Mandatory HIV Testing Would Intrude on the Privacy Rights of Suspects

The privacy interests of the suspect should not be undervalued. A bloodtest for HIV is an intrusive process, often with serious emotional, social and legal consequences, that should not be forced upon someone without consent. Serious questions about the constitutionality of the Task Force's recommendation must be raised. Can such an intrusion be considered constitutionally sound, especially as to a suspect who has not been found guilty of any crime? We regard forced testing in this instance to be in violation of the Fourth

¹Lange, J.M.A., et al., Failure of Zidovudine Prophylaxis After Accidental Exposure to HIV-1, N Engl J Med 1990; 321:1375-7.

²Centers for Disease Control. Public health service statement on management of occupational exposure to HIV, including considerations regarding zidovudine post-exposure use. MMWR 1990; 39(sppl RR1).

Amendment. Furthermore, we do not believe that the confidentiality of the suspect can be adequately protected. There is a possibility that the suspect's HIV status will become a factor that improperly influences the trial. What will the effect of testing the suspect be on his or her family life, mental and physical health, and in his or her job? Is it fair to subject the suspect to the possibility of discrimination without any proof of wrongdoing on his or her part, and in the absence of meaningful benefit to the victim? We think not.

Public health experts, including the National Academy of Sciences and the President's Commission on HIV, agree that HIV testing is most effective when it is performed on a voluntary basis. The New York State Legislature enacted legislation that reflects this policy. New York requires that HIV testing be voluntary, confidential and coupled with appropriate counseling. Programs which promote mandatory testing only serve to re-enforce the stigma that HIV testing is punishment and that being HIV positive is something to be ashamed of. This only undermines the effectiveness of testing and prevention programs overall.

It must be made very clear that in taking this position, we are in no way devaluing the devastating position in which a victim has been placed. However, we cannot let the fact that the issue is emotionally charged replace a rational analysis of appropriate policy. If testing the suspect could provide meaningful information about the victim's HIV status, and if there was a consequent intervention that might prevent seroconversion, then the testing could be justified under appropriate circumstances. Unfortunately, those conditions are not met. Sound public health policy dictates that HIV testing be voluntary, non-coercive and only one part of a broader attempt to educate people about AIDS and HIV transmission.

Therefore, we strongly urge that the recommendation allowing for mandatory HIV testing of rape suspects be eliminated. Instead, we call for effective counseling and referral programs for victims and offering testing on a voluntary basis to suspects.

Thank you for your attention in this matter and please feel free to call me to discuss this issue in greater detail.

Sincerely,

David A. Hansell, Esq.
Deputy Executive
Director for Policy

cc: Governor Mario Cuomo
Hon. David Axelrod
Hon. Richard Gottfried
Nicholas Rango, M.D.

Victims' group assails bill mandating testing

10/7/91 AT
TIMES STAFF

Alaskan AIDS Assistance Association, an Anchorage agency which has served more than 200 clients in the past two years, strongly opposes the proposed Alaska House Bill 24 to mandate testing of suspected rapists.

Rebecca Rogers, executive director, said, "This bill does not take into account the nature of the HIV and AIDS testing process.

"A rapist could test negative up to six months after the attack and still be contagious. If a rape goes on during that time, testing won't necessarily inform the victim of the infection.

"In fact, if the victim is tested within the first three months, she could know her situation sooner than if the rapist is immediately tested," Rogers said. The director said 95 percent of HIV infections show up in the first three months after an encounter, and the remaining 5 percent in the next three months.

Four-A has never had a rape victim seek its help, she added. "The only rape we know of that transmitted HIV occurred in prison Outside," she said.

Alaska has 104 diagnosed cases of AIDS, Rogers said, and

A rapist could test negative and still be contagious.

384 known cases of HIV, as of December, 1990. New statistics are due soon.

"The HIV cases reflect only those who have gone through state lab facilities," Rogers said. "We don't know the number that have used doctors' offices or private labs and tested HIV positive, but we are sure the figure is a lot higher."

Rogers said she considers Alaska's figures for both HIV and AIDS to be "low prevalence."

Maureen Dursi, president of Four-A's board of directors, said her organization "definitely is not in favor of this piece of legislation" on grounds of invasion of privacy, application to a charged rather than a convicted defendant, and because "there is no good purpose to the testing."

"Why don't we test everyone convicted for hepatitis B?" Dursi asked. "That's far more likely to be transmitted during a rape than HIV or AIDS."

AIDS-test bill draws opposition

By BRIAN S. AKRE
The Associated Press

JUNEAU — Advocates of AIDS victims are lining up against a bill that would make testing for the deadly disease mandatory for convicted sex offenders.

The bill would allow an offender's victims, as well as police, firefighters, ambulance workers and jailers who have physical contact with the offender, to seek court permission to gain the test results.

Fairbanks Republican Rep. Bert Sharp, prime sponsor of House Bill 24, said the measure would help protect victims of sexual assault from further trauma.

"Studies indicate that fear of exposure to the AIDS virus is more pronounced when intimate contact is involuntary," Sharp told the House Health, Education and Social Services Commit-

tee. "To subject a victim to the added stress of 'not knowing' is inequitable and cruel justice."

But at a committee hearing this week, advocates of AIDS victims said the bill would further traumatize victims of sexual assault.

The so-called HIV test, if positive, shows only that a person has been exposed to the AIDS virus. It does not mean the person has acquired immune deficiency syndrome.

Mark Tumeo, co-founder of the Interior AIDS Association in Fairbanks, also noted the test only indicates if the person has the virus at the time of the test.

"A test four months after an assault, the minimum time for sexual assault conviction after an arrest, will not indicate whether the person was positive at the time the sexual assault occurred,"

Tumeo said. "It says absolutely nothing about the status of the victim."

Tumeo said the test is "the type of potential state-sanctioned violation of personal rights" that AIDS victims fear.

Sharp said the courts have upheld such testing laws in other states, determining that the government's interest in protecting the public outweighs the criminal's privacy rights.

"When it threatens the lives of innocent victims, it is in the public interest that government step in and take action," he said.

Mandatory testing of criminals would further stigmatize all who test positive for the virus by associating them with deviant behavior, Tumeo said.

"The fact is that a person who commits rape is less likely to be a carrier than

anyone who has sex with prostitutes or is promiscuous," he said.

Bonnie McCorquodale of Fairbanks said sexual assault victims should be encouraged to get AIDS tests immediately after an assault, and testing the offender is no substitute.

"The motive is a good one. Unfortunately, the bill will not provide any additional protection for victims of sexual assault," she said.

Cindy Smith of Juneau, director of the Network on Domestic Violence and Sexual Assault, said her group has taken no position on the bill. But she suggested it be amended to require counseling for victims when the test results are released.

HESS Committee Co-chairwoman Rep. Georgiana Lincoln, R-Rampart, assigned the bill to a subcommittee for further study.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH

P.O. BOX 110610
JUNEAU, ALASKA 99811-0610
PHONE: (907) 465-3090

February 17, 1993

Honorable Pete Kott, Member
House HESS Committee
Alaska State Legislature
State Capitol
Juneau, AK 99811

Dear Representative Kott,

At the House hearing of HB 109 (Blood testing on individuals accused of sexual assault) on 9/16/93 I made an error in a statement on the disease, Hepatitis B. I wish to take this opportunity to correct that misunderstanding and to apologize for any confusion that the statement may have created.

Contrary to my statement, although the primary method of transmission is through the blood route, Hepatitis B is considered to be a sexually transmitted disease.

Hepatitis B is a highly infectious virus that is very stable and can exist over a month in the dried state. It is not transferred in the fecal, oral route but is transmitted through blood and the sexual process. It can also be transmitted from an infected mother at the birthing and through the saliva of an infected person. The later is considered one reason for the high incidence of hepatitis B in institutions that cared for children who were severely mentally retarded.

Hepatitis B immune globulin is available for those who have high risk exposures but the preventions of hepatitis B is not definite. A Hepatitis B vaccine is available for preventing the disease if given before exposure. The vaccine is given in combination with the globulin at times after the exposure to maximize the possibility of preventing the disease.

In view of the transmission of hepatitis B through sexual practices it would be reasonable that testing for this disease be included in the blood tests mandated under C.S. for H.B. 109.

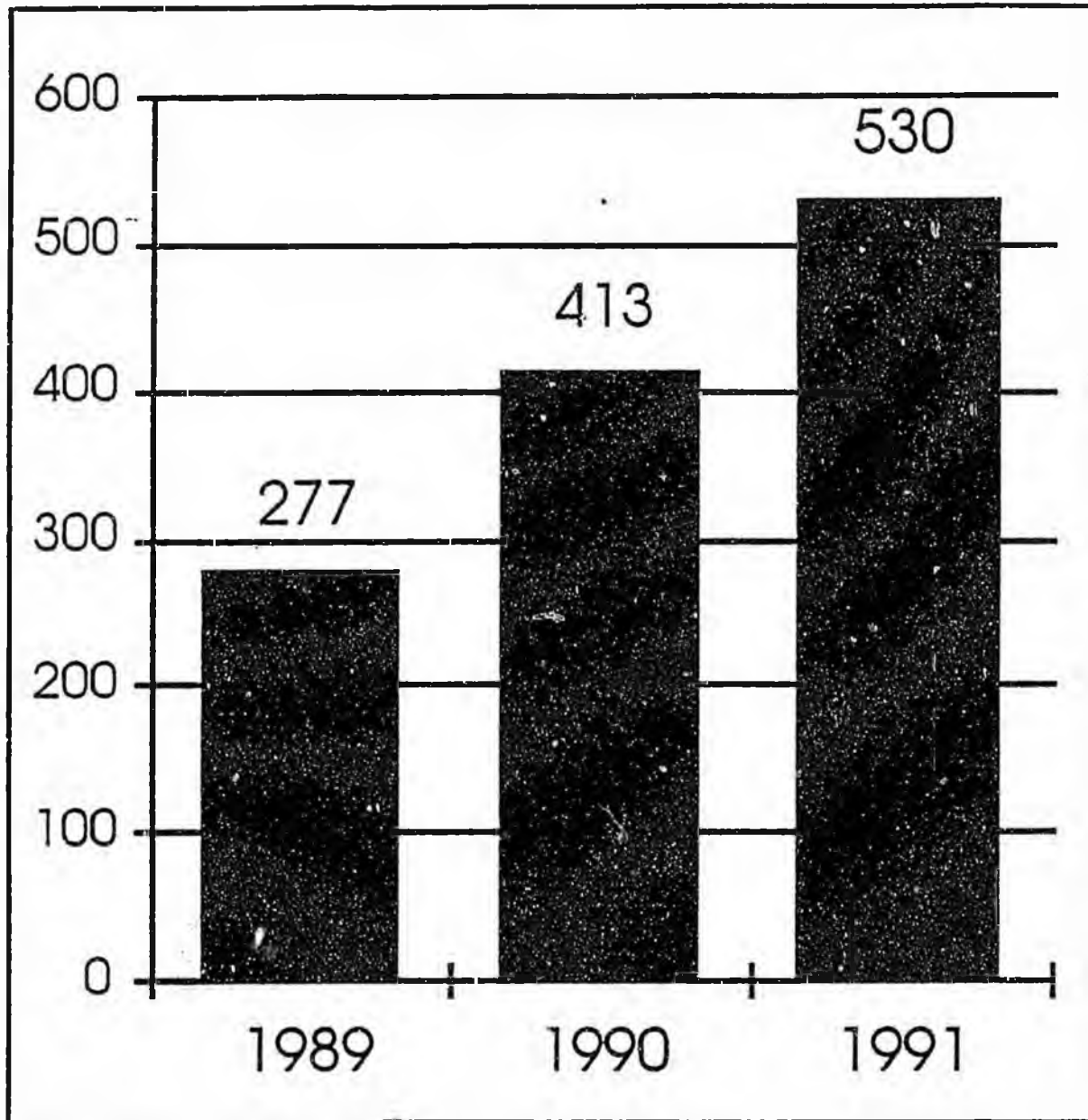
Thank you for giving me the opportunity to correct any misinformation that may have been provided earlier.

Sincerely,



Peter M. Nakamura M.D., M.P.H.
Director, Division of Public Health.

Reported Rapes in Alaska 1989 through 1991



Provided by The Network on Domestic Violence and Sexual Assault
Source: Department of Public Safety

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P. O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3428

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

March 10, 1993

The Honorable Pete Kott
House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99801-1182

Re: CSHB 109(HES) (Relating to blood tests for persons charged with sex offenses)

Dear Representative Kott:

By letter dated February 26, 1993, you have asked us to review CSHB 109(HES), relating to blood tests for persons charged with sex offenses. In particular, you wish to know whether there are potential due process problems in allowing the court to order a blood test without holding a hearing on the matter at which the defendant may be present.

We do not believe that this provision presents any constitutional problems. Proposed AS 18.15.300(c) authorizes the superior court to order a defendant to provide a blood sample for testing if the court determines that there is probable cause to believe that the defendant committed one of the enumerated offenses and that sexual penetration with the victim took place.

The "probable cause" standard set forth in this bill is the same standard that is used for the issuance of search warrants. Search warrants are uniformly issued at ex parte proceedings; the defendant is neither present nor has any right to be heard before the warrant is issued and executed. Search warrants per force involve an invasion of the subject's privacy. The sufficiency of the probable cause standard to support search warrants is highly indicative of the sufficiency of that same standard for the issuance of an order requiring a charged defendant to submit a blood sample for testing. Similarly, the permissibility of obtaining search warrants in ex parte proceedings is highly indicative that an order requiring the production of a blood sample may be issued without providing the defendant an opportunity to be heard on the issue.

Proposed AS 18.15.300(c) further states: "In making the [probable cause] determination, the court may rely on the evidence presented at a grand jury proceeding or

preliminary hearing."¹ At a preliminary hearing, the prosecution bears the burden of establishing that there is probable cause to believe that the alleged offense was committed by the defendant. Criminal Rule 5.1(h). The defendant has the right to be present at this hearing and may cross-examine the witnesses against him. Criminal Rule 5.1(b). Thus, to the extent that the court relies upon evidence that was presented at a preliminary hearing, the defendant had the opportunities to be present and confront the evidence against him at that hearing; a second such opportunity need not be provided.

The defendant does not have the opportunity to be present at a grand jury proceeding. Our constitution, however, provides alternative safeguards to secure defendants' rights. Thus, a grand jury, which is comprised of eighteen persons, hears the evidence against the defendant and applies a standard at least as strict as the "probable cause" standard used in preliminary hearings (whether "all of the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant"). Criminal Rule 6(q). To the extent that this proceeding is sufficient to justify the maintenance of felony charges against the defendant, with the appreciable loss of liberty entailed throughout those proceedings, we believe that it is also sufficient to justify an order requiring the defendant to provide a blood sample for testing.

Finally, we note that proposed AS 18.15.310(f) specifies that "the results of tests ordered under AS 18.15.300 -- 18.15.330 are not admissible evidence in a criminal or juvenile proceeding." Although we do not believe that this provision is constitutionally required, it further reduces any concerns that may exist regarding the lack of a new evidentiary hearing on the issue of whether a blood test should be ordered. A defendant would have a greater interest in challenging an order to provide a blood sample if that sample could be used as evidence against him.²

In summary, we find no constitutional impediment to this bill's provision authorizing the court to rely upon a preliminary hearing and/or grand jury proceedings in making the factual determination that there is probable cause to believe that the defendant committed one of the enumerated offenses and that sexual penetration with the victim took place.

You also wish to know whether the defendant's privacy interests are sufficiently safeguarded by providing that unauthorized disclosure is punishable by contempt of court. We

¹ We would like this sentence to be amended to explicitly acknowledge that the court may rely *exclusively* on such evidence.

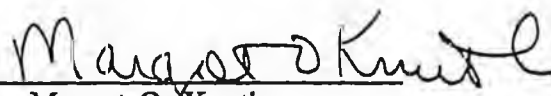
² We note that there is nothing in this bill that would prevent a prosecuting attorney from obtaining an independent order for the provision of a blood sample under Criminal Rule 16.

believe that this is sufficient. To the extent that the circumstances justify the invasion of the defendant's privacy rights in the first instance by requiring the production of a blood sample for testing, the defendant's additional privacy interests in restricting the disclosure of the test results are adequately protected by the provision in this bill prohibiting unauthorized disclosures. We do not believe that the defendant's right of privacy is appreciably affected by whether a violation of that prohibition is treated as contempt of court or is made a new criminal offense.

If you have further questions or if we may be of assistance in any other manner, please feel free to contact us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Margot O. Knuth
Assistant Attorney General

cc: Charles Cole
Attorney General

Deborah Behr
Department of Law

Kris Lethin
Legislative Liaison

Richard Burton, Commissioner
Department of Public Safety

Dr. Ted Mala
Commissioner
Department of Health and Social Services

Lloyd Rupp
Commissioner
Department of Corrections

HB 109
Rep. Kott
2/8/93

Appendix

Worksheet

For Fiscal Year 1994, States and other Jurisdictions (for convenience hereafter referred to as States) must be in compliance with the HIV mandatory testing standards for certain offenders established by Sec. 1804 of the Crime Control Act of 1990, 42 U.S.C. § 3756(f) (hereafter referred to as Section 1804) in order to receive continued full funding under the Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant Program.

The purpose of this worksheet is to assist the States in providing a self-assessment of their compliance with Section 1804. It need not be returned.

1. Victim Request.

Does the State statute require an HIV testing procedure at the request of any victim of a sexual act for which the person to be tested was convicted in State court (or make such a test mandatory for *all* persons thus convicted regardless of victim request)?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300

2. Administration of the Test.

Does the State statute require an agency of the State (such as a court, health department, correctional authority, etc.) to direct that a test be administered in such cases?

Yes No

Does the State statute specifically require testing in these cases for the presence of acquired immune deficiency syndrome (AIDS) or its precursor, human immunodeficiency virus (HIV).

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300 (c)

AS 18.15.310 (b) i

3. The Person to be Tested.

Does the State statute require persons to be tested who have been convicted under State law of a defined sexual act?

Yes, in all cases Yes, but only at the request of a victim No

Does this either specifically or by definitional inclusion encompass persons found guilty of the offense by a jury or court, as well as those entering a pleas of guilty? (Note: Because Question 6 below concerns the definition of juveniles as persons "convicted," please disregard that issue for Question 3).

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300
(cf. AS 11.41.410 - 11.41.440)

4. Disclosure of the Test Results.

Does the State statute provide for disclosure of the test results to the both the victim and the person tested?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300 (d)

5. Victim Services.

Does the State statute provide for making the following services available to the victims of these sexual acts at their request:

1. Counseling regarding HIV disease?

Yes No

2. HIV testing in accordance with applicable law?

Yes No

3. Referral for appropriate health care and support services?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.310 (h) - AS 18.15.310 (i)

What are the sources of the funds to pay for these services?

Dept. of Health + Social Services

(test paid by defendant by order of the court
if defendant found guilty.)

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.320

AS 18.15.310 (h)

6. Definition of the term "convicted" as including Juveniles.

Does the State statute require HIV testing for juveniles who have been adjudicated under State law of committing sexual acts as it does with adults?

Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300

7. Definition of the term "Sexual Act."

Does the State statute define "sexual act" as having the meaning (either literal or approximate) as that given the term in 18 U.S.C. § 2245(2)(A) or (B)? (See Division 7 of the "Guide for the States").

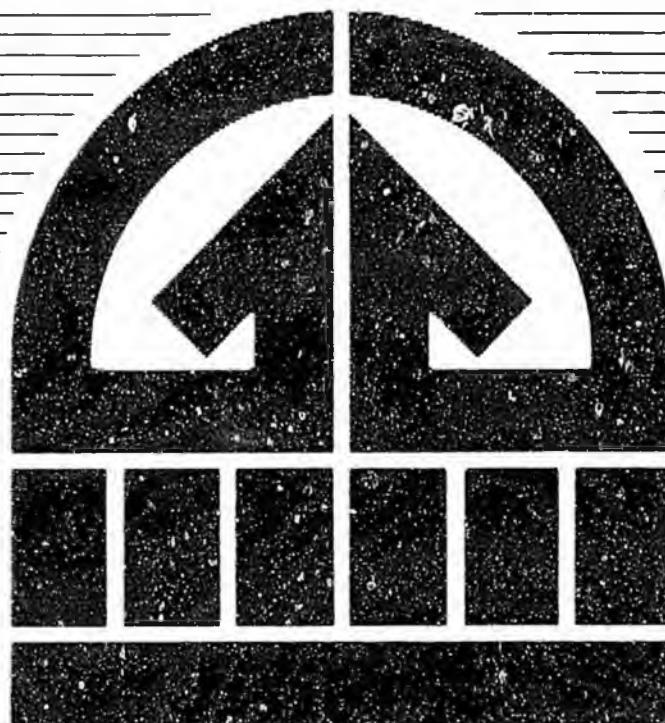
Yes No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 11.41.410 - 11.41.440

HB 109
Rep Kott
2/8/93

STATE LEGISLATIVE REPORT



TESTING SEX OFFENDERS FOR HIV

by

Lucinda L. Bryant
HIV/AIDS Consultant
and
Tracey A. Hooker
HIV/AIDS Policy Specialist

Vol. 16, No. 7 September 1991

An Information Service of the National Conference of State Legislatures
1560 Broadway, Suite 700, Denver, Colorado 80202. William T. Pound, Executive Director

NCSL REPORT

STATE LEGISLATIVE REPORTS

- "Adolescents and AIDS: Stopping the Time Bomb"
(Vol. 15, No. 12) (ISBN 1-55516-268-1) June 1990
- "Asbestos Disposal: A Legislative Primer"
(Vol. 15, No. 13) (ISBN 1-55516-269-X) July 1990
- "Legislative-Judicial Relations: Seeking a New Partnership"
(Vol. 15, No. 14) (ISBN 1-55516-270-3) July 1990
- "Pesticide Applications: States Move to Limit Farmer Liability
for Groundwater Contamination"
(Vol. 15, No. 15) (ISBN 1-55516-271-1) July 1990
- "Science Education in the States: A Survey"
(Vol. 15, No. 16) (ISBN 1-55516-272-X) October 1990
- "Update on Low-Level Waste Compact Activities"
(Vol. 15, No. 17) (ISBN 1-55516-273-8) November 1990
- "Monitored Retrievable Storage of High-Level Radioactive
Waste: Routing Implications and Emergency Response
to Transportation Accidents"
(Vol. 15, No. 18) (ISBN 1-55516-274-6) December 1990
- "Prison Boot Camps: Policy Considerations and Options"
(Vol. 16, No. 1) (ISBN 1-55516-300-9) March 1991
- "Compensated Worksharing: An Alternative to Layoffs"
(Vol. 16, No. 2) (ISBN 1-55516-301-7) April 1991
- "State Cutback Management: Proposals for Fiscal Year 1991
and Fiscal Year 1992"
(Vol. 16, No. 3) (ISBN 1-55516-302-5) April 1991
- "Jurisdiction Over Nuclear Waste Transportation on Indian
Tribal Lands: State Tribal Relationships"
(Vol. 16, No. 4) (ISBN 1-55516-303-3) May 1991
- "Comparative Retirement Benefits for General State Employees
and Public Safety Personnel"
(Vol. 16, No. 5) (ISBN 1-55516-304-1) July 1991
- "Distance Learning: New Technology and New Potential"
(Vol. 16, No. 6) (ISBN 1-55516-305-X) July 1991
- "Testing Sex Offenders for HIV"
(Vol. 16, No. 7) (ISBN 1-55516-306-8) September 1991

STATE LEGISLATIVE REPORT is published 12 to 18 times a year. It is distributed without charge to legislative leaders, council and research directors, legislative librarians, and selected groups for each issue. For further information on STATE LEGISLATIVE REPORT or to obtain copies, contact the NCSL Book Order Department in Denver at 303/830-2200.

Copyright©1991 by the National Conference of State Legislatures.

TESTING SEX OFFENDERS FOR HIV

"The public good to be achieved must be balanced against the costs of the policy."
Larry Gostin, *The Politics of AIDS*, 1989

INTRODUCTION

In the United States each year between 1973 and 1987 some 155,000 women reported they had been raped. (1, p. 7) Although rape is not solely a crime against women, national statistics on homosexual rape are not available. All victims of sexual assault (or survivors, the term some advocacy groups such as the Center for Women Policy Studies prefer) suffer physical and emotional trauma. (2) When the fear of being infected with the human immunodeficiency virus (HIV) is added, the emotional burden increases. Because the victims not only have been assaulted but also possibly threatened with a deadly disease, they often want to know if their assailant is infected with HIV, and public sentiment tends to support requiring the accused to undergo HIV testing.

States feel pressure to respond with legal remedies. One option is to require offenders to be tested for HIV infection (the presence of HIV antibodies) so that victims may have the information. Federal legislation passed in 1990, the Martin amendment to the Comprehensive Crime Control Act of 1990 (P.L.101-647), pressures states to require HIV testing of convicted sex offenders at the victim's request or lose 10 percent of their victim's assistance funds.

Still, questions exist about the usefulness of testing and the legality of mandatory testing. Being infected with HIV is not a crime; infection only becomes relevant to criminal proceedings in the cases involving reckless endangerment, such as assault with intent to infect or deliberate transmission of the virus.

The states have the task of balancing the rights of victims and defendants. To do so, legislators need to conduct careful research about the issues and involve rape victim assistance groups, other relevant community organizations and public health agencies, as well as legal counsel. As Larry Gostin, executive director of the American Society of Law and Medicine, asserts, "The public good to be achieved must be balanced against the costs of the policy [including] . . . the invasion of human rights, the financial cost or the practical burdens of the policy." (3, p. 1020) This report examines some of those policy costs, focusing on issues for legislators to consider regarding HIV testing. The issues include both practical and legal questions about requiring HIV tests for sex offenders.

PRACTICAL CONSIDERATIONS ABOUT HIV TESTING

Tests for HIV infection screen for antibodies produced by the immune system's response to HIV, not for the virus itself. The usual testing procedure is to screen with the ELISA (enzyme-linked immunosorbent assay) and then to confirm positive results with the more labor intensive Western blot test. (4, p. 261-2) Testing sex offenders for HIV raises a number of questions, including the small risk of transmission, the reliability of the tests, the usefulness of the information and the cost.

The risk of transmission of HIV from a single sexual assault. HIV is transmitted through the transfer of body fluids such as semen and blood. The risk of HIV transmission from a single sexual encounter is relatively low. Currently available data suggest at most a 1-in-500 chance of

infection from a single male-to-female exposure if the male is infected. (5, p. 2429 and 6) Risk may be somewhat higher if tissue damage occurs, as may be likely in cases of forcible rape. Of those who died from AIDS-related illness between 1981 and 1990, only 3.6 percent (3,587) were infected through heterosexual contact. (7) The most recent Centers for Disease Control data attribute 10,011 (6 percent) of all known AIDS cases in the United States to heterosexual contact. (8) No cases of HIV transmission from rape have been reported in the United States and only one in Great Britain. (9, p. 36 and 10, p. 2)

Reliability of HIV tests. Most individuals with detectable antibodies are assumed capable of transmitting infection. Current tests are quite reliable, but no test is 100 percent so. (4, p. 260) Especially in low-risk populations, there are significant problems with false positive results (positive tests when the virus is not present) and false negative results (negative tests when the virus is actually present). (4, p. 263) Test results vary among laboratories and are vulnerable to subjective interpretation. Most infected people test HIV-positive within four to six weeks after exposure, but some may not test positive for up to six months, possibly longer, because tests monitor antibodies produced in response to the virus rather than the actual presence of the virus. There is hope for more reliable tests in the future.

Usefulness of testing information. Sexual assault victims might want information about the accused offender's HIV status for two primary reasons: concern for their own health and concern for the health of their sex partners. The victims and their sex partners would be relieved to know if the offender did not test HIV-positive. If the offender tested HIV-positive, victims would want to know quickly to initiate preventive medical action and to protect their partners. A pregnant woman or a woman considering pregnancy has a particularly compelling need to know the offender's HIV status so she can make informed decisions about the health of her future children. Testing the victim will not give useful, reliable information immediately after the assault, because the virus can have an incubation period of six months or more.

A victim might request treatment with AZT (zidovudine), which is used to delay the progression from HIV infection to full-blown AIDS and to increase the length and quality of life of infected patients. Some physicians recommend immediate administration of AZT as a prophylaxis to healthcare workers who have been exposed to HIV, but no studies to date have proven the effectiveness of AZT as a preventive measure. The U.S. Public Health Service recommends that physicians and exposed individuals (but not specifically victims of sexual assault) make decisions about the use of AZT based on risk of infection, time elapsed since exposure, and counseling about the risk of toxicity and the uncertainty about the effectiveness of the medication as a preventive measure. (11, p. 7)

Time also is an issue. Because early intervention may be more effective (if AZT intervention is beneficial at all), testing and communication of test results to the victim need to be completed as quickly as possible after the assault. Waiting until conviction, which can take up to three years, decreases the usefulness of the information to the victim. Testing all accused offenders may solve this problem but raises legal questions. If the offender is not tested promptly, then testing the victim provides at least as much useful information to the victim, because it may show the actual presence or absence of the virus. (12, p. 264)

Cost and payment of mandatory or court-ordered testing. Testing costs vary widely, depending on whether testing is done in bulk, as through a state health department, or individually, by private physicians. Costs also depend on the number of tests required, determined by preliminary test results and the individual's risk factor(s). Costs for tests in bulk are estimated at \$3 to \$15 for the ELISA and \$25 to \$40 for the Western blot assay. Individual tests are substantially more expensive, averaging \$50 to \$75, and can cost as much as \$200.

Only a few states have laws that provide for paying for testing, and none unconditionally pays for a victim's testing. Florida draws on general revenue funds. Kansas, Ohio, South Carolina and Virginia demand repayment from the convicted offender, either directly or as part of the court's judgment. If the defendant is indigent, then the state, municipality or county pays. Oregon uses Crime Victim Compensation funds. Missouri's Department of Health pays for the victim's test if the defendant tests HIV positive, and Idaho pays only to the extent that the Legislature appropriates specific funds.

LEGAL CONSIDERATIONS ABOUT HIV TESTING

The Fourth and Fourteenth Amendments to the U.S. Constitution raise two major issues concerning mandatory testing of offenders and non-voluntary disclosure of test results to victims and others. The Fourth Amendment guarantees protection of the individual from unreasonable searches and seizures and requires that search warrants be based on probable cause. The Fourteenth Amendment is concerned with personal liberty, restrictions on state action and the right to privacy.

Reasonable search. Obtaining a blood sample for HIV testing is a "search" under federal law. The U.S. Supreme Court's interpretation is that the reasonableness of a search is determined "by balancing the government's need to conduct the search against the invasion which the search entails." (13) Warrantless administrative searches may be allowed in non-criminal proceedings when the government's interest in protecting public safety outweighs the individual's privacy interest. (14) The uncertainty surrounding HIV test accuracy and the decreasing usefulness of the offender's test results over time may weaken the case that testing protects public safety in terms of sexual assault victims.

Privacy. Discrimination against HIV-infected individuals is a serious problem. There are concerns about fairness of trials and treatment in correctional facilities. Knowledge that an individual was tested, regardless of the results, can be damaging. Perhaps more important, if the defendant is tested before conviction, it may prejudice the presumption of innocence. On the other hand, if testing is restricted only to convicted sex offenders, it fails to allow for early medical intervention and provides little physical or emotional benefit to the victim.

Court-ordered testing. If a court receives the defendant's written, informed consent to test, or if a court weighs the need for testing against the right of the defendant and finds cause to test, then there are fewer constitutional constraints on testing. A Connecticut law (S.B. 812, 1989), although not specifically directed at sex offenders, is an example of legislation that balances public need and legal protection. Before a court may issue an order for testing, it must find clear and imminent danger to the public health or the health of another person. In addition, the person requesting testing must demonstrate a compelling need that cannot be met by other means. To assess "compelling need," the court must weigh the need for the test result against the test subject's privacy interests and the public interest, which may be poorly served by involuntary testing, (15, p. 61) The problem with these procedures is how long they take.

OPTIONS OTHER THAN HIV TESTING OF THE OFFENDER

The Presidential Commission on the HIV Epidemic and others concerned with the needs of assault victims have recommended focusing on the victim's needs and health status, providing HIV and rape counseling, and making medical care available. (2,16,17,18)

When reason exists to suspect HIV transmission from an assault, testing the victim, and retesting over the period of incubation, is the most reliable source of information. (19, p. 1632) In

addition, the victim may better benefit from an immediate assessment of the risk status of the accused offender, with or without HIV testing, to the extent possible within the legal limits of confidentiality. The victim also needs to know the latest information about preventive measures, such as AZT treatment.

The Centers for Disease Control recommend that pre-test counseling include information about:

- ▶ The risk of infection;
- ▶ The limitation of the test results;
- ▶ The consequences of a positive test result, such as concerns about insurance, employment and housing discrimination; and
- ▶ Measures to prevent the spread of the virus.

STATE RESPONSES

As of May 1991, at least 23 states had passed laws concerning HIV testing of sexual offenders. In addition, at least 70 bills about this issue were proposed in 26 states during the 1991 legislative sessions.

States have taken different approaches to concerns about sex assault. Some have emphasized the rights of victims, others the rights of defendants. California's and New York's laws tend to illustrate the range.

California (S.B. 1007, 1988 and S.B. 2643, 1989) places greater emphasis on victims' rights. One law mandates HIV testing of convicted sex offenders. Another requires the court to issue a search warrant to obtain a blood sample for HIV testing from a person charged with sexual assault when there is probable cause to believe there was a transfer of body fluids. Counseling for both the victim and the accused is required. If the test is positive and confirmed, the victim is notified. The victim is immune from civil liability for disclosing the information as necessary to protect the health and safety of self, sex partner(s) and family. (12, p. 244 and 16, p. 1625)

New York's AIDS Testing and Confidentiality Law [NY PUB. HEALTH LAW 2781.1], which does not specifically address testing sex offenders, protects the rights of the defendant while weighing the needs of the victim. It does not give the victim the right to have the defendant tested. The person to be tested must give written, informed consent unless the test is authorized by law. The court must weigh the victim's needs against the defendant's privacy interests and find "clear and imminent danger" to the victim's life or health before ordering testing or disclosure of test results to the victim. Any further disclosure or redisclosure is prohibited. (12, p. 259 and 16, pp. 1627-29)

The Appendix contains a chart of state laws concerning HIV testing of sex offenders and their provisions on the issues addressed in this report. The following is a summary of the provisions:

- ▶ **Testing Requirements:** fourteen states (CO, FL, ID, IL, IN, MS, MO, NV, ND, OH, OR, SC, TN, WV) require testing for convicted or, in some cases, charged sex offenders; 11 states (AK, AZ, CA, FL, GA, KS, MI, OR, TX, VA, WA) require a court order, some only after failure to get the accused's consent.

- ▶ **Timing:** At least nine states (CA, CO, FL, GA, ID, NV, OH, TX, VA) allow testing at the time of arrest or after charges have been filed, as opposed to after conviction. Four of them require the victim to first request the testing.
- ▶ **Access to Test Results:** Almost all states with testing laws make results available to the victim and the accused as well as to public health authorities. In some states the court and penal system also have access to the results.
- ▶ **Penalties for Unauthorized Disclosure:** Three states (AZ, KS, OR) consider it a misdemeanor to reveal test results to anyone not legally authorized to have access. Penalties include fines.
- ▶ **Counseling:** Laws in 14 states (AK, AZ, CA, FL, GA, IN, KS, MI, MN, OH, OR, VA, WA, WI) include provisions for counseling the victim and/or the accused.
- ▶ **Funding:** Nine states (FL, GA, ID, KS, MO, OH, OR, SC, VA) have included methods of paying for testing in their laws. In Ohio and South Carolina the accused is charged for testing; Kansas and Virginia pay for testing and then include restitution through the convicted person's court costs. Florida draws on general revenue funds, and Oregon uses crime victim compensation funds.

Legislation proposed in 1991 continued to focus on mandatory testing for convicted sex offenders and mandatory or permitted testing of individuals arrested for sex offenses. Other issues under consideration included victim counseling and methods of paying for testing and counseling.

COURT RESPONSES

State laws concerning HIV testing of sex offenders are relatively new and have undergone little court scrutiny. Michael Stoy, Idaho deputy attorney general, says of his state's law that requires testing of anyone charged with a sex offense, "I keep waiting for our own law to be challenged constitutionally . . . but there has not yet been a definitive nationwide statement as to whether someone can be tested against their will. It's a Fourth Amendment privacy right balanced against a public health situation." (9, p. 38)

CONCLUSION

Requiring HIV testing is one highly visible legislative response to the problems of sexual assault and AIDS. State policymakers are faced with constitutional issues of balancing both the rights of victims and defendants and with practical concerns about risks, reliability, usefulness and costs of testing. So far, at least 23 states have responded with a variety of legislative provisions concerning testing: mandatory vs. court ordered, before or after conviction, with or without compulsory counseling, and with various notification procedures. Testing, by itself, may not best serve policymakers' intent to assist victims. It may provide some relief to victims, but programs that include counseling, monitoring of victims' own health status, and emphasis on their own well-being may generate greater long-term benefits. States will continue to be involved in addressing this highly emotional and legally difficult issue. Legislators may want to consult with legal counsel, rape victim assistance groups, other relevant community organizations and public health personnel when considering appropriate responses.

NOTES

1. Caroline Wolf Harlow. "Female Victims of Violent Crime." U.S. Dept. of Justice, *Bureau of Justice Statistics* 7. (January 1991):7.
2. Kathleen Stoll, project director, Center for Women Policy Studies, Washington, D.C., August 15, 1991: personal communication.
3. Larry Gostin. "The Politics of AIDS." *Ohio State Law Journal* 49 (1989):1017-1058.
4. Michael J. Barry, Paul D. Cleary and Harvey V. Fineberg. "Screening for HIV Infection: Risks, Benefits, and the Burden of Proof." *Law, Medicine and Health Care* 14, no. 5-6 (December 1986):259-267.
5. Norman Hearst and Stephen B. Hulley. "Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice?" *Journal of the American Medical Association* 259, no. 16 (April 22/29, 1988):2428-2432.
6. Nancy Padian, J. Wiley and W. Winkelstein. "Male-to-Female Transmission of Human Immunodeficiency Virus (HIV): Current Results, Infectivity Rates, and San Francisco Population Seroprevalence Estimates." Abstract THP.3-48: 171. Presented at the Third International Conference on AIDS, Washington, D.C., June 1-5, 1987. Cited by Hearst (4).
7. "Characteristics of Persons Who Have Died of AIDS 1981-90." *Morbidity and Mortality Weekly Report* 40, no. 3 (January 25, 1991):41-44.
8. Centers for Disease Control. *CDC HIV/AIDS Surveillance* (July 1991).
9. Jan Hoffman. "AIDS and Rape: Should New York Test Sex Offenders?" *The Village Voice* 34, no. 37 (September 12, 1989):35-41.
10. "British Rape Victim Contracts AIDS." Report of the National Association of Crime Victim Compensation Boards (November/December 1990):2.
11. Centers for Disease Control. "Public Health Service Statement on Management of Occupational Exposure to Human Immunodeficiency Virus, Including Considerations Regarding Zidovudine Postexposure Use." *Mortality and Morbidity Report* 39, no. RR-1 (January 26, 1990):1-14.
12. David K. Moody. "AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders." *Cornell Law Review* 76 (1990):238-267.
13. *Skinner vs. Railway Labor Executives' Association*, 109 S.Ct.
14. *New York vs. Burger*, 482 S.Ct.
15. Intergovernmental Health Policy Project. *A Summary of AIDS Laws from the 1989 Legislative Session*. (April 1990).
16. "Initial Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic." (June 24, 1988).

17. Lisa Bowleg, AIDS Policy Center, Intergovernmental Health Policy Project, George Washington University, Washington, D.C., July 2, 1991: personal communication.
18. American Bar Association Criminal Justice Section. "Report to the House of Delegates." (February 1989):13.
19. Paul H. MacDonald. "AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders." *Vanderbilt Law Review* 43 (1990):1607-1636.

APPENDIX

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Arizona 1990, Chap. 335 (HB 2173)		✓ (1)			✓	<ul style="list-style-type: none"> • Victim • Accused • Dept. of Health Services 	Class 3 misdemeanor (Fine ≤ \$5,000)	<ul style="list-style-type: none"> • Victim • Accused 	
Arkansas 1989, Act 614 (HB 1496)		✓				<ul style="list-style-type: none"> • Victim 		<ul style="list-style-type: none"> • Victim 	
California 1989, Chap. 1360 (SB 2643) [Penal Code 1524.1] 1988, Chap. 1597 (SB 1007) 1988, Chap. 1582 (AB 3255)	✓	✓ (1)		✓	✓	<ul style="list-style-type: none"> • Victim • Accused • Those victim "deems necessary" 	\$1,000 - \$10,000	<ul style="list-style-type: none"> • Victim • Accused 	
Colorado 1988, Act 18-3-415 (SB 8)	✓			✓ (2)		<ul style="list-style-type: none"> • Victim (1) • Court 			
Florida 1990, Chap. 90-210 (HB 1115)	✓ (5)	✓ (1)		✓	✓	<ul style="list-style-type: none"> • Victim (1) • Accused • Dept. of Health & Rehab. 		<ul style="list-style-type: none"> • Victim • Accused 	General Revenue Fund
Georgia 1988, Act 1440 (HB 1281) 1991, Act 411 (HB 554)		✓ ✓ (1) ✓ (15)			✓ (3) ✓	<ul style="list-style-type: none"> • Victim • Court • Penal Facility • Dept. of Human Res. 		<ul style="list-style-type: none"> • Victim 	Victim or arrested person, at court's discretion

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Idaho 1988, Chap. 45 (HB 432) 1990, Chap. 310 (HB 638)	✓			✓		• Victim (1) • Public health authorities (5) • Court • Victim (5)			State (4)
Illinois 1987, P.A. 85-935 (HB 2044)	✓				✓	• Judge			
Indiana 1988, P. Law 88-123 (SB 9)	✓				✓	• Victim • Accused • Probation Officer • Board of Health		• Victim • Accused	
Kansas 1988, Chap. 230 (HB 2659)		✓			✓ (6)	• Victim • Accused • Victim's health care provider • Secty. of Health & Env. • Secty. of Corrections	Class C Misdemeanor	• Victim	State (7)
Michigan 1988, P.A. 471 (HB 4008) 1988, P.A. 488 (HB 5189)		✓			✓	• Victim • Accused • Corrections Department • Health Department	\$1,000 - \$5,000	• Accused • Victim, after test	
Minnesota 1990, Chap. 436 (SB 2046)								• Victim	

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Mississippi 1991, Chap. 425 (HB 492)	✓				✓	• Rape victim & spouse • Accused & spouse			
Missouri 1989, Section 191.226 (SB 138)	✓ (8)				✓				Department of Health (9)
Nevada 1989, Chap. 138 (SB 73)	✓			✓		• Victim		(10)	
North Dakota 1989, Chap. 181 (SB 2048)	✓				✓				
Ohio 1989, Vol. 143 (SB 2)	✓			✓	✓ (6)	• Accused • Victim (1) • Penal facility • Court		• Anyone tested	Accused (11)
Oregon 1989, Chap. 568 (HE 2030)		✓ (12)	✓		✓ (6)	• Victim • Accused • Victim's health care provider • Health Division	Class C Misdemeanor	• Victim • Accused, at arrest (13)	Crime Victim Compensation
1987, Chap. 600 (HB 2067)	✓				✓				
South Carolina 1988, Ratification No. 547 (HB 2807)	✓				✓ (14)	• Victim • Accused • Department of Health			• Accused (11)
Tennessee 1991, Public Chap. 25 (HB 52)	✓ (1)				✓	• Victim			

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent Of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Texas 1987, Chap. 55 (SB 66-XX)		✓ (1)		✓ (17)		• Victim • Local Health Authority			
Virginia 1990, Chap. 957 (HB 815)		✓ (15) ✓	✓	✓	✓	• Victim • Accused • Department of Health		• Accused	State (7)
Washington 1988, Chap. 206 (SB 6221)		✓ (16)			✓			• Accused, pre- and post-test	
West Virginia 1988, Chap. 16 (HB 303)	✓				✓	• Victim (5)		• Accused	

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

Source: Intergovernmental Health Policy Project, George Washington University:
A Synopsis of State AIDS Laws Enacted During the 1983-1987 Legislative Sessions.
A Summary of AIDS Laws from the 1988 Legislative Sessions.
A Summary of AIDS Laws from the 1989 Legislative Session.
A Summary of the HIV/AIDS Laws from the 1990 State Legislative Sessions.
 Preliminary 1991 information as of May 30, 1991.

HIV/AIDS Information and Education Project for State Legislators

NCSL works in partnership with the Centers for Disease Control (CDC) to educate and inform state legislatures on HIV and AIDS trends. Continued funding from the CDC enables NCSL's HIV/AIDS Project to serve legislators and their staff as an information resource and a forum to communicate with legislative colleagues, experts, and government officials around the country.

Legislators and legislative staff of the nation's 50 states, its commonwealths and territories are encouraged to request assistance from NCSL's HIV/AIDS Project. The following services are available at no cost to legislators and staff:

- o information clearinghouse
- o publications
- o technical assistance
- o meetings and workshops

The project is funded through a cooperative agreement with the U.S. Centers for Disease Control. For further information contact Tracey Hooker, policy specialist, at NCSL's Health Services Program (303/830-2200).

The Difference Between HIV and AIDS

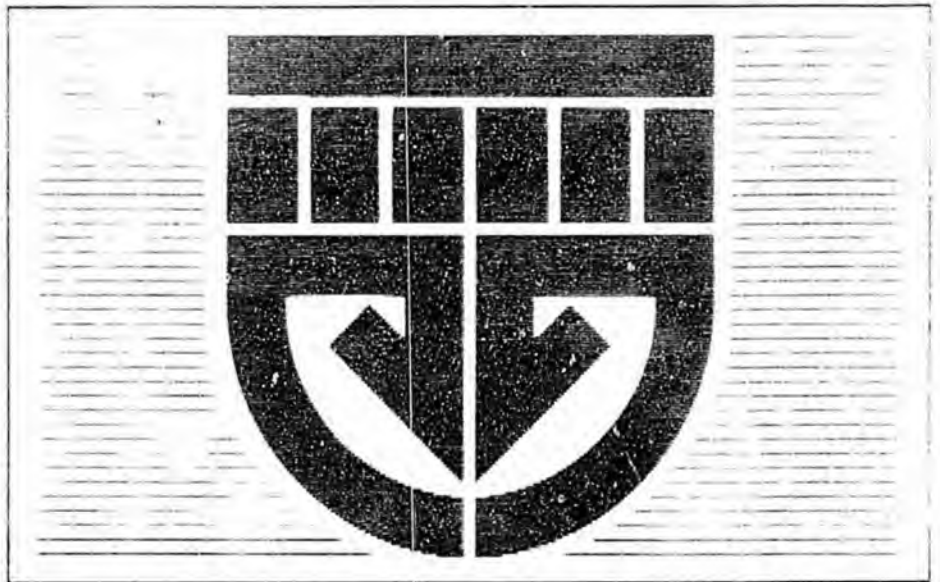
It is important for legislators to understand the distinction between the terms "HIV" and "AIDS" when they formulate policies. There is an immense difference between being infected with HIV and being diagnosed as having AIDS.

HIV is the term for the virus that damages the immune system and may eventually cripple the body's ability to fight disease. AIDS is the end result of HIV infection. People infected with HIV are diagnosed as having AIDS if they develop certain serious diseases or conditions, such as Kaposi's sarcoma (a rare skin cancer), pneumocystis carinii pneumonia, or HIV dementia.

Many more people are infected with HIV than have developed AIDS. An estimated one million individuals are believed to be infected. Many HIV-infected people experience no symptoms of illness for up to 10 years or more. "HIV infection" more correctly defines the scope of the public health problem that legislators face today.

Some of the most regularly misunderstood phrases related to HIV:

Misleading	More Accurate
Infected with AIDS	HIV infection
AIDS virus	HIV (human immunodeficiency virus)
HIV virus	HIV
AIDS test	HIV antibody test
AIDS antibodies	HIV antibodies
Positive AIDS test	Positive test for HIV antibodies
AIDS transmission	HIV transmission
AIDS victim	PWA (person with AIDS) or PLWA (person living with AIDS)
High risk groups	High risk behaviors



STATE
LEGISLATIVE
REPORT

National Conference
of State Legislatures
1560 Broadway, Suite 700
Denver, Colorado 80202

Non-Profit Organization
U.S. Postage
PAID
Denver, Colorado
Permit No. 3535

HOUSE COMMITTEE REPORT

(9)

Date Referred: January 29, 1993

FURTHER REFERRALS:

Judiciary
Finance

Date of Committee Action: 2-16-93

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered:

HB 109

HOUSE BILL NO. 109

BLOOD TESTS ON SEX CRIME PERPETRATORS

"An Act relating to blood tests for persons charged with sex offenses; and providing for an effective date."

RECOMMENDATIONS:

bc replaced with CS HB 109 (HESS) the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact H+SS

fiscal note(s) _____

zero fiscal note Corrections, Law

zero fiscal note(s) _____

SIGNING <u>DO PASS</u>	DP	<u>OTHER</u> RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				

[Signature]
CHAIRMAN'S SIGNATURE

Bill would allow AIDS testing of rape suspects

By IAN MADER

THE ASSOCIATED PRESS

Sexual assault victims would be able to find out whether their suspected attacker carries the virus that causes AIDS, under legislation introduced in the House.

Victims could petition the court to have the suspect tested for the human immunodeficiency virus, known as HIV. If the court found probable cause that bodily fluids were exchanged, it would have to order the test.

The bill is a rewrite of legislation that died last year. More than a dozen states have passed such laws. To protect the rights of suspects, some states require a conviction before the test can be or-

dered.

No conviction is required under House Bill 109, but if the suspect were convicted, he or she would have to pay for the test. Otherwise, the Department of Health and Social Services would pay.

Rep. Pete Kott, R-Eagle River and sponsor of the bill, said a negative HIV test could alleviate fear for a traumatized victim. If the suspect carried the virus, the victim would know of the risk and could seek prompt medical treatment, Kott said.

The House Judiciary Committee is among the panels that will review the bill. Rep. Brian Porter, R-Anchorage and committee chairman, said testing suspects

may be an unnecessary expense.

A negative test for a suspect is no guarantee that HIV was not passed to the victim, said Porter, a former police chief. An attacker could recently have contracted the virus, but may not be testing positive yet.

"A victim would have to get tested themselves anyway," Porter said. "Anyone, including victims of sex crimes, can obtain free testing in Alaska."

The state will lose \$200,000 in federal aid without such a law, but administering the program may cost more than that, Porter said.

Among other measures introduced in the Legislature recently:

- HB91 and HB107, which would issue general obligation bonds to pay for public school construction and equipment. HB91 would issue \$414 million in bonds for rebuilding schools throughout the state

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 109 (HES)

Revision Date: February 23, 1993
Title: "...relating to blood tests for persons charged with sex offenses."
Sponsor: Representative Kott
Requestor: Representative Kott

Department Affected: Department of Law
BRU: Prosecution, Legal Services
Component: Prosecution - All
Legal Services - Operations
COMPONENT SERIAL NO. 0085 through 0090, 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Phone: 465-3672
Date: February 23, 1993
Date: February 23, 1993

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CS 109 (HES)

ANALYSIS (Continued):

The committee substitute for HB 109, CSHB 109 (HES), changes the standard for hearing petitions of victims to request an order requiring that blood samples be taken from a defendant, to require (1) that a court find that probable cause exists to believe that a crime for which a test may be ordered has been committed, and (2) that a court find that probable cause exists to believe that sexual penetration took place between the defendant or a minor and the alleged victim. The bill further provides that in making these determinations, the court may rely on the evidence presented at a grand jury proceeding or preliminary hearing. We believe that these changes will eliminate virtually all "mini-hearings" and associated discovery efforts that we predicted in our fiscal note comments dated February 3, 1993. Consequently, there should not be a fiscal impact for the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

No. 2
Bill Version: CSHB 109 (HES)
(H) Publish Date: 2/17/93

Revision Date: February 3, 1993
Title: ...relating to blood tests for persons charged with sex offenses.
Sponsor: Representative Kott
Requestor: Representative Kott

Department Affected: Department of Law
BRU: Prosecution, Legal Services
Component: Prosecution - All
Legal Services - Operations
COMPONENT SERIAL NO. 0085 through 0090, 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division

Phone: 465-3672
Date: February 3, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
At: Department of Law

Date: February 3, 1993

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

FISCAL NOTE

CS HB 109 (HES)
No. 2

STATE OF ALASKA
1993 LEGISLATIVE SESSION

ANALYSIS (Continued):

This bill amends AS 18.15 to provide that a defendant charged with a violation of the state's sexual assault laws, including a minor subject to a juvenile proceeding for committing the same violations, is subject to an order of a court to require testing for HIV and other communicable diseases. The bill would permit the alleged victim, or the prosecuting attorney at the request of an alleged victim, to petition the court for an order to require the testing. A court would then have to promptly conduct a hearing on the petition. If the court finds that probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant, or minor, and the alleged victim, the court shall then order the tests.

The Department of Law handles about 200 sexual assault cases a year where criminal charges are filed, and where the assault includes conduct that would fall within the requirements of this bill. The department also handles a somewhat smaller number of sexual assaults involving minors in juvenile proceedings that would be subject to this bill.

We cannot predict how many sexual assault victims will request the department to petition on their behalf for a court hearing to require HIV and other communicable disease testing. If the number is large there could be a significant expense for the department. This is because our prosecutors would have to conduct a mini-trial and present evidence for each petition sufficient enough to convince a court that probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant, or minor, and the alleged victim.

Defendants would be expected to resist prosecutors' efforts to show probable cause because of the effect that the hearing might have on their eventual defense at trial. In many cases, prosecutors would be required to prematurely reveal their evidence substantially earlier than normally required by court rule, in order to show probable cause. This could result in an additional level of defense discovery, giving the defense first crack at the state's case and witnesses.

However, because we cannot predict the number of times petitions will be requested, sufficient to warrant fiscal impact funding at any given location, fiscal note funds have not been requested.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 109 HESS

Revision Date: 2/18/93 Dept. Affected: Health and Social Services
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services
 Component: Laboratories
 Sponsor: Kott
 Requestor: House HESS COMPONENT SERIAL NO. #291

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES	27.9	27.9	27.9	27.9	27.9	27.9
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	27.9	27.9	27.9	27.9	27.9	27.9

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

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	27.9	27.9	27.9	27.9	27.9	27.9
1005 GF/Program Receipts						
06 GF/MHTIA						
Other						
TOTAL	27.9	27.9	27.9	27.9	27.9	27.9

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary)

This fiscal note is based on the costs for the laboratory testing alone. It does not take into account the costs of medical personnel to perform the requisite counseling and testing, travel for medical personnel to communities where qualified personnel are unavailable, shipment of specimens, cost to ensure chain of evidence, and documentation of procedures and test results.

In 1992, 339 charges were made for arrests for sex offenses. Using 350 as the base, the laboratory costs associated with HB 109 is as follows:

Prepared by: Peter M. Nakamura, MD, MPH
 Division: Division of Public Health

Phone: (907) 465-3090
 Date: 2/18/93

Approved by Commissioner: Theodore A. Mala, MD, MPH
 Agency: Department of Health & Social Services

Date: 2/18/93

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information call the Governor's Legislative Office

Revision Date: _____

BILL NO. CSHB 109 HESS

NALYSIS (cont.):

1. Cost for initial HIV screening @ \$16.30/test	5,705
2. Assuming that 0.9% initially screened were positive, the cost for HIV Western blot for making a positive diagnosis is \$93.15/test	293
3. Cost for screening negative results after the six month window period for 347 @ \$16.30/test	5,656
4. Cost for West Blot for the 0.9% of those persons which tested positive after the 6 month window period	293
5. Cost of Hepatitis B screening @ \$16.30/test	5,705
6. Cost of Hepatitis B testing on the 11.2% that will test positive @ \$114.10/test	4,473
7. Cost of RPR test for syphilis @ \$16.30/test	5,705
TOTAL	\$27,830

FISCAL NOTE

No. 3

STATE OF ALASKA
19th LEGISLATIVE SESSION

Bill Version: CSHB 109 (HES)
(H) Publish Date: 2/17/93

Revision Date: _____ Dept. Affected: Corrections
 Title: "An Act relating to blood tests
for persons charged with sex offenses " BRU: Statewide Programs
 Component: Inmate Health Care
 Sponsor: _____
 Requestor: _____ COMPONENT SERIAL NO. 705

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
REVENUE FUND SOURCE						

FUNDING: (Thousands of Dollars)

	FY94	FY95	FY96	FY97	FY98	FY99
1001 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/INTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						
Estimate of current year (FY93) impact: 0	-0-					

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Dana LaTour Phone: 465-3376
 Division: Commissioner's Office Date: 2-11-93
 Approved by Commissioner: Lloyd G. Rupp Date: 2-11-93
 Agency: Department of Corrections

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: _____ Dept. Affected: Health and Social Services
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services
 Sponsor: Kott Component: Laboratories
 Requestor: _____ COMPONENT SERIAL NO. #291

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES	27.9	27.9	27.9	27.9	27.9	27.9
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	27.9	27.9	27.9	27.9	27.9	27.9

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

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

FUNDING	FY94	FY95	FY96	FY97	FY98	FY99
1002 Federal Receipts						
1003 GF Match						
1004 GF	27.9	27.9	27.9	27.9	27.9	27.9
1005 GF/Program Receipts						
1006 GF/M.HTIA						
Other						
TOTAL	27.9	27.9	27.9	27.9	27.9	27.9

POSITIONS:

POSITION TYPE	FY94	FY95	FY96	FY97	FY98	FY99
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary)

This fiscal note is based on the costs for the laboratory testing alone. It does not take into account the costs of medical personnel to perform the requisite counseling and testing, travel for medical personnel to communities where qualified personnel are unavailable, shipment of specimens, cost to ensure chain of evidence, and documentation of procedures and test results.

In 1992, 339 charges were made for arrests for sex offenses. Using 350 as the base, the laboratory costs associated with HB 109 is as follows:

Prepared by: Peter M. Nakamura, MD, MPH
 Division: Division of Public Health

Phone: (907) 465-3090
 Date: 2/8/93

Approved by Commissioner: Theodore A. Mala, MD, MPH
 Agency: Department of Health & Social Services

Date: 2/9/93

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information call the Governor's Legislative Office

ANALYSIS (cont.):

1. Cost for initial HIV screening @ \$16.30/test	5,705
2. Assuming that 0.9% initially screened were positive, the cost for HIV Western blot for making a positive diagnosis is \$93.15/test	293
3. Cost for screening negative results after the six month window period for 347 @ \$16.30/test	5,656
4. Cost for West Blot for the 0.9% of those persons which tested positive after the 6 month window period	293
5. Cost of Hepatitis B screening @ \$16.30/test	5,705
6. Cost of Hepatitis B testing on the 11.2% that will test positive @ \$114.10/test	4,473
7. Cost of RPR test for syphilis @ \$16.30/test	5,705
TOTAL	\$27,830

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: _____ Dept. Affected: Corrections
 Title: "An Act relating to blood tests
for persons charged with sex offenses." BRU: Statewide Programs
 Component: Inmate Health Care
 Sponsor: _____
 Requestor: _____ COMPONENT SERIAL NO. 705

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program. Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: \$ -0-

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Dana LaTour *D LaTour* Phone: 465-3376
 Division: Commissioner's Office Date: 2-11-93
 Approved by Commissioner: Lloyd G. Rupp *Lloyd G. Rupp* Date: 2-11-93
 Agency: Department of Corrections

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information call the Governor's Legislative Office

FN-CORRECTIONS

FISCAL NOTE

BILL NO. HB 109

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Revision Date: February 3, 1993
Title: "...relating to blood tests for persons charged with sex offenses."
Sponsor: Representative Kott
Requestor: Representative Kott

Department Affected: Department of Law
BRU: Prosecution, Legal Services
Component: Prosecution - All Legal Services - Operations
COMPONENT SERIAL NO. 0085 through 0090, 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division

Phone: 465-3672
Date: February 3, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Date: February 3, 1993

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

Fiscal Note - Dept of Law

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 109

ANALYSIS (Continued):

This bill amends AS 18.15 to provide that a defendant charged with a violation of the state's sexual assault laws, including a minor subject to a juvenile proceeding for committing the same violations, is subject to an order of a court to require testing for HIV and other communicable diseases. The bill would permit the alleged victim, or the prosecuting attorney at the request of an alleged victim, to petition the court for an order to require the testing. A court would then have to promptly conduct a hearing on the petition. If the court finds that probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant, or minor, and the alleged victim, the court shall then order the tests.

The Department of Law handles about 200 sexual assault cases a year where criminal charges are filed, and where the assault includes conduct that would fall within the requirements of this bill. The department also handles a somewhat smaller number of sexual assaults involving minors in juvenile proceedings that would be subject to this bill.

We cannot predict how many sexual assault victims will request the department to petition on their behalf for a court hearing to require HIV and other communicable disease testing. If the number is large there could be a significant expense for the department. This is because our prosecutors would have to conduct a mini-trial and present evidence for each petition sufficient enough to convince a court that probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant, or minor, and the alleged victim.

Defendants would be expected to resist prosecutors' efforts to show probable cause because of the effect that the hearing might have on their eventual defense at trial. In many cases, prosecutors would be required to prematurely reveal their evidence substantially earlier than normally required by court rule, in order to show probable cause. This could result in an additional level of defense discovery, giving the defense first crack at the state's case and witnesses.

However, because we cannot predict the number of times petitions will be requested, sufficient to warrant fiscal impact funding at any given location, fiscal note funds have not been requested.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

No. 1
Bill Version: CSHB 109 (HES)
(H) Publish Date: 2/17/93

Division Date: _____ Dept. Affected: Health and Social Services
: Blood Tests for persons charged with sex BRU: State Health Services
offenses _____ Component: Laboratories
Sponsor: Kott
Requestor: _____ COMPONENT SERIAL NO. #291

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES	27.9	27.9	27.9	27.9	27.9	27.9
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	27.9	27.9	27.9	27.9	27.9	27.9

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

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	27.9	27.9	27.9	27.9	27.9	27.9
1005 GF/Program Receipts						
1006 GF/MI/TIA						
Other						
TOTAL	27.9	27.9	27.9	27.9	27.9	27.9

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary)

This fiscal note is based on the costs for the laboratory testing alone. It does not take into account the costs of medical personnel to perform the requisite counseling and testing, travel for medical personnel to communities where qualified personnel are unavailable, shipment of specimens, cost to ensure chain of evidence, and documentation of procedures and test results.

In 1992, 339 charges were made for arrests for sex offenses. Using 350 as the base, the laboratory costs associated with HB 109 is as follows:

Prepared by: Peter M. Nakamura, MD, MPH *PN*
Division: Division of Public Health

Phone: (907) 465-3090
Date: 2/8/93

Approved by Commissioner: Theodore A. Mala, MD, MPH *TAM*
Agency: Department of Health & Social Services

Date: 2/9/93

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

Revision Date: _____

CS HB 109 (HES)
No. 1.

ANALYSIS (cont.):

1. Cost for initial HIV screening @ \$16.30/test	5,705
2. Assuming that 0.9% initially screened were positive, the cost for HIV Western blot for making a positive diagnosis is \$93.15/test	293
3. Cost for screening negative results after the six month window period for 347 @ \$16.30/test	5,656
4. Cost for West Blot for the 0.9% of those persons which tested positive after the 6 month window period	293
5. Cost of Hepatitis B screening @ \$16.30/test	5,705
6. Cost of Hepatitis B testing on the 11.2% that will test positive @ \$114.10/test	4,473
7. Cost of RPR test for syphilis @ \$16.30/test	5,705
TOTAL	\$27,330

H B

h b

(7)

Date Referred: March 3, 1993

FURTHER REFERRALS:

Date of Committee Action: 3-22-93

The JUDICIARY Committee considered:

HB 112

HOUSE BILL NO. 112

UNIFORM LIMITED PARTNERSHIP ACT UPDATE

"An Act relating to limited partnerships; and providing for an effective date."

RECOMMENDATIONS: the same title
be replaced with _____ a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) LAW + DCED 3/3/93

SIGNING <u>DO PASS</u>	DP	<u>OTHER</u> RECOMMENDATIONS	DNP	NR	AM
<i>Brian D. Porter</i>	<input checked="" type="checkbox"/>	<i>City of Anderson</i>		<input checked="" type="checkbox"/>	
<i>Lail Phillips</i>	<input checked="" type="checkbox"/>				
<i>Annally Johnson</i>	<input checked="" type="checkbox"/>				
<i>Bob [unclear]</i>	<input checked="" type="checkbox"/>				
<i>Joseph [unclear]</i>	<input checked="" type="checkbox"/>				

Brian D. Porter
CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: March 22, 1993

Place: Capitol Room 120

HB 4 Elderly and Disabled Adults

Subject of Meeting: HB 3 Home Care Providers
HB 112 Uniform Limited Partnership Act

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
H. SWO, D SW	OTG					<input checked="" type="radio"/> Y <input type="radio"/> N	4
W Majors	Alaskans Com.	PO Box 110209	99801		465-3478	<input checked="" type="radio"/> Y <input type="radio"/> N	3
Art Peterson	NCCUSL	One Sackaska Plaza Suite 202 Juneau, AK 99801 →			586-4000	<input checked="" type="radio"/> Y <input type="radio"/> N	HB 112
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	
						<input type="radio"/> Y <input type="radio"/> N	

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: March 22, 1993
Place: Capitol Room 120

HB 4 Elderly and Disabled Adults

Subject of Meeting: HB 3 Home Care Providers
HB 112 Uniform Limited Partnership Act

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
KARA LUCK	DCED OCC LIC	3811 KILLEWICH DR JUNIATA ALC	99801	9-4657	2538	Y <input checked="" type="radio"/> N	AVAILABLE TO ANSWER QUESTIONS
MARGO KNEETH	LAW CACD	PO BOX 110300	99811		3428	<input checked="" type="radio"/> Y N	HB 4
WILLIS KIRKPATRICK	DCED ^{Banking} sec-corp	PO BOX 110808	99811		2521	Y <input checked="" type="radio"/> N	available HB 112
PAT O'BRIEN	DHSS	PO Box 110630	99811	465-2145		Y N	Available for questions HB 3 + 4
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

Alaska State Legislature

Representative Carl E. Moses



CHAIRMAN
HOUSE RULES COMMITTEE

CHAIRMAN
HOUSE SPECIAL FISHERIES COMMITTEE

MEMBER
FINANCE SUBCOMMITTEES
FISH AND GAME
PUBLIC SAFETY

SESSION:
CAPITOL BUILDING, ROOM 204
JUNEAU, ALASKA 99801-1182
PHONE: (907) 465-4451
FAX: (907) 465-3445

INTERIM:
P.O. BOX 109
UNALASKA, ALASKA 99665
PHONE: (907) 581-1234
FAX: (907) 581-2875

M E M O R A N D U M

DATE: March 5, 1993

TO: Rep. Brian Porter, Chairman
House Judiciary Committee

FROM: Rep. Carl E. Moses, Chairman *CEM*
House Rules Committee

RE: Request for Hearing

I would like to request a committee hearing on HB 112, the bill to complete the modernization of Alaska's Uniform Limited Partnership Act. As you may know, the Act was brought up to nationally prescribed standards last year by SB 193. Previous to that, Alaska law embraced statutory language dating back to 1916.

In short, Alaska, the last state to do so, adopted the 1976 revisions with further amendments from 1985, as recommended by the National Conference of Commissioners on Uniform State Law. In its upgrade, SB 193 did not include one significant component: It did not adopt the more efficient NOTICE form of certification, as opposed to the cumbersome LONG form. With many limited business partnerships today having as many as hundreds of partners, it is impractical and unnecessary to require amendments and new filings in each case of a partner selling his or her interest.

Section 1 of HB 112 substitutes the NOTICE form of the certificate of limited partnership for the LONG form. The remainder of the bill provides compatibility amendments, and an effective date, which coincides with the effective date of SB 193 from last year. The effective date will be July 1, 1993.

Available to testify before the committee is Mr. Arthur H. Peterson, Uniform Law Commissioner for the State of Alaska. If you need further information, or wish to contact Mr. Peterson, please advise Tim Benintendi of my office at 3764.

CEM/tb/m13

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 9, 1993

SUBJECT: Sectional analysis of HB 112

TO: Representative Carl Moses, Chair
House Labor and Commerce Committee
Attn: Tim

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have requested a sectional analysis of the above-described bill. As a preliminary matter, note that a sectional analysis of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 of the bill removes the requirement that two or more persons have to execute the certificate of limited partnership. Reduces the amount of information that must be provided in the certificate of limited partnership. This is the major change in the bill. The majority of the other changes in the bill reflect this change. The bill takes the approach of relying on a written partnership agreement or on the partnership records as the sources for the information deleted from the certificate.

Section 2 of the bill amends the section relating to the amendment of the certificate of limited partnership. Deletes partnership contribution changes from the list of events that require an amendment to the certificate of limited partnership. This reflects the deletion of contribution information from the information required to be in the certificate.

Section 3 amends the section on the execution of partnership certificates. Simplifies the execution requirements of certain partnership certificates by only requiring execution by the general partners. Deletes the reference to contributions. These changes are necessary because the certificate of limited partnership is no longer required to include information on limited partners and the contributions of the partners.

Section 4 of the bill allows a person to use an attorney-in-fact to sign original certificates of limited partnership, certificates of amendment, and certificates of

-SECTIONAL SUMMARY-

cancellation. Since the certificates are no longer required to contain information on limited partners or partnership contributions, the reference in this subsection to partners is limited to general partners, and the reference to contributions is deleted.

Section 5 of the bill changes the scope of the notice provided by a filed certificate of limited partnership. The certificate provides notice of who is a general partner, not who is a limited partner.

Section 6 of the bill changes the section on the admission of limited partners. The section is amended (1) to add subsection (a), and (2) to delete a subsection that provided that new limited partners are added by amending the certificate of limited partnership. These changes result from the changes made to the certificate of limited partnership. Under those changes, limited partners are no longer required to be identified in the certificate.

Section 7 of the bill indicates that a person who makes certain contributions to a limited partnership is liable as a general partner to certain third parties until either of two listed events occurs. Rewrites the second event to refer to general partners and not to limited partners, since the chapter no longer requires limited partners to be identified in the partnership certificates.

Section 8 of the bill addresses the enforceability and compromise of a partner's promise to contribute to the limited partnership. Adds a new subsection (a), and makes other changes to implement the fact that contribution information is no longer required to be included in the certificate of limited partnership.

Section 9 of the bill directs how profits and losses of a limited partnership are to be allocated among the partners. Substitutes a reference to the partnership records for the reference to the certificate of limited partnership, since information on the value of partnership contributions is no longer required to be contained in the certificate.

Section 10 of the bill directs how distributions are to be allocated among the partners. Substitutes a reference to the partnership records for the reference to the certificate of limited partnership, since information on the value of partnership contributions is no longer required to be contained in the certificate.

Section 11 of the bill states the extent and time when a partner is entitled to receive distributions from a limited partnership. The deletion of paragraph (2) reflects the changes made in sec. 1 of the bill to the information required to be in the certificate of limited partnership.

Section 12 of the bill establishes when a limited partner can withdraw from a limited partnership. Since under sec. 1 of the bill the certificate of limited partnership will contain less information, the section substitutes references to the partnership

agreement for the references to the certificate. Requires the time or events of withdrawal to be specified in written form in the agreement or the section takes over.

Section 13 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership and refers instead to a written partnership agreement.

Section 14 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership and refers instead to the records required under AS 32.11.840 as the source of the information.

Section 15 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership. Refers instead to the partnership agreement as the source of the authority for giving an assignee of a partnership interest the right to become a limited partner.

Section 16 deletes the reference to the certificate of limited partnership since, under sec. 1 of the bill, the certificate is no longer required to contain information from which liabilities of the limited partnership could be ascertained.

Section 17 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership. The section substitutes a written partnership agreement as a source for determining what events trigger the dissolution of the partnership.

Section 18 of the bill deletes paragraph (3) from the registration application for a foreign limited partnership. The same deletion was made for domestic limited partnerships. Requires the foreign limited partnership to include in its registration application the name and address of each general partner, the address where information on the limited partners is kept, and an undertaking by the partnership to maintain the records.

Section 19. The deletion of AS 32.11.810(3) reflects that information on the character of the limited partnership's business is no longer required to be included in the certificate of limited partnership.

Section 20 of the bill requires a limited partnership to maintain records containing some of the information that is no longer required to be included in the certificate of limited partnership.

Section 21 of the bill makes a deletion to reflect that the identity of the limited partners is no longer required to be included in the certificate of limited partnership.

Section 22 of the bill provides transition provisions for the bill.

Representative Carl Moses
February 9, 1993
Page 4

Section 23 of the Act makes its provisions retroactive to the desired effective date if the Act is not enacted by the effective date.

Section 24 of the bill provides that the Act takes effect on July 1, 1993, the date when AS 32.11, the chapter being amended, is scheduled to go into effect.

If I may be of further assistance, please advise.

TLB:glc
93-110.glc

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 12, 1993

Hon. Brian Porter
Alaska House of Representatives
State Capitol Building, Room 122
Juneau, AK 99801

Re: HB 112

Dear Representative Porter:

The Department of Law has reviewed HB 112, updating the Uniform Limited Partnership Act in Alaska.

We find no legal problems. The bill is important for making Alaska's law consistent with other states that have enacted the uniform Act on this subject.

We understand that the bill is before your committee. We would appreciate scheduling of a hearing on the bill.

If you have questions, please let us know.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: *Deborah E. Behr*
Deborah E. Behr
Assistant Attorney General

DEB:cl

cc: Alaska's Uniform Law Commissioners Delegation
Justice Jay Rabinowitz
Arthur H. Peterson, Esq.
Jerry Kurtz, Esq.
Tam Cook, Esq.
Grant Callow, Esq.

Kris Lethin, Legislative Liaison
Office of the Governor

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

1031 W. 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P. O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 463-3600
FAX: (907) 463-5295

HB 112: "An Act relating to limited partnerships; and providing for an effective date."

The Department of Commerce and Economic Development favors passage of House Bill 112, as it provides greater uniformity to the Uniform Partnership Act. These amendments to Chapter 128, SLA 1992, effective July 1, 1993, will have, to a small degree, some filing reduction of activity by the department, due to the deletions of information to be filed.

While no amendments are offered by the department, the Legislature may wish to consider the following:

1. Section 1 and Section 18 delete the requirement of a limited partnership to file a general character of the business it proposes to transact. It is suggested that the Legislature may wish to weigh the inclusion of a Standard Industrial Classification code (SIC) to be filed with the department. This would provide statistical information to agencies of the state government and to others who wish to determine the scope of Limited Partnership businesses operating in the State of Alaska. The SIC codes are a requirement for business licenses and for corporations filing with the department. This information has been helpful in Economic Development studies.
2. The department in preparation for the July 1, 1993, effective date of Chapter 128 SLA 1992, has found that other states have had some administrative problems with the lack of authority to dissolve a limited partnership when it becomes known that the limited partnership no longer has any operational existence. The only action available to the department would be to remove the nonfunctional limited partnership at the expiration date listed on its certificate. It might be appropriate for the Legislature to consider including the department as one that could make application to Superior Court for judicial dissolution (Section 32.11.380).

The department appreciates the opportunity to state our position, and finds that should HB 112 pass, there would be no fiscal impact upon the agency.



Paul Fuhs, Commissioner

2-8-93

Date

PF/WFK/lvs149.WK/2893c

LAW OFFICES

DILLON & FINDLEY

A PROFESSIONAL CORPORATION

Dennis C. Bailey
Ray R. Brown
Caroline Crenna
Paul L. Dillon
Thomas W. Findley
Richard D. Monkman
Arthur H. Peterson

One Sealaska Plaza, Suite 202
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

ANCHORAGE:
510 L Street, Suite 601
Anchorage, Alaska 99501
Telephone (907) 277-5400
Facsimile (907) 274-9649

SITKA:
514 Lake Street
Sitka, Alaska 99835
Telephone (907) 747-3900
Facsimile (907) 747-3990

February 11, 1993

Willis Kirkpatrick, Director
Division of Banking, Securities,
and Corporations
Department of Commerce &
Economic Development
P.O. Box 110808
Juneau, AK 99811-0808

Re: SB 66 and HB 112, Certificates of Limited
Partnership

Dear Willis:

In your recent position papers for SB 66 and HB 112, you suggest that the legislature may wish to consider the following two possible amendments:

1. Inclusion of a requirement that a Standard Industrial Classification code (SIC) statement be filed with your department.
2. Amend AS 32.11.380 to authorize your department to apply to the Superior Court for judicial dissolution of a limited partnership.

I have just talked with the legal counsel and legislative director of the National Conference of Commissioners on Uniform State Laws, and he suggests that the Uniform Act not be amended in these respects. While the SIC idea would not do major violence to the Uniform Act, it is preferable to maintain the national uniformity, and, since including the SIC code information on the certificate of limited partnership would necessitate an amendment of the certificate if the partnership changes the category of its business, the additional paperwork requirements run counter to the general thrust of the modern Act. You might wish to consider adopting a regulation imposing such a requirement for initial filings, but I have not researched your statutory authority to adopt such a regulation.

As to the idea of allowing the department to apply to Superior Court for dissolution of a limited partnership "when it becomes known that the limited partnership no longer has any operational existence," the NCCUSL attorney pointed out that that would

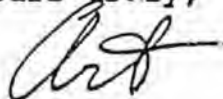
Willis Kirkpatrick
February 10, 1993

Page 2

constitute a major grant of power to the department. It would necessitate the partners defending the existence of their partnership in court whenever an administrative official concluded that the partnership no longer had "an operational existence." Unlike corporations, which may have perpetual existence, limited partnerships are to specify in the certificate of limited partnership "the latest date upon which the limited partnership is to dissolve" (see proposed AS 32.11.010(a)(4), at page 1, line 12 of the bill). Also see existing AS 32.11.370(1). The judicial dissolution provided for in existing AS 32.11.380 provides a special alternative for partners when one of the normal dissolution alternatives set out in AS 32.11.370(1) -- (4) is not sufficient. Your department's interest in getting what appears to be an inoperative partnership off the department books would seem to be outweighed by the desirability of national uniformity on this point and the public interest in facilitating use of these partnerships (even those that might appear dormant for a time).

I hope that these comments are helpful. Thanks for your support of the bill.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

AHF/mh

cc: Senator Jim Duncan

— Representative Carl Moses

Deborah E. Behr
Assistant Attorney General
Legislation/Regulations Section
Alaska Department of Law

LAW OFFICES

DILLON & FINDLEY

A PROFESSIONAL CORPORATION

Dennis C. Bailey
Ray R. Brown
Caroline Crenna
Paul L. Dillon
Thomas W. Findley
Richard D. Monkman
Arthur H. Peterson

One Sealaska Plaza, Suite 202
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

ANCHORAGE:
510 L Street, Suite 601
Anchorage, Alaska 99501
Telephone (907) 277-5400
Facsimile (907) 274-9649

SITKA:
514 Lake Street
Sitka, Alaska 99835
Telephone (907) 747-3900
Facsimile (907) 747-3990

February 10, 1993

Hon. Bill Hudson, Chair
House Labor & Commerce Committee
Alaska State Legislature
Room 108, State Capitol
Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: HB 112 (limited partnerships)

Dear Bill:

HB 112 (limited partnerships) has been referred to your committee, and I would appreciate your scheduling a hearing on it as soon as possible. I understand that Tim Benintendi, of Rep. Carl Moses' staff, will furnish additional background information.

This bill is a vital element in the completion of the updating of Alaska's 1917 version of the Uniform Limited Partnership Act. It picks up the National Conference of Commissioners on Uniform State Laws' 1985 amendments to the modern Act that were omitted from the bill passed by the legislature last year (ch. 128, SLA 1992).

The bill has a July 1, 1993 effective date, which coincides perfectly with the effective date of last year's enactment. So we will be able to have a completed update of our Uniform Limited Partnership Act this summer.

The heart of the bill is sec. 1. It substitutes the "notice" form (i.e., "short form") of the certificate of limited partnership for the old "long form" certificate. It thus recognizes modern-day types and uses of limited partnerships, conforms to the national standard, and facilitates doing business by means of this kind of entity in Alaska.

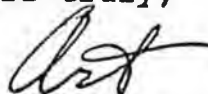
//
//
//
//

UNIFORM LAW
-LETTER COMMISSIONER

Hon. Bill Hudson, Chair
February 10, 1993
Page 2

Thank you for considering this matter.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

AHP/mh

cc: Rest of Alaska's ULC Delegation:
Jay A. Rabinowitz
W. Grant Callow
Tamara Brandt Cook
L.S. Kurtz, Jr.
Deborah E. Behr

ah/ahp/hudson.110

HELLER, EHRMAN, WHITE & MCAULIFFE
ATTORNEYS

333 BUSH STREET
SAN FRANCISCO, CALIFORNIA 94104-2878
FACSIMILE (415) 772-0368
TELEPHONE (415) 772-8000

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1900 ENSERCH CENTER - 550 WEST 7TH AVENUE
ANCHORAGE, ALASKA 99501-3571
TELEPHONE (907) 277-1900 - FACSIMILE (907) 277-1920

101 FIFTH AVENUE
SEATTLE, WASHINGTON 98104-7098
FACSIMILE (206) 447-0848
TELEPHONE (206) 447-0800

DILLON & FADLEY
APR 08 1992
RECEIVED
101 FIFTH AVENUE
PORTLAND, OREGON 97201-3688
FACSIMILE (503) 341-0880
TELEPHONE (503) 227-7400
588 SOUTH STREET
LOS ANGELES, CALIFORNIA 90071-2308
FACSIMILE (213) 814-1888
TELEPHONE (213) 888-0200

525 UNIVERSITY AVENUE
PALO ALTO, CALIFORNIA 94301-1908
FACSIMILE (415) 324-0838
TELEPHONE (415) 328-7800

John H. Tindall
(907) 263-8401

April 2, 1992

VIA EXPRESS MAIL & FACSIMILE

Senator Pat Rodey
State Capital, Room 113
Juneau, Alaska 99801-1182

Re: Committee Substitute for Senate Bill No. 193/
Limited Partnerships

Dear Senator Rodey:

The undersigned business and tax law practitioners met in Anchorage on March 11, 1992, to discuss pending legislation. Of particular interest to the group was CSSB 193.

As a group, we strongly and unanimously support your effort to update Alaska's Uniform Limited Partnership Act by adoption of the 1976 version of the Uniform Limited Partnership Act with the 1985 amendments. We are equally committed, however, in our unanimous belief that the 1985 amendments should be adopted in the form proposed by the Uniform Law Commissioners ("ULC"), and not with the deviations found in CSSB 193. Specifically, we believe Section 201 of the 1985 amendments as promulgated by the ULC, which provides for a shorter or "notice" form of certificate of limited partnership, should be adopted, rather than proposed AS 32.11.010, which requires substantially greater and more detailed information and reflects no substantial change from current law. ★

We believe a notice filing is preferable because the longer form certificate imposes significant costs and burdens on limited partnerships with no resultant benefit to third-party creditors of or investors in limited partnerships.

Financial institutions and others who may extend credit to or otherwise do business with limited partnerships are in a position to acquire such information from the general partners of a limited partnership as they deem necessary as a condition to the extension of credit or commencement of business with the limited partnership.

Senator Pat Rodey
April 2, 1992
Page 2

Investors in limited partnerships are adequately protected by the disclosure requirements of the Alaska Securities Act of 1959. Even in instances where an investor transaction is exempted from the registration requirements of the Act, a prudent investor has the ability and incentive to request additional information of the type provided by the long form certificate prior to investing.

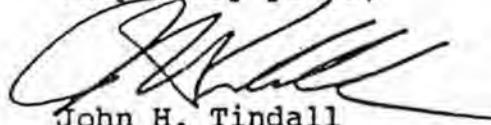
Current practice and the 1985 amendments demonstrate that no benefit is obtained from the longer form certificate after initial investment either. It is common under current law for limited partners to grant powers of attorney to allow a general partner to sign certificates, amendments, and even the writing that cancels a certificate. See Bankston & O'Hara, The Creation, Operation and Dissolution of a Limited Partnership in Alaska, 2 Alaska L. Rev. 271, 303-304 (1985). This practice is expressly sanctioned by proposed AS 32.11.040(b). The longer form limited partnership certificate thus provides no additional protection to existing limited partners.

Finally, no other Alaska statutory business entity is required to provide the level of financial disclosure required by AS 32.11.010: no par value stock and essentially "notice" type articles of incorporation are permitted by our corporate code; general partnerships are not required to make any filings reflecting their existence or respective partner contributions.

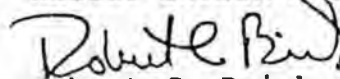
The limited partnership entity fulfills a unique and valuable different role in Alaska's business hierarchy, and should not be hindered or rendered economically unfeasible at a time when all investment vehicles are necessary to facilitate a hopefully recovering economy.

We strongly support your efforts to amend Alaska's Uniform Limited Partnership Act and thank you for your efforts. As business and tax law practitioners, however, we urge you to abandon CSSB's deviation from the ULC's 1985 proposed Section 201 and instead support adoption of the notice form of certificate of limited partnership.

Very truly yours,



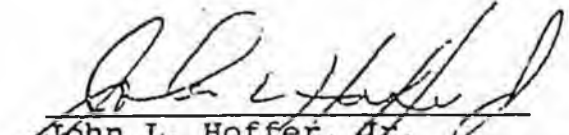
John H. Tindall
Heller Ehrman White & McAuliffe

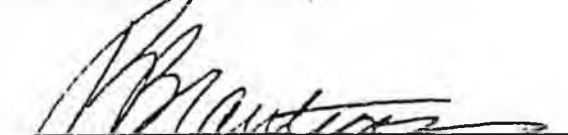


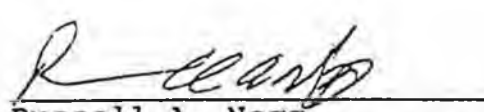
Robert C. Brink
Law Offices of Robert C. Brink

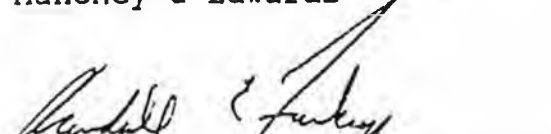
Senator Pat Rodey
April 2, 1992
Page 3

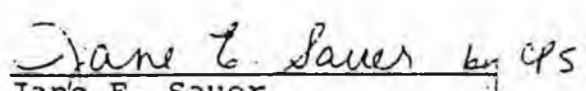
cc: Fred Zharoff, Chairman of the Senate Rules Committee
Dave Donley, House Judiciary Committee
Max Gruenberg, House Judiciary Vice-Chairman
Lori Nottingham, Deputy Legislative Liaison
Arthur H. Peterson, Uniform Law Commissioner

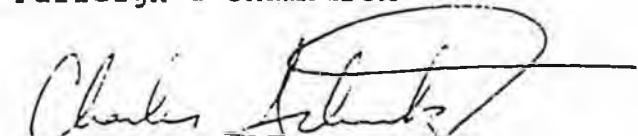

John L. Hoffer, Jr.
Law Offices of John L. Hoffer,
Jr.

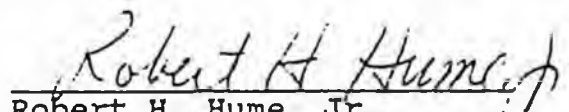

Peter B. Brautigam
Hartig, Rhodes Norman,
Mahoney & Edwards

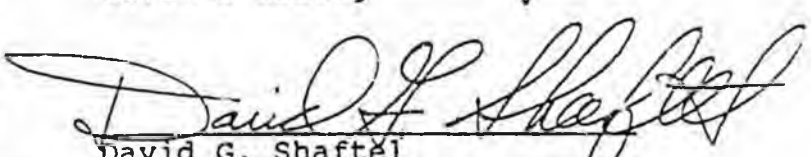

Russell A. Nogg
Law Offices of Russell A. Nogg

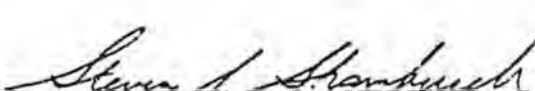

Randy E. Farleigh
Farleigh & Shamburek

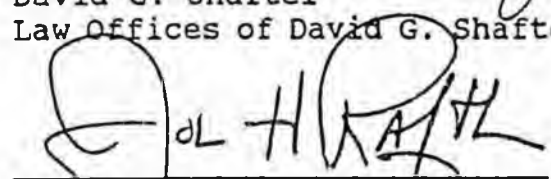

Jane E. Sauer
Jamin, Ebell, Bolger & Gentry

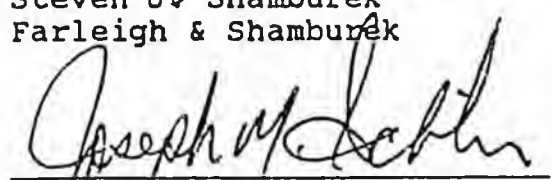

Charles F. Schuetze
Davis & Goerig

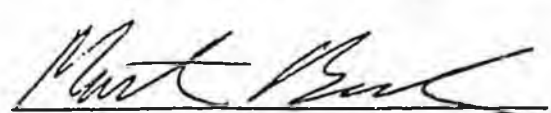

Robert H. Hume, Jr.
Copeland, Landye, Bennett & Wolf



David G. Shaftel
Law Offices of David G. Shaftel



Steven J. Shamburek
Farleigh & Shamburek


John H. Raforth
Heller Ehrman White & McAuliffe


Joseph M. Schierhorn
Northrim Bank, Vice President


Martin J. Barrack
Heller Ehrman White & McAuliffe


Steven T. O'Hara
Bankston & McCollum


Dan K. Coffey
Law Offices of Dan Coffey

**A Few Facts About
THE UNIFORM LIMITED PARTNERSHIP ACT**

PURPOSE: To provide a more flexible and stable basis for the organization of limited partnerships, and help states stimulate new limited partnership business ventures.

ORIGIN: Completed by the Uniform Law Commissioners in 1976, and amended in 1985. The original Limited Partnership Act was completed in 1916 and adopted in 49 states and the District of Columbia.

APPROVED BY: American Bar Association

STATE ADOPTIONS OF ULPA (1976):	Alabama	Maryland	New Jersey
	Arizona	Michigan	Ohio
	California	Montana	South Carolina
	Connecticut	Missouri	Washington
	Iowa	Nebraska	Wyoming

STATE ADOPTIONS OF ULPA (1976) WITH 1985 AMENDMENTS:	Alaska	Kansas	Oklahoma
	Arkansas	Kentucky	Oregon
	Colorado	Massachusetts	Pennsylvania
	Delaware	Minnesota	Rhode Island
	District of Columbia	Mississippi	South Dakota
	Florida	Nevada	Tennessee
	Georgia	New Hampshire	Texas
	Hawaii	New Mexico	Utah
	Idaho	New York	Virginia
	Illinois	North Carolina	West Virginia
	Indiana	North Dakota	Wisconsin

**INTRODUCTIONS
OF ULPA (1976)
WITH 1985
AMENDMENTS:**

**INTRODUCTIONS
OF 1985
AMENDMENTS
ONLY:**

For any further information regarding the Uniform Limited Partnership Act (1976) with 1985 Amendments, please contact John McCabe or Katie Robinson at 312-915-0195.

(1/15/93)

- FACT SHEET -

NEED A
SPEAKER?

These persons are available to provide testimony
or give presentations on the Uniform Limited
Partnership Act:

Joel Adelman
Detroit, Michigan
Advisor

Robert Berger
Chicago, Illinois
Reporter

Howard Walthall
Birmingham, Alabama
ABA Advisor

For information on arranging a speaker, contact John McCabe
or Katie Robinson at 312-915-0195.

REVISED UNIFORM LIMITED PARTNERSHIP ACT

The Uniform Limited Partnership Act (ULPA) was promulgated originally in 1916. It has been adopted in 45 jurisdictions and, with the Uniform Partnership Act, is the basis for law regulating partnerships in the United States. The limited partnership is distinguished from a general partnership by the existence of limited partners who invest in the partnership with liability limited to the amount invested. A general partner is liable individually for all the obligations of the partnership. In return for limited liability, the limited partner relinquishes any right of control or management of partnership affairs.

Limited partnerships have become, in 60 years, an important means of business organization and are used extensively. Over the 60 years of generally salubrious usage, this form of organization has encountered some problems. In 1976, a revision has been drafted, based on 60 years of extensive experience, to improve this method of organization even more.

The most important changes have been made in the scope of the limited partner's activities vis-a-vis the partnership. Under the original ULPA, a limited partner could not contribute services to the partnership. He had to contribute property or other valuable obligations to obtain his status. Under the revision, services may now be contributed, as well as property or valuable obligations.

The second change regards voting rights. The original ULPA did not deny voting rights to limited partners, but neither did it permit them. The revision allows limited partners to be granted voting rights in the partnership agreement. These two provisions both change and enhance a limited partner's status.

When a limited partner can vote and contribute services, the question of control or participation in management becomes more critical. The Revised Act, therefore, takes special care in distinguishing those acts which do not alone determine control. The question of control is to be answered in the light of all the facts and circumstances, but, if the limited partner does singly any of certain things, he or she is not by that fact liable as a general partner. These things include being a contractor for or agent of a general partner, consulting or advising a general partner with respect to partnership business, acting as a surety for the limited partnership, approving or disapproving an amendment to the partnership agreement, or voting on certain specific matters. The object of these specific enumerations is to prevent unreasonable determinations that a limited partner takes part in the control of the business.

The original ULPA provided only for a certificate of partnership. It made no mention of partnership agreements. The Revised Act changes the face of the partnership by changing the emphasis from the certificate to the agreement. Under the Revised Act, the certificate of limited partnership is confined principally to matters respecting the addition and withdrawal of partners and of capital. Other issues that are important are left to the agreement.

For example, a partner may lend money to and transact other business with a limited partnership as if the partner were a total outsider, except as otherwise provided in the partnership agreement. The partnership agreement determines the distribution of voting rights. The shares in profits and losses are decided in the partnership agreement. The partnership agreement becomes the important working document in the operation of the partnership.

There are other important changes, also, in the Revised Act. For example, a central registry is provided for limited partnerships. It is anticipated that the registrar for corporations and other business organizations, usually the Secretary of State, will also perform the function for a limited partnership.

Another important addition guarantees limited partners the right to partnership records, a right not before accorded. This permits a limited partner to protect his or her investment in the partnership by keeping better track of the business itself.

Also provided is a derivative action by limited partners against the partnership to redress mismanagement affecting a limited partner's interests. This would be very like a stockholder's derivative suit against a corporation. One of the historically apparent difficulties of limited partnerships has been protection of limited partner's rights. People have been induced to invest only to find that the investment has been squandered, and nothing could be done until general insolvency. These changes would curtail this problem.

Another significant, new contribution of the Revised Act is registration of foreign limited partnerships. Doing business interstate is a commonality for all business organizations, including limited partnerships. Therefore, the problems of jurisdiction and notice parallel those of corporations. Accordingly, a registration requirement for limited partnerships from other states doing business in an enacting state is established. This is required now in almost all jurisdictions for a foreign business corporation. The requirement recognizes the scope of the limited partnership as utilized in the United States today.

The 1916 ULPA has served well as the backbone of the law on limited partnerships. However, usages change, and new problems arise. The old Act is remarkably resilient, considering the historical record. Its revision now comes forward as a response to the changes that have occurred. It is the same business organization, but with characteristics for today's business. It should be good, at least, for another 60 years.

UNIFORM LIMITED PARTNERSHIP ACT (1976)
WITH 1985 AMENDMENTS

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FOURTH YEAR
IN MINNEAPOLIS, MINNESOTA
AUGUST 2-9, 1985



WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Baltimore, Maryland, February 11, 1986

UNIFORM LIMITED PARTNERSHIP ACT (1976)
WITH 1985 AMENDMENTS

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Limited Partnership Act (1976) with 1985 Amendments was as follows:

BROCKENBROUGH LAMB, JR. 1200 Mutual Building, Richmond, VA 23219, *Chairman*
ROBERT H. CORNELL. 25th Floor. 50 California Street, San Francisco, CA 94111
ROBINSON O. EVERETT. 450 E Street, N.W., Washington, DC 20442
PATRICK C. GULLOT. Suite 3300, InterFirst Plaza, Dallas, TX 75202
MORRIS W. MACEY. Suite 900, 133 Carnegie Way, N.W., Atlanta, GA 30303
ROGER P. MORGAN. One Financial Plaza, Hartford, CT 06103
MICHAEL P. SULLIVAN. 3400 City Center, Minneapolis, MN 55402
ROBERT M. BERGER. Room 1955, 231 South LaSalle Street, Chicago, IL 60604, *Reporter*
CARLYLE C. RING, JR. Room 322-D, 5390 Chersee Avenue, Alexandria, VA 22312, *President (Member Ex Officio)*
WILLIAM J. PIERCE. University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director*
ROBERT C. ROBINSON, 12 Portland Pier, P.O. Box 568, Portland, ME 04112, *Chairman, Division D (Member Ex Officio)*

Advisors to Special Committee on
Uniform Limited Partnership Act (1976) with 1985 Amendments
from the American Bar Association
Section of Corporation, Banking and Business Law

JOEL S. ADELMAN. 2290 First National Building, Detroit, MI 48226
THURSTON R. MOORE. P.O. Box 1535, Richmond, VA 23212
JOHN H. SMALL. 1310 King Street, Wilmington, DE 19899
HOWARD P. WALTHALL. Cumberland Law School, Samford University,
800 Lakeshore Drive, Birmingham, AL 35229

Final, approved copies of this Act
and copies of all Uniform and Model Acts
and other printed matter issued by the Conference
may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611
(312) 321-9710

UNIFORM LIMITED PARTNERSHIP ACT (1976) WITH 1985 AMENDMENTS

(Additions and Deletions in the Act
are indicated by Underscore and Strikeout)

PREFATORY NOTE

~~The Revised Uniform Limited Partnership Act adopted by the National Conference of Commissioners on Uniform State Laws in August, 1976~~ In 1976, the National Conference of Commissioners on Uniform State Laws adopted the first revision of the Uniform Limited Partnership Act, originally promulgated in 1916. The 1976 Act was intended to modernize the prior uniform law while retaining the special character of limited partnerships as compared with corporations. The draftsman of a limited partnership agreement has a degree of flexibility in defining the relations among the partners that is not available in the corporate form. Moreover, the relationship among partners is consensual, and ~~requires a degree of privity that forces the~~ under some circumstances may require a general partner to seek approval of the other partners (sometimes unanimous approval) under circumstances that corporate management would find unthinkable. The limited partnership was not intended to be an alternative in all cases where the corporate form is undesirable for tax or other reasons, and the new 1976 Act was not intended to make it so. The new 1976 Act ~~clarified~~ clarified many ambiguities and ~~fills filled~~ interstices in the ~~prior uniform law~~ 1916 Act by adding more detailed language and mechanics. In addition, it effected some important substantive changes and additions ~~have been made from the prior uniform law.~~

The Uniform Limited Partnership Act (1976) with the 1985 Amendments (the 1985 Act) follows the 1976 Act very closely in most respects. It makes almost no change in the basic structure of the 1976 Act. It does, however, differ from the 1976 Act in certain significant respects for the purpose of more effectively modernizing, improving and establishing uniformity in the law of limited partnerships. The 1985 Act accomplishes this without impairing the basic philosophy or values underlying the 1976 Act, by incorporating into the structure, framework and text of the 1976 Act the best and most important improvements that have emerged in the limited partnership acts enacted recently by certain states. Most of those improvements were considered by the draftsmen of the 1976 Act but were not included in it because of uncertainties as to the possible consequences of such inclusion under applicable Federal income tax laws. Those uncertainties have since been resolved satisfactorily, and no impediment to incorporating them in the 1985 Act remains at this time.

Article 1 provides a list of all of the definitions used in the Act, integrates the use of limited partnership names with corporate names and provides for an office and agent for service of process in the state of organization. All of these provisions ~~are new~~ were innovations in the 1976 Act and were carried over from the 1976 Act to the 1985 Act. Article 2 collects in one place all provisions dealing with execution and filing of certificates of limited partnership and certificates of amendment and cancellation. When adopted in 1976, Articles 1 and 2 reflected an important change in the prior statutory scheme: recognition that the basic document in any partnership, including a limited partnership, is the partnership agreement. The certificate of limited partnership is not a constitutive document (except in the sense that it is a statutory prerequisite to creation of the limited partnership), and merely reflects the most basic matters as to which government officials, creditors, and others dealing or considering dealing with the partnership should be put on notice. This principle is further implemented by the 1985 Act's elimination of the requirement, carried from the original 1916 Act into the 1976 Act, that the certificate of limited partnership set out the name, address and capital contribution of each limited partner and certain other details relating to the operation of the partnership and the respective rights of the partners. The former requirement served no significant practical purpose while it imposed on limited partnerships (particularly those having large numbers of partners or doing business in more than one state) inordinate administrative and logistical burdens and expenses connected with filing and amending their certificates of limited partnership. Many of the other changes made by the 1985 Act merely reflect the elimination of that requirement.